ORDERED in the Southern District of Florida on 06/11/12.

Raymond B. Ray, Judge
United States Bankruptcy Court

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA
FORT LAUDERDALE DIVISION

IN RE:
REUBEN HERTZ,
Debtor
_____/

Chapter 7
Case No. 09-11864 BKC-RBR

BOAZ GROMAN, a/k/a
BARRY GROMAN,
Plaintiff,
vs.

REUBEN HERTZ, and JACQUELINE A. POWELL
Defendants.
_____/

Adv. Case No. 09-02023-RBR

SONYA L. SALKIN, Trustee
Plaintiff,
vs.

REUBEN J. HERTZ, and JACQUELINE A. POWELL,
Defendants.
_____/

Adv. Proc. No. 09-02033-RBR

ORDER SUSTAINING PLAINTIFFS' OBJECTIONS TO DISCHARGE UNDER 11 U.S.C. § 727(a)(2) AND (a)(3)

THIS MATTER came before the Court on Plaintiff, Boaz "Barry" Groman's Second Amended Complaint (D.E. 33) in Adv. No. 09-2023-RBR and Plaintiff, Sonya L. Salkin,

Trustee's Second Amended Complaint (D.E. 41) in Case No. 09-2033-RBR. The Court held a trial on October 25 and 26, 2011, November 29, 2011, and February 23, 2012. *Salkin v. Hertz*, Case No. 09-2033 and *Groman v. Hertz*, Case No. 09-2023 were consolidated for trial. The Court, having considered the Complaint, having received testimony of witnesses, having reviewed the evidence, papers and pleadings filed herein, including the exhibits admitted into evidence, having heard the arguments of counsel for Groman, counsel for the Trustee, counsel for Reuben J. Hertz ("Hertz" or "Debtor"), and counsel for his wife Jacqueline A. Powell ("Powell") (collectively, "Defendants"), finds and concludes as follows.

BACKGROUND

The Complaints of Trustee Sonya L. Salkin ("Trustee") and Boaz "Barry" Groman ("Groman") (collectively, "Plaintiffs") both seek to deny Hertz a discharge and object to claimed exemptions of many of Hertz's financial institution accounts. Specifically, Groman's Complaint objects to the dischargability of a $3.1 million Judgment under 11 U.S.C. § 523(a)(2)(A),[1] objects to Hertz' discharge under 11 U.S.C. 727(a)(2), (a)(3), and (a)(4), and objects to certain of Hertz' exemptions. The Trustee's Complaint seeks to avoid an alleged $198,029.65 fraudulent transfer under section 726.105(1)(a), Florida Statutes, impose an equitable lien on certain St. Lucie real property, avoid a transfer of Exxon stock under 11 U.S.C. § 544(b) and section 548(a), and objects to Hertz' discharge under 11 U.S.C. § 727(a)(2), (a)(3), and (a)(4). The Trustee's Complaint also includes claims that Hertz's tenancy-by-the-entirety ("TBE") bank accounts owned jointly with Powell, were funded with individual assets under circumstances that are alleged to establish intent to hinder Hertz's individual creditors.

[1] Groman, holds two final judgments entered in the Circuit Court of Broward County against Hertz in the amounts of $3,100,001, plus nine years pre-judgment interest and $31,514.57. (Salkin Exh. 17, 48) These judgments are on appeal in Florida's Fourth District Court of Appeal. The Court has bifurcated Groman's objection to the dischargeability of Hertz' debt owed to Groman count from the present trial. (D.E. 185)

The Defendants argue that all of the accounts listed on Hertz's bankruptcy schedules are properly claimed as TBE according to Florida law. As to the alleged fraudulent transfers, they argue that at all times they were doing nothing more than conducting their financial affairs by owning assets together as would any normal husband and wife. The Defendants' position is that they could not have intended to defraud Groman because they never knew that Groman had a claim against Hertz until, at the earliest, Groman filed his state court counterclaim in July 2005. Further, the Defendants never believed Hertz would lose the state court lawsuit until they received notice of the entry of the Judgment in December 2008.

For the reasons that follow, the Court sustains the Plaintiffs' objection to Hertz' bankruptcy discharge under 11 U.S.C. § 727(a)(2) and (a)(3).[2]

FACTS

Hertz and Powell were married on December 24, 1992. (Powell Ex. UUU, ¶ 3; Tr. 206) Powell is a longtime banker and also licensed as a certified public accountant and a certified financial planner. (Salkin Exh 11, pp. 6-10; TT, 204) Due to her experience with banking and financial matters, Powell handles virtually all of the couple's banking and financial affairs. Whenever Hertz received any funds, he would turn over the funds to Powell so she could place the funds into a joint account. (Hertz Ex. ¶ 5) Indeed, Powell and Hertz both testified that since the time they were married, their intent and practice is own virtually all of their property, including bank accounts, together as husband and wife. (Tr. 143, 219-220, 223; Powell Ex. UUU ¶¶ 4-5) Every time they open an account in both of their names, they intend the account to be both of their property, owned together as husband and wife. There has never been an instance where they expressly disclaimed or rejected an account being opened as TBE. If the TBE form of ownership was offered to them, they selected it. (Powell Ex. UUU ¶¶ 4-5; Tr. 248-9) Powell

[2] The Court does not reach issues in the other counts because it denies Hertz a bankruptcy discharge.

testified that in order to maximize the rate of return on their savings, they regularly purchased certificates of deposit ("CDs"). When the CDs matured, they transfered the funds to another CD at an institution that offered the highest rate of interest. Powell testified that none of the transactions at issue in this suit were driven by events that occurred in Hertz's lawsuit with Groman and that the transactions were all done as part of their normal banking practices. (Powell Ex. UUU ¶ 12; Tr. 248) The Court finds this testimony to be credible and supported by the banking history of the Defendants. For purposes of these two adversary proceedings only, Hertz and Powell were doing nothing more than conducting their financial affairs by owning assets together as would any normal husband and wife notwithstanding Powell knowing that TBE form of ownership immunizes property from the debts of one spouse. (Salkin Exh 11, pp. 102-04)

In May of 1995, Hertz, a dentist, met Groman, his patient. (Tr. 327). The two formed a business together to develop and market a disposable air abrasion dental device. (Tr. 328-9) In December 1995, Hertz caused one of his companies to enter into a Joint Marketing and Development Agreement ("Agreement") that ultimately was not successful. Hertz and Groman terminated their business relationship in 2001. (Salkin Ex. 17 at 4) Three years later, on November 10, 2004, Hertz sued Groman in Broward County Circuit Court to recover damages for fees and expenses he had incurred in patent matters relating to business ventures with Groman. (D.E. 142 at 3, ¶ h) On July 8, 2005, Groman filed a counterclaim against Hertz, alleging that Hertz had wronged Groman in 1995. (D.E. 142 at 3, ¶ h) The case was tried without a jury on July 14-16, 2008. On December 16, 2008, the Circuit Court entered a Judgment ("Judgment") in favor of Groman, and against Hertz for $3,100,001. (Salkin Ex. 17) Thereafter, Hertz transferred the balance ($25,000) in his last remaining individual account,

(Suntrust #7915) to an account held jointly with Powell (Washington Mutual #9148). Hertz (or Powell acting on his behalf) used the now jointly held funds to pay income taxes. (Pretrial Order, ¶ 1(u), TT, 39, 587-89, 598) Then, in December 2008 or January 2009, Hertz sold his one-half interest in an Indian River Estates lot for $9,000 to the other half owner with instructions to make the check payable directly to Hertz' state court attorneys. (TT, 40-45; Salkin Exh 39) The Court finds that transfers made after the time of the entry of the Judgment were made with intent to delay, hinder, or defraud Groman.

Hertz filed a voluntary petition under chapter 7 on February 3, 2009. Both the Trustee and Groman seek to, *inter alia*, deny Hertz a bankruptcy discharge because he transferred individual assets with intent to delay, hinder, or defraud creditors within one year before filing the petition and because he unjustifiably failed to keep or preserve records. This Court agrees.

CONCLUSIONS OF LAW

11 U.S.C. § 727(a)(2)

The Court denies Hertz' discharge under 11 U.S.C. § 727(a)(2). Count II of Groman's Complaint and Count III of the Trustee's Complaint object to Hertz' discharge under 11 U.S.C. § 727(a)(2). This section denies a discharge to a debtor who, within a year before filing, transfers or conceals property with the intent to hinder, delay, or defraud a creditor. *Id.* A creditor must establish, by a preponderance of the evidence, that

> (1) the act complained of was done within one year prior to the date the petition was filed, (2) with actual intent to hinder, delay, or defraud a creditor, (3) that the act was that of the debtor, and (4) that the act consisted [of] transferring, removing, destroying, or concealing any of the debtor's property.

Coady v. DAN Joint Venture III, LP (In re Coady), 588 F.3d 1312, 1315 (11th Cir 2009) (quoting *Jennings v. Maxfield (In re Jennings)*, 533 F.3d 1333, 1339 (11th Cir. 2008)). The only element

at issue is element number two—whether Hertz or another on his behalf (Powell), acted with intent to delay, hinder, or defraud a creditor.

Given the difficulties in establishing a transferor's actual intent, courts generally look at the totality of the circumstances and the badges of fraud surrounding the transfers. *See Walton v. Charno (In re Charno)*, 452 B.R. 299, 304 (Bankr. S.D. Fla. 2011). The badges of fraud present here include that the two transfers were made: (1) after a Judgment had been entered against Hertz; (2) for substantially all of Hertz' individual assets; and (3) at a time when Hertz was insolvent.

Shortly before filing bankruptcy and with the actual intent to delay, hinder, or defraud Groman, Hertz liquidated the only assets he had left for possible distribution to creditors and used those funds to pay income taxes and state court defense costs. Specifically, one month before the petition date, Hertz transferred the balance ($25,000) in his last remaining individual account, (Suntrust #7915) to an account held jointly with Powell (Washington Mutual #9148) Hertz (or Powell acting on his behalf) then used the now jointly held funds to pay income taxes (Pretrial Order, ¶ 1(u), TT, 39, 587-89, 598) Then, in December 2008 or January 2009, Hertz sold his one-half interest in the Indian River Estates lots for $9,000 to the other half owner with instructions to make the check payable directly to Hertz' attorneys. (TT, 40-45; Salkin Exh 39) At trial, Hertz even admitted that he sold his interest because of "what happened with the lawsuit." (TT, 41) Hertz made or directed that both transfers be made while knowing that a large Judgment had been rendered against him. Despite having large sums of funds held in TBE available, he liquidated his two remaining individual assets to satisfy his tax obligation and pay his attorneys. Therefore, the Court finds that Hertz acted with intent to delay, hinder, or defraud Groman in making these transfers.

For the foregoing reasons, the Court finds that Hertz or another on his behalf (Powell), transferred Hertz' individual assets with intent to delay, hinder, or defraud Groman at a time when Hertz faced a substantial Judgment. Accordingly, the Court denies Hertz' discharge under section 727(a)(2).

11 U.S.C. § 727(a)(3)

The Court also denies Hertz a discharge under 11 U.S.C. § 727(a)(3). Count III of Groman's complaint and Count IV of the Trustee's complaint object to Hertz' discharge under 11 U.S.C. § 727(a)(3). Section 727(a)(3) serves to deny a debtor's discharge for concealing, destroying, or failing to keep or preserve records when that failure is unjustified under the circumstances:

> (a) The court shall grant the debtor a discharge, unless—
>
> . . .
>
> (3) the debtor has concealed, destroyed, mutilated, falsified, or failed to keep or preserve any recorded information, including books, documents, records, and papers, from which the debtor's financial condition or business transactions might be ascertained, unless such act or failure to act was justified under all of the circumstances of the case;

11 U.S.C. § 727(a)(3). The purpose of section 727(a)(3) ensures that "the trustee and creditors receive sufficient information to trace a debtor's financial history for a reasonable period past to present." *Menotte v. Hahn (In re Hahn),* 362 B.R. 542, 547 (Bankr. S.D. Fla. 2007) (quoting *U.S. v. Trogdon,* 111 B.R. 655, 658 (Bankr. N.D. Ohio 1990)). "[D]ebtors must produce records which provide creditors with enough information to ascertain the debtor's financial condition and track his financial dealings with substantial completeness and accuracy . . . . " *In re Juzwiak*, 89 F.3d 424, 427 (7th Cir. 1996) (citations and quotations omitted).

Here, Hertz has failed to keep or preserve recorded information from which a business transaction could be ascertained. Hertz testified that he failed to keep records of other services

that resulted in additional income. He bartered dental services upon request to another dentist owning the respective office space where Hertz continued to perform dental services. (TT, 157) Hertz paid for his use of office space but did not keep records of the relationship because the dentist was his longtime friend and the payment amount was small. (TT, 158-59) This barter arrangement was not disclosed as income on Hertz's tax returns. Powell did not know anything about the barter arrangement and therefore she did not include barter information when filing tax returns. (TT, 160) Yet Powell knew that Hertz was providing freelance dental services and that he shared office space. Although Hertz stated the records of this transaction would be his checkbook, he produced no records at trial. (TT, 158-60, 226-27) Section 727(a)(3) "places an affirmative duty on the debtor to create books and records" that accurately portray his business affairs. *Dzikowski v. Kirshner (In re Kirshner)*, No. 06-1872-PGH, 2007 WL 3232258, *4 (Bankr. S.D. Fla. Oct. 30, 2007); *see Goldberg v. Lawrence (In re Lawrence)*, 227 B.R. 907, 915 (Bankr. S.D. Fla. 1998). Indeed, "the requirement to keep records" means "to maintain a record by entering it into a book." *In re Hahn*, 362 B.R. at 547 (quotations omitted). Here, Hertz failed to do so. Therefore, the Court finds that Hertz failed to keep or preserve recorded information from which his business transaction could be ascertained.

Hertz also destroyed recorded information about his financial condition both before and, perhaps more troubling, during the pendency of this case. Hertz testified that he does not shred financial records, only "junk mail" but then added "and everything else." (TT, 113) In the next breath, Hertz admitted that he does shred tax returns and bank records. (TT, 114-15) Although Hertz testified that he produced everything requested (TT, 115), Salkin's Exhibit 57 highlights missing or "not produced" documents.[3] Specifically, the documents that were shredded or discarded include the documents listed on Salkin's Exhibit 57: (1) bank statements for the time

[3] Documents that were not produced either "do not exist" or were shredded. (TT, 116, 224)

period between 2003-2006[4] with account numbers ending with *4988, *6355, *3680, *0656, *7593, *2217, *2209, *9148, *8913, *7915, *2072; (2) brokerage account statements for an account ending with*7365; (3) CD documents for an account ending with *8258; (4) individual retirement account documents for an account ending with *2555; and (5) statements from 2003 to November 2006 for annuity accounts ending with *9697 and *7565. (*See also* TT, 180) Although Hertz provided copies of his 2004, 2005, 2006, and 2007 Federal Income Tax Returns, he destroyed the requested 2003 return. (Salkin, Ex. 57; TT, 111-12; *see* TT, 183) Hertz also failed to produce any records for his company regarding the production or sale of products for any of the years included in the Plaintiff's document request. (Salkin Exh 57, TT, 161-63) Hertz admitted that his company maintained a bank account but immediately qualified that the account balance was insubstantial.

Finally, Hertz listed a joint interest in BP stock worth $55,825 on his schedules. (Salkin Exh 38, p. 10) Hertz offered no evidence of the account being in joint names prior to September 24, 2009. He kept no records relating to the BP stock ownership prior to the September date. (Powell Exh OOO; Salkin Exh 19, p. 227; TT, 46, 140, 141, 155-57) Thus, no records of the transfer of BP stock were produced at trial despite the Trustee requesting the documents. (Salkin Ex. 57; TT, 46, 263-65, 193-95) Further, Hertz produced no records of a transfer of approximately $12,000 of Exxon stock from Hertz to joint names with Powell. (TT, 34, 38-39, 263-65, 193-95) This transfer was made within three months of the filing of the bankruptcy and was also included in the Trustee's document request. (Salkin Ex. 57)

It is Hertz' "burden, as a debtor, to maintain books and records from which his financial condition can be [ascer]tained." (TT, 135) Here, he has not. Therefore, the Court finds that

[4] While courts have found a "reasonable period" to be at least two years prior to the filing of the bankruptcy petition, *see In re Hahn*, 362 B.R. at 548, the Plaintiffs' request that Hertz produce documents dating back to 2003 is not unreasonable given Powell's financial sophistication and the nature of the state court litigation with Groman.

Hertz has failed to keep or preserve recorded information relating to his business transaction. Hertz has also destroyed and failed to keep or preserve recorded information relating to his financial condition.

The Court must now decide whether Hertz' failure to keep records and the destruction thereof was justified under all of the circumstances of the case. In examining a debtor's justification, the court considers the debtor's education, the sophistication of the debtor's business, the debtor's personal financial structure, and any other circumstances that should be considered in the interest of justice. *In re Hahn*, 362 B.R. at 548 (citing *Nisselson v. Wolfson (In re Wolfson)*, 139 B.R. 279, 287 (Bankr. S.D.N.Y. 1992)). "An act is justified if it is right or appropriate in the circumstances." *Lassman v. Keefe (In re Keefe)*, 380 B.R. 116, 121 (Bankr. D. Mass. 2007).

After examination of all the circumstances, the Court finds that Hertz' action in discarding the documents and inaction in failing to maintain records of his business were not justified. Hertz and Powell are educated. Although Hertz may not be financially sophisticated, Powell is. Powell has worked in the banking industry since 1977 and is a certified public accountant with tax experience. (TT, 205) She also has a certified financial planner certificate. (TT, 204-05) Powell handles all of the marital financial matters. She also makes decisions involving what financial documents to discard and when to discard the documents. (TT, 114-15, 594, 617) Powell testified that she did not have a set schedule of purging documents. Instead she instructed Hertz to shred documents "as needed." (TT, 597; *see* TT, 609) Document purges were done without any rhyme or reason other than Powell believing that the documents were too old or unneeded. (TT, 224-25)

And at Powell's direction, Hertz shredded documents. He periodically shredded documents without even ascertaining the nature of the documents. (TT, 168-70; Hertz Ex.A at ¶ 19) Hertz assumed Powell would not have shredded anything responsive to the Plaintiffs' document request, but he otherwise did not know if she had. (TT, 178) Although Powell helped compile documents necessary to respond to the Plaintiffs' document requests, Hertz had no discussions with Powell when he received the Plaintiffs' document request regarding whether responsive documents had already been shredded. (TT, 179) Thus, Hertz continued to shred records postpetition, after the Trustee had requested he preserve them, without regard to what he was shredding. He only knew that Powell instructed that he shred, and like a robot, he complied. Accordingly, Hertz showed no regard for his obligations as a debtor to preserve the records with respect to his assets. His excuse that Powell instructed that he discard the documents and his blindly following her instruction amount to an unjustified destruction of documents under the circumstances.

The Defendants suggest that their failure to retain bank records for the periods more than a year prepetition, and their failure to retain tax returns and investment records for the periods more than four years prepetition, are simply the result of routine purging of unnecessary records by systematically shredding records. (TT, 114) However that practice does not otherwise excuse a debtor's obligation to maintain records, especially considering Plaintiffs' document request in connection with the Rule 2004 Examination of Hertz. (Salkin Exh 57)

Finally, Hertz has presented no justification for failing to keep records of his business barter transaction, other than alleging the barter transaction was for an insubstantial amount of money.

For the foregoing reasons, the Court finds that Hertz failed to maintain his obligations under 11 U.S.C. § 727(a)(3) by failing to maintain records in which his financial condition and business transaction can be ascertained. Based upon Hertz' failure to maintain records from which the Trustee could ascertain the Debtor's financial condition, the Court must deny the Debtor's discharge pursuant to 11 U.S.C. § 727(a)(3).

CONCLUSION

The Debtor is not entitled to a bankruptcy discharge because he transferred assets with intent to delay, hinder, or defraud creditors and unjustifiably destroyed or failed to keep or preserve records. Therefore, the Court, having considered the evidence presented at trial, the testimony of the witnesses, the argument of counsel, the applicable law, the submissions of the parties, and being otherwise fully advises in the premises, does hereby

ORDER that Counts II and III of Groman's Complaint and Counts III and IV of the Trustee's Complaint objecting to Ruben Hertz' bankruptcy discharge under 11 U.S.C. § 727(a)(2) and (a)(3) are **SUSTAINED** and the Debtor, Ruben Hertz, shall not be granted a bankruptcy discharge.

The Trustee and Groman shall upload separate final judgments pursuant to Federal Rule of Bankruptcy Procedure 9021 sustaining their objection to Hertz' discharge under 11 U.S.C. § 727(a)(2) and (a)(3) in their respective cases.

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Copies to:
Plaintiffs
Defendants