

213
CIA
JK

FILED

NOV 13 2000

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA**

TIMOTHY R. WALBRIDGE, CLERK
U.S. BANKRUPTCY COURT
NORTHERN DISTRICT OF OKLAHOMA

IN RE:

PAMELA ANNE LAWLER,

Debtor.

**Case No. 99-00539-M
Chapter 7**

FRED VAN EMAN,

Plaintiff,

Adv. Proc. No. 99-0203-M

v.

PAMELA ANNE LAWLER,

Defendant.

MEMORANDUM OPINION

THIS MATTER came before the Court for trial on August 23 and September 8, 2000. Plaintiff Fred Van Eman ("Plaintiff" or "Mr. Van Eman") appeared personally and through his attorney, Mark A. Craige. Defendant Pamela Anne Lawler ("Defendant" or "Ms. Lawler") appeared personally and through her attorney, Gary G. Grisso. The Court received evidence and heard argument from the parties. The Court also considered the facts stipulated to by the parties in the Pre-Trial Order filed in this action on April 19, 2000. The following findings of fact and conclusions of law are made pursuant to Bankruptcy Rule 7052 and Federal Rule of Civil Procedure 52.

Jurisdiction

The Court has jurisdiction over this adversary proceeding pursuant to 28 U.S.C.A. §

11-13-00
U.S. Bankruptcy Court
Northern District of Oklahoma

1334(b).¹ Reference to the Court of this adversary proceeding is proper pursuant to 28 U.S.C.A. § 157(a). This is a core proceeding as contemplated by 28 U.S.C.A. § 157(b)(2)(I)&(J).

Burden of Proof

This action has been brought seeking a denial of Ms. Lawler's discharge under §§ 727(a)(2)(A), (a)(4)(A) and/or (a)(5). In the alternative, Plaintiff seeks an order determining that the debt owed by Defendant to Plaintiff is non-dischargeable under § 523(a)(2)(A). In each case, the burden of proof in this action is upon the Plaintiff to establish the necessary elements by a preponderance of the evidence. *See In re Serafini*, 938 F.2d 1156 (10th Cir. 1991); *see also Grogan v. Garner*, 498 U.S. 279 (1991). As one court has noted, "[i]n order to fulfill the primary purpose of the Bankruptcy Code of providing debtors with a 'fresh start,' objections to discharge under Section 727 are construed strictly against the plaintiff and liberally in favor of the debtor." *In re Constantini*, 201 B.R. 312, 315 (Bankr. M.D. Fla. 1996)(citations omitted).

Findings of Fact

The dispute between the parties centers around the sale of a business known as the Enrollment Center (the "Center") to Ms. Lawler by Mr. Van Eman. The Center was incorporated by Mr. Van Eman sometime in the early 1990s. The Center was engaged in the independent brokerage of various forms of insurance. At all times prior to the sale of the Center to Ms. Lawler, Mr. Van Eman served as its chief operating officer.

Ms. Lawler began working for the Center in early 1997 as the sales manager for its health insurance department. At the time she began her employment with the Center, Ms. Lawler had some

¹ Unless otherwise noted, all statutory references are to sections of the United States Bankruptcy Code, 11 U.S.C.A. § 101 *et seq.* (West 2000).

measure of experience in the insurance brokerage industry. She had entered into and was the holder of an insurance production contract with an entity described as American Medical Security (the "AMS Contract"), and may have held other such contracts as well. Under the terms of the AMS Contract, Ms. Lawler was entitled to receive payments based upon policies sold by her and/or agents who worked for her. According to Ms. Lawler, the AMS Contract was never assigned to the Center. However, Ms. Lawler testified that she did assign the right to receive commissions under the AMS Contract to the Center.

The Court heard two completely different stories with respect to the circumstances surrounding the sale of the Center to Ms. Lawler. According to Mr. Van Eman, Ms. Lawler informed him in early 1997 that she intended to leave the Center and take some of its agents to start her own agency. At the same time, Mr. Van Eman was offered an opportunity for new employment outside of the independent insurance brokerage business. As a result of his new employment, Mr. Van Eman was left with two options with respect to the Center: he could either close it down and collect residual payments for the insurance which the Center had brokered, or he could sell the Center to a new owner. Given her stated intention to form her own insurance agency, Mr. Van Eman believed that Ms. Lawler was the logical choice to become the new owner of the Center. According to Mr. Van Eman, he and Ms. Lawler had several meetings at which they negotiated the terms of sale of the Center. During the time frame of these negotiations, Mr. Van Eman instructed his bookkeeper, Ms. Suzanne Jennings ("Ms. Jennings") to provide Ms. Lawler with full access to the financial records of the Center, with the possible exception of some business contacts and commission agreements which Ms. Lawler could use to her benefit in the event she chose not to purchase the Center. Mr. Van Eman admitted that he made no effort to determine whether Ms.

Lawler had the experience, business acumen or financial wherewithal to operate and/or pay for the Center.

Ms. Lawler tells a far different story of the events that led to her purchase of the Center. She testified that she began to work for the Center in January of 1997. Sometime in April of that year, she was ushered into a closed door meeting with Mr. Van Eman in which he informed her that he intended to leave the Center, and that she should consider its purchase. According to Ms. Lawler, Mr. Van Eman presented her with a two page contract for the purchase of the Center at that meeting. At no time after that meeting did Ms. Lawler ever review the books and records of the Center; instead, she chose to rely on the representations of Mr. Van Eman that the Center was a sound business investment for her. According to Ms. Lawler, when she made inquiry of Ms. Jennings regarding the financial condition of the Center, Ms. Jennings stated that she was not at liberty to provide Ms. Lawler with any such information. Ms. Jennings, who at the time of trial was employed by the same company as Ms. Lawler, corroborated her testimony in this regard.

The parties ultimately agreed on a purchase price of \$50,000.00 for the Center. An agreement for its purchase was executed on July 11, 1997. Under the terms of the Agreement, Ms. Lawler² was to pay Mr. Van Eman the sum of \$50,000.00 for the Center over a period of thirty-six months without interest. In the event Ms. Lawler did not pay the entire \$50,000.00 within the thirty-six month period, any remaining balance was to be paid over the next twenty-four months, with interest at an annual rate of six per cent. In exchange for payment of these sums, Ms. Lawler was

² Darrell Lawler was also a party to this agreement. At the time of the purchase of the Center, Darrell Lawler was the spouse of Ms. Lawler. They have since divorced, and he is not a party to this adversary proceeding, nor is he a debtor in the underlying bankruptcy case.

to receive the Center, together with all of its books, records and equipment. Although the agreement was dated July 11, 1997, Ms. Lawler had begun to manage the Center upon Mr. Van Eman's departure from the Center in May of 1997.

In the fall of 1997, Ms. Lawler became aware of an entity known as the Integra Financial Group ("Integra"). Integra was an insurance brokerage firm with its principal offices in Florida which was looking to expand into other states. The chief operating officer of Integra was Gary Christopher ("Mr. Christopher"). Integra, through Mr. Christopher, made the decision to expand into the state of Oklahoma. In order to do so, Integra needed to form an Oklahoma corporation. The corporation was formed with Ms. Lawler as its legal incorporator on July 15, 1998. The exact nature of Ms. Lawler's interest in Integra is a matter of dispute between the parties.

According to Ms. Lawler, the Center was in severe financial trouble from the moment she acquired it. In December of 1997, unable to pay the operating expenses of the Center out of its cash flow, she borrowed \$10,000.00 from Mr. Christopher in order to pay said expenses. Although no documentation regarding this loan was produced at trial, Ms. Lawler testified that the loan was secured by the personal property (mainly office equipment and computers) owned by the Center. Apparently this property was later transferred to Integra in satisfaction of the loan made to the Center by Mr. Christopher.

At the time Ms. Lawler purchased the Center, it was housed in leased office space located at the State Bank Office Building located on East 31st Street in Tulsa, Oklahoma. The lease on that office space expired at the end of 1997. According to Ms. Lawler, she was advised by State Bank (the landlord) that in order to remain at those premises, the Center would be required to pay its past due rent. In addition, Ms. Lawler was advised that the rent for this office space would double. Ms.

Lawler testified that she believed that the Center could not afford the rental increase. As a result, the Center vacated the State Bank Office Building, and Ms. Lawler relocated her business activities to an office building located at 31st Street and Memorial Drive ("31st and Memorial") in Tulsa. Ms. Lawler testified that the Center ceased to exist for all practical purposes upon the relocation of the business.

When Ms. Lawler opened the office at 31st and Memorial, she did so using the same office equipment and telephone number that had been used by the Center at the State Bank Office Building. However, she did not open for business in the name of the Center. Instead, she opened in the name of Integra,³ using the office equipment, computers and telephone number previously owned and used by the Center. In addition, the Court heard evidence which indicated that the books and records of the Center, including the lists of its customers, was also relocated to the offices at 31st and Memorial. Ms. Lawler testified that the personal property of the Center was somehow transferred to Integra in repayment of the \$10,000.00 loan made to the Center by Mr. Christopher in October of 1997. The exact details of that transaction were not made a part of the record in this adversary proceeding. In addition, Ms. Lawler testified that she transferred all of her interest and right to receive commissions under the AMS Contract to Integra "sometime" in 1998. When pressed for more detail as to the date of the transfer, Ms. Lawler testified that she did not know. She also

³ Although Ms. Lawler testified upon direct examination that she opened the 31st and Memorial offices in the name of Integra in January of 1998, she later testified on cross-examination that she began doing business as Integra "anywhere from April to July" of 1998. In addition, the record reflects that Integra was not incorporated until July 15, 1998. These inconsistencies leave the Court a bit puzzled as to what actually transpired.

testified that Integra took none of the customers of the Center with it to 31st and Memorial.⁴ Ms. Lawler continues to be employed by Integra on a full-time basis, and now serves as its "president of marketing."

Notwithstanding the fact that the Center (at least in the eyes of Ms. Lawler) ceased doing business as of January 1, 1998, it continued to receive commission checks from various insurance companies. Ms. Lawler testified that she was unsure as to what to do with these checks so she decided to hold them, uncashed, until she determined a proper course of action. In support of her testimony, Ms. Lawler offered into evidence copies of the checks which she stated had been received and held. Interestingly, almost all of the checks are dated after February 12, 1999. Some are made payable to the Center; many are made payable to Mr. Van Eman directly. The oldest check offered by Ms. Lawler is dated November 7, 1998, over ten months after the Center ceased doing business. The Court is left to ponder why, if Ms. Lawler held all of the checks she received after January 1, 1998, there were no such checks received during the first ten months of 1998.⁵

⁴ The testimony of Ms. Lawler on this point was directly contradicted by the testimony of a Mr. Kent Jenkins ("Mr. Jenkins"). Mr. Jenkins, a former employee of the Center, testified that he was aware of Ms. Lawler's plans to relocate the business, and believed that: (1) she did not intend to pay Mr. Van Eman; and (2) she took insurance clients of the Center and brokered new policies for them in the name of Integra. The Court notes that Mr. Jenkins was fired by Ms. Lawler about the time the business was relocated, and that Mr. Jenkins filed an action against Ms. Lawler for unpaid insurance commissions. Mr. Jenkins prevailed in that action, and ultimately recovered the entire amount of the judgment. The personal animosity between Mr. Jenkins and Ms. Lawler was evident at the trial of this action. As most of Mr. Jenkins' conclusions regarding the intent of Ms. Lawler are based upon his subjective judgment and perception, the Court gives them little weight.

⁵ The testimony of Ms. Lawler on this point is not consistent with the testimony of Ms. Jennings or the documentary evidence before the Court. While Ms. Lawler testified that none of the checks payable to the Center were ever negotiated, Ms. Jennings testified that checks payable to the Center which were received after December 1, 1997, were deposited in a bank account in the name of the Center. In addition, the Court received into evidence the bank records of an account in the

Although the parties disagree as to much of what happened after the purchase agreement was signed, they both agree that Ms. Lawler never paid any sums directly to Mr. Van Eman for the purchase of the Center. Ms. Lawler places the blame for non-payment upon her belief that the Center was never financially viable, while Mr. Van Eman testified as to his belief that Ms. Lawler never intended to pay for the Center. After some degree of effort, including a failed attempt to resolve their differences through a mediation process involving Ms. Lawler's church, the matter ended up in litigation. On January 15, 1999, Mr. Van Eman obtained a judgment against Ms. Lawler and Darrell Lawler in the amount of \$50,000.00, together with post-judgment interest, costs and attorneys' fees.

Ms. Lawler filed her petition for relief with this Court on February 12, 1999. Her schedules make no mention of her ownership of the Center or her employment in the insurance industry; instead, she listed her occupation as "sales." The schedules make no mention of any interest held by Ms. Lawler in any insurance contracts, nor do they reflect the transfer of any such interests to Integra. In addition, the schedules and statements of affairs make no mention of any property held for another, nor do they list any executory contracts or unexpired leases, nor any transfers of any interests in the same within the year prior to the filing of the bankruptcy case.

In her original schedules, Ms. Lawler stated that she was the owner of a one-half interest in Integra. On September 2, 1999, she filed an amendment to her schedules in which she retracted her

name of the Center at State Bank and Trust Company for the time period between January 1 and December 31, 1998. *See Plaintiff's Exhibits 7 through 16.* Those records indicate significant activity in the account, including numerous deposits into and checks written against the account. The Court was provided with no detail regarding the nature of either the deposits made or the checks written.

claim of an ownership interest in Integra. Upon being questioned as to the reason for the amendment, Ms. Lawler testified that she became aware of documentation which established that she in fact held no ownership interest in Integra. Said documents were not made a part of the record at the trial of this adversary proceeding.

Ms. Lawler also testified that during the time period between November of 1999 and the trial of this adversary proceeding, she received checks from AMS with a total face amount in excess of one million dollars. In addition, Mr. Van Eman testified without objection or contradiction that Ms. Lawler had received checks from AMS totaling approximately \$250,000.00 in the period between January 15, 1998, and December 31, 1998. All of these checks listed Ms. Lawler as the payee. Ms. Lawler testified that although these checks were made payable to her personally, none of the funds belonged to her. Instead, the funds which those checks represented actually belonged to various insurance agents who were employed by Integra. According to Ms. Lawler, those checks were cashed and the funds paid to the agents who had earned them. In addition, Ms. Lawler testified that Integra was entitled to a "commission override" of approximately \$40,000.00.⁶

To the extent the "Conclusions of Law" contain any items which should more appropriately be considered "Findings of Fact," such items are incorporated herein by this reference.

Conclusions of Law

Mr. Van Eman argues that Ms. Lawler should be denied a discharge under several subsections of § 727. One of those subsections provides that:

The court shall grant the debtor a discharge, unless —

⁶ According to the testimony of Ms. Jennings, Ms. Lawler was included in the agents who would be entitled to receive commissions from these funds.

(5) 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.

§ 727(a)(5). The United States Court of Appeals for the Eleventh Circuit explained the standards under § 727(a)(5) as follows:

At trial, the party objecting to a discharge has the burden of proving the objection. Bankruptcy Rule 4005 (1983). But once that party meets the initial burden by producing evidence establishing the basis for his objection, the burden shifts to the debtor to explain satisfactorily the loss. 4 Collier on Bankruptcy ¶ 727.08 (15th ed. 1984). "The creditor's burden of persuasion does not obviate the necessity that the debtor provide a satisfactory explanation of the loss of his assets." *In re Reed*, 700 F.2d 986, 992-93 (5th Cir. 1983). To be satisfactory, "an explanation" must convince the judge. *In re Shapiro & Ornish*, 37 F.2d 403, 406 (N.D. Tex. 1929), *aff'd*, 37 F.2d 407 (5th Cir. 1930). Vague and indefinite explanations of losses that are based upon estimates uncorroborated by documentation are unsatisfactory. *In re Reed*, 700 F.2d at 993 (debtor's explanation that \$19,586 was consumed by business and household expenses and gambling debts was unsatisfactory); *Baum v. Earl Millikin, Inc.*, 359 F.2d 811, 814 (7th Cir. 1966) (satisfactory explanation must consist of more than a vague, indefinite and uncorroborated hodgepodge of financial transactions). See 4 Collier on Bankruptcy, ¶ 727.08 (15th ed. 1984).

In re Chalik, 748 F.2d 616, 619 (11th Cir. 1984) (footnote omitted); *accord*, *In re Lordy*, 214 B.R. 650, 669 (Bankr. S.D. Fla. 1997). In order to meet the burden under § 727 (a)(5), the explanation as to the loss of assets must convince the judge that he or she now understands where the money went. *See In re Hawley*, 51 F.3d 246, 248 (11th Cir. 1995); *see also In re Levy*, 221 B.R. 559, 561 (Bankr. S.D. Fla. 1998). Numerous courts have held that "[in] any event, the debtor must come forward with something more than generalized, vague and uncorroborated statements in oral testimony." *Peoples State Bank v. Drenckhahn (In re Drenckhahn)*, 77 B.R. 697, 710 (Bankr. D. Minn. 1987) (and cases cited therein) (denying § 727(a)(5) claim where debtor's explanation as to loss of assets was "sufficiently specific and credible"); *see also In re D'Agnese*, 86 F.3d 732, 734

(7th Cir. 1996) (discharge denied under § 727(a)(5) where debtor claimed, without supporting documentation, to have sold over \$300,000.00 in assets pre-petition); *Soloman v. Barman (In re Barman)*, 244 B.R. 896, 901 (Bankr. E.D. Mich. 2000) (discharge denied under § 727(a)(5) where debtor claimed, without supporting documentation, to have sustained \$131,000.00 in gambling losses); *Mitchell v. Blasini (In re Blasini)*, 67 B.R. 373, 375 (D. P. R. 1986) (discharge denied as a result of failure to explain loss of \$500,000.00 in business assets).

In the present case, it has been established that Ms. Lawler received approximately a quarter of a million dollars in the form of checks made payable to her in the months prior to the filing of her bankruptcy case. In addition, she received over one million dollars' worth of such checks after the case was filed. When she was questioned about the receipt of those funds and why the same were never listed in her bankruptcy schedules, she responded by testifying that none of the funds belonged to her, and that they were paid to third parties. She presented no documentation to support these claims. It seems logical to the Court that where such large sums of money are involved, an individual or entity engaged in the insurance brokerage business would have records to establish the receipt and disbursement of those funds. The Court was not provided with any such documentary evidence; instead, it is left to rely upon the uncorroborated testimony of Ms. Lawler.

The Court is equally concerned about the alleged transfer of the AMS Contract to Integra. Ms. Lawler testified that the AMS Contract was of significant value; however, the reasons for its transfer to Integra were not made part of the record herein. In addition, Ms. Lawler produced no documentation to support her claim that the AMS Contract had been assigned to Integra. The Court is left to ponder the inconsistency of the statement that the AMS Contract had been assigned to Integra with the fact that AMS continued to issue checks payable to Ms. Lawler personally. After

reviewing the testimonial and documentary evidence offered to it, the Court does not know how, when or if Ms. Lawler transferred her interest in the AMS Contract to Integra, or what ultimately happened to the monies she received in excess of \$1.25 million both before and after this case was filed.⁷

The Court also does not have a clear understanding of whether Ms. Lawler actually owns (or ever owned) an interest in Integra. Ms. Lawler certainly believed that she owned such an interest at the time she filed her bankruptcy case. She has since changed her mind, based apparently upon a review of certain unidentified documents which were not made part of the record in the trial of this adversary proceeding. The effect of this change is to remove any interest in Integra from the bankruptcy estate and place it in the hands of Mr. Christopher, the husband of Ms. Lawler.⁸ Without supporting documentation, the testimony of Ms. Lawler must be viewed with some degree of skepticism.

The Court has only the testimony of Ms. Lawler in support of her claims. These statements are not sufficient for purposes of § 727(a)(5). *See cases cited a pp. 10-11 supra.* In addition, the Court has noted numerous inconsistencies in the testimony offered by Ms. Lawler. For example,

⁷ The testimony of Ms. Lawler was corroborated to a degree by the testimony of Ms. Jennings. However, the Court notes that Ms. Jennings was at the time of trial an employee of Integra working under the supervision of Mr. Christopher, who is now the spouse of Ms. Lawler. In addition, there was no documentation provided in support of the testimony of Ms. Jennings. The undisputed fact is that checks with a face value in excess of \$1.25 million were made payable to Ms. Lawler.

⁸ In closing argument, counsel for Ms. Lawler repeatedly stated that Ms. Lawler had made full disclosure of all matters to Steven W. Soulé, the Chapter 7 trustee appointed in her bankruptcy case, and that Mr. Soulé was satisfied with her responses. Unfortunately, Mr. Soulé did not testify at the trial of this adversary proceeding. Statements made by counsel in closing argument are not a substitute for evidence.

Ms. Lawler testified on direct examination that she began to operate Integra in January of 1998. On cross-examination, she changed the date to sometime between April and July of that year. The documentary evidence before the Court established that Integra was not incorporated until July of 1998.⁹ As a result of inconsistencies such as these (most of which are described in this Memorandum Opinion), the Court concludes that Ms. Lawler is not a credible witness.

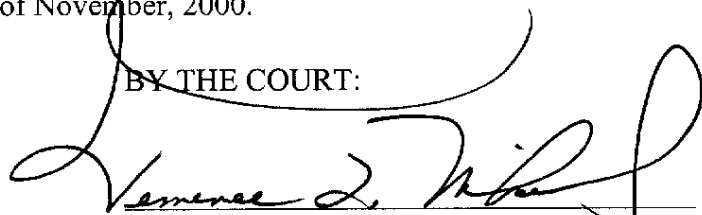
Conclusion

Ms. Lawler has failed to satisfactorily explain what happened to the monies she received from the AMS Contract prior to the filing of her bankruptcy case. Accordingly, cause exists for the denial of her discharge under § 727(a)(5). Having determined that denial of her discharge is appropriate under this section, the Court does not reach any of the other grounds for denial of discharge or for determination of the dischargeability of a debt raised by Mr. Van Eman.

A separate judgment consistent with this Memorandum Opinion is entered concurrently herewith.

Dated this 13th day of November, 2000.

BY THE COURT:



TERRENCE L. MICHAEL, CHIEF JUDGE
UNITED STATES BANKRUPTCY COURT

⁹ The timing issue is significant. Ms. Lawler sought bankruptcy relief on February 12, 1999. In her statement of affairs, she is required to disclose the transfer of any and all assets within one year prior to the filing of her bankruptcy case. She did not disclose the transfer of the AMS Contract to Integra. If in fact she did not start doing business with Integra until April of 1998, it would stand to reason that she could not have transferred the AMS Contract to Integra until that time. If Ms. Lawler transferred her interest in the AMS Contract after February 12, 1998, she was required to disclose that transfer in her statement of affairs. All of this reflects poorly on her credibility.

cc: Gary Grisso
Mark A. Craige

2089.3