

**UNITED STATES BANKRUPTCY COURT
FOR THE
WESTERN DISTRICT OF KENTUCKY**

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| IN RE: |) | |
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| MILLENNIUM III MEDICAL-SURGICAL |) | |
| |) | CASE NO. 03-11259 |
| Debtor(s) |) | |
| _____ |) | |
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| MILLENNIUM III MEDICAL-SURGICAL |) | |
| |) | AP NO. 03-01078 |
| Plaintiff(s) |) | |
| |) | |
| v. |) | |
| |) | |
| ROBERT JARRETT |) | |
| |) | |
| Defendant(s) |) | |
| _____ |) | |

MEMORANDUM-OPINION

This matter came before the Court for trial on March 16, 2005, on the Complaint filed by Millennium Medical (“Millennium”) against the Debtor, Robert Jarrett, M.D. (“Debtor”). The parties each appeared and the Court, having heard the testimony and evidence presented at trial, reviewed the authorities submitted by the parties and conducted its own research. The Court made an oral ruling from the bench at the conclusion of the trial, determining that Millennium’s Complaint must be dismissed with prejudice, as it failed to sustain the elements of its burden of proof. The Court issues this Memorandum-Opinion as a supplement to its oral Findings of Fact and Conclusions of Law read into the record at trial and pursuant to Fed. R. Bank. P. 7052.

FINDINGS OF FACT

1. The Debtor is a medical doctor who has practiced surgery for approximately 35 years. Today, he only operates one surgical location in Bowling Green, Kentucky.

2. Dr. Konetzki, a general surgeon who resides in Chicago, Illinois, owns and operates, with his wife, Millennium Surgical. Millennium Surgical is staffed largely by relatives of Dr. Konetzki.

3. Millennium Surgical and Debtor entered into a contract whereby Millennium provided Debtor and his staff with an operating system for a free standing surgical facility for specialized vein issue treatment. The agreed upon services provided by Millennium with this operating system included among other things:

- a. a set of manuals describing how to start up a free standing surgical facility (not affiliated with a hospital or surgical center),
- b. site visits by Dr. Konetzki to train the surgeon on the surgical techniques,
- c. assistance in filing insurance claims and collection of amounts due,
- d. a set of documentation to use in setting up and documenting patient files.

4. The underpinning of Millennium's business concept is that the surgeon who runs such a facility can earn not only a fee for his/her surgical services, but may also earn the fees paid by the insurance carriers to the facility which supplies the operating room and surgical products and supplies for the surgeries.

5. Debtor and Millennium executed two contracts, one for Bowling Green for 15 percent of Debtor's gross monthly revenue and one for Owensboro for 13 percent of Debtor's gross monthly revenue.

6. After a period of time of operation under the contracts, shortly after the September 11, 2001 terrorist attacks in New York City, trouble began between the parties. Patient volume began to dwindle at the Debtor's facilities as the Debtor's vein surgery practice is largely elective, cosmetic surgery. Further, the Debtor claims Millennium failed to diligently file claims with insurance carriers and failed to properly follow up on the collection of the sums due. By early 2003, the parties were at an impasse. The Debtor quit paying Millennium's monthly percentage billings.

7. The Debtor and members of his staff testified to failures by Millennium's staff to properly service its accounts, while Millennium, through Dr. Konetzki, pointed to the Debtor's continued use of its operating system after the Debtor quit paying under the contracts.

8. Millennium points to omissions or misstatements in the Debtor's schedules and statement of affairs filed with his petition. The Debtor acknowledges that there are errors in the schedules and statement of affairs, but that he believed they were substantially correct when he signed them.

9. Bruce Clewell, a paralegal who prepared the schedules and statement of affairs under Fred Greene's supervision (counsel for the Debtor), testified at length about how the information from the Debtor arrived at his office, the sloppy nature of the transmission of the documents, the speed with which this case had to be filed and the way these types of documents are routinely tendered to him to put together for filing. Mr.

Clewell provided credible and detailed testimony that supported the Debtor's testimony that the Debtor and his staff fully cooperated in the preparation and provision of all of the requested information. Mr. Clewell testified that given the speed at which he was asked to work and the condition of the information he was given that there would likely be amendments to the petition to correct any errors after filing.

10. While the Court heard evidence of numerous omissions and errors in the schedules they were largely and convincingly explained away by Debtor. Most persuasive to the Court after hearing all of the evidence of omissions was the fact that the Debtor's schedules and statement of affairs did not disclose movement of funds from the Debtor's personal accounts to new business accounts shortly before the petition. Notwithstanding the fact that this occurred, the Court finds that Debtor's demeanor, testimony and that of his other witnesses, supported his explanation for the Debtor's movement of funds from Branch Bank and Trust accounts to Fifth Third Bank and to Auburn Bank. The Court finds there was no subjective or actual intent to harm creditors. While the Court found the nondisclosure troubling, the testimony of the Debtor and his long-standing accountant, Laurie Schwimmer, supported that the old accounts were always used exclusively for business purposes and that the funds transferred to the new accounts came solely from business collections. In sum, the Court believes that the nondisclosure was an oversight given that the Debtor honestly believed these funds were business funds and not personal. Indeed, his accountant testified that the Debtor had always respected the distinction of the accounts and simply drew a salary at the end of the month and never used the accounts for personal expenditures.

CONCLUSIONS OF LAW

Plaintiff filed this adversary proceeding seeking to bar Debtor's discharge pursuant to 11 U.S.C. §723(a)(2), (3), (4) and (5). The party objecting to discharge bears the burden of proving the objection by a preponderance of the evidence. In re Keeney, 227 F.3d 679, 683 (6th Cir. 2000). The Court finds that Millennium failed to carry its burden of proof.

Under 11 U.S.C. §727(a)(2), Millennium had to prove that the Debtor, with intent to hinder, delay or defraud a creditor transferred, removed, destroyed, mutilated or concealed property of the Debtor or the estate. To be successful on this claim, Millennium had to prove (1) a disposition of property, such as concealment, and (2) a subjective intent by the Debtor to hinder, delay or defraud a creditor through the act of disposing of the property. Keeney, 227 F.3d at 683. While it is permissible to infer fraudulent intent from the debtor's actions, In re Chambers, 36 B.R. 791, 793 (Bankr. W.D. Ky. 1984), Millennium failed to provide sufficient evidence from which this Court could infer intent by Debtor to hinder, delay or defraud creditors. Accordingly, Millennium failed to establish its burden of proof on this claim.

Millennium also failed to sustain its burden on its claim under 11 U.S.C. §727(a)(3). The statute provides that discharge shall not be entered where 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. The purpose of this provision 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 Trogdon, 111 B.R. 655, 658 (Bankr. N.D. Ohio 1990).

The initial burden of proof on this claim was on the Plaintiff. However, Millennium simply failed to submit any proof in support of its claim. It is, therefore, appropriate to find in Debtor's favor on this claim also.

Millennium's next claim is based on 11 U.S.C. §727(a)(4). A debtor must be denied a discharge under this section of the Code if he or she "knowingly and fraudulently, in or in connection with the case made a false oath or account." Millennium had to prove by the preponderance of the evidence that (1) debtor made a statement under oath; (2) the statement was false; (3) the debtor knew the statement was false; (4) the debtor made the statement with fraudulent intent; and (5) the statement related materially to the bankruptcy case. In re Keeney, 227 F.3d at 685. The evidence did not support this claim either. While Millennium did offer proof of omissions and misstatements in Debtor's Schedules and Statement of Affairs filed with his Petition, Millennium failed to prove that Debtor did so "knowingly and fraudulently." As with the claim made under §727(a)(2), the requisite intent may be proven by an inference drawn from the facts. See, 6 Lawrence P. King, Collier on Bankruptcy ¶727.04[1][a] (15th ed. 2005). However, a false statement resulting from ignorance or carelessness is not one that is knowing and fraudulent. Id., citing In re Espino, 806 F.2d 1001 (11th Cir. 1986). The Court's factual findings support the conclusion that the mistakes and omissions in the Debtor's Petition and Schedules did not meet the standard of "knowingly and fraudulently" as required by the statute. Millennium also failed to carry its evidentiary burden on this claim.

Plaintiff's last claim is based on 11 U.S.C. §727(a)(5) which provides that a debtor will be denied a discharge when "the debtor has failed to explain satisfactorily, before the determination of denial of discharge, any loss of assets or deficiency of assets to meet the

debtor's liabilities." While the plaintiff need not prove the same element as intent for denial of discharge as in the preceding claims, Millennium still had to identify particular assets which had been lost. In re Brien, 208 B.R. 255 (B.A.P. 1st Cir. 1997). Once this initial burden of proof is met, the debtor then bears the burden of satisfactorily explaining the loss. The Court finds Millennium failed to meet its initial burden of proving the loss of particular assets. The omissions in the Schedules were adequately explained by the Debtor, in any event. Thus, even if the omissions in the Schedules met Plaintiff's initial burden, the Court finds that the Debtor adequately rebutted Millennium's claim on this Count also.

Millennium also asserted a claim based upon Debtor's breach of the Management Agreement. Debtor admitted it owed Millennium on the contract. The Court makes no specific finding on the breach of contract claim since the Court's findings on the claims asserted under 11 U.S.C. §727 make a finding on the breach of contract claim unnecessary.

CONCLUSION

For all of the above reasons, the Court enters Judgment in favor of Defendant/Debtor, Robert Jarrett, M.D. on the Amended Complaint of Plaintiff Millennium III Medical-Surgical. A Judgment incorporating the findings herein accompanies this Memorandum-Opinion.

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JUDGMENT

Pursuant to the Memorandum-Opinion entered this date and incorporated herein by reference,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Judgment is entered in favor of Defendant/Debtor Robert Jarrett, M.D. on the Amended Complaint of Plaintiff Millennium III Medical-Surgical. The Amended Complaint is dismissed with prejudice with each party to bear its own costs.

This Judgment is final and appealable. There is no just reason for delay.