

**United States Bankruptcy Court
District of New Mexico**

Document Verification

Case Title: James Alan Wylie v. Donna Wylie
Case Number: 98-01072
Nature of Suit:
Judge Code: S
Reference Number: 98-01072 - S

Document Information		
Number:	25	
Description:	Memorandum Opinion re: [21-1] Motion For Partial Summary Judgment on Count 2 of Defendant's Counterclaim for Denial of Discharge - Plaintiff prays that count 2 of the Defendants Counterclaim be dismissed with prejudice. An Order will be entered granting the Motion for Summary Judgment in Part.	
Size:	8 pages (17k)	
Date Received:	06/30/1999 09:35:36 AM	Date Filed: 06/30/1999 Date Entered On Docket: 07/02/1999
Court Digital Signature		View History
68 af 50 c8 f6 75 de 08 3e df 0a 63 cd 13 82 03 2f b0 9e 72 72 c7 47 00 d1 d2 b9 7b 89 21 67 4b e6 89 ae 79 4a 8b cf 55 51 14 0b 06 91 a7 f4 22 a4 a4 1b 7c 66 0c c1 dc c8 c1 28 ea 31 0e f1 3e 9d d4 dc 45 e8 7b 6d 58 ae 8a 0b ab 3f 17 89 87 9b 04 45 3b 5c eb 8d 09 19 ee 7d 24 b3 0a c5 54 09 67 b8 78 8e 9e 34 a9 2d 0a d9 09 9f 38 6c 34 b0 86 74 f9 15 42 00 ac 90 81 f0 d0 30 80 bf a0		
Filer Information		
Submitted By:		
Comments:	Memorandum Opinion on Plaintiff's Motion for Summary Judgment on Count 2 of Counterclaim	

Digital Signature: The Court's digital signature is a verifiable mathematical computation unique to this document and the Court's private encryption key. This signature assures that any change to the document can be detected.

Verification: This form is verification of the status of the document identified above as of *Wednesday, December 22, 2004*. If this form is attached to the document identified above, it serves as an endorsed copy of the document.

Note: Any date shown above is current as of the date of this verification. Users are urged to review the official court docket for a specific event to confirm information, such as entered on docket date for purposes of appeal. Any element of information on this form, except for the digital signature and the received date, is subject to change as changes may be entered on the Court's official docket.

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEW MEXICO

In re:

JAMES ALAN WYLIE,
Debtor.

No. 7-98-10995 SA

JAMES ALAN WYLIE,
Plaintiff,

v.

Adv. No. 98-1072 S

DONNA WYLIE,
Defendant.

**MEMORANDUM OPINION ON PLAINTIFF'S MOTION
FOR SUMMARY JUDGMENT ON COUNT 2 OF COUNTERCLAIM**

This matter comes before the Court on the Plaintiff's Motion for Partial Summary Judgment on Count 2 of Defendant's Counterclaim for Denial of Discharge, filed May 4, 1999. Plaintiff is represented by Gary B. Ottinger. Defendant is represented by George M. Moore. This Memorandum Opinion constitutes the Court's findings of fact and conclusions of law pursuant to Bankruptcy Rule 7052.

Plaintiff filed this adversary proceeding on April 2, 1998. Defendant filed an amended answer and counterclaim on May 18, 1998. The counterclaim has two counts: 1) nondischargeability of her debt under 11 U.S.C. § 523(a)(15), and 2) denial of discharge under 11 U.S.C. § 727(a). Plaintiff filed his motion for partial summary judgment on Count 2 of the counterclaim on May 4, 1999.

Summary judgment is proper when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Bankruptcy Rule 7056(c). Once the moving

party has properly demonstrated that there is no genuine issue of material fact, the burden shifts to the nonmoving party to show that there is a genuine issue of material fact. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 257 (1986). In this case movant filed his motion for summary judgment and attached as supporting documents: an Affidavit of Plaintiff; the Antenuptial Agreement entered February 16, 1995 between Debtor and Marion Newman which was recorded in Bernalillo County, New Mexico on December 27, 1995; and an "Agreement" describing ownership of a house dated March 13, 1996.

NM LBR 7056-1 states that any material fact set forth in movant's statement shall be deemed admitted unless specifically controverted in a response. Defendant did not file a response to the motion for summary judgment, thereby admitting the material facts stated in the motion. Therefore, if movant has satisfactorily established that there is no issue of material fact related to his defense to the counterclaim, summary judgment should be entered if proper as a matter of law. Bankruptcy Rule 7056(e).

The Counterclaim

For her counterclaim seeking a denial of discharge, defendant alleges:

1. On information and belief, the debtor, within one year prior to the filing of the petition herein, and with intent to hinder, delay or defraud a creditor (or the trustee), has transferred or permitted to be

- transferred property of the debtor; and
2. On information and belief, the debtor has knowingly and fraudulently made false oaths or affirmations in this proceeding, including, but not limited to, statements regarding the transfers of property referred to ... above.

This language basically tracks 11 U.S.C. § 727(a)(2)(A) and (a)(4)(A).

Undisputed facts

The Court finds the following facts are undisputed, based on the complaint and amended answer:

1. Debtor filed his petition under Chapter 7 on February 19, 1998.
2. Donna Wylie, former spouse of the debtor, was scheduled as a creditor on Schedule F.
3. The above captioned adversary proceeding is a complaint to determine that the claim of Donna Wylie in the amount of \$181,000 is dischargeable under Chapter 7 of the Bankruptcy Code.
4. The Court has jurisdiction over the parties and subject matter of the complaint, pursuant to 28 U.S.C. § 1334 and this is a core proceeding under 28 U.S.C. §157(b)(2)(I).
5. On February 4, 1992, the Plaintiff and Defendant were granted a Final Decree of Divorce in Second Judicial District Cause No. DR 89-03418. As part of the Decree of Divorce and the Marriage Settlement Agreement added thereafter, the Debtor was required to pay \$4,310 per month

to the Defendant, and those payments were denominated as alimony in the final decree.

The Court finds that the following facts are deemed admitted pursuant to NM LBR 7056-1:

6. Debtor's spouse Marion Wylie has had a one-half community interest in the debtor's home at 9200 Florence, N.E., Albuquerque, New Mexico since the property was purchased in April of 1996.
7. Within a few days of closing the purchase of the Florence property, Debtor gave a deed to himself and his wife Marion as joint tenants, thus formally recognizing his wife's interest in the property.
8. Approximately a year after the purchase of the Florence property, the debtor and his spouse Marion Wylie again exchanged deeds prior to and after the refinance of their home mortgage which was executed in order to obtain a more favorable interest rate and to obtain money for home improvements.
9. The deed given to the Debtor's spouse Marion Wylie was given for the purposes of facilitating the refinance of the property, and was not given for the purpose of hindering, delaying, or defrauding any creditor.
10. The end result of the exchange of deeds between the Debtor and his spouse was that they each retained their respective equity interests in the Florence property and that the

debtor's bankruptcy estate was neither increased or diminished.

From a review of the bankruptcy file, the Court also finds:

11. Marion Wylie is not a joint debtor in the bankruptcy. Her address is listed as 9200 Florence NE, Albuquerque, NM on the Disclosure of Non-filing Spouse pursuant to NM LBR 1002-1.
12. Debtor's schedule of real estate included 9200 Florence, NE Albuquerque, NM as having a value of \$295,000 with a secured claim against it in the amount of \$242,000.
13. The first meeting of creditors was held and concluded on March 27, 1998.
14. On April 8, 1998, debtor amended his Schedule C exemptions and the Statement of Financial Affairs. The amended Schedule C exempts debtor's one-half interest in the Florence Property at a value of \$26,500. The original Statement of Financial Affairs listed no "Other transfers" of property within one year immediately preceding the commencement of the case. The amended Statement of Financial Affairs lists a transfer on April 30, 1997, of the Florence property from "James A. Wylie, a married man, as his sole and separate property" to himself and Marion Wylie. It also states: "The property at Florence had previously been owned by Alan and Marion Wylie as joint tenants, with Marion Wylie making regular monthly mortgage payments from

her sole and separate property from the time the property was purchased in April, 1996. ... The conveyances to him and from him were ultimately a reflection of Marion Wylie's interest in the property."

15. No parties objected to the claim of exemptions.

CONCLUSIONS OF LAW

The debtor argues in his memorandum that Count 2 is devoid of any specific facts, and the debtor knows of no other transfers than the exchange of deeds referred to in facts 7 through 10 above. Furthermore, the failure to disclose these transfers was innocent and promptly remedied by amendment. Therefore, because these transfers were innocent and did not deplete the estate, and the omissions from the documents innocent, summary judgment should be entered. Unfortunately, Count 2 is sufficiently vague that the Court cannot be sure that the only transfers the counterclaims are based on are those listed in facts 7 through 10, or that the only false oath complained of is their omission from the schedules. The Debtor is in the difficult situation of proving the nonexistence of something that has not been specifically alleged. Therefore, despite the lack of an answer to the motion for summary judgment, the Court is not inclined to grant the motion except to the extent that it involves the transfers and other facts set out above.

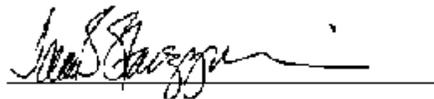
Under 11 U.S.C. § 727(a)(2) a debtor is denied a discharge

if he or she, "with intent to hinder, delay, or defraud" a creditor or a trustee, "has transferred ... or concealed property of the debtor". Although the Debtor's affidavit is self-serving with respect to his intentions, it does offer a reasonable explanation for the series of transactions that transpired. Furthermore, the evidence is that the transactions did not in fact transfer any equitable interest in the property; rather, the deeds were executed to reflect the actual community property status of the property. Therefore, the Court will grant the motion for summary judgment to the extent only that it seeks a denial of discharge for the execution of the deeds referred to in the facts above.

Under 11 U.S.C. § 727(a)(4) a debtor is denied a discharge if he or she "knowingly and fraudulently ... made a false oath." To trigger this section, the oath must relate to a material matter and must be made willfully with the intent to defraud. Calder v. Job, 907 F.2d 953, 955 (10th Cir. 1990). A matter is material if it concerns discovery of assets, business dealings or the existence of disposition of property. Hamo v. Wilson, 233 B.R. 718, 725 (6th Cir. BAP 1999). In this case, the debtor disclosed the existence of the property on his original schedules, and amended the statement of financial affairs shortly after the first meeting of creditors to disclose the deeds back and forth between him and his spouse. The Court finds this omission to have not been material. Therefore, the Court will

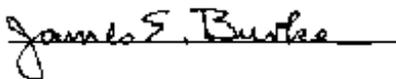
grant the motion for summary judgment to the extent only that it seeks a denial of discharge for the omission of the deeds referred to in the facts above from the original statement of financial affairs.

An Order will be entered granting the motion for summary judgment in part.

A handwritten signature in black ink, appearing to read "James S. Starzynski", written over a horizontal line.

Hon. James S. Starzynski
United States Bankruptcy Judge

I hereby certify that, on the date file stamped above, a true and correct copy of the foregoing was either electronically transmitted, faxed, mailed, or delivered to the following: Gary Ottinger, George Moore, Michael Caplan (Trustee) and the United States Trustee.

A handwritten signature in black ink, appearing to read "James S. Burke", written over a horizontal line.