

ORDER ENTERED ON:
1/24/03
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UNITED STATES BANKRUPTCY COURT
DISTRICT OF CONNECTICUT

-----)	
IN RE:)	
)	CASE NO. 01-30923 (ASD)
ROBERT L. MARRA,)	
)	CHAPTER 7
DEBTOR.)	
-----)	
THE CADLE COMPANY,)	
)	
PLAINTIFF,)	
)	
vs.)	ADV. PRO. NO. 01-3075
)	
ROBERT L. MARRA,)	
)	
DEFENDANT.)	
-----)	

JAN 24 2003

APPEARANCES:

Gregory T. Lattanzi, Esq.
45 Court Street, Suite 1
New Haven, Connecticut 06511

Attorney for Plaintiff

Charles P. Costanzo, Esq.
1110 Boston Post Road
Guilford, Connecticut 06437

Attorney for Defendant

**MEMORANDUM OF DECISION ON COMPLAINT
TO DENY DISCHARGE**

DABROWSKI, ALBERT S., United States Bankruptcy Judge.

I. INTRODUCTION

In this adversary proceeding The Cadle Company (hereafter, the "Plaintiff"), through a Complaint filed June 4, 2001, seeks to deny the Debtor, Robert L. Marra (hereafter, the "Debtor"), his bankruptcy discharge pursuant to Bankruptcy Code Section 727(a)(2)(A). The allegation that the Debtor acted with the requisite fraudulent intent of Section 727(a)(2)(A) does not weather the evidence as a whole, and particularly the notably credible trial testimony of the Debtor, which the Court views as persuasive of the fact that in creating and transferring funds to a Limited Liability Company the Debtor did not act with such intent, or otherwise engage in conduct warranting discharge denial pursuant to that Section.

The Court, having now considered all the evidence, having received and reviewed the parties' respective briefs, and in view of, *inter alia*, the aforementioned credible trial testimony of the Debtor, determines the Debtor is entitled to his discharge as more fully explained hereafter.

II. JURISDICTION

The United States District Court for the District of Connecticut has subject matter jurisdiction over the instant adversary proceeding by virtue of 28 U.S.C. § 1334(b); and this Court derives its authority to hear and determine this matter on reference from the District Court pursuant to 28 U.S.C. §§ 157(a), (b)(1). This is a "core proceeding" pursuant to 28 U.S.C. § 157(b)(2)(I).

III. PROCEDURAL AND FACTUAL BACKGROUND

The Debtor commenced the instant bankruptcy case by the filing of a voluntary

petition under Chapter 7 of the Bankruptcy Code on March 7, 2001 (hereafter, the "Petition Date"). On June 4, 2001, the Plaintiff initiated this adversary proceeding by the filing of a complaint alleging, *inter alia*, that the Debtor transferred funds to a Limited Liability Corporation, Arram, LLC, 3 Madaket Court, Guilford, Connecticut 06437 (hereafter, "Arram"), *with intent to hinder, delay and/or defraud* the Plaintiff.¹ Trial of the adversary proceeding was held before this Court on January 13, 2003, at which the Court heard the testimony, *inter alia*, of the Debtor, and received and examined documentary evidence. In addition, the Court received and reviewed the parties' post-trial Memoranda filed January 21, 2003.

The facts are relatively straightforward and largely uncontested. On March 3, 1992, Branford Savings Bank (hereafter, "Branford") obtained a Connecticut state court judgment against the Debtor, *inter alia*. The Plaintiff, by assignment of this judgment, is the successor-in-interest to Branford. On or about August 30, 2000, upon application of the Plaintiff, the Clerk of the Connecticut Superior Court, Judicial District of New Haven, on the basis of the aforementioned judgment, issued a bank execution (hereafter, the "Bank Execution"). On or about September 13, 2000, the Plaintiff caused the Bank Execution to be levied on the Debtor's individual bank accounts at Webster Bank (hereafter, the "Individual Accounts")² pursuant to Connecticut General Statutes § 52-367a.

Prior to September 13, 2000, the Debtor used the Individual Accounts as a funding

¹More specifically, the Complaint alleges that "[t]he debtor, with intent to hinder, delay or defraud the [Plaintiff], transferred, removed or concealed, or permitted to be transferred, removed or concealed, property of the debtor, by transferring funds of the debtor to Arram LLC . . ." Complaint at ¶ 9.

²Webster Bank Checking Account Nos. 29219863 & 73359443.

vehicle in connection with two investment properties (hereafter, the "Properties")³ and for personal financial transactions. Deposits into the Individual Accounts included rental income from the Properties. Payments from the Individual Accounts were regularly made, *inter alia*, for mortgage and other payments related to the Properties.

After September 13, 2000, the Debtor believed that any funds deposited into the levied Individual Accounts would be immediately taken by the Plaintiff, triggering defaults on the mortgages related to the Properties. Accordingly, on or about October 4, 2000, with the primary intent and objective to create an instrument to facilitate payments on the Properties' mortgage notes and related obligations, the Debtor, in accordance with Connecticut state law, created Arram. On October 17, 2000, in furtherance of that objective, the Debtor caused Arram to open a checking account at Webster Bank (hereafter, the "Arram Account") into which he deposited rental income from the Properties, and made mortgage and other payments in connection with the Properties. The Debtor also used the Arram Account for personal purposes. The Debtor listed Arram in his bankruptcy Schedules, see Schedule B, line 12, and responded to related questions at his April 25, 2001, Section 341 meeting.⁴

³Located at 487 Elm Street and 10 Salem Street, New Haven, Connecticut.

⁴At the Section 341 Meeting, the Debtor testified:

Q. [By the Chapter 7 trustee] What's an Arrum (sic) LLC?

A. It's a (inaudible) for the investment properties.

Q. So is the investment properties owned by Arrum (sic) LLC or are they in your name?

A. They are in my name.

Q. Okay, so what are the assets of Arrum (sic) LLC?

A. Basically there are none. Just the money goes in, the money goes out, and I use it for some personal stuff, too.

* * * *

Q. [By counsel for the Plaintiff] If I understand your testimony correctly, the purpose of depositing funds into that LLC was so that the [Plaintiff] could not attach those funds?

A. No, the purpose was I had to make mortgage payments and payments to take care of

IV. DISCUSSION

Appreciative of the fact that denial of a debtor's discharge "imposes an extreme penalty for wrongdoing," the United States Court of Appeals for the Second Circuit in In re Chalasani, 92 F.3d 1300, 1310 (2d Cir. 1996), has instructed that Section 727 "must be construed strictly against those who object to the debtor's discharge and 'liberally in favor of the bankrupt'" Id. Nevertheless, the relief of a bankruptcy discharge is not an absolute right, but rather, a privilege accorded honest debtors who provide full and honest disclosure to creditors and otherwise satisfy bankruptcy statutory obligations. The party objecting to the granting of a discharge bears the ultimate burden of persuasion by a preponderance of the evidence in an adversary proceeding pursuant to Section 727(a). Fed.R.Bank.P. 4005. Cf. Grogan v. Garner, 498 U.S. 279 (1991).

Section 727(a)(2)(A) provides:

(a) The court shall grant the debtor a discharge, unless—

(2) the debtor, with *intent to hinder, delay, or defraud* a creditor or an officer of the estate charged with custody of property under this title, has transferred, removed, destroyed, mutilated, or concealed, or has permitted to be transferred, removed, destroyed, mutilated, or concealed –

(A) property of the debtor, within one year before

the houses . . . so I just formed the LLC for that purpose.

* * * *

Q. Okay. And did you open up a new bank account under the name of an LLC and put money in there so that it would not be subject to the attachment of the [Plaintiff]?

A. Yes

Q. Okay. Any other reason for opening up a bank account in the name of Arrum (sic) LLC?

A. To make payments on, mortgage payments on my investment properties and other payments which had to do with the investment properties, such as insurances, (inaudible), maintenance, whatever.

Exhibit A, Section 341 Transcript of April 25, 2001 at 8-9, 22, 24-25.

the filing of the petition

11. U.S.C. § 727(a)(2)(A) (1990) (emphasis added).

To sustain an objection to discharge under Section 727(a)(2)(A), a creditor must prove that the act or undertaking:

- (1) occurred within one year prior to the commencement of the case;
- (2) *was performed with actual intent to defraud* a creditor;
- (3) was done by the debtor or his duly authorized agent; and
- (4) involved concealing, destroying, transferring, or removing debtor's property, or permitting any of these acts to be done.

E.g., In re Maletta, 159 B.R. 108, 115 (Bankr. D. Conn. 1993).

The transfer or concealment of the property, without more, is not enough to deny discharge under 11 U.S.C. §727(a)(2); rather, there must be a showing of an *actual intent to hinder, delay, or defraud creditors*. E.g., In re Bernhard, 99 B.R. 563 (Bankr. S.D.N.Y. 1989). Upon the record as a whole the Court is satisfied that the Debtor did not act with the requisite intent to conceal, defraud or delay the Plaintiff. Indeed, it appears to the Court that the Debtor's primary motivation was to preserve the Properties by faithfully servicing the Properties' mortgages and obligations.

While the Debtor's formation of Arram, and the establishment of the Arram Account, purportedly at the suggestion of an attorney⁵, technically hindered and delayed the Plaintiff,

⁵Courts have determined that reliance upon counsel can negate fraudulent intent. *E.g., In re Cycle Accounting Services*, 43 B.R. 264 (Bankr. E.D. Tenn. 1984); *In re Sullivan*, 111 B.R. 317 (Bankr. D. Mont. 1990). In this case, however, the extent, if any, to which the Debtor relied on the advice of counsel is unclear. At trial he testified he formed Arram on the advice of counsel. At the Section 341 meeting he testified as follows:

Q. [By counsel for the Plaintiff] Did you open that - - was that Arram (sic) LLC business started and the bank account opened on the advice of counsel?

that impact was incidental; the Debtor's action was actually intended to benefit other creditors. And while the deposits into the Arram Account were "transfers" of the Debtor's property⁶, the Debtor himself realized little, if any, financial gain. Furthermore, at no time does it appear that the Debtor tried to hide the creation of Arram. Rather, the evidence reflects full and complete disclosure of that entity and its purpose.

V. CONCLUSION

The Plaintiff has failed to meet its burden to establish that the Debtor acted with the requisite intent of Section 727(a)(2). Accordingly, the objection to the Debtor's discharge based upon Bankruptcy Code Section 727(a)(2)(A), shall be **OVERRULED** and **DENIED**.

This Memorandum of Decision shall constitute this Court's Findings of Fact and Conclusions of Law pursuant to Fed. R. Bankr. P. 7052. A separate Judgment in favor of the Debtor-Defendant shall enter simultaneously herewith.

BY THE COURT



Albert S. Dabrowski
United States Bankruptcy Judge

1/24/03

DATED: January 24, 2003

A. No, not really. I basically knew that I'd have some form of, you know, taking care of my properties, taking care of those obligations and that seemed like the best way to do it. Exhibit A, Section 341 Transcript of April 25, 2001 at 25.

⁶Had the Debtor simply established a new checking account in his own name there would be no basis to argue a transfer or removal of property under Section 727(a)(2) and he would have achieved, for a time, the same effect – freedom from the Bank Execution and a vehicle to make payments in connection with the Properties.

OPINION SERVICE LIST

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Doc. ID. :
Adv. No.: 01-3075
Name : Cadle Company v.
Robert L Marra

1. Parties (attorneys):
Gregory T. Lattanzi, Esq.
Charles P. Costanzo, Esq.

2. Publishers:

3. Judges:

Chief Judge Alan H. W. Shiff
Judge Robert L. Krechevsky
Judge Lorraine Murphy Weil

4. Other:

Patricia Beary, Assistant United States Trustee
United States District Courts Library
Laura Gold Becker, Esq.
Sheila Denton, Esq.

Signature of sender

Venet - Miss Marra

Date sent

1/24/03