

UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA

In re:

Kenneth L. Kasden,

Debtor.

BKY 4-94-3841

Thomas F. Miller, Trustee of
the Bankruptcy Estate of
Kenneth L. Kasden,

ADV 4-96-185

Plaintiff,

V.

ORDER FOR JUDGMENT

Kenneth L. Kasden,

Defendant.

At Minneapolis, Minnesota, February 3, 1997.

This adversary proceeding came on for trial on the plaintiff's complaint to revoke the defendant's discharge and to recover money. Randall L. Seaver appeared for the plaintiff and the defendant appeared pro se. The court has jurisdiction pursuant to 28 U.S.C. Section 157(a) and 1334(b) and Local Rule 201. This is a core proceeding under 28 U.S.C. Section 157(b)(2)(A), (J), and (O).

Based on the evidence and the arguments of the parties, the court makes the following:

MEMORANDUM ORDER
Prepetition Conduct

The defendant filed a petition under chapter 7 on August 3, 1994. The plaintiff is the trustee in this case. Much of the background of that filing and subsequent litigation the defendant's homestead exemption may be found in my opinion In re Kasden, 181 B.R. 390 (Bankr. D. Minn.1995) and the district court's opinion reversing me, Steiner and Saffer v. Kasden (In re Kasden), 186 B.R. 667 (D. Minn. 1995), aff'd, 84 F.3d 1104 (8th Cir. 1996).

On approximately July 27, 1994, the defendant received a check from Indian River Distribution Company in the amount of \$7,500.00. At the time he cashed the check on August 1, 1994, the defendant was planning to file bankruptcy and set out to spend the entire sum so that he would not have any money on hand at the time of filing, therefore preventing his creditors from obtaining any of the money. On August 3, 1994, he received another check from Indian River Distribution Company for the amount of \$2,700.00 from the sale of a skidloader. He had the same plan for this money.

Shortly before he filed, Kasden made a number of transfers.

On July 21, he made a \$1,000.00 cash payment to All American Recreation, Inc., and on August 3, 1994, paid an additional \$2,500.00 to All American Recreation, Inc., all towards the purchase of a spa.

On August 1, he paid Knox Lumber \$1,384.50 as payment for roof trusses which he did not pick up before he filed bankruptcy.

On August 2 or 3, he paid \$2,000.00 in cash to Jay Roshay as a prepayment for labor to be provided at his home.

On August 3, he also paid \$1,800.00 in cash as an advance payment for 600 feet of marble tile. The defendant did not pick up the tile before he filed.

On August 3, 1994, he endorsed the \$2,700.00 Indian River Distribution Company check over to the Fire Place Center. In addition to that check, the defendant paid the Fire Place

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Center \$853.13, all for the purchase of equipment and the prepayment of certain fees for a total of \$3,553.13. On August 3, he purchased paint from Knox Lumber for \$777.02.

The Transfers

The debtor's transfers to the various entities indicated above were transfers of property of the debtor within one year of the date of the filing of the petition with the intent to hinder, delay, or defraud creditors or the plaintiff, all of which constitutes grounds for denial of discharge under 11 U.S.C. Section 727(a)(2)(A). See *Norwest Bank Nebraska, N.A. v. Tveten* (In re Tveten), 848 F.2d 871 (8th Cir. 1988), *Hanson v. First Nat'l Bank in Brookings* (In re Hanson), 848 F.2d 866 (8th Cir. 1988), and *Panuska v. Johnson* (In re Johnson), 880 F.2d 78 (8th Cir. 1989). For the best analysis of the law regarding such transfers, see *Panuska v. Johnson* (In re Johnson), 124 B.R. 290 (Bankr. D. Minn. 1991).

The Schedules

None of these transfers were disclosed in the defendant's schedules or statements. In response to question 10 of the debtor's Statement of Affairs, the defendant specifically disclosed a number of prepetition transfers, but none of the ones listed above. The failure to list these transfers in his Statement of Affairs and his Verification of the statement constitute the making of a false oath, providing grounds for denial of discharge under Section 727(a)(4)(A) or the concealing of transfers providing grounds for denial of discharge under Section 727(a)(2).

The fireplace equipment, the prepaid labor, the prepaid tile, the prepaid lumber, and the spa all constituted property of the estate which the defendant did not disclose on his Schedule B.

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This failure to disclose the existence of this property provide grounds for denial of discharge under Section 727(a)(2) for concealing property or under Section 727(a)(4) for the making of a false oath.

In the debtor's Schedule I, the defendant indicates that he was unemployed and shows no income. This statement was false in that the defendant was employed and admits to being employed right up until a couple of days before filing and again immediately after filing. He was employed throughout this time, but created a fiction that he was unemployed shortly before he filed and then became immediately reemployed after the case was filed. These false statements in Schedule I also constitute a making of a false oath providing grounds for denial of discharge under Section 727(a)(4).

Denial of Discharge

As discussed above, plenty of grounds existed for denial of the defendant's discharge under various subdivisions of Section 727(a). However, the plaintiff, who is the trustee in the debtor's case, did not discover any of these facts in sufficient time to object to the debtor's discharge. Fed. R. Bankr. P. 4004(a) sets 60 days following the first date set for the meeting of creditors as the date for objecting to a debtor's discharge. In this case, that date was November 7, 1994. That date passed and on January 24, 1995, the debtor's discharge was entered. Thus it is too late to try to deny the debtor's discharge on any of the bases indicated and the plaintiff does not seek to do so.

Postpetition Conduct

In January and February of 1995, the defendant returned certain of the fireplace equipment to the Fire Place Center and obtained refunds of \$1,402.15 and \$660.83. After the discharge was entered, as part of his investigation, the plaintiff came across facts which disclosed the

'The delay in the entry of discharge was the result of a pending objection to discharge by a creditor. Indian River Distribution Company's affairs. The plaintiff requested Heidinger to provide him a copy of the check which reflected Indian River Distribution Company's purchase of the skidloader. When the defendant discovered that the plaintiff had contacted Heidinger, the defendant met with Heidinger and altered the check to delete the defendant's endorsement of the check to the Fire Place Center. The purpose of this alteration was to prevent the plaintiff from discovering the transfer to the Fire Place Center which the defendant rightly feared would lead the plaintiff to uncover the series of prepetition transfers. The plaintiff was able to obtain another copy of the check from the Indian River's bank which contained the endorsement, thus leading the plaintiff to discover the alteration of the check and the transfers.

Revocation of Discharge

The plaintiff now seeks to have the defendant's discharge revoked pursuant to Section 727(d)(2) which provides:

On request of the trustee, a creditor,
or the United States trustee, and after
notice and a hearing, the court shall
revoke a discharge granted under subsection
(a) of this section if-- . . .

(2) the debtor acquired property that is property of the estate, or became entitled to acquire property that would be property of the estate, and knowingly and fraudulently failed to report the acquisition of or entitlement to such property, or to deliver or surrender such property to the trustee....

11 U.S.C. Section 727(d)(2).

Most of what was obtained by the defendant as a result of the prepetition transfers went to improve the debtor's home. The trusses were installed, the marble and lumber were used to improve the home and the prepaid painting was apparently actually done to the home. Only the fireplace equipment and the spa were not completely installed. The plaintiff has obtained \$2,750.00 from All American Recreation, Inc., but the defendant received the refunds from the Fire Place Center and has not paid that money to the plaintiff. While the debtor clearly intended the improvements to his home to inure to his benefit rather than that of his creditors', ultimately he was mistaken. The home turned out to be not exempt and the improvements paid for prepetition and made post-petition actually went to improve property of the estate, which the plaintiff has sold. Thus the benefit of that property went to the estate. The only property of the estate that the debtor obtained was the \$2062.98 in refunds from the Fire Place Center.

Thus, while the defendant has engaged in the long list of inappropriate behaviors, the plaintiff's action for revocation of discharge boils down to whether or not the defendant acquired property of the estate and knowingly and fraudulently failed to report the acquisition of the property to the plaintiff or failed to deliver or surrender such property to the plaintiff. Clearly the prepayments on the fireplace equipment was property of the estate. The cash refund for those deposits was also property of the estate and the defendant does not deny obtaining that property. The question is whether or not he "knowingly and fraudulently failed to report" his acquisition of the refunds.

The defendant protests that when he received the refunds, he did not know they were property of the estate to which the plaintiff was entitled. When the plaintiff started making inquiries, the defendant clearly knew that the plaintiff was performing his duties as trustee in trying to obtain information and property that was properly property of the estate. The defendant's attempts to falsify a check with the admitted purpose of misleading the plaintiff and preventing him from discovering the payments to the Fire Place Center all belie his protestations that he was not intentionally failing to report property to and keeping property from the plaintiff to which the plaintiff was entitled. The defendant's claim that somehow he interpreted the plaintiff's requested narrowly so that he did not have the obligation to turn over a true copy of the

check is not believable. Likewise, his claim that he thought the plaintiff and his attorney were spending too much time on his case, incurring attorney's's fees which would diminish distribution to creditors, also lacks credibility. The thought that somehow he could increase the distribution to his creditors by hiding information and assets from the plaintiff is not just "stupid" as claimed by the defendant, but is in fact fraudulent.

Even if the defendant thought that he had no duty to disclose the prepetition transfers and the assets that they created because somehow they related to his exempt homestead, by the time the refunds and the plaintiffs request for them were made, the defendant knew that his homestead exemption had been disallowed and that, therefore, he had no right to the refund for the fireplace equipment. The fact that later the defendant then falsified a check in an attempt to cover up the transaction only confirms the defendant's knowledge in his attempt to defraud the plaintiff.

Therefore, I find that the defendant did acquire property of the estate and knowingly and fraudulently failed to report its acquisition to the plaintiff. He has also failed to turn it over to the plaintiff.

Turnover

While the plaintiff seeks to have the defendant pay the sum of \$8,353.13, reflecting the transfers to All American Recreation, Inc., the Fire Place Center, Jay Roshay and the Tile Shop, less the amount that the plaintiff received from All American Recreation, Inc., most of those transfers went to improve the defendant's home, which ultimately was property of the estate and the plaintiff obtained the value of those transfers when the improvements were made and the property subsequently sold. However, the refunds that the defendant received from the Fire Place Center clearly are property of the estate to which the plaintiff is entitled.

Order

THEREFORE, IT IS ORDERED:

1. The defendant's discharge entered January 24, 1995, is revoked.

2. The plaintiff shall recover from the defendant the sum of \$2,062.98, together with costs of \$120,00, for a total of \$2,182.98.

LET JUDGMENT BE ENTERED ACCORDINGLY.

ROBERT J. KRESSEL
UNITED STATES BANKRUPTCY JUDGE