IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 94-30096

Summary Calendar

In The Matter Of: GEORGE A. FARBER, MD,

Debtor.

HOMER NATIONAL BANK,

Appellee,

v.

GEORGE A. FARBER, MD,

Appellant.

Appeal from the United States District Court
for the Eastern District of Louisiana
(CA-93-2397-F)

(September 1, 1994)

Before KING, HIGGINBOTHAM and BARKSDALE, Circuit Judges.

PER CURIAM:*

George A. Farber appeals from the district court's judgment affirming the bankruptcy court's denial of his discharge pursuant to 11 U.S.C. § 727(a)(4). We affirm.

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*Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the court has determined that this opinion should not be published.

I. FACTS AND PROCEDURAL HISTORY

Farber is a physician who was practicing medicine through a professional medical corporation known as Burks Dermatology and Dermatological Surgery Clinic (old corporation). In the spring of 1990, Homer National Bank (the bank) received a $600,000 judgment against Farber. The bank ultimately executed on its judgment, and, on November 6, 1990, the Jefferson Parish Sheriff seized certain property at Farber's residence.

Sometime in November of 1990, the old corporation purportedly transferred all of its assets to Gulf South Medical and Surgical Institute (new corporation), a newly formed corporation, in exchange for an assumption of liabilities. The new corporation is a Louisiana corporation with Michael G. Farber, Farber's son, as its president and sole stockholder.

On November 7, 1990, Farber filed a petition for relief under Chapter 7 of the Bankruptcy Code. In his schedules of assets and liabilities, Farber listed his stock in the old corporation as having no value. A § 341 meeting of creditors was held on December 11, 1990, at which time Farber testified under oath to questions of the trustee and the bank. At the § 341 meeting, Farber testified that he and two other doctors owned stock in the old corporation, and that the old corporation had been dissolved through formal state proceedings. Farber also testified that no money had been transferred to the new corporation by the old corporation.

On March 7, 1991, the bank filed a complaint objecting to the discharge of Farber under various provisions of § 727 of the Bankruptcy Code. Following a two day trial, the bankruptcy court entered judgment denying Farber's discharge under §§ 727(a)(2) and (4). The bankruptcy court concluded that "the Debtor knowingly made false statements on his Schedules and at the § 341 meeting concerning when the 'transfer' took place, how it took place, that, as of the date of the filing, the old corporation did not exist and was worthless, and, very importantly, that his stock in the old corporation had no value." The bankruptcy court determined that Drs. Bridenstine and Hernandez were never issued stock in the old corporation, and Farber's testimony to the contrary was a false oath under § 727(a)(4). The bankruptcy court concluded that Farber gave the false oaths in an attempt to "hinder the full disclosure of the Debtor's assets at the time of filing, as well as the transactions taking place around the time of the filing."

In relation to the old corporation's transfer of assets to the new corporation, the bankruptcy court observed that Farber and his sons each testified at trial that the transfer took place on November 5th or 6th. The bankruptcy court concluded, however, that the other evidence presented at the adversary proceeding supported the conclusion that "either the transfer took place post-petition or it never properly took place at all, at least at law." In support of this conclusion, the bankruptcy court noted that the minutes of the November 5th meeting reflected only the

decision to transfer. The bankruptcy court also noted that the document entered into evidence which purportedly reflected the sale of the assets was merely an agreement to sell. In fact, the document provided that the closing of the sale was to be on November 14, 1990. The bankruptcy court further observed that the new corporation did not even exist until November 26, 1990, because the articles of incorporation for the new corporation were not recorded until then. In sum, the bankruptcy court determined that the transfer of the assets from the old corporation to the new corporation did not occur, if it did at all, until after Farber filed his bankruptcy petition.

In support of its conclusion that Drs. Bridenstine and Hernandez were never issued any shares in the old corporation, the bankruptcy court noted that Farber testified that the doctors had never been issued any stock certificates, and it was totally illogical that they would be issued stock in a corporation that was about to be dissolved. The bankruptcy court further noted that Drs. Bridenstine and Hernandez were present at only a part of the shareholder meeting held on November 5, 1990, and that there was no evidence that these doctors were present when the decision to dissolve the old corporation and transfer its assets was made and agreed upon. Also, the bankruptcy court observed that the 1990 income tax return for the old corporation clearly listed Farber as the 100% stockholder.

In reaching its conclusion that Farber fraudulently made a false oath, the bankruptcy court stated that "the most important

of the facts and circumstances revealed by the evidence is the timing, and indeed the actual occurrence, of the 'transfer' from the old corporation to Gulf South." The bankruptcy court further observed that a "review of [Farber's] testimony at the § 341 meeting as compared to that at the trial of this matter reveals many inconsistencies which indicate that, at the § 341 meeting, the Debtor was either knowingly making false statements or knowingly not making full and complete disclosure." The bankruptcy court cited as an example of Farber's selective amnesia at the § 341 meeting Farber's professed lack of knowledge concerning most of the details of the dissolution of the old corporation and what happened to its assets, but his clear and definite knowledge that the old corporation was insolvent. The bankruptcy court further believed that it was highly questionable that Farber would operate the old corporation by himself for years and then rely solely on his sons to handle its dissolution. Moreover, at the § 341 meeting, more then a month after the transfer was supposed to have taken place, Farber still expressed a lack of knowledge of many relevant matters pertaining to the transfer.

The bankruptcy court also determined that Farber violated § 727(a)(2) by concealing his interest in the old corporation. Specifically, the bankruptcy court found that Farber falsely stated that his stock in the old corporation was worthless. Further, the bankruptcy court found that Farber falsely represented the value of his stock in the old corporation in

order to "hinder and delay the creditors and the Trustee from discovering the full and true extent of [Farber's] assets and relevant transactions."

On appeal to the district court, the district court upheld the bankruptcy court's determination that Farber should be denied a discharge under § 727(a)(4). Because the district court believed that there was ample support in the record for the bankruptcy court's denial of Farber's discharge pursuant to § 727(a)(4), it did not discuss the bankruptcy court's decision that § 727(a)(2) also supported a denial of Farber's discharge. Farber then appealed the decision of the district court.

II. STANDARD OF REVIEW

This court reviews findings of fact by the bankruptcy court under the clearly erroneous standard and decides issues of law de novo. Haber Oil Co. v. Swinehart (In re Haber Oil Co.), 12 F.3d 426, 434 (5th Cir. 1994). "A finding of fact is clearly erroneous 'when although there is evidence to support it, the reviewing court on the entire evidence is left with a firm and definite conviction that a mistake has been committed.'" Wilson v. Huffman (In re Missionary Baptist Found. of Am., Inc.), 712 F.2d 206, 209 (5th Cir. 1983) (quoting United States v. United States Gypsum Co., 333 U.S. 364, 395 (1948)).

III. DISCUSSION

Section 727(a)(4) provides that a debtor will not be granted a discharge if "the debtor knowingly and fraudulently, in or in connection with the case . . . made a false oath or account."

The bank had the burden to prove that (1) Farber made a statement under oath, (2) the statement was false, (3) Farber knew the statement was false, (4) Farber made the statement with fraudulent intent, and (5) the statement was material to the bankruptcy case. See Beaubouef v. Beaubouef (In re Beaubouef), 966 F.2d 174, 178 (5th Cir. 1992). The elements of an objection to discharge under § 727(a)(4)(A) must be proven by a preponderance of the evidence. Id. False oaths sufficient to justify the denial of discharge include (1) a false statement or omission in the debtor's schedules or (2) a false statement by the debtor at the examination during the proceedings. Id. "'The subject matter of a false oath is "material," and thus sufficient to bar discharge, if it bears a relationship to the bankrupt's business transactions or estate, or concerns the discovery of assets, business dealings, or the existence and disposition of his property.'" Id. (quoting In re Chalik, 748 F.2d 616, 617 (11th Cir. 1984)). "Actual intent, however, may be inferred from the actions of the debtor and may be proven by circumstantial evidence." Pavy v. Chastant (In re Chastant), 873 F.2d 89, 91 (5th Cir. 1989).

On appeal, Farber argues that the district court erred in determining that the bankruptcy court's conclusion that he made a false oath was not clearly erroneous. We disagree.

We note initially that the bankruptcy court based its findings of fact, in part, on its determination that Farber's testimony was not credible. As we have stated before, "[t]he

determination as to credibility of a witness is within the province of the bankruptcy judge--i.e. the trier of fact." First Nat'l Bank v. Martin (In re Martin), 963 F.2d 809, 814 (5th Cir. 1992); see also Texas Mortgage Servs. v. Guadalupe Sav. & Loan Ass'n (In re Texas Mortgage Servs.), 761 F.2d 1068, 1078 (5th Cir. 1985) ("We will not attempt to reassess the credibility of witnesses whom we have not had an opportunity to see on the stand."). As an example of Farber's lack of credibility, the bankruptcy court cited Farber's "professed lack of knowledge at the § 341 meeting concerning most of the details of the dissolution of the old corporation and what happened to its assets, but his clear and definite knowledge that the old corporation was insolvent, which is his asserted reason for not giving any value to his stock on the Schedules." The bankruptcy court further found that the numerous inconsistencies in Farber's various statements were indicative of fraudulent intent. For example, Farber testified at the adversary proceeding that he knew the new corporation was receiving the old corporation's accounts receivable; however, Farber's testimony at the § 341 meeting, was very evasive as to what the new corporation received from the old corporation. The following exchange at the adversary proceeding, in which the bank is questioning Farber concerning his testimony at the § 341 meeting, is representative of Farber's inconsistent testimony:

> Q. The next question is, underneath where you answer "employee business and business management," I asked you "Did this corporation receive any assets, loans or other

benefits from the corporation being dissolved?" And what did you respond, Dr. Farber?

A. I asked you to restate the question.

Q. All right. And I restated it. "Did this corporation, Gulf South Corporation, receive any money, loans or other financial benefits, assistance or aid from the corporation undergoing dissolution?" And you answered?

A. "Yes, sir, we received a lot of aid."

Q. And then I asked you "What was that?" And then what did you say, Dr. Farber?

A. I said "I don't know."

Q. In fact, you knew that Gulf South had received all of its assets to start business --

A. You didn't ask that question.

Q. -- from the medical corporation

A. You didn't ask that question.

Q. My next question, Dr. Farber, was "what assistance, aid, or monies were delivered from the old corporation to the new corporation." And your answer was "The assistance was in recruiting all of the personnel and recruiting the doctors to work as independent contractors for the new corporation. The old corporation had debts more than it could pay. It was overdrawn at the bank and could not pay. It was overdrawn at the bank and could not pay the doctors so I, acting as the old corporation officer, induced them to work for the new corporation or they were out of a job."

After reviewing the record, we do not believe that the bankruptcy court erred in determining that Farber should be denied a discharge under § 727(a)(4).

IV.

For the foregoing reasons, the judgment of the district court is AFFIRMED.