UNITED STATES BANKRUPTCY COURT

WESTERN DISTRICT OF WISCONSIN

In re:

GENE BORRESON

Debtor.

Case Number:

LF7-85-01943

UNION STATE BANK OF WEST SALEM,
a Wisconsin banking corporation,

Plaintiff,

v.

GENE BORRESON,

Defendant.

Adversary Number:

85-0359-7

ORDER

The court having this day entered its memorandum opinion, findings of fact, and conclusions of law;

NOW, THEREFORE, IT IS ORDERED that the Union State Bank of West Salem has failed to sustain its burden of proving that the debtor should be denied his statutory right to the discharge of his debts.

IT IS FURTHER ORDERED that the Union State Bank of West Salem's complaint objecting to the discharge of the debtor is hereby dismissed.

Dated: September 11, 1986.

BY THE COURT:

William H. Frawley

William H. Frawley
U.S. Bankruptcy Judge

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MEMORANDUM OPINION,
FINDINGS OF FACT, AND CONCLUSIONS OF LAW

The Union State Bank of West Salem (Union), by Bryant Klos, has initiated this adversary proceeding objecting to the discharge of the debtor pursuant to 11 U.S.C. § 727(a)(4)(A) and Bankruptcy Rule 4004. The debtor appears by Galen Pittman and Jeffrey Mochalski and contests the complaint. A trial was held in this proceeding on June 24, 1986. The matter was taken under advisement in order to allow the trustee, Lawrence J. Kaiser, to conduct further investigation. Such investigation was conducted and the matter has been submitted for determination by briefs.

The debtor filed for relief under Chapter 7 of the Bankruptcy Code on September 30, 1985. Union alleges that the

debtor knowingly and fraudulently made a false oath or account in connection with his bankruptcy case by failing to properly list certain assets in his bankruptcy schedules. Specifically, Union alleges that the debtor failed to state his interest in:

1. A 1932 Model B Ford.
2. A boat, motor, and trailer.
3. An employee pension plan.
4. A workers compensation claim.
5. A wrongful discharge claim.
6. A potential products liability claim.
7. Several items of personal property.

Union also alleges that the debtor used erroneous values in his schedules with respect to several items of personal property.

Union alleges that the debtor made a false oath or account with respect to a 1932 Model B Ford automobile. The debtor entered into a written contract to sell this automobile to his mother, Marie Borreson, on September 5, 1984, for $1,500.00. This sale occurred over a year before the debtor filed for relief under Chapter 7 of the Bankruptcy Code. To satisfy her part of the sales agreement, Marie Borreson paid the debtor's rent of $250.00 for five months and provided the debtor with $250.00 in cash. The debtor was going through a divorce at the time of the sale and sold the automobile because he was in need of liquid assets.

The title to the automobile was not transferred into the name of Marie Borreson. The undisputed testimony revealed that the debtor's ex-wife, Mary Borreson, took possession of the box that contained all of the debtor's important papers including titles and registrations. The title to the automobile was not

transferred to Marie Borreson because the debtor was not in possession of the certificate of title at the time of the sale and, therefore, was not able to sign it over.

The automobile is stored in the debtor's garage. Marie Borreson lives in a trailer and does not have a place to park the vehicle. Also, apparently the engine on the vehicle is "frozen up" and the vehicle is not operational. Marie testified that she feels that the automobile is hers to sell at any time. The appraised value of the vehicle in July of 1986 was $1,650.00. The debtor listed the vehicle as personal property in a divorce stipulation signed September 7, 1984, two days after the sale of the automobile to Marie Borreson. The debtor testified that he had informed the attorney representing him in the divorce proceedings that he had sold the automobile prior to the execution of the stipulation but was advised by counsel to sign the stipulation anyway. The debtor testified that he did not list the automobile as "property held for others" in his bankruptcy schedules because he had understood his attorney to only ask of him what property was held for others "in his house." It had not occurred to him that he was holding property for others in his garage. Marie Borreson was at liberty to take the vehicle any time she wished.

Union alleges that the debtor should have listed the vehicle as property of the bankruptcy estate pursuant to 11 U.S.C. § 541 since the title was still in his name. Union also alleges that the debtor should have listed the vehicle in his schedules as

property held for others. Finally, Union apparently questions the veracity of the debtor with respect of the sale of the automobile to his mother. Union in effect argues that an actual sale was not consummated because the debtor verified that the automobile was still his in the divorce stipulation agreement signed September 7, 1984.

The debtor listed a 1974 Starcraft boat, a 70 horsepower Johnson motor, and trailer in his schedules as property transferred during the year immediately preceding his filing for relief under Chapter 7 of the Bankruptcy Code. The debtor sold these items to his brother, Jerry Borreson, by written contract dated May 15, 1985, for $2,800.00. Jerry Borreson paid the debtor about $350.00 in cash at the time of the execution of the contract and paid the remainder of the purchase price through cash payments over a period of time. Some of these payments, $845.00, were paid to the debtor post-petition, and these funds are now held by the trustee. The appraised value of the boat in July of 1986, was $1,460.32.

The boat is kept in the debtor's garage because Jerry Borreson did not have room to store the boat and there is no cover for the boat. The debtor did not list the boat, motor, and trailer as property held for others in his bankruptcy schedules. The debtor testified that he only considered the property "held in his house" when listing property held for others in his bankruptcy schedules. Jerry Borreson was free to take and remove the boat from the debtor's garage whenever he wished.

The registration to the boat was lost, along with the title to the Model B Ford, in the circumstances surrounding the divorce. Because the certificate of registration was not in the debtor's possession at the time of sale, the registration was not transferred into Jerry Borreson's name. Several days after the sale, the debtor received a notice of renewal of registration. The debtor signed his name on the renewal form and mailed it in. The debtor did not think of the boat as his property when filling out his bankruptcy schedules.

Union asserts that the boat was registered in the debtor's name and should have been listed as property of the bankruptcy estate in the debtor's schedules pursuant to 11 U.S.C. § 541. Union also points out that the boat should have been listed as property held for others in the debtor's bankruptcy petition. Finally, Union asserts that the debtor should have listed the amounts still owing on the sale of the boat as an asset of the bankruptcy estate.

The debtor did not list his interest in a workers pension fund in his bankruptcy schedules. Apparently there is about $4,763.22 in this fund that may inure to the benefit of the debtor's spouse, or children, or other specified persons should the debtor die before he retires. The debtor has no present right to these funds. It is also quite clear that to the extent this fund is vested it is subject to many contingencies that could cause it to be divested. The debtor did not list this fund

in his bankruptcy schedules because he did not consider it as an asset. The present value of this fund is about $0.00.

The debtor did not list his interest in a workers compensation claim in his initial bankruptcy schedules. After Union filed a complaint objecting to the discharge of the debtor, the debtor amended his schedules to include the workers compensation claim. The court notes that such a workers compensation award is not subject to the claims of creditors. Wis. Stat. § 102.27(1). See also In re Brandstaetter, 36 B.R.369 (Bankr. E.D. Wis. 1984).

The debtor did not list his interest in a wrongful discharge claim against his former employer. This claim sought reinstatement and back pay. Union points out that the debtor testified at a hearing in front of the examiner for the Wisconsin Employment Relations Commission nine days before he signed his bankruptcy schedules. The attorneys for the debtor in his employment related suit also initiated an age discrimination suit as an alternative approach to the employment action. The debtor believed that these claims were so contingent that they were not really an asset of the bankruptcy estate.

Union also argues that the debtor omitted to include on his schedules any reference to a possible products liability claim that he could have against the manufacturer of an air ride suspension seat. This suit has not yet been filed and the debtor apparently does not intend to file a suit. No defect in the product has been presented to the court. This potential claim is so

speculative that it need not have been listed in the debtor's schedules.

Finally, Union alleges that the debtor failed to list certain items of personal property in his bankruptcy schedules. Union also alleges that the debtor placed erroneous values on various items of personal property in his bankruptcy schedules. Initially, there are several different and distinct approaches to valuation of property. Generally, in bankruptcy the relevant value is the forced liquidation value. In other types of proceedings the replacement value is often the relevant value. Obviously, replacement values are somewhat higher than the forced liquidation values used in bankruptcy. Union contends that the values the debtor placed on personal property in the divorce proceeding should be used to indicate values for this bankruptcy. The other items of property which the debtor omitted to include on his schedules consist of small household goods. The debtor did not list these items of property because he did not feel they were of any value. Union argues that the debtor thought that these items of property were of sufficient value to list them in his divorce proceedings. Union has not had an independent appraisal done for any of this property.

The denial of a discharge in bankruptcy is a harsh sanction that should only be imposed in rare circumstances. In re Kellen, (Bankr. E.D. Wis. Adv. #84-0494, Aug. 14, 1986). The right to a discharge in bankruptcy is statutory and all inferences should be construed liberally in favor of the debtor and strictly against

an objecting creditor. In re Shebel, 54 B.R. 199, 202 (Bankr. D. Vt. 1985). One of the primary purposes of bankruptcy is to provide a debtor with a fresh start. In re Riposa, 59 B.R. 563, 567 (Bankr. N.D. N.Y. 1986). Hence, the debtor should be granted a discharge in bankruptcy unless it is clearly established that the discharge should be denied. In re Morris, 58 B.R. 422 (Bankr. N.D. Tex 1986).

The extraordinary measure of the denial of discharge is justified "only where there is a preconceived scheme to thwart the rights of creditors and the process of [the] court, or such a cavalier disregard of duty as to constitute the legal equivalent of such motives." In re Yokely, 61 B.R. 198, 199 (Bankr. W.D. Ky. 1986); In re Brame, 23 B.R. 196, 200 (Bankr. W.D. Ky. 1982). A showing of omissions from simple mistake or inadvertance is not sufficient to demonstrate that a false oath was made knowingly and fraudulently. In re Ligon, 55 B.R. 250, 253 (Bankr. M.D. Tenn. 1985).

The plaintiff has the burden of proving that the debtor should be denied a discharge. Bankruptcy Rule 4005. Once the plaintiff has established the existence of omissions or fraudulent type behavior on the part of the debtor, then the debtor is required to come forward with explanations. Finally, the ultimate burden of proving that the debtor should be denied a discharge is on the plaintiff. In re Martin, 698 F.2d 883 (7th Cir. 1983).

Union has properly demonstrated that the debtor failed to include assets or items of property that should have been included in his bankruptcy schedules. The debtor then had the burden of satisfactorily explaining the reason for the absence of such assets or items of property on the bankruptcy schedules. Union carries the ultimate burden of proving that the debtor was engaged in "a preconceived scheme to thwart the rights of creditors and the process of court..." In re Yokley, 61 B.R. 198, 199 (Bankr. W.D. Ky. 1986).

The debtor did not list the Model B Ford or the boat, motor, and trailer in his schedules because he did not consider these items as his property. The two contracts of sale indicate that these items did not actually belong to the debtor. Ideally the debtor would have listed in his schedules that these items were still registered in his name. However, it cannot be said that the debtor's neglect to list his interest in this property amounts to fraud. The debtor did not conceal the fact of the sale of this property. The conduct of the debtor with respect to the automobile, boat, motor, and trailer does not constitute fraud.

The debtor did not list his interest in a workers pension plan, a wrongful discharge claim, a potential products liability claim, or a workers compensation claim as property of his estate. All of these claims, with the exception of the potential products liability claim, should have been listed in the debtor's schedules. However, all of these claims were contingent at the time

the debtor filled out his schedules. The present value of the pension plan is $0.00. A workers compensation award under the Wisconsin Statutes is totally exempt from the claims of creditors. Wis. Stat. § 102.27(1). The wrongful discharge claim was very contingent and the debtor did not believe it was an asset. Although these claims should have been listed in the debtor's schedules, their omission does not constitute fraud or warrant a denial of discharge.

The discrepancy in the value of several items of personal property between the values placed on the items in the divorce proceedings and in the bankruptcy proceedings can be explained by using different approaches to valuation. An actual appraisal by an independent appraiser has not been provided to the court. The debtor also failed to list several items of personal property that apparently have only nominal value. There has been no showing that these items were willfully omitted. Nor is there any reason to believe that the debtor attempted to conceal these items.

Union seems to be a fully secured creditor of the debtor. The proof of claim filed by Union on November 15, 1985, lists the debt owed Union by the debtor as a secured obligation. The court notes that Union is a "creditor" and may file an objection to discharge pursuant to § 727(c) of the Bankruptcy Code. 11 U.S.C. § 101(9). This seems to be true regardless of the fact that such an objection is of no apparent benefit to Union. However, the Bankruptcy Court is not intended to be a forum for fighting per-

sonal disputes unrelated to the legitimate financial interests of the parties. In re Kellen, (Bankr. E.D. Wis. Adv. #84-0494, Aug. 14, 1986).

The debtor did fail to list in his bankruptcy schedules several items of property that should have been included. However, all of this property was contingent in nature, of nominal value, or exempt. The fact that these assets were of negligible value to the bankruptcy estate tends to indicate that their omission in the schedules was unintentional. In re Morris, 58 B.R. 422 (Bankr. N.D. Tex. 1986); In re Kellen, (Bankr. E.D. Wis. Adv. #84-0494, Aug. 14, 1986). This opinion is also based on the court's observations as to the credibility of the witnesses who testified in the trial on this matter. The debtor did not knowingly attempt to perpetrate fraud on his creditors or on the court. Union has not succeeded in carrying its burden of proving that the debtor should not be granted his statutory right to a discharge. It is the conclusion of the court that Union's complaint objecting to the discharge of the debtor should be denied.

This opinion shall constitute findings of fact and conclusions of law in accordance with Bankruptcy Rule 7052.

Dated: September 11, 1986.

BY THE COURT:

William H. Frawley
U.S. Bankruptcy Judge

cc: Attorney Bryant Klos
Attorney Galen Pittman
Attorney Jeffrey Mochalski
Attorney Lawrence J. Kaiser