NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL FOR THE FIRST CIRCUIT

BAP NO. MW 10-002

Bankruptcy Case No. 06-41597-MSH
Adversary Proceeding No. 07-04054-MSH

LEONARD P. CORMIER, JR.,
d/b/a LEONARD P. CORMIER, JR. AND SONS, INC.,
d/b/a CORMIER BUILDING & REMODELING,
Debtor.

STEVEN T. McCLURE,
Plaintiff-Appellee,

v.

LEONARD P. CORMIER, JR.,
Defendant-Appellant.

Appeal from the United States Bankruptcy Court
for the District of Massachusetts
(Hon. Joel B. Rosenthal, U.S. Bankruptcy Judge)

Before
Haines, Lamoutte, and Tester,
United States Bankruptcy Appellate Panel Judges.

James P. Ehrhard, Esq., on brief for Defendant-Appellant.
Lawrence E. Cohen, Esq., on brief for Plaintiff-Appellee.

August 5, 2010

Lamoutte, U.S. Bankruptcy Appellate Panel Judge.

Leonard Cormier, Jr. (the "Debtor") appeals from the order denying his discharge pursuant to § 727(a)(4) (the "Order").[1] On appeal, the Debtor admits that his schedules and Statement of Financial Affairs contained errors, but asserts that they were immaterial, inadvertent, and largely the fault of his former attorney. For the reasons set forth below, we **AFFIRM.**

BACKGROUND

The Debtor is in his early sixties and has worked in construction for approximately 25 years. During that time, he operated his business through three different corporate entities. When he filed for relief, however, his business was no longer incorporated. In 2004, Steven T. McClure (the "Appellee") engaged the Debtor to build a house. The Appellee terminated the contract after the Debtor failed to finish the construction and in 2005 sued the Debtor in state court.

In 2006, the Debtor filed for relief under chapter 7. At the meeting of creditors, the Debtor admitted that after he reviewed his petition, schedules, and Statement of Financial Affairs, he signed them under penalty of perjury. Upon questioning by the chapter 7 trustee (the "Trustee") regarding whether these documents accurately represented the Debtor's assets, the Debtor answered that there were vehicles he owned but had not listed due to their poor condition. In response to another question, the Debtor explained that he owned but did not list certain tools,

[1] Unless expressly stated otherwise, all references to "Bankruptcy Code" or to specific statutory sections shall be to the Bankruptcy Reform Act of 1978, as amended by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA"), Pub. L. No. 109-8, 119 Stat. 23, 11 U.S.C. §§ 101, et seq. All references to "Bankruptcy Rule" shall be to the Federal Rules of Bankruptcy Procedure.

including concrete forms. One creditor asked about gross income and the Debtor explained that he had earned income, but had listed none because he had incurred tax losses. The Trustee continued the meeting and asked the Debtor to provide a list of his tools and their values, a list of his vehicles and their values, information regarding his income, and documentation regarding his bank accounts.

At the continued meeting of creditors, the Trustee reviewed the documents that the Debtor provided. The first was an affidavit that included a list of accounts receivable. The Debtor's counsel explained that he had not listed these in the schedules because he had determined that they were not collectable. The Debtor also provided some information regarding his bank accounts. He offered an appraisal of the omitted vehicles, concrete forms, and other tools, which reflected that they did have value albeit not a significant amount. The Debtor's counsel explained that he had intended to amend the schedules. With respect to income, the Trustee requested more information from the Debtor.

The Appellee ultimately filed a complaint against the Debtor seeking the denial of his discharge under § 727(a)(4) and, alternatively, the nondischargeability of his claim under § 523(a)(6). In the initial stages of the case, the Appellee moved for partial summary judgment on the § 727(a)(4) claim, the Debtor did not object, and the bankruptcy court granted the motion. The Debtor's failure to respond appears to be due to the disbarment of his counsel. After the Debtor hired new counsel, the bankruptcy court granted his request to reopen the case and vacated the summary judgment order. The bankruptcy court then denied the request for partial summary judgment and set the matter for trial.

At trial, the Debtor admitted that he failed to list the income he had received in the six months prior to his petition in Official Form B22A, Statement of Current Monthly Income. The Debtor also agreed that he had failed to list some assets in Schedule B, Personal Property, including three vehicles, certain tools, and several accounts receivable.[2] With respect to Schedule F, Creditors Holding Unsecured NonPriority Claims, the Debtor acknowledged that he omitted several creditors including the Appellee and the Debtor's wife. Regarding Schedule G, Executory Contracts and Unexpired Leases, the Debtor agreed that although he had listed no executory contracts or unexpired leases, he had outstanding contracts related to his construction work. The Debtor also agreed that his Schedule I, Current Income of Individual Debtor, was substantially inaccurate. With respect to Schedule J, Current Expenditures of Individual Debtor(s), he recognized that he had business expenses that he did not list. The Debtor further agreed that the figures for his gross wages were incorrect and that he did not list all of the lawsuits that had been filed against him in his Statement of Financial Affairs. The Debtor represented that many of the errors had resulted from his mistaken belief that if an asset had no value, he did not need to list it. He testified that he had not intended to omit creditors, and that when the omissions were brought to his attention, he willingly offered to amend his schedules.

The Debtor's former attorney testified that he had devoted 25 percent of his practice to bankruptcy law and that he filed approximately 200 bankruptcy petitions a year. At trial, he accepted responsibility for the many errors in the petition, schedules, and Statement of Financial

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[2] The Debtor testified that he and his attorney had drafted amended Schedules B, C, and G, and an amended Statement of Financial Affairs, and that he thought these had been filed. The amended schedules were never filed and, in any event, it does not appear that the proffered draft contained all of the information discussed at the meeting of creditors.

Affairs, including his determination of what constituted the income of the Debtor. The Debtor's former attorney explained that he felt he had enough information to analyze the Debtor's assets, but qualified that with the statement that the Debtor was "exceptionally unorganized, and his paperwork was not as organized as it should have been."

The bankruptcy court recited § 727(a)(4) from the bench, and explained that reckless disregard can constitute fraudulent intent and that the false oath must be material. A false oath is material if it involves the business transactions or assets of a debtor. The bankruptcy court also explained that the statute addresses not whether there was detriment to creditors, but rather whether the false oath or account adversely affects the ability to ascertain or investigate assets. The bankruptcy court offered that reasonable reliance on counsel can be a defense.

Turning to the case before it, the bankruptcy court explained that it was uncontested that several of the Debtor's schedules and the Statement of Financial Affairs contained inaccuracies. The Debtor's defense, the bankruptcy court described, was that he had relied upon the advice of counsel. Turning to the testimony of the Debtor's former attorney, the bankruptcy court decided to give it little weight. As grounds, the court explained that it was dubious the attorney could remember the case given that he testified without referring to a file, the information gathering for the petition had occurred "years" ago, and the attorney had filed a large number of bankruptcy petitions during that time period.

With respect to the Debtor, the bankruptcy court found that he acknowledged the substantial inaccuracies despite having reviewed his schedules and Statement of Financial Affairs with his former attorney at least twice before they were filed. The bankruptcy court explained that a debtor cannot simply provide counsel with an "information dump" and assume that the

ensuing documents will be correct. The court found notable that the Debtor never testified that he questioned his attorney about the omissions in his schedules and Statement of Financial Affairs. The court indicated that such testimony may have established that a debtor's reliance on attorney advice was made in good faith and, in support, cited to his recently published opinion involving similar facts. Comm. of Mass. v. Bartel (In re Bartel), Ad. Proc. Nos. 07-1019, 01-1018, 2009 WL 2461727, *5 (Bankr. D. Mass. Aug. 10, 2009) ("While it is true that a debtor who relies on his attorney's advice may lack the requisite intent required to deny discharge, such reliance must be made 'in good faith.'") (citing First Beverly Bank v. Adeeb (In re Adeeb), 787 F.2d 1339, 1343 (9th Cir. 1986)).

Ultimately, the bankruptcy court rejected the Debtor's defense and concluded that the Debtor had demonstrated a "reckless disregard for his duty of full and truthful disclosure."[3] Thereafter, the bankruptcy court entered the Order and the Debtor filed a timely appeal.

JURISDICTION

Before addressing the merits of an appeal, the Panel must determine that it has jurisdiction, even if the issue is not raised by the litigants. See Boylan v. George E. Bumpus, Jr. Constr. Co. (In re George E. Bumpus, Jr. Constr. Co.), 226 B.R. 724 (B.A.P. 1st Cir. 1998). The Panel has jurisdiction to hear appeals from: (1) final judgments, orders and decrees; or (2) with leave of court, from certain interlocutory orders. 28 U.S.C. § 158(a); Fleet Data Processing Corp. v. Branch (In re Bank of New England Corp.), 218 B.R. 643, 645 (B.A.P. 1st Cir. 1998). A decision denying a debtor's discharge is a final order. Chase v. Harris (In re Harris), 385 B.R.

[3] After denying the discharge, the court made findings and conclusions with respect to the Appellee's request for relief under § 523(a)(6) and granted the Debtor judgment on that count. The Appellee did not file a counter-appeal with respect to that ruling.

802, 804 (B.A.P. 1st Cir. 2008) (citing Aoki v. Atto Corp. (In re Aoki), 323 B.R. 803, 811 (B.A.P. 1st Cir. 2005)).

STANDARD OF REVIEW

The Panel reviews the bankruptcy court's findings of fact for clear error and its conclusions of law *de novo*. See TI Fed. Credit Union v. DelBonis, 72 F.3d 921, 928 (1st Cir. 1995); Western Auto Supply Co. v. Savage Arms, Inc. (In re Savage Indus., Inc.), 43 F.3d 714, 719 n.8 (1st Cir. 1994). In this appeal, the burden was on the Debtor to demonstrate that the bankruptcy court's findings were clearly erroneous. Pena v. Gonzalez (In re Pena), 397 B.R. 566, 576 (B.A.P. 1st Cir. 2008). The Panel in Harris described the clearly erroneous standard as follows:

> The determination that a debtor acted with a fraudulent intent is a finding of fact reviewed for clear error. Annino, Draper & Moore, P.C. v. Lang (In re Lang), 256 B.R. 539, 540 (B.A.P. 1st Cir. 2000). A finding is clearly erroneous when, although there is evidence to support it, the reviewing court on the entirety of the evidence is left with the definite and firm conviction that a mistake has been committed. Anderson v. Bessemer City, 470 U.S. 564, 573 (1985); Cabral v. Shamban (In re Cabral), 285 B.R. 563, 571 (B.A.P. 1st Cir. 2002). If the trial court's account of the evidence is plausible in light of the record reviewed in its entirety, a reviewing court may not reverse. Anderson, 470 U.S. at 574. Factual findings based primarily on the credibility and demeanor of the debtor should be given deference. Palmacci v. Umpierrez, 121 F.3d 781, 785 (1st Cir. 1997) (citing In re Burgess, 955 F.2d 134 (1st Cir. 1992)).

385 B.R. at 804.

DISCUSSION

Under § 727(a)(4)(A), a debtor can be denied a discharge if the debtor "(i) knowingly and fraudulently made a false oath, (ii) relating to a material fact." Boroff v. Tully (In re Tully), 818 F.2d 106, 110 (1st Cir. 1987). Reckless indifference to the truth is sufficient to establish fraud

under the statute. Id. at 112. This Panel has noted that "while sworn statements are to be treated with seriousness in any court proceeding, this is especially so in bankruptcy where the successful functioning of the bankruptcy system hinges on both the debtor's truthfulness and her willingness to make a full disclosure." In re Harris, 385 B.R. at 805.

The First Circuit specifically explained the shifting burdens of proof in proceedings involving false oaths by stating that the "burden of proof rests with the [plaintiff], . . . but 'once it reasonably appears that the oath is false, the burden falls upon the bankrupt to come forward with evidence that he has not committed the offense charged.' Matter of Mascolo, 505 F.2d 274, 276 (1st Cir. 1974)." In re Tully, 818 F.2d at 110.[4] The initial burden on the plaintiff is to "establish the elements by a preponderance of the evidence." Ford v. Jackson (In re Jackson), 2004 WL 2595900, *3 (Bankr. D.N.H. Apr. 26, 2004) (citing Rhode Island Depositors Econ. Prot. Corp. v. Hayes (In re Hayes), 229 B.R. 253, 259 n.7 (B.A.P. 1st Cir. 1999)).

The Debtor acknowledges in his brief that some of the statements in his schedules and Statement of Financial Affairs were inaccurate. He offers, however, that the inaccuracies were due to mistake or inadvertence and that they were immaterial.[5] As such, he contends that it was error to determine that the inaccuracies were made knowingly and fraudulently. In support, the

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[4] In his brief, the Debtor contends that the bankruptcy court unfairly shifted the burden to the Debtor and should have given more weight to the testimony of his former counsel. The bankruptcy court, however, correctly applied the burden of proof as outlined in In re Tully.

[5] The Debtor never explains why he concludes that the omissions were not material. The standard to determine whether an omission is material is generally whether the "subject matter 'bears a relationship to the bankrupt's business transactions or estate, or concerns the discovery of assets, business dealings, or the existence and disposition of his property.'" In re Tully, 818 F.2d at 111 (citing Chalik v. Moorefield (In re Chalik), 748 F.2d 616, 618 (11th Cir. 1984)). The omissions in this case, the Debtor's income, contracts, assets and lawsuits, bear a strong relationship to the Debtor's business transactions.

Debtor explains that he consulted with his attorney, he gave the attorney all of his information regarding his assets, and trusted that his attorney would accurately incorporate that information in his schedules and Statement of Financial Affairs. Despite that confidence, the Debtor explained that his attorney then made independent and ultimately erroneous decisions as to what information to provide.

In In re Tully, faced with a similar defense, the First Circuit stated:

> Nor can an attorney's willingness to bear the burden of reproach provide blanket immunity to a debtor; it is well settled that reliance upon advice of counsel is, in this context, no defense where it should have been evident to the debtor that the assets ought to be listed in the schedules. See Mascolo, 505 F.2d at 277 n.4; In re Russell, 52 F.2d 749, 754 (D.N.H. 1931); Nazarian, 18 B.R. at 147. A debtor cannot, merely by playing ostrich and burying his head deeply enough in the sand, disclaim all responsibility for statements which he has made under oath.

818 F.2d at 111.[6]

In this case, the bankruptcy court found, and the Debtor admits, that the Debtor reviewed and signed his petition despite the multiple omissions and errors. The omissions and errors related to material issues. Although the Debtor attended the meeting of creditors and his depositions and answered the questions posed, the Debtor drafted, but never filed, amendments to correct his schedules and Statement of Financial Affairs. The Debtor should have had a

[6] Many courts agree that a debtor has an independent obligation to review the petition. See, e.g., Stanton v. Temecula Valley Bank (In re Stanton), C.A. H-07-670, 2007 WL 2538431,*6 (S.D. Tex. Aug. 31, 2007) ("As a matter of law, reliance on advice of counsel is no defense to an action under 11 U.S.C. § 727(a)(4)(A) where the debtor has knowingly sworn to false information."); U.S. Trustee v. Vigil (In re Vigil), 414 B.R. 743, 750 (Bankr. D.N.M. 2009) (explaining reliance on counsel is no defense when debtors have duty to carefully review petition); Murrietta v. Fehrs (In re Fehrs), 391 B.R. 53, 79 (Bankr. D. Idaho 2008) (defense unavailable when property should have been scheduled); Kaler v. McLaren (In re McLaren), 236 B.R. 882, 898 (Bankr. D.N.D. 1999) (explaining that reliance on attorney does not absolve debtor's independent obligation to review petition carefully).

heightened awareness as to his duty to file accurate schedules and Statement of Financial Affairs after the court granted partial summary judgment in favor of the Appellee upon the Debtor's failure to oppose the same. Although the bankruptcy court subsequently vacated the order, the Debtor was apprised at that time of the adverse consequences that failure to file accurate schedules entails. The failure to file the amendments cannot be imputed exclusively to the attorney under such circumstances.

The bankruptcy court found that the Debtor's former attorney was not credible, in part, because he testified as to the minutia of the case without referring to the case file. The bankruptcy court gave no weight to the Debtor's attempt to lay blame solely at his disbarred counsel's feet, particularly as the Debtor never testified that at the time he signed the petition he questioned any of the items that appeared obviously incorrect. As such, the court concluded that the Debtor's advice of counsel defense was of no assistance in the face of such obvious omissions and that the Debtor had demonstrated a reckless disregard for his disclosure duty. To hold otherwise would make meaningless the provisions in Bankruptcy Rule 1008 that "[a]ll petitions, lists, schedules, statements, and amendments thereto shall be verified or contain an unsworn declaration as provided in 28 U.S.C. § 1746." Alleging or establishing that the information was provided to bankruptcy counsel, by itself, does not dispense with a debtor's duty to disclose.

In this case, the bankruptcy court conducted a trial and observed the testimony of the Debtor and his former counsel. The bankruptcy court concluded that the facts as he found them demonstrated that the Debtor had a reckless disregard for the truth and that he had failed to establish sufficient facts for his defense. To prevail on appeal, it was incumbent upon the Debtor

to demonstrate that the bankruptcy court's findings were clearly erroneous. This is a high hurdle, especially in light of the deference we must give to the findings that were primarily based upon the credibility of the Debtor and his witness. An appellant cannot prevail by simply claiming that the bankruptcy judge should have found the facts as the appellant viewed them. We will reverse only if the bankruptcy court's factual findings are clearly erroneous - which they are not.

CONCLUSION

After reviewing the record, we conclude that the bankruptcy court's findings were plausible and were not clearly erroneous. Accordingly, the bankruptcy court's findings should be left undisturbed. As such, we **AFFIRM.**