

**UNITED STATES BANKRUPTCY COURT  
SOUTHERN DISTRICT OF FLORIDA  
WEST PALM BEACH DIVISION**

**In re:**

**Case No. 02-31848-BKC-SHF  
Chapter 7 Proceeding**

**STUART FRIEDMAN,**

**Debtor.**

---

**DEBORAH C. MENOTTE,  
Trustee in Bankruptcy  
for Stuart Friedman,**

**Plaintiff,**

**vs.**

**Adv.Proc.No. 02-3244-BKC-SHF-A**

**STUART FRIEDMAN,**

**Defendant.**

---

**MEMORANDUM OPINION DENYING DISCHARGE OF DEBTOR**

THIS CAUSE came before the Court for trial on November 1, 2004, upon the Complaint Objecting to the Discharge, filed by Deborah C. Menotte, Chapter 7 Trustee, ("trustee") against Stuart Friedman, the debtor in the above-referenced chapter 7 proceeding ("debtor"). The complaint alleges five counts: transfer of property interests with intent to hinder, delay, or

defraud creditors, pursuant to 11 U.S.C. § 727(a)(2); concealment or destruction of books and records from which the debtor's financial condition or business transactions might be ascertained, pursuant to 11 U.S.C. § 727(a)(3); submission of a false oath or account in connection with the debtor's bankruptcy case, pursuant to 11 U.S.C. § 727(a)(4)(A); failure to satisfactorily explain a loss or deficiency of assets, pursuant to 11 U.S.C. § 727 (a)(5); and failure to obey a lawful order of this Court, pursuant to 11 U.S.C. § 727(a)(6)(A). The Court, having heard the testimony of witnesses and having considered their credibility and demeanor, and also having considered the exhibits introduced at trial, and being otherwise fully advised in the premises, makes the following findings of fact and conclusions of law pursuant to Federal Rule of Bankruptcy Procedure 7052, which incorporates Federal Rule of Civil Procedure 52. Consistent with this Court's judgment, the Court **denies** the issuance of a Discharge of Debtor in favor of defendant Stuart Friedman, pursuant to 11 U.S.C. §§ 727(a)(2) and (a)(4)(A).

#### **FINDINGS OF FACT**

The debtor's bankruptcy case was commenced on April 8, 2002 with his filing of a voluntary chapter 7 petition. As of the petition date, the debtor resided at 16017 Briar Creek Drive, Delray Beach, Florida. Title to the referenced home is held in the name of the debtor's wife, Dorothy C. Friedman ("wife"), which home was purchased on or about June 1, 2001 for approximately \$627,000 (Pl.'s Ex. 25, pg. 8). The home is subject to a first mortgage of approximately \$500,000 (Pl.'s Ex. 25, pg. 8). The debtor's wife ostensibly used the proceeds generated from her sale of a prior home which she and the debtor had owned, which home was sold in June 2000, to purchase the debtor's present residence. The debtor and his wife moved into their current residence in April or May 2001, and within one year of the debtor's petition date. The debtor's bankruptcy filing appears to have been precipitated, at least in part, by the

entry of a judgment against the debtor in the amount of \$546,489.45 in favor of Bank One, Louisiana, N.A.("Bank One") on October 26, 2000 (Pl.'s Ex.19). Subsequent to the entry of the referenced judgment against the debtor, the judgment was assigned to Oracle Oil, L. C.

The debtor claims to have been advised by non-bankruptcy counsel that it would be in his best interest to render himself "judgment proof" (Pl.'s Ex. 25, pgs. 25 - 30). Consequently, the debtor closed a bank account held jointly with his wife, Dorothy C. Friedman, maintained with First Union National Bank, Account No. 1090009966154, in July 2001 (Pl.'s Ex. 3). Contemporaneously, the debtor's wife opened a new checking account maintained solely in her name, also with First Union National Bank, under Account No. 1010043812529 (Pl.'s Ex. 5). Among the monthly deposits into the "new" account of the wife were, and are, the debtor's disability payment, in the amount of \$6,296.00, and the debtor's social security payment, in the amount of \$1,204.00. During the debtor's Bankruptcy Rule 2004 examination conducted on August 16, 2002 (Pl.'s Ex. 25, pgs. 25 - 27), and again at trial, the debtor acknowledged that he "changed" his checking account at First Union from a joint account to an account held solely in the name of Dorothy C. Friedman out of concern that Bank One would recover upon its state court judgment (Pl.'s Ex. 25, pg. 25), the entry of which supposedly came to the debtor's attention in the first half of 2001.

The debtor previously engaged in the practice of medicine and specialized in neurosurgery. He was earning in excess of \$200,000 a year, but retired in 1986, at age 50, as a consequence of severe depression, anxiety, and migraine headaches. Since retirement, the debtor's only regular source of funds has been his disability payments and his Social Security payments. However, the debtor's wife apparently contributes to the joint subsistence of her husband and herself. She is the owner of Promotions for Profit, Inc., which entity sells plants

and other horticultural products to grocery stores. Mrs. Friedman operates Promotions for Profit Inc. ("PFP") from her home, and has operated the business since 1984 (Pl.'s Ex. 26, pg. 9). At the trial, Mrs. Friedman testified that she earns approximately \$1,000.00 per month through the operation of PFP.

During the course of the trial, the debtor contended that he did not know the nature or extent of assets held in his wife's revocable trust, which was created in June 1998 (Pl.'s Ex. 22). The debtor also testified that he did not assist his wife in establishing her revocable trust, which is maintained through Prudential Securities (Pl.'s Ex. 13). After the debtor and his wife had closed their joint bank account at First Union National Bank, and had opened a new account with First Union National Bank maintained solely in the wife's name, the debtor obtained an extension of funds against his MBNA America credit card (Pl.'s Ex. 12, pg. 4), in the amount of \$50,000, on January 17, 2002, which funds were deposited into the checking account of Dorothy C. Friedman (Pl.'s Ex. 5, pg. 14). Subsequently, the debtor obtained an additional extension of funds against his MBNA America credit card on March 12, 2002 in the amount of \$5,000 (Pl.'s Ex. 12, pg. 2). The debtor testified in deposition that the \$5,000 advanced upon his MBNA America credit card account were utilized in large part to fund his wife's Prudential Revocable Trust (Pl.'s Ex. 25, pgs. 42 - 43). MBNA America is listed on the debtor's Schedule F of his bankruptcy schedules, in the amount of \$54,971.22 (Pl.'s Ex. 1)<sup>1</sup>. In addition, the debtor acknowledged during his trial testimony that his reason for, in effect, converting the joint bank account maintained at First Union National Bank into an account held solely in his wife's name

---

<sup>1</sup>An adversary proceeding commenced by MBNA America against the debtor, Adv. Pro. No. 02-3192-A, objecting to the dischargeability of the obligation due to MBNA America, was settled during the course of this bankruptcy case.

was to thwart any attempt by his former business associate, Howard Stern, to seize or execute upon funds held in the debtor's name. Howard Stern is the former investment adviser for the debtor (Pl.'s Ex. 25, pgs. 85 - 86; pgs. 90 - 101). The debtor invested in Diversified Natural Resources, Inc. through Howard Stern, who also enticed numerous other persons to advance funds to him for the purpose of developing an oil field owned and/or operated by Diversified Natural Resources, Inc. (Pl.'s Ex. 25, pgs. 93 - 95). According to the debtor, Stern's efforts in raising funds to invest in Diversified Natural Resources was a ruse, and his investment in Diversified Natural Resources, Inc. was a total loss.

Among the allegations contained in the trustee's complaint is the contention that the debtor, in allegedly having issued a financial statement dated January 15, 1997 reflecting his net worth at \$3,363,311.00, issued a false financial statement, and further, that in conjunction with the filing of his chapter 7 petition and schedules, the debtor failed to satisfactorily explain his disposition of the assets reflected upon the financial statement. The debtor, in his Written Opening Statement (C. P. 87) denied the veracity of the financial statement, and also denied that he executed the financial statement. Rather, the debtor contends that the financial statement was forged, and was likely prepared and "executed" by Howard B. Stern. Although the debtor's signature, as reflected upon his chapter 7 petition (Pl.'s Ex. 1), bears some resemblance to the signature reflected upon the Confidential Financial Statement attached to the trustee's complaint, a comparison of the two signatures by the Court, in absence of expert testimony, is inconclusive as to whether the debtor actually did execute the Confidential Personal Statement.

The trustee also elicited the testimony from the debtor's wife relating to funds that were transferred from the joint checking account maintained by the debtor and his wife (First Union National Bank Account No. 1090009966154), made payable to First Union Business Credit Line

and to Key Bank U.S.A. (Pl.'s Exs. 3 and 4). At trial, the wife testified that she maintained "lines of credit" with both First Union National Bank and Key Bank, U.S.A. to finance her operation of PFP. She further testified that the bank account maintained by PFP was not available for use by the debtor, and that all loan repayments on her "lines of credit" were for her sole benefit. Between January 6, 2001 and March 3, 2001, transfers totaling \$33,274.94 were effected from the afore-described joint checking account maintained at First Union National Bank to pay the balance due to First Union National Bank on the line of credit maintained by the debtor's wife (Pl.'s Ex. 4, pgs. 5 - 7). In addition, between December 21, 2000 and February 21, 2001, transfers totaling \$25,650.99 were effected from the aforementioned joint bank account maintained at First Union National Bank to pay the balance due to Key Bank, U.S.A. on the credit line maintained by the debtor's wife (Pl.'s Ex. 4, pgs. 8 - 10). During the time periods in which the above-referenced transfers from the joint checking account at First Union National Bank were effected, the debtor's wife was aware of the pending litigation initiated by Bank One against Diversified Natural Resources, Inc. (Pl.'s Ex. 19), to which the debtor was a party.

### **CONCLUSIONS OF LAW**

In actions to determine whether a particular indebtedness should be deemed dischargeable, and in actions to determine whether a debtor should be granted a discharge, the standard as to burden of proof is by the preponderance of the evidence. *Grogan v. Garner*, 498 U. S. 279; 111 S. Ct. 654, 661, 112 L. Ed. 2d 755 (1991); *Furr v. Lordy*, 214 B. R. 650, 664 (Bankr. S. D. Fla. 1997); *Stone v. Bosse*, 200 B. R. 419, 421 (Bankr. S. D. Fla. 1996). Once evidence sufficient to sustain the objection is presented, the burden shifts to the debtor to explain why the discharge should nevertheless be granted. *In re Chalik v. Moorefield*, 748 F.2d 616, 619

(11th Cir. 1984). The prepetition conduct of the debtor warranting denial of his discharge can be categorized as follows:

- Transfers of property with intent to hinder, delay, or defraud a creditor or officer of a bankruptcy estate;
- Submission of a false oath or account in connection with bankruptcy case;

**TRANSFERS OF PROPERTY WITH INTENT TO HINDER, DELAY, OR DEFRAUD A CREDITOR OR OFFICER OF A BANKRUPTCY ESTATE**

The record is replete with instances of the debtor's intentional transfer of property interests to hinder, delay or defraud creditors. The debtor admitted that his actions in closing his joint checking account maintained with First Union National Bank, and in opening a new checking account also maintained with First Union National Bank, but solely in his wife's name, were intended to shield his income from the claims of his creditors, most particularly Bank One, Louisiana, N. A. For purposes of 11 U.S.C. § 727(a)(2)(A), Congress intended that the deposit of funds in a bank account would constitute a transfer. *In re Craig*, 252 B. R. 822 (Bankr. S. D. Fla. 2000); *Ameritrust Nat'l Bank v. Davidson*, 164 B. R. 782, 785 (Bankr. S. D. Fla. 1994), *aff'd in relevant part*, 178 B. R. 544, 550. In *Davidson, id.*, the United States District Court affirmed this Court's determination that a debtor's transfer of assets to avoid a claim of a particular creditor evidenced an intent to hinder or delay a creditor sufficient to warrant the denial of a discharge. *In re Davidson*, 178 B. R. 544 (S. D. Fla. 1995). "The actual intent to hinder, delay or defraud a creditor may be proven by an inference drawn from a debtor's course of conduct," and the issue of intent is a question of fact to be determined by the bankruptcy judge. *In re Wingate*, 332 B. R. 649, 654 (Bankr. M. D. Fla. 2005); *Accord In re Pomerantz*, 215 B. R. 261 (Bankr. S. D. Fla. 1997). *Sub judice*, the debtor admitted that he closed the First Union National Bank joint

checking account, and contemporaneously opened a new First Union National Bank checking account held solely in his wife's name, so that the funds held in his wife's account, including his monthly disability and social security payments, would be protected. In addition, the debtor obtained extensions of funds against his MBNA America credit card account in January and March of 2002 in the aggregate amount of \$55,000. When the debtor obtained the MBNA America advances, he was unemployed and insolvent, based upon the October 26, 2002 judgment entered in favor of Bank One, Louisiana against him. The Court concludes that the debtor's transfer of funds from his First Union checking account, and the debtor's extensions of funds against his MBNA America credit card account, constitute transfers of property interests made with intent to hinder, delay, or defraud creditors under 11 U.S.C. § 727(a)(2).

#### **FALSE OATH OR ACCOUNT**

The Court also determines that, in connection with this bankruptcy case, the debtor has made false oaths and false accounts warranting the denial of a discharge. Firstly, the debtor failed to disclose the closing of his joint First Union National Bank account, bearing Account No. 1090009966154, in July 2001 (Pl.'s Ex. 3). In completing his Statement of Financial Affairs, the debtor, with regard to Question 11 of his Statement of Financial Affairs (Pl.'s Ex. 1, pg. 22), "checked" a box beneath the word "None", indicating that there were no financial accounts previously maintained by the debtor which were closed within one year of the commencement of this case. Such information clearly was incorrect, upon analysis of the bank statements for the referenced First Union National Bank account (Pl.'s Ex. 3), evidencing that the joint account was closed on July 2, 2001, and **within** one year of the filing of the debtor's chapter 7 petition. The debtor also failed to disclose, on his Schedule B17., that a liquidated indebtedness was owed to him by Howard Stern in the amount of \$40,000 (Pl.'s Ex. 17). The

debtor explained at trial that he did not list the Stern judgment as an asset because he believed it to be uncollectible.

Although the debtor's failure to list the Stern judgment as an asset, and his failure to list the closing of the joint First Union National bank account, in and of themselves, might be understandable, his failure to list his membership in the Mizner Country Club clearly is not justifiable. The debtor applied for membership in September of 2000 (Pl.'s Ex. 14) and contemporaneously, made a full membership contribution of \$62,000. Pursuant to the terms of the membership agreement (Pl.'s Ex. 15), upon a member's resignation or death, or upon the re-issuance of the membership to a new member, Mizner Country Club "...shall pay to the resigned Full Member or Sports Member a transfer payment equal to the actual membership contribution previously paid to the Company or the Club by the resigned member for their classification of Equity Membership, without interest." (Pl.'s Ex. 15, ¶ H.). Not only did the debtor make full payment in the amount of \$62,000 for his equity membership, but he also regularly paid for his monthly charges due to the country club under Account No. F009 (Pl.'s Ex. 4, pgs. 1 - 4). At trial, the debtor acknowledged that he completed the membership application, and that he was an active member of the country club. Also conspicuously absent from the debtor's bankruptcy schedules and Statement of Financial Affairs is any reference to the debtor's interest in the "Chase The Moon, Inc." movie project. The debtor was a partner in this project. He reported a \$5,254 loss relating to the project on his 1999 Federal Income Tax return (Pl.'s Ex. 8 - Schedule E and Form 8582 Worksheets), which loss offset taxable passive income, and reduced the debtor's 1999 Federal income tax liability. The debtor similarly referenced his interest in the "Chase the Moon, Inc." movie project in Schedule E of his 2000 Federal Income Tax return (Pl.'s Ex. 9 - Schedule E). Although the debtor may have believed that his interest in the "Chase the Moon,

Inc." project had no value, he nonetheless was required to disclose his interest so that his bankruptcy trustee and creditors could assess the value of this property interest for themselves.

As noted in *In re Dupree*, 336 B.R. 490, 494 (Bankr. M.D. Fla. 2005):

There are two elements that must be proven in order to deny the debtor a discharge under § 727(a)(4)(A). First, the debtor's oath or account must have been knowingly and fraudulently made, and second, it must be related to a material fact.

Given the magnitude of the omissions by the debtor, both in terms of the number of omissions and the value of the assets omitted, this Court concludes that the referenced omissions from the debtor's schedules and Statement of Financial Affairs were made knowingly and fraudulently, so as to preclude the issuance of a Discharge of Debtor.

With regard to the remaining counts of the trustee's complaint under § 727(a)(3) - concealment, destruction, or failure to keep or preserve any recorded information; § 727(a)(5) - failure to satisfactorily explain any loss or deficiency of assets to meet the debtor's liabilities; and § 727(a)(6)(A) - failure to obey any lawful order of the court, the record does not warrant a denial of discharge. The trustee's allegations under Count II (§ 727(a)(3)) address the debtor's alleged failure to keep or preserve over \$3.4 million in assets, representing the value of the assets reflected upon the Confidential Personal Statement ostensibly executed on January 15, 1997. The Confidential Financial Statement was not introduced at trial. During the debtor's August 16, 2002 Bankruptcy Rule 2004 examination conducted by the trustee, the debtor denied that he executed the Confidential Financial Statement, and contended that his signature on the statement was forged (Pl.'s Ex. 25, pg. 69). The trustee presented no evidence to the contrary, and as such, the trustee's allegations as to § 727(a)(3) have not been proven.

Similarly, the trustee has failed to establish that the debtor failed to satisfactorily explain a loss or deficiency of assets. The trustee's allegations are predicated upon his contention that the debtor has incurred liabilities to general unsecured creditors exceeding \$800,000, and that the debtor "...cannot demonstrate a loss of assets or deficiency of assets to meet these liabilities" (C. P. 1, ¶ 36). Of the \$634,356.03 in general unsecured creditors listed in the debtor's Schedule F of his bankruptcy schedules (Pl.'s Ex. 1), \$546,489.00 represents the judgment obtained by Bank One, Louisiana, N.A. as a result of the debtor's unsuccessful foray into the oil business. The existence of this judgment, coupled with the debtor's greatly diminished earning capacity as a result of his disability, provides an explanation sufficient to overcome the trustee's contentions as to 11 U.S.C. § 727(a)(5).

Lastly, as to the trustee's allegations that the debtor failed to comply with this Court's July 30, 2002 Order Granting Motion to Compel Debtor to Allow Inspection of Household Goods and Furnishing (Case No. 02-31848 - C. P. 31), and thus, that a denial of discharge is warranted pursuant to § 727(a)(6)(A), the debtor testified during trial that, when the referenced order was entered, the debtor already had made plans to drive to New Haven, Connecticut, and that he had directed his attorney to seek a postponement of the inspection, which already had been scheduled by the trustee. Upon his return, the trustee conducted an inspection of the debtor's home, and thereafter, the trustee's objection to exemptions was heard and adjudicated (Case No. 02-31848 - C. P. 44), whereby it was determined that the debtor's household furnishings including a bedroom set; a living and dining room set; dinette set; coffee table; two television sets; stereo; book case; wall unit; desk and chair; miscellaneous lamps and small appliances and prints and decorative pictures constituted non-exempt assets, to be administered by the trustee. Based upon the Court's review of the record, the debtor's non-exempt household

furnishings, as to which the trustee bases her objection to the debtor's discharge under § 727(a)(6)(A), have yet to be administered or sold by the trustee. The actions of the debtor clearly do not warrant a denial of his discharge, as it appears that he has fully complied with the Court's July 30, 2002 order.

Pursuant to Bankruptcy Rule 7054(a), the Court shall enter a Judgment denying the issuance of a Discharge of Debtor in favor of the debtor.

###

Copies furnished to:

Philip B. Harris, Esq.  
Attorney for the Plaintiff  
222 Lakeview Avenue, Suite 1330  
West Palm Beach, FL 33401

Harvey H. Harling, Esq.  
Attorney for the Defendant  
7000 W. Palmetto Park Rd., Ste. 404  
Boca Raton, FL 33433