ORDERED in the Southern District of Florida on 04/03/12.

Raymond B. Ray, Judge
United States Bankruptcy Court

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA
Fort Lauderdale Division

IN RE:

ISMAEL GONZALEZ,

Debtor.
_____/

CASE NO. 11-22884-RBR
CHAPTER 7

VITAL PHARMACEUTICALS, INC.,

Plaintiff,

vs.

ISMAEL GONZALEZ,

Defendant.
_____/

ADV. CASE NO. 11-02411-RBR

MEMORANDUM ORDER OVERRULING PLAINTIFF'S OBJECTION TO ENTRY OF DISCHARGE

THIS MATTER came before the Court on February 29, 2012 for trial on the Plaintiff, Vital Pharmaceuticals, Inc.'s Complaint [DE 1] seeking a denial of Debtor, Ismael Gonzalez' discharge pursuant to 11 U.S.C. §§ 727(a)(3) and (a)(5).[1]

[1] At the start of trial, the parties informed the Court that the Plaintiff was abandoning the claim under § 727(a)(4)(A).

Facts

The following facts are undisputed:

1. On May 11, 2011 the Debtor filed a petition for relief under Chapter 7 of the title 11 of the U.S. Code. The Debtor listed the Plaintiff as a creditor in his schedules.
2. The Debtor was the 70% owner of a company known as American Nutritional Exchange ("ANE").
3. ANE ordered products from the Plaintiff from January 2004 to July 2004.
4. The Debtor signed a personal guarantee for products ordered by ANE from the Plaintiff.
5. After not receiving payment for monies owed, the Plaintiff brought a breach of contract lawsuit against ANE and the Debtor as a personal guarantor. The Plaintiff alleged that ANE and the Debtor purchased products from the Plaintiff, sold the products for profit, and failed to fully compensate the Plaintiff.
6. The Plaintiff obtained a judgment against ANE and the Debtor in 2009 in the amount of $85,394.23.
7. ANE was evicted from its business premises in December 2006 and was administratively dissolved by the Secretary of State on September 26, 2008.
8. The Debtor was not in possession of any of the corporate records of ANE and did not know whether any such documents still existed.

The Court makes the following findings of fact:

9. ANE ceased doing business in 2006.
10. The Plaintiff sought production of documents from the Debtor relating to ANE's contract with the Plaintiff, bank records of ANE, copies of ANE's financial

statements, tax returns of ANE, documents relating to the dissolution of ANE, and other documents relating to ANE. [DE 20-1] However, during the course of the Debtor's bankruptcy and this adversary proceeding, the Plaintiff never sought any financial information from the Debtor. The Plaintiff never sought tax returns, bank statements, pay stubs or any financial information from the Debtor. Thus, the only documents sought during this proceeding were the corporate documents of ANE.

Analysis

11 U.S.C. § 727(a)(3)

A bankruptcy discharge under 11 U.S.C. § 727(a)(3) will be denied when the plaintiff establishes, by a preponderance of the evidence that:

> 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

Id. The relevant test is whether the debtor's financial papers and disclosures are sufficient to enable the creditors and trustee to ascertain the debtor's financial condition and material business transactions. *Turner v. Amash (In re Amash)*, No. 07-10078, 2007 Bankr. LEXIS 2578, at *7-8 (Bankr. S.D. Fla. July 26, 2007); *Furr v. Lordy (In re Lordy)*, 214 B.R. 650, 664 (Bankr. S.D. Fla. 1997). Once evidence sufficient to sustain the objection is presented, the burden shifts to the debtor to explain why the discharge should nevertheless be granted. *Chalik v. Moorefield (In re Chalik)*, 748 F.2d 616, 619 (11th Cir. 1984); *Dulbina of America, Ltd. v. Sklarin (In re Sklarin)*, 69 B.R. 949, 952 (Bankr. S.D. Fla.1987).

"'The purpose of [Section 723(a)(3)] is to ensure that the trustee and creditors receive sufficient information to trace a debtor's financial history for a reasonable period past to

present.'" *In re Lordy*, 214 B.R. at 665 (*quoting U.S. v. Trogdon (In re Trogdon)*, 111 B.R. 655, 658 (Bankr. N.D. Ohio 1990)). The debtor has an affirmative duty to provide such documents, and the trustee and creditors "are not required to . . . ferret out" the required records. *Govaert v. Southern Nat'l Bank (In re Caserta),* 182 B.R. 599, 611 (Bankr. S.D. Fla. 1995).

As the Court noted during the trial, for the presentation of its case, the Plaintiff relied on only the contents of the adversary file and the main file along with the evidence admitted. The Plaintiff called no witnesses. The evidence included the following documents: a. Debtor's personal guarantee; b. The Order of Final Default Judgment; c. The Recorded Judgment Lien; d. The Debtor's schedules; e. The Request for Production of Documents; and f. The Debtor's response to the Request for Production of Documents.[2]

To meet its burden, the Plaintiff relies on the Debtor not having any documents relating to the financial condition of his business, ANE. ANE ceased operating as a business in 2006. During the trial, the Court specifically asked the Plaintiff's counsel if the Plaintiff requested the Debtor's tax returns during the bankruptcy proceeding. The Plaintiff responded that the documents were only requested in the state court proceeding, not in the bankruptcy proceeding. [DE 53 at T50] While the Plaintiff sought production of documents from the Debtor relating to ANE's business dealings, the Plaintiff never sought tax returns, bank statements, pay stubs or any financial information from the Debtor. *See In re Amash,* 2007 Bankr. LEXIS 2578, at *7-8. Further, although the Debtor owned 70% of ANE, the Plaintiff never established that the Debtor was the accountant, bookkeeper, or otherwise in control of ANE's books and records. [DE 53 at T38-39]. Therefore, the Plaintiff failed to meet its burden under section 727(a)(3).

[2] The Plaintiff also attempted to introduce the transcript of Debtor's Bankruptcy Rule 2004 examination taken prior to the filing of the adversary proceeding. [DE 53 at T3-4; Ex. 7] The Debtor objected to the use of the examination. The Court allowed the transcript to be used for cross-examination only.

11 U.S.C. § 727(a)(5)

The Plaintiff also objected to the Debtor's discharge pursuant to 11 U.S.C. § 727(a)(5). For a denial of discharge under section 727(a)(5) the Plaintiff must establish, by a preponderance of the evidence that:

> the debtor has failed to explain satisfactorily, before determination of denial of discharge under this paragraph, any loss of assets or deficiency of assets to meet the debtor's liabilities

Id. The Plaintiff must show that the Debtor has failed to satisfactorily explain his loss of assets. *In re Amash,* 2007 Bankr. LEXIS 2578, at *10 (stating that the movant must show that the debtor once owned substantial identifiable assets that are no longer available for distribution to creditors in order to succeed in obtaining a denial of discharge under this section); *see also ITT Commercial Fin. Corp. v. Walz*, 115 B.R. 353, 357 (Bankr. N.D. Fla. 1990) (citing *In re Sklarin*, 69 B.R. 949 (Bankr. S.D. Fla. 1987)). Once the movant demonstrates a loss of assets, the burden shifts to the debtor to explain what happened to the assets. *Id.* "A satisfactory explanation requires the debtor to demonstrate good faith in the conduct of his affairs and in explaining the loss of assets." *Walz,* 115 B.R. at 357 (citing *Fox v. Cohen (In re Cohen)*, 47 B.R. 871 (Bankr. S.D. Fla. 1985)).

The Plaintiff identifies the Debtor's 70% interest in ANE as a "substantial identifiable asset" that is no longer available for distribution to creditors. Even assuming ANE was a "substantial identifiable asset" of the Debtor, the Court finds that the Debtor has satisfactorily explained the loss of ANE.

ANE was at its "height" in 2004, with twenty to twenty-five employees and $7 million in gross sales. [DE 53 at T33] While the seven million in sales sounded like a large number, ANE "operate[d] off a very, very thin margin." *Id.* at 40. ANE was a re-distributor of products, selling only at an eight-percent markup. *Id.* ANE's supplier held ANE to a quota yet the

supplier continued to compete with ANE "on a local level." *Id.* at T33. This proved problematic for ANE. During 2004, ANE had a net operating loss of over $1 million business for ANE in 2005 became "rocky" and "volatile." *Id.* at T21, 29, 30, 44. When questioned about why ANE did not pay the Plaintiff's invoices in 2004, the Debtor explained that ANE had returned the goods to the Plaintiff or sold them while ANE was "trying to stay afloat." [DE 53 at T20, 38] After a failed business deal with another corporation, ANE's business collapsed and the company eventually evicted from its business premises in 2006. *Id.* at 31, 38.

Therefore, even if ANE can be considered a "substantial identifiable asset" (with a net operating loss of over $1 million in 2004 and eventual collapse in 2006), the Debtor has satisfactorily explained the loss of ANE. Consequently, the Plaintiff's objection to the Debtor's discharge under section 727(a)(5) is overruled.

Conclusion

Based on the foregoing, it is

ORDERED that the Plaintiff's objection to the Debtor's discharge is **OVERRULED** and relief sought in the Complaint [DE 1] is **DENIED**. The Debtor shall upload to CM/ECF a separate Final Judgment in accordance with Federal Rule of Bankruptcy Procedure 9021, denying the relief sought, within fourteen (14) days of this order.

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Copies to:
Brian K. McMahon
April Rolle
Debtor