UNITED STATES BANKRUPTCY COURT
CENTRAL DISTRICT OF CALIFORNIA
LOS ANGELES DIVISION

In re: Dorothy Victoria Long, Debtor	Case No.: 2:18-bk-22399-ER Adv. No.: 2:19-ap-01086-ER
United States Trustee for the Central District of California, Plaintiff v. Dorothy Victoria Long, Defendant	**MEMORANDUM OF DECISION** **TRIAL:** Date: October 26, 2020 Time: 9:00 a.m. Location: Ctrm. 1568 Roybal Federal Building 255 East Temple Street Los Angeles, CA 90012

I. Introduction

On March 26, 2019, the United States Trustee for the Central District of California (the "Plaintiff" or the "U.S. Trustee") commenced this adversary proceeding by filing a *Complaint for Denial of Discharge Pursuant to 11 U.S.C. § 727(a)(3),(a)(4), and (a)(5)* ("Complaint") against the Debtor Dorothy Victoria Long (the "Defendant"), who is proceeding *in pro se* [Adv. Doc. No. 1]. On August 29, 2019, entry of default was entered against the Defendant [Adv. Doc. No. 12]; however, on June 26, 2019, the Court entered an order to set aside the default [Adv. Doc. No. 19]. The Plaintiff objects to the Defendant's discharge on the grounds that the Defendant failed to keep adequate financial records, knowingly and fraudulently understated the value of personal property in commencement schedules, and proffered false, incomplete, or contradicting information with respect to unsecured loans totaling $112,500.

II. Facts Established by the Pretrial Order

As set forth by the *Joint Pretrial Stipulation and Order* (the "Pretrial Order") [Adv. Doc. No. 26], which supersedes all previous pleadings, the parties have agreed to the admission of the following facts:

In May 2016, the Defendant obtained five unsecured loans (the "Loans") in the total sum of $112,500 (the "Borrowed Funds") from the following financial institutions: (a) on May 19, 2016, from First Technology Federal Credit Union for $20,000; (b) on May 25, 2016, from NASA Federal Credit Union ("NASA") for $15,000; (c) on May 25, 2016, from NASA for $45,000; (d) on May 26, 2016, from LA Financial Credit Union ("LA Financial") for $20,000; and (e) on May 26, 2016, from LA Financial for $12,500. Pretrial Order at ¶ A. 6. Over the next two weeks, the Defendant executed three wire transfers totaling $87,750 (the "Transferred Funds") to a Bank of America, N.A. account in the name of "Bel Cante 2011" ("Bel Cante"), as follows: on May 27, 2016, Defendant transferred $12,500 to Bel Cante, $34,750 on June 1, 2016, and $40,500 on June 9, 2016. *Id.* at ¶ A. 7.

The Defendant filed her chapter 7 bankruptcy petition on October 22, 2018 (the "Petition Date"). *Id.* at ¶ A. 8. On November 5, 2018, the Defendant successfully requested additional time to prepare and file her bankruptcy schedules. *Id.* at ¶ A. 9. In support of her motion to receive additional time to prepare schedules, the Defendant attested that "she was unable to get all materials to complete my schedules and documents as they were in storage and had to be retrieved by third persons." *Id.* The Court set November 16, 2018 as the new deadline to file commencement documents. *Id.* On November 16, 2018, the Defendant filed her schedules, which provided, *inter alia*, that she owned personal property with an aggregate fair market value of $2,921. *Id.* at ¶ A. 10. Schedule I further disclosed that Defendant works for National Gym Supply, Inc. as an accounts receivable manager and earns $68,700 annually. *Id.*

The § 341(a) meeting of the creditors was first held on November 27, 2018, continued to January 3, 2019, and concluded on February 6, 2019. *Id.* at ¶ A. 11. At the November 27 creditors' meeting (the "November 27 Creditors' Meeting"), the Defendant testified that she had read, comprehended, and completed her commencement forms; Defendant further denied transferring any assets in excess of $5,000 to any third-party within the last four years. *See id.* at ¶ A. 12 (providing an excerpt of Debtor's testimony at the November 27 Creditors' Meeting). At the same creditors' meeting, the Defendant testified that she had secured the Loans to invest in a real estate venture to "flip houses" promoted by an individual named Al Noble ("Noble"). *See id.* at ¶ A. 13. The Defendant further testified that she did not possess any records memorializing her investments in Noble's business venture. *Id.* at ¶ A. 15. The Defendant also alleged that the entirety of her investments in the house flipping opportunity (all of the Borrowed Funds) were lost. *See id.* at ¶ A. 13. Although initially claiming that she had made a police report, the Defendant later declared, at the same examination, that another individual had filed the report. *See id.* at ¶ A. 15 (Defendant testified, "[h]e make – they made – they claim they made a police report.").

On December 7, 2018, the Defendant filed amended schedules, including an amended Schedule A/B: Property ("Amended Schedule A/B") form that disclosed that the Defendant

owned personal property with an aggregate fair market value of $103,002.87 [Bankr. Doc. No. 50]. The Amended Schedule A/B stated increased market values for the following items:

- Household holds from $320 to $3,000;
- Electronics from $450 to $1,500;
- Sports and Hobby Equipment from $0 to $250;
- Clothing from $340 to $5,000;
- Jewelry from $175 to $1,500; and
- Retirement accounts from $0 to $63,621.42.

Id. at ¶ A. 16.

On February 25, 2019, the Court entered an order approving the parties' stipulation for the Defendant's examination under Rule 2004 and for the production of certain records. *Id.* at ¶ A. 17; Bankr. Doc. No. 50. The Defendant's 2004 examination took place on March 11, 2019 (the "2004 Examination"). Pretrial Order at ¶ A. 17. At the 2004 Examination, the Defendant failed to produce any of the documents set forth in the parties' stipulation, but provided additional testimony concerning her "house flipping" investments, information supplied in the amended schedules, and the Borrowed Funds. The Defendant stated that the Transferred Funds were wired to the Bel Cante account as an investment in the house flipping business operated by Noble and her then-boyfriend Jason Baumann ("Baumann"), Noble's friend and business partner. *Id.* at ¶ A. 19. According to the Defendant's testimony, the return expected from her real estate investments was expected to finance the Defendant's wedding to Baumann, which was anticipated to cost approximately $140,000. *Id.* During that same examination, however, the Defendant stated that the loans were for "personal use, to plan a wedding. When that didn't pan out, we decided, okay, well, let's just invest in something . . . ." *Id.* Approximately eight months after transmission of the Transferred Funds, Defendant alleged that her wedding was canceled and both Baumann and Noble ceased all communication. *Id.*

At the 2004 Examination, the Debtor testified that the changes from the Schedule A/B to the Amended Schedule A/B were the result of relying on friends who advised her to not put the fair market value of items and her performing no due diligence of any kind to ensure that her Schedule A/B was accurate. *Id.* at ¶ A. 20. The Debtor admitted to knowing that she signed inaccurate documents under penalty of perjury. *Id.* Later on in the examination, when asked about the Borrowed Funds, the Debtor testified that only $87,750 of the funds were transferred to Bel Cante for a house flipping opportunity and the remaining $24,750 was spent on personal expenses. *Id.* at ¶ A. 22. The Debtor then testified that she was not sure what she spent most of the money on except that she bought her daughter a bed for $2,000; however, the U.S. Trustee was unable to find any large charges to account for the $24,750 in the Defendant's bank statement. *Id.* at ¶ A. 24.

On October 26, 2020, the Court held a trial via Zoom (the "Trial"). At the conclusion of the Trial, the Court took this matter under submission.

III. Issues in Dispute and Positions of the Parties

The Plaintiff alleges that the Defendant failed to keep adequate records relating to the Borrowed Funds and the failure to keep or preserve such records is not justified under the circumstances because the Debtor obtained the Borrowed Funds 2 ½ years before the Petition date, and the amount in question, $112,500, is almost double the Defendant's annual income. *Id.* at ¶¶ B. 1(a)-(c). In addition, the Plaintiff believes that the failure to keep adequate records is not justified because the Defendant has been employed in the accounting field for over 31 years. *Id.* at ¶ B. 1(d).

The Plaintiff argues that the Defendant knowingly and fraudulently gave false written oaths by disclosing only $2,921 on her original Schedule A/B. *Id.* at ¶ B. 2(a). Furthermore, the Plaintiff argues that the Defendant knowingly and fraudulently gave false oral oaths at her November 27 Creditors' Meeting that: 1) everything in her bankruptcy papers was true and correct; 2) she had not transferred more than $5,000 in value four years prior to the Petition date; and 3) *all* Borrowed Funds were transferred to Bel Cante. *Id.* at ¶ B. 2(b)-(d). The Plaintiff also alleges that the false written and oral oaths were material. *Id.* at ¶ B. 2(e).

The Plaintiff argues that the Defendant failed to satisfactorily explain her loss of assets by failing to provide documents to fully explain what happened to the entirety of the Borrowed Funds. *Id.* at ¶ B. 3(a). In addition, the Defendant provided a series of conflicting responses, under oath, to questions concerning the Borrowed Funds. *Id.*

IV. Discussion

A. The Defendant is Not Entitled to a Discharge Under § 727(a)(3)

Section 727(a)(3) provides that a debtor is not entitled to a discharge if:

> 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.

Denial of discharge under § 727(a)(3) does not require proof of fraudulent intent. *Peterson v. Scott (In re Scott)*, 172 F.3d 959, 969 (7th Cir. 1999). A U.S. Trustee objecting to discharge under § 727(a)(3) "must show (1) that the debtor failed to maintain and preserve adequate records, and (2) that such failure makes it impossible to ascertain the debtor's financial condition and material business transactions." *Lansdowne v. Cox (In re Cox)*, 41 F.3d 1294, 1296 (9th Cir. 1994) (internal citations omitted). Once the U.S. Trustee demonstrates "that the debtor's records are absent or are inadequate, the burden of proof then shifts to the debtor to justify the inadequacy or nonexistence of the records." *Id.*

At the November 27 Creditors' Meeting, the Defendant admitted that she has no records pertaining to the Borrowed Funds or the Transferred Funds:

> **Bankruptcy Analyst:** And do you have any documentation about any type of contract that you had with this person to do it or any - - anything to - - to give us some idea that there was a working partnership or what was this?
> **Defendant:** Trust. Just trust.
> **Bankruptcy Analyst:** You had no documentation with - -
> **Defendant:** Just trust.

Pretrial Order at ¶ A. 15. In addition, at the October 26, 2020 trial (the "Trial") the Defendant again admitted that she has no relevant records:

> **US Trustee:** Yet you didn't [g]et even a receipt for the transfer of this money, isn't that correct?
> **Defendant:** That's correct. The only receipt I have is what the bank shows.

Trial Transcript at page 33-34, lines 23-25 & 1 [Adv. Doc. No. 52]. During her direct testimony, the Defendant also stated: "I'm, stuck holding the bag, and have no paperwork for anything . . . I have no defense for it . . . ." *Id.* at page 32, lines 21-25. Therefore, it is undisputed that element one, that the Defendant failed to maintain and preserve adequate records, is met.

At the Trial, the Plaintiff brought as a witness an auditor with experience in civil enforcement of chapter 7 cases, corroborating debtors' schedules, reviewing debtors' financial affairs, and investigating investments that debtors make. *Id.* at page 25, lines 2-20. The auditor reviewed the Defendant's file and agreed that in his experience, when individuals are engaged in real estate investments, "they have information about those investments." *Id.* at page 28, lines 20-24. He went on to state:

> Well, in reviewing the Debtor's bank statement, there was . . . 87,000 plus in transfers to an entity, which [to] my understanding from reviewing the documents, was for purposes of an investment, however, nothing beyond the transfer was provided. Without understanding what the transfers were for, with no documentation to substantiate the purpose of the transfers, there - - it's impossible to determine what the funds were used for.

Id. at page 29, lines 18-25. On redirect examination of the Defendant, the Defendant again admitted: "I don't know where the money went . . . I don't have any information regarding these transfers and the check given." *Id.* at page 30, lines 12-18. Given the Defendant admitting her to the elements of § 727(a)(3) during trial, as well as the Defendant failing to offer any justification for failing to keep any records pertaining to the Borrowed Funds, the Court finds that both elements of § 727(a)(3) are met, and the Defendant is not entitled to a discharge under that section.

B. <u>The Defendant is Not Entitled to a Discharge Under § 727(a)(4)</u>

Section 727(a)(4) provides that a debtor is not entitled to a discharge if:

> the debtor knowingly and fraudulently, in or in connection with the case—

(A) made a false oath or account;

A "false statement or an omission in the debtor's bankruptcy schedules or statement of financial affairs can constitute a false oath." *Khalil v. Developers Surety and Indemnity Co. (In re Khalil)*, 379 B.R. 163, 172 (9th Cir. BAP 2007) (citing *Searles v. Riley (In re Searles)*, 317 B.R. 368, 377 (9th Cir. BAP 2004)). The false statement or omission "must involve a material fact. A fact is material 'if it bears a relationship to the debtor's business transactions or estate, or concerns the discovery of assets, business dealings, or the existence and disposition of the debtor's property.'" *Id.* at 173-73 (citing *Fogal Legware of Switzerland, Inc. v. Wills (In re Wills)*, 243 B.R. 53, 62 (9th Cir. BAP 1999)). Finally, the false statement or omission must be made "knowingly and fraudulently." A debtor "acts knowingly if he or she acts deliberately and consciously…. A false statement resulting from ignorance or carelessness does not rise to the level of 'knowing and fraudulent.'" *Roberts v. Erhard (In re Roberts)*, 331 B.R. 876, 882 (9th Cir. BAP 2005). A debtor acts fraudulently if she (1) made representations (2) involving a material fact (3) that at the time she knew were false (4) with the intention and purpose of deceiving creditors/the U.S. Trustee. *Id.* at 882; *see also In re Khalil*, 379 B.R. at 173.

"[I]ntent usually must be proven by circumstantial evidence or inferences drawn from the debtor's course of conduct. *See, e.g., In re Searles,* 317 B.R. at 377 (evidence supported 'factual inference' that debtor 'intended to list a sum below the trustee's radar screen'); *In re Roberts,* 331 B.R. at 884 (fraudulent intent 'may be established by inferences drawn from [debtor's] course of conduct'); *In re Wills,* 243 B.R. at 64 (same). Recklessness can be part of that circumstantial evidence." *In re Khalil*, 379 B.R. at 174. A court "may find the requisite intent where there has been a pattern of falsity or from a debtor's reckless indifference to or disregard of the truth." *Id.* However, "neither sloppiness nor an absence of effort by the debtor supports, *by itself*, an inference of fraud . . . . The essential point is that there must be something about the adduced facts and circumstances which suggest that the debtor intended to defraud creditors or the estate. For instance, multiple omissions of material assets or information may well support an *inference of fraud* if the nature of the assets or transactions suggests that the debtor was aware of them at the time of preparing the schedules and that there was something about the assets or transactions which, because of their size or nature, a debtor might want to conceal." *Id.* at 174-75 (citing *Garcia v. Coombs (In re Coombs)*, 193 B.R. 557, 565-66 (Bankr. S.D. Cal. 1996)) (emphasis in original).

The Defendant has changed her story multiple times. At her November 27 Creditors' Meeting, she testified that she had not transferred any assets in excess of $5,000 to any third-party within the last four years. Pretrial Order at ¶ A. 12. In addition, the Defendant claimed that the entirety of the Borrowed Funds was lost in Noble's house flipping business venture, that she applied for all of the loans, and that she had made a police report. *Id.* at ¶¶ A. 13, 15 & 19. At that same meeting, the Defendant changed her story regarding the police report, claiming that "they made – they claim they made a police report"). *Id.* at ¶ 15. Furthermore, the Defendant testified that she had read, comprehended, and completed her commencement forms, but filed an Amended Schedule A/B drastically increasing the market value of her personal belongings up to over $100,000. *Id.* at ¶ A. 16.

At her 2004 Examination, the Defendant claimed that the return from the Transferred funds was meant to fund a wedding for her and Baumann, but then again changed her story, claiming that the entirety of the Borrowed Funds were for the wedding. *Id.* at ¶ A. 19. Later in the 2004 Examination, the Defendant said that $24,750 of the funds were used for personal expenses, but could provide no documentation for how those funds were spend. *Id.* at ¶¶ A. 22 & 24. The Defendant also admitted that she knew her incorrect schedules were signed under penalty of perjury. *Id.* at ¶ A. 20.

At the Trial, the Defendant testified that it was actually Al Noble who applied for the loans, rather than herself. Trial Transcript at page 32, lines 5-6. In addition, the Defendant reiterated that she knew her schedules were signed under penalty of perjury, and stated "I take accountability for what I did." Trial Transcript at page 37, lines 1-2.

While the Defendant claimed at the Trial that she had not made any false statements, it is evident that she has. *See* Trial Transcript at page 16, line 16. As the court in *In re Khalil* stated, "false statement or an omission in the debtor's bankruptcy schedules or statement of financial affairs can constitute a false oath." 379 B.R. at 172. At the November 27 Creditors' Meeting, the Defendant explicitly stated that she had not made any transfers of over $5,000 in the last four years, a statement that is both false and material. In addition, the Defendant never provided a clear summation of exactly what money was used for what purpose, who applied for the loan, or who filed a police report. The Defendant has changed her story multiple times, making any inquiry into her financial affairs much more difficult and complex for the US Trustee. As the Defendant was aware that all of her schedules were made under penalty of perjury, and all of her testimony was under penalty of perjury, the Court finds that the Defendant knowingly and fraudulently made false oaths and accounts. Therefore, the Defendant is not entitled to a discharge under § 727(a)(4).

C. The Defendant is Not Entitled to a Discharge Under § 727(a)(5)

Section 727(a)(5) provides that a debtor is not entitled to a discharge if:

> 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.

To prevail on its claim under § 727(a)(5), the U.S. Trustee must establish "that the debtor had a cognizable interest in specific identifiable property at a time not too far removed from the bankruptcy which [the debtor] no longer possesses. It is insufficient to merely allege that the debtor has failed to explain losses; the plaintiff must produce some evidence of an identifiable asset loss." *Sonders v. Mezvinsky (In re Mezvinsky)*, 265 B.R. 681, 689 (Bankr. E.D. Pa. 2001). If the U.S. Trustee provides evidence of an identifiable asset loss, the "burden of production … shifts to the debtor to explain satisfactorily the losses or deficiencies…. [E]xplanations of a generalized, vague, indefinite nature such as assets being spent on 'living expenses,' unsupported by documentation, are unsatisfactory." *Id.* at 689-90.

To begin, the US Trustee has identified a specific asset loss: the entirety of the Borrowed Funds. Therefore, the burden shifts to the Defendant to satisfactorily explain the loss. On multiple occasions the Defendant has admitted that she "cannot explain the loss." Trial Transcript at page 16, lines 12-13; *see also* Trial Transcript at page 16, line 25 ("I just can't explain it"); Trial Transcript at page 30, line 12 ("I don't know where the money went"). While the Defendant has stated that much of the loss is attributed to a failed business venture, that statement is wholly unsupported by documentation. *See* § IV. A. of this Memorandum of Decision. Therefore, the Defendant is not entitled to a discharge under § 727(a)(5).

V. Conclusion

For the reasons stated above, the Court concludes that the Defendant is not entitled to a discharge pursuant to §§ 727(a)(3), (a)(4), and (a)(5). The Court will enter the judgment.

Date: November 30, 2020

Ernest M. Robles
United States Bankruptcy Judge