

**UNITED STATES BANKRUPTCY COURT
DISTRICT OF VERMONT**

In re:

**PETER JAMES WISELL, II,
Debtor.**

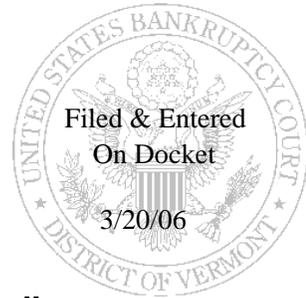
**Chapter 7 Case
04-11269**

**AILEEN WISELL and DOUGLAS J. WOLINSKY,
Chapter 7 Trustee of the Estate of
PETER JAMES WISELL,
Plaintiffs,**

v.

**PETER JAMES WISELL, II,
Defendant.**

**Adversary Proceeding
05-1044**



ORDER
DENYING PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT,
DENYING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT
AND SETTING DATES FOR PRETRIAL STATEMENT AND PRETRIAL CONFERENCE

Aileen Wisell and case trustee Douglas J. Wolinsky (the "Plaintiffs") initiated the instant adversary proceeding (doc. #1) to obtain an order denying the discharge of James Wisell (the "Defendant"), pursuant to 11 U.S.C. § 727(a)(4)(A), on the ground that he made intentional false statements in the documents he filed in this Court. The Plaintiffs filed a motion for summary judgment (doc. # 15) and the Defendant filed a cross-motion for summary judgment (doc. # 19). The Defendant asserts that the alleged false oaths in his schedules were purely technical errors and he has corrected them. There are no material facts in dispute except as to whether the Debtor acted with intent to defraud.

The Court finds that since there are no extraordinary circumstances present that suggest the Debtor would not testify in this matter, and therefore that it should hold an evidentiary hearing before determining whether deny the Defendant a discharge under § 727(a)(4)(A). Accordingly, the Court denies both the Plaintiffs' and Defendant's motion for summary judgment.

To prevail under § 727(a)(4)(A), the creditor bears the burden of proof in establishing that: (1) the debtor made a false statement under oath; (2) the statement was false; (3) the debtor knew the statement was false; (4) the debtor made the statement with fraudulent intent; and (5) the statement related materially to the bankruptcy case. In re Mick, 2003 WL 22247169, *7 (Bankr. D.Vt. 2003). A false statement made under oath may "consist of (1) a false statement or omission in the debtor's schedules or (2) a false statement by the debtor at an examination during the course of the proceedings." In re Sapru, 127 B.R. 306, 314 (Bankr. E.D.N.Y. 1991); In re Abramov, 329 B.R. 125, 132 (Bankr. E.D.N.Y. 2005).

The party objecting to discharge must show that the debtor omitted information from his or her schedules for the purpose of misleading creditors and not because the debtor was careless in preparing the schedules or failed to properly follow an attorney's instructions. In re Gollomp, 198 B.R. 433, 437 (Bankr. S.D.N.Y. 1996). "However, since a debtor will rarely admit to defrauding creditors, ... fraudulent intent may be established by circumstantial evidence or by inferences drawn from a course of conduct." Mick, 2003 WL at *7. The Second Circuit has recognized that a debtor's fraudulent intent may be inferred from a series of incorrect statements contained in the schedules. In re Diorio, 407 F.2d 1330, 1331 (2d Cir. 1969); In re Kaiser, 722 F.2d 1574, 1583 n.4 (2d Cir. 1983). This Court has held that under § 727(a)(4)(A), a debtor's reckless indifference to or cavalier disregard for the truth provides a court with sufficient grounds to sustain an action for fraud. Mick, 2003 WL at *7; Gollomp, 198 B.R. at 438. Thus, a debtor shall be denied a discharge if he or she is found to have exhibited a reckless indifference for the truth in his or her schedules or to have acted with a fraudulent intent in the course of examinations during the bankruptcy proceeding.

While the Second Circuit Court of Appeals has recognized that a debtor's fraudulent intent may be inferred from misstatements made in bankruptcy schedules, that Court has not countenanced a determination of fraud being made without an evidentiary hearing. Furthermore, few courts within the Circuit have made a finding of fraudulent intent on the part of a debtor without holding an evidentiary hearing. Of those cases in which a creditor moved for summary judgment on a § 727(a)(4)(A) complaint, it appears that there is just one reported decision, in this Circuit, in which the debtor's discharge was denied without an evidentiary hearing, and that case involved rather unusual circumstances. See In re Sapru, 127 B.R. 306 (Bankr. E.D.N.Y. 1991). In Sapru, the parties agreed that the court should decide their cross-motions for summary judgment without a hearing because it had become clear that the debtor would not testify. Id. at 311. Thus, while courts in the Second Circuit appear to be willing to make a finding of fact as to fraud based on a debtor's schedules and other written documents, such a determination is generally not made based on written filings alone. See e.g. In re Wolfson, 139 B.R. 279, 281 (Bankr. S.D.N.Y. 1992) (court granted trustee's motion for summary judgment and denied debtor's discharge after a review of the depositions, written evidence and testimony); In re Abramov, 329 B.R. at 135-136 (court denied debtor's discharge under § 727(a)(4)(A) based on false oaths in debtor's bankruptcy petition and trial testimony); In re Gannon, 173 B.R. 313, 320 (Bankr. S.D.N.Y. 1994) (denied debtor's discharge under § 727(a)(4)(A) based on inconsistencies in schedules, affidavits and testimony); Mick, 2003 WL at *10 (debtor was denied discharge under § 727(a)(4)(A) for knowingly making false oaths on statement of financial affairs and failing to present a credible explanation at hearing).

The Court is cognizant that the cost of an evidentiary hearing may deter some creditors or trustees from initiating a § 727(a) action and that is unfortunate. However, counterbalancing that consideration are the facts that the denial of a discharge is an extreme remedy, and a finding of fraud depends, in large measure, on the credibility of the defendant. Hence, this Court is convinced an evidentiary hearing is essential to a sound outcome in any action that seeking a denial of discharge based upon fraudulent intent.

In sum, after reviewing the jurisprudence on this issue, particularly in the Second Circuit Court of Appeals and the bankruptcy courts within the Second Circuit, this Court is persuaded that, absent extraordinary circumstances, the factual determination of whether a debtor's schedules contain fraudulent oaths should not be made without the Court taking the opportunity to assess the credibility of the defendant through live testimony. Therefore, this Court will conduct an evidentiary hearing in this case before making a determination of whether the Defendant perpetrated a fraud and must be denied a discharge under § 727(a)(4)(A).

For the reasons set forth above, **IT IS HEREBY ORDERED** that:

1. the Plaintiffs' motion for summary judgment is denied;
2. the Defendant's motion for summary judgment is denied;
3. the Parties shall file a joint pretrial statement by **April 7, 2006**; and
4. the Parties shall appear for a final pretrial conference on **April 18, 2006 at 11:30 a.m. in Burlington, Vt.**, at which a trial date will be set.

March 19, 2006
Rutland, Vermont



Colleen A. Brown
United States Bankruptcy Judge