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UNITED STATES BANKRUPTCY COURT
DISTRICT OF VERMONT

In re:
ROBERT PATRICK MICK,
Debtor.

Chapter 7 Case
 # 02-10517

RAYMOND J. OBUCHOWSKI,
Chapter 7 Trustee, and
GARY BRICKER and SHARON BRICKER,
Plaintiffs,
v.

ROBERT PATRICK MICK,
Defendant.

Adversary Proceeding
 # 02-1047

Appearances:

Raymond J. Obuchowski, Esq.
Obuchowski Law Offices
Bethel, VT
For the Trustee

John J. Kennelly, Esq.
Pratt Vreeland Kennelly Martin & White, Ltd.
Rutland, VT
For Plaintiff Brickers

Jess T. Schwidde, Esq.
Glinka & Schwidde
Rutland, VT
For the Defendant-Debtor

MEMORANDUM OF DECISION
BASED UPON TRIAL ON THE MERITS

I. INTRODUCTION

Plaintiffs, Raymond J. Obuchowski, Esq., the case trustee ("Trustee"), and Gary and Sharon Bricker ("the Brickers" or "Creditors"), initiated an adversary proceeding objecting to the discharge of Debtor Robert Patrick Mick ("the Debtor" or "Mick") alleging: (1) pursuant to 11 U.S.C. § 727(a)(2)(A), that the Debtor transferred or concealed contract rights; and (2) pursuant to 11 U.S.C. § 727(a)(4)(A), that the Debtor knowingly and fraudulently failed to include on his schedules amounts due to him from his employer. See Compl. (doc. #1). Mick answered Plaintiffs' Complaint with a general denial. See Answer (doc. #6). On July 14, 2003, the Court held a one-day bench trial on Plaintiffs' Complaint at which the Debtor appeared and presented a defense. At the conclusion of the trial, the Court took the matter under advisement, reserved decision on two evidentiary objections, and directed the parties to file proposed findings of facts and conclusions of law. The Court advised the parties that it would issue its decision on Plaintiffs' Objection to Exemption (doc. #20 in main case[1]) in conjunction with its ruling on the Plaintiffs' Complaint.

[1] All "doc. #" citations refer to documents filed in this adversary proceeding unless, as here, otherwise indicated.

This Court has jurisdiction over this contested matter and adversary proceeding pursuant to 28 U.S.C. §§157(b)(2)(B) and (J) and §1334.

Based upon the evidence presented and for the reasons stated below, the Court finds the Plaintiffs have met their burden of proof on their § 727 Complaint, see Order Regarding Burden of Proof in a § 727 Action (doc. #24); and that the Creditors have failed to present a sufficient basis for denying the Debtor's exemption. Accordingly, orders will be entered denying the Debtor's discharge and overruling the objection to exemption.

II. RULING ON OUTSTANDING EVIDENTIARY OBJECTIONS

Pursuant to FED. R. EVID. 402, the Brickers objected to the Debtor's questioning of Mr. Bricker about the filing of an insurance claim for a back injury, asserting that such inquiry was not at all relevant to the issues presented at the trial. Rule 402 states, in part, that "evidence which is not relevant is inadmissible." FED. R. EVID. 402; see also United States v. Southland Corp., 760 F.2d 1366 (2d Cir. 1985) ("Particular deference is properly accorded to a ruling of the trial judge with respect to relevancy.") (citing United States v. Catalano, 491 F.2d 268, 273 (2d Cir. 1974)). The Court finds that the line of questioning was relevant to the credibility of the witness. Thus, the Court overrules the Brickers' objection. Having reviewed this evidence about the insurance claim, I find that it did not persuade me one way or the other as to the credibility of this witness and, hence, give it no weight in determining the merits of the issues presented.

The Brickers also objected to the introduction of two checks. See Ex. 27. The Debtor sought to use these checks to further challenge Mr. Bricker's credibility. Rule 608(b) states specific instances of conduct of a witness, for the purpose of attacking or supporting the witness' credibility, other than the conviction of a crime, may not be proved by extrinsic evidence. See FED. R. EVID. 608(b). The Court finds these checks are extrinsic evidence, and thus, pursuant to Rule 608(b), they are inadmissable to challenge Mr. Bricker's credibility. Therefore, the Brickers' objection as to the introduction of Exhibit 27 is sustained.

III. FINDINGS AND CONCLUSIONS

Plaintiffs' § 727[2] Complaint seeks an order denying the Debtor's discharge on two grounds: (1) pursuant to § 727(a)(2)(A), based upon the Debtor's alleged intent to hinder, delay or defraud a creditor, evidenced by the Debtor's transfer or concealment of property within one year of the date of the filing of his bankruptcy petition, see Compl. at ¶¶1–18 (doc. #1); and (2) pursuant to § 727(a)(4)(A), based upon the

[2]All statutory references are to Title 11 of the United States Code (the "Bankruptcy Code") unless otherwise specified.

Debtor's intentional utterance of a fraudulent oath in this bankruptcy case, see id. at ¶¶19–21. Upon consideration of the record, which includes the testimony and exhibits entered into evidence,[3] the Court makes the following findings, see FED. R. BANKR. P. 7052(a):

(1) The Debtor and Plaintiff Gary Bricker had been business partners, owning and operating several companies together since 1998. These companies were involved in construction management and real estate development. For various reasons, the working relationship between the Debtor and Mr. Bricker deteriorated to the point where each filed law suits against the other in 2001. Later that year, the Debtor and Mr. Bricker reached an omnibus settlement agreement (in the form of a purchase and sale agreement) whereby the Debtor was to buy out Mr. Bricker's interests in their various, jointly-owned companies for $400,000. Ultimately, the Debtor breached the parties' settlement agreement, whereafter, Mr. Bricker pursued his state law remedies, securing an attachment order. With the attachment order, Mr. Bricker attached three of the Debtor's bank accounts, as well as some real property. Subsequently, the Debtor filed for chapter 7 bankruptcy relief.

(2) The Debtor filed the instant chapter 7 bankruptcy case on April 15, 2002.

(3) Raymond J. Obuchowski, Esq., was appointed interim trustee and was duly qualified and is presently serving in that capacity.

(4) On Schedule B – Personal Property, which the Debtor filed on April 15, 2002, the Debtor marked "None" in response to Item No. 17, which requires the listing of property that is "Other liquidated debts owed debtor including tax refunds. Give particulars." See Ex. C.

(5) The Debtor admitted that he amended his bankruptcy schedules three or four times. From the evidence presented, the Court takes judicial notice that the Debtor amended his bankruptcy schedules four times.

(6) At the time he filed for bankruptcy, the Debtor was an employee of Atlantic Cascade of Vermont, LLC (hereinafter, "AC-Vt." or the "Company"), a company owned by the Debtor's wife, Claudia H. Mick. The Debtor has an employment agreement with AC-Vt. that the Debtor testified was executed on December 28, 2001. See Ex. Q. The Debtor testified that, as of the date of the trial, he was still employed by the Company.

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[3] The Court finds that the Plaintiffs raised several arguments at trial in support of Count II of their Complaint that were not specifically articulated in their Complaint or Pre-Trial Statement. Pursuant to FED. R. BANKR. P. 7015 (i.e., Rule 15(b)), "When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings." Finding implied consent to the introduction of additional arguments raised in support of their § 727(a)(4)(A) cause of action, as no objections were raised to these additional arguments, the Court shall treat them as if they were raised in the pleadings and rule on them accordingly.

(7) Mrs. Mick is the only member of AC-Vt.

(8) AC-Vt. was registered with the Vermont Secretary of State in or around December 2001. The Debtor, however, had prepared an Operating Agreement for the Company in September 2001. He used the Operating Agreement from his Connecticut company, Atlantic Cascade Group, LLC as a template for AC-Vt.'s Operating Agreement and prepared the paperwork necessary to register the Company with the Vermont Secretary of State himself.

(9) AC-Vt. was a party to an agreement with Yvon Cormier Construction Corp., or some entity owned or controlled by Mr. Cormier, concerning the construction management of a shopping center project in Brattleboro, Vermont, known as the Fairfield Plaza. This was an oral agreement.

(10) Before AC-Vt. entered into the Cormier agreement, the Debtor had sent a Fax Memorandum to a Mr. Leo Roy, a vice-president of Yvon Cormier Construction Corp., to discuss the terms of the ultimate agreement. The Fax Memorandum was sent on the Debtor's individual letterhead and it made a reference to "us" without identifying who the word "us" referred to. See Ex. K.

(11) The agreement between AC-Vt. and Yvon Cormier Construction Corp. called for AC-Vt. to be paid 10% of the project cost, with Yvon Cormier Construction Corp. making $1,750.00 weekly advances against the 10% fee.

(12) At his June 17, 2002, deposition, the Debtor estimated that AC-Vt. had been paid approximately $70,000 under the agreement with Yvon Cormier Construction, Corp. as of that date.

(13) At various points throughout the trial, the Debtor testified that he was an employee, the manager, the president, and the CEO of AC-Vt. (Tr. 38, 48). The Debtor also testified that he kept the records of the Company, did the Company's banking, and had signatory authority over the Company's checking account. Moreover, the Debtor testified that his wife, Claudia H. Mick, did not take part in the management of the Company (Tr. 35); and that the Debtor was the person who made the business decisions for AC-Vt. (Tr. 44). Based upon all the evidence presented, the Court is persuaded that the Debtor was not merely an employee of AC-Vt., but rather, was its managing executive. (Tr. 48).

(14) The parties presented conflicting evidence regarding whether the Debtor was owed money from AC-Vt. at the time of his filing for bankruptcy relief:

A. According to his original Schedule B, the Debtor was not owed any money from the Company on April 15, 2003, the date of his bankruptcy filing. See Ex. C, Schedule B at Item 17. Nor, did any of the Debtor's subsequent sets of amendments indicate that he was owed any money from AC-Vt. See Exhs. D, E, F, and G.

B. However, at his June 17, 2002, deposition, the Debtor testified that he was, indeed, owed money from AC-Vt. See Ex. A at 15.

C. Yet, at trial the Debtor testified:

I. that he did not understand Attorney Kennelly's question asked at the deposition (Tr. 55-57); and

ii. that he was not owed any money from AC-Vt. when he filed for bankruptcy relief on April 15, 2002.

(15) The Court is unpersuaded that the Debtor did not understand Mr. Kennelly's question. The Court finds the question asked at the deposition was very clear, as was the Debtor's answer; there is no indication of confusion or misunderstanding evinced in the Debtor's response:

Q. So, as of the date of the petition, Atlantic Cascade owed you money?
A. That would be correct.

Ex. A. at 15-17; Tr. 55.

Moreover, the Debtor acknowledged that he had the opportunity to review his deposition testimony and make corrections, and admitted that he made no corrections. (Tr. 57).

(16) The Debtor's claim that he was not owed money from the Company is inconsistent with the Debtor's prior position that the Company could not pay him what was owed him, and therefore he agreed to continue working for AC-Vt. for whatever amount the Company could pay him. (Tr. 34). The Debtor's shifting explanations in combination with the multiple amendments and the timing of those amendments persuades the Court that the Debtor did not provide accurate information on his schedules regarding the monies the Company owed to him.

(17) The Debtor also gave conflicting testimony regarding the amount of money the Company paid to him during the period from January 1, 2002 to April 15, 2002:

A. The Debtor's original Statement of Financial Affairs ("SOFA") indicated at Item No. 1 that AC-Vt paid him $3,500 during this period. See Ex. C.

B. In his second set of amendments, the Debtor amended the answer to this question on his SOFA to increase this amount to $3,900. See Ex. E.

C. Then, in his last set of amendments, the Debtor increased the income he received from AC-Vt. during this period to $12,250. See Ex. G.

(18) At trial, the Debtor failed to provide a clear or credible explanation for the evident discrepancy in these three responses. The Court is not persuaded that the Debtor was unable to compute the amounts which had been paid to him without his completed tax returns from his accountant. The Debtor had an employment agreement with the Company; it provided the terms of his salary. Additionally, the Debtor kept the books of the Company and did its banking. It is simply not credible that the Debtor

did not have this information. The Court finds the Debtor was engaged in forensic accounting of AC-Vt. at the time he needed to determine the amount of monies he was paid by AC-Vt. from the beginning of 2002 until the date of his bankruptcy filing.

(19) An examination of the summary of the Company's general payroll account, see Ex. 9, shows that the payments made to the Debtor in 2002 totaled $2,950, and the payments made to Mrs. Mick in 2002 totaled $5,465. The Court therefore find the answer of $3,500 to be inaccurate. Moreover, the Court finds the response that the Debtor gave to Attorney Kennelly's request for clarification on this point was evasive. It shed no light on the question of why the Debtor stated he had been paid $3,500 on his original bankruptcy petition. The Debtor admitted that he had no record at trial to support his statement that he had been paid $3,500. (Tr. 160). The Court finds the Debtor's putative explanation for this misstatement of income on the SOFA to be unpersuasive and implausible.

(20) There is also inconsistency between the current gross wages figure the Debtor provided on his Schedule I and the amount of money he received from AC-Vt. in 2002. In his original filing, the Debtor listed $3,360 as his current monthly gross wages. See Ex. C. Yet, in his original SOFA, the Debtor indicated he received $3,500 from the Company per month during that period. The fact that these figures are not identical raises a question. Moreover, it is not until he filed the last set of amendments that the Debtor showed monthly gross income on his Schedule I that matched the amount of income the Debtor received from the Company from the beginning of 2002 until the time of his bankruptcy filing. In his last amendment, the Debtor indicated that he received $12,250 from AC-Vt. in the pre-petition period of 2002. Since there were three-and-one-half months from the beginning of 2002 through the Debtor's April 15th filing date, the $12,250 would represent the Debtor's monthly gross salary of $3,500 received three-and-one-half times. While this last amendment provides a tying of the numbers, there is still the discrepancy between this figure and the summary of AC-Vt.'s payroll account. See Ex. 9. That summary conflicts with the Debtor's statement that he was paid $12,250 during the pre-petition period in 2002. It shows the Debtor was paid $2,950. The Debtor provided no satisfactory explanation for this discrepancy.

(21) There is also a material misstatement with regard to the Debtor's role in the Company. On his original petition and in all four sets of amendments thereafter, the Debtor never identified himself as the managing executive of AC-Vt. However, at trial, he testified that he was the Company's managing executive (Tr. 48), and that Mrs. Mick took no part in the management of the Company. (Tr. 35). Moreover, the record supports a finding that the Debtor was the executive manager of AC-Vt. The Debtor confirmed at trial that he was the person who made all the decisions for the Company (Tr. 15, 44), that he kept the records for the Company (Tr. 57), that he managed the finances of the Company

(Tr. 35, 127), and that he had signatory authority on the Company's checking account (Tr. 36). Additionally, according to the Debtor's employment agreement with AC-Vt., he was the president and CEO of the Company. See Ex. Q.; Tr. 38, 48. Thus, the Debtor's omission of his managing executive status with AC-Vt. on his schedules is a misstatement of fact. The Debtor knew and failed to disclose his management position in the Company. This constitutes a false oath made by the Debtor when he signed his original petition, as well as when he signed all the subsequent amendments.

(22) The Debtor testified throughout the trial that he had portions of his salary paid to his wife. (Tr. 34, 43, 52-53, 154). He further testified that AC-Vt. was set up as "a conduit of bringing money into the Mick family." (Tr. 165). The Debtor testified that one of the reasons for setting up the Company in his wife's name was because of the "financial straits" he was in. (Tr. 164). There are often good business reasons for putting a business in the name of one's spouse, provided certain criteria for this arrangement can be established. Here, no such criteria have been established. On its face, the Court finds no legitimate purpose for setting up the Company with Mrs. Mick as its owner, as opposed to the Debtor, in light of the Debtor's testimony that he managed the Company, kept its books and records, managed its finances including having signatory power over its accounts, and authorized portions of his salary to be paid directly to Mrs. Mick; and Mrs Mick apparently played no role in the operation of the business. The only purpose for this ownership structure appears to be that of thwarting creditors seeking to attach the Debtor's earnings. Cf., Ex. A at 20 (Debtor testifying that he was hoping to avoid filing for bankruptcy at the time he was setting up AC-Vt.).

(23) The Debtor and Mr. Bricker both testified that they had a meeting at a diner in Connecticut in September 2001. On cross-examination by his counsel, the Debtor testified that he told Mr. Bricker he was working in Vermont for a company his wife owned and that, through the company, he was doing construction management work for Yvon Cormier. (Tr. 125). By contrast, Mr. Bricker testified that the Debtor never mentioned that he (the Debtor) was working in Vermont or that he was working for a company owned by Mrs. Mick (Tr. 185-87), and that the conversation focused on trying to find a way to resolve their differences. In that vein, Mr. Bricker testified that he asked the Debtor why he would enter into a settlement agreement knowing he would not be able to "close the deal." (Tr. 188). Mr. Bricker testified that, in response, the Debtor told him, "I could just simply file bankruptcy, you are not going to get a dime out of this [settlement] agreement, and I know how to manipulate the system." Id.

(24) Based on all the evidence presented, the Court finds the Debtor is an experienced businessman, familiar with the bankruptcy system. He has owned and operated numerous legal entities as vehicles for conducting business. See Ex. C, SOFA; Tr. 48, 172. The evidence and testimony presented

persuades the Court that the Debtor knew how to derive maximum financial benefit from various types of business entities. This is a skill that the Debtor developed over many years of operating his own businesses. The Debtor is also aware of the consequences and benefits of bankruptcy filings as he has filed a prior bankruptcy case in the early 1990s and had one of the companies in which he had an ownership interest, Steeplegate Associates, LLC, forced into an involuntary chapter 11 bankruptcy in 2001.[4]

(25) The Court finds that Mr. Bricker is also a seasoned businessman. He has owned and operated several legal entities through which he has conducted his businesses.

(26) Having weighed the demeanor and credibility of the Debtor and Mr. Bricker, the Court finds Mr. Bricker's testimony as to the conversation at the Connecticut diner to be the more credible. While not determinative of any of the specific issues raised in the instant Complaint, this determination is relevant to the Debtor's credibility generally.

(27) During cross examination of the Debtor by his counsel, the Debtor provided substantial testamentary evidence about his work relationship with Plaintiff Gary Bricker, the business entities that they owned together, and the backdrop to the various lawsuits between the Debtor and Mr. Bricker. The Court finds it has little relevance to Plaintiffs' § 727 Complaint, and therefore, the Court will accord it little weight.

IV. CONCLUSIONS OF LAW

It is axiomatic that bankruptcy relief under this country's bankruptcy system is available only to an honest debtor in need of a fresh start. See generally Williams v. United States Fidelity & Guaranty Co., 236 U.S. 549 (1915) There is simply no question that the extraordinary relief afforded by the Bankruptcy Code is intended to be available only to the honest debtor. In re Maynard, 269 B.R. 535, 539 (D. Vt. 2001) See also In re Carlton, 211 B.R. 468 (Bankr. W.D.N.Y. 1997). Section 727 of the Bankruptcy Code denies a discharge to a debtor who commits certain acts, such as making fraudulent transfers to defeat creditors, failing to keep or destroying books and records, and making false statements. See In re Murray, 249 B.R. 223, 227 (E.D.N.Y. 2000). "Denial of discharge is a severe sanction and as a result § 727 must be construed strictly in favor of the debtor." Id. (citing In re Chalasani, 92 F.3d 1300, 1310 (2d Cir. 1996)); In re Maynard, 269 B.R. at 539.

[4] In re Steeplegate Associates, LLC, #01-50313 (chapter 11) (Bankr. D. Conn.).

A. Relief Under § 727(a)(4)(A)

The Brickers allege that the Debtor made three distinct false statements and each of them is sufficient to warrant a denial of the Debtor's discharge. They allege that the Debtor intentionally failed to accurately disclose his income during the pre-petition months of 2002 on the SOFA, that he gave a false answer to the question on the SOFA requiring him to identify his interest in business entities, and that he intentionally misstated his income on Schedule I. The allegation regarding incorrect reporting of 2002 income is clearly set forth in the Complaint, see ¶¶5-7, 11, 19, 20, and the Final Pre-Trial Statement (doc #15). The two remaining allegations are not specified in either the Complaint or the Final Pre-Trial Statement but were addressed at both the deposition of the Debtor, see generally Ex.B., and during the trial, without objection by the Debtor. Pursuant to Fed. R. Bankr. P. 7015(b), the Court may rule on these allegations, notwithstanding the fact that the Plaintiffs did not raise them in their Complaint or move to amend their pleading to conform to the evidence, because the Defendant demonstrated implied consent through a lack of affirmative objection.[5]

To prevail on a § 727 complaint under subsection (a)(4)(A), a creditor must prove the following by a preponderance of the evidence:

(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 Murray, 249 B.R. at 228 (citing In re Dubrosky, 244 B.R. 560, 572 (E.D.N.Y. 2000) (citations omitted)). Several courts have instructed that "fraudulent intent must be shown by actual, not constructive fraud." Id.; see also In re Dubrosky, 244 B.R. at 571; In re Kelly, 135 B.R. 459, 461 (Bankr. S.D.N.Y. 1992). However, since "[a] debtor will rarely admit to defrauding creditors, . . . fraudulent intent may be established by

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[5]That rule directs:

> **(b) Amendments to Conform to the Evidence.**
> When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues. If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice the party in maintaining the party's action or defense upon the merits. The court may grant a continuance to enable the objecting party to meet such evidence.

circumstantial evidence or by inferences drawn from a course of conduct," In re Dubrowsky, 244 B.R. at 572 (citing In re Kelly, 131 B.R. at 459); see also In re Murray, 249 B.R. at 228. Moreover, "[I]t is important to note that under section 727(a)(4)(A), a reckless indifference to the truth is sufficient to sustain an action for fraud." In re Dubrowsky, 244 B.R. at 572 (citing In re Kaiser, 722 F.2d 1574, 1582 (2d Cir. 1983)); see also In re Diorio, 407 F.2d 1330, 1331 (2d Cir. 1969) ("successful administration of the Bankruptcy Act hangs heavily on the veracity of statements made by the [debtor] . . . . [R]eckless indifference to the truth . . . is the equivalent of fraud."); In re Brenes, 261 B.R. 322 (Bankr. D. Conn. 2001). As to materiality, courts consider a statement to be material "if it is pertinent to the discovery of assets." Id. at 334; see also Katz v. Kurtaj (In re Kurtaj), 284 B.R. 528, 530 (Bankr. D. Conn. 2002); In re Maletta, 159 B.R. 108, 112 (Bankr. D. Conn. 1993). A material matter is "one bearing a relationship to the debtor's business transactions or estate or which would lead to the discovery of assets, business dealings or existence of disposition of property." In re Sawyer, 130 B.R. 384, 394 (Bankr. E.D.N.Y. 1991). Once a creditor meets its burden of proof[6] by producing persuasive evidence of a false statement, the burden of production shifts to the debtor "to come forward with some credible explanation" for the false statement in his schedules. In re Brenes, 261 B.R. at 334.

Here, the Court finds that the Creditors have demonstrated that the Debtor made three false statements under oath, that the Debtor can provide a credible explanation for only one of them, and that the other two false statements are material.

1. The Debtor's Misstatement as to Income Earned from AC-Vt. from January 1,2002, through April 15, 2002.

The Court finds the Debtor's statement on his SOFA at Item No. 1, regarding the monies paid to him by AC-Vt. during the pre-petition months of 2002, to be false. While the Debtor ultimately amended his SOFA to indicate he was paid $12,250 from the Company in pre-petition 2002, see Ex. G, there is contradictory evidence that indicates that the Debtor actually received less than this claimed amount. See Ex. 9. The fact that the Debtor changed this amount so many times and still did not provide a clear, correct response is disturbing primarily because it reflects that he filed the amendments as a defensive maneuver and that he failed to take the oath of honesty seriously. The Bankruptcy Code expects that when debtors and their

[6] The Court already ruled that the Plaintiffs' burden of proof is by a preponderance of the evidence. See Order Regarding Burden of Proof in a § 727 Action at 1 (doc. #24). As the Supreme Court has instructed: "The burden of showing something by the preponderance of the evidence . . . simple requires the trier of fact to believe that the existence of a fact is more probable than its nonexistence before [he or she] may find in favor of the party who had the burden to persuade the [judge] of the fact's existence." Concrete Pipe & Products of Cal., Inc. v. Construction Laborers Pension Trust for Southern Cal., 508 U.S. 602, 622 (1993) (internal quotation marks omitted). "In other words, the preponderance standard goes to how convincing the evidence in favor of a fact must be in comparison with the evidence against it before that fact may be found, but does not determine what facts must be proven as a substantive part of a claim or defense." Metropolitan Stevedore Co. v. Rambo, 521 U.S. 121,137 n.9 (1997).

attorneys are finalizing and signing their schedules, they will devote their full attention to them in order to ensure that they are complete and accurate to the best of the debtors' knowledge and information. Section 727 was enacted, in part, to prohibit a discharge and a fresh start for those who 'play fast and loose' with their assets or with the reality of their affairs. See In re Ptasinski, 290 B.R. 16, 26-27 (Bankr. W.D.N.Y. 2003). Since the Debtor testified that he handled the books and records of the Company, as well as handled the Company's banking, he should have been able to provide an accurate statement of how much money AC-Vt. paid to him pre-petition in 2002. The Court finds the evidence supports a finding that in this conduct the Debtor demonstrated a reckless indifference to the truth. Moreover, the Court finds this false statement to be material. The statement regarding the monies the Company paid to the Debtor during the pre-petition months of 2002 could have led to the discovery of assets or the existence or the disposition of property. Further, the Court does not find the Debtor's explanation about his difficulty in figuring out how much money the Company paid to him to be credible. On the contrary, the evidence showed that the Debtor was running AC-Vt.; he was extremely familiar with its books and records since he was their keeper. The Debtor also maintained AC-Vt.'s bank accounts and wrote and signed the vast majority of its checks, including payroll checks. Thus, the Debtor was in the best position possible to know the actual amount paid to him during the pre-petition months of 2002.

2. The Debtor's Misstatement on the SOFA as to His Role in Business Entities.

The Court also finds that the Debtor made a false statement in his answer to Item No. 18 of his SOFA. Item No. 18 requires the debtor to list the nature, names and locations of all businesses – whether corporations, partnerships, or sole-proprietorships – in which a debtor is an officer, director, partner or managing executive. Nowhere under Item No. 18 did the Debtor list AC-Vt. Yet, the Debtor is the president and CEO of AC-Vt. See Ex. Q (Employment and Management Agreement); Tr. 38, 48. There can be no doubt that the Debtor knew this since he signed the Employment and Management Agreement which, *inter alia*, clearly identified that the Debtor was to hold both these positions. See Ex. Q. Further, the Debtor specifically testified that he was the managing executive of the Company. (Tr. 48). The Court has found that the Debtor is a savvy businessman, knowing how to derive maximum financial benefit from various types of business entities and how to navigate through the bankruptcy system. This acumen may be admirable when put to constructive purpose, but is one of the elements of his undoing when it is employed, as here, to intentionally mislead the case trustee, creditors and the Court as to the true nature of his role in AC-Vt.

After weighing the evidence presented and assessing the credibility of the witnesses, the Court is convinced that the Debtor should have known to include AC-Vt. on his SOFA as an entity in which he held a management position, and that his failure to do so was at best a reckless disregard for truth and at worst an

intentional fraud. Moreover, the Court finds the omission of AC-Vt. from Item No. 18 is material since it illuminates the Debtor's business transactions. See Sawyer, 130 B.R. 384 (Bankr. E.D.N.Y. 1991). The Court is unpersuaded by the Debtor's testimony that he did not believe he had to list this interest on his SOFA because he was not the owner of the Company. "Virtually every imaginable asset becomes property of the estate upon the filing of a bankruptcy petition. . . . Lying about assets that are part of the estate–even if possibly exempt–certainly bears a relationship to the estate." In re Murray, 249 B.R. at 230. In fact, the combination of the Debtor's previous business holdings and his testimony that one of the purposes for setting up AC-Vt. with his wife as its owner was due to his "financial straits" persuades the Court that the Company was set up in this manner, at least in part, to thwart the Debtor's creditors. See also Ex. A at 20 (Debtor testifying that when he created AC-Vt., he was hoping to, but not certain he could, avoid bankruptcy). The Creditors have carried their burden of proof in establishing a *prima facie* case that this was a false statement. The Court finds that the Debtor has not provided a plausible explanation for his omission of AC-Vt. from Item No. 18 of his SOFAs.[7]

3. The Debtor's Misstatement as to the Period of His Employment with the Company.

The Brickers argue that the Debtor's misstatement on Schedule I as to how long he had worked for the Company as of the petition filing date is a false statement made under oath pursuant to § 727(a)(4)(A). The Debtor contends this was a mere typographical error, not a false statement. Having had the opportunity to evaluate the Debtor's demeanor and credibility throughout the July 14, 2003 trial, the Court finds the Debtor is being truthful with regard to the mis-reporting of the duration of his employment and finds his explanation sufficiently credible to rebut the Creditors' allegation.

In sum, the Court finds the Debtor knowingly made false statements on his bankruptcy schedules and SOFAs, with intent to defraud, and that these statements were material to his bankruptcy case. Even if each falsehood or omission considered separately may not be sufficient to warrant a denial of discharge pursuant to § 727(a)(4)(A), a multitude of discrepancies, falsehoods and omissions taken collectively may be of sufficient materiality to bar a debtor's discharge. See In re Kurtaj, 284 B.R. at 530 (citing In re Sapru, 127 B.R. 306, 315-16 (Bankr. E.D.N.Y. 1991)). Here, reasonable minds might differ as to the magnitude of the materiality of either of the two intentional false statements made by the Debtor. However, the Debtor's

[7]This is in contrast to evidence presented by a debtor in this District in a recent and similar situation. In In re French, 2003 WL 21188644 (Bankr. D. Vt. 2003), the debtor's numerous amendments to his schedules raised a specter of doubt as to the debtor's good faith in filing for bankruptcy, but his subsequent explanation as to the need for those amendments satisfied the Court that the debtor had acted in good faith. There, the Court confirmed the debtor's chapter 13 plan with modifications requiring certain reporting requirements to monitor the debtor.

apparent reckless disregard for the need for honesty on the schedules combined with the fact that two of these false statements were material to the Debtor's case persuades me that, pursuant to § 727(a)(4)(A), a denial of discharge is warranted under the facts of this case.

B. Relief Under § 727 (a)(2)(A)

Having found that the Debtor has made false statements under oath on his bankruptcy schedules and SOFAs warranting denial of discharge pursuant to § 727(a)(4)(A), the Court need not address Court I of the Brickers' Complaint, which seeks relief under § 727(a)(2)(A). However, in the interest of thoroughness, the Court will address that allegation, asserting that the Debtor, with the intent to hinder, delay or defraud a creditor, transferred or permitted to be transferred or concealed property, i.e., contract rights with an Yvon Cormier construction company. The evidence clearly established that the Debtor conducted business through various legal entities. See, e.g., Tr. 171-73; Ex. C. (SOFA at 18). The evidence also established that, while the Debtor was AC-Vt.'s managing executive, president and CEO, he was not the owner of the Company; his wife was. This is not unusual and fraud cannot be implied solely from such a business structure.

In an attempt to establish an intent to hinder, delay or defraud, the Brickers made much of a July 30, 2001 Fax Memorandum from the Debtor to Mr. Leo Roy, a vice-president of Yvon Cormier Construction Corp. See Ex. K (hereinafter, the "Letter"). The Letter was written on the Debtor's individual letterhead, not that of a company. Further, there is a reference to "us" that the Brickers argue means "the Debtor" individually and a Cormier company. The Court is unpersuaded. The Debtor testified that this was a pre-negotiation letter and that the "us" was used generically; once details were finalized, the Debtor and Yvon Cormier, respectively, would decide the legal entities that would be formal parties to a construction management agreement. (Tr. 20-21, 26-27). Having examined the Letter and considered the Debtor's explanation of the use of "us," the Court finds no fraudulent intent to transfer or conceal this contract right. The contract right would not be the Debtor's individual property interest; a business entity would own that right. The Brickers have failed to meet their burden of proving fraud under Count I of their Complaint.

V. BRICKERS' OBJECTION TO EXEMPTION

The Debtor's Schedule C includes an exemption of the proceeds, if any, in the lawsuit he has filed against Gary Bricker and in the lawsuit he has filed against Gary Bricker and Valley View Construction. The Debtor asserts a right to exempt these proceeds exists under 12 V.S.A. § 2740(7).[8] Creditor Brickers have

[8] **§ 2740. Goods and chattels; exemptions from**

The goods or chattel of a debtor may be taken and sold on execution, except the following articles, which shall be exempt from attachment and execution, unless turned out to the officer to be taken on the attachment or

objected to this exemption, alleging that the subject statute does not permit this relief and that equity mandates denial of the exemption. See doc. #20 in main case.

It is well settled law that Vermont exemption statutes are remedial in nature and should be liberally constructed in favor of debtors. See In re Parrotte, 22 F.3d 472 (2d Cir. 1994). The burden is on the objecting creditor to demonstrate that a debtor is not entitled to the claimed exemption or that the statute cited in support of taking the exemption does not authorize the exemption claimed. See FED R. BANK P. 4003(c).[9] The exemption provided for in 12 V.S.A. § 2740(7), colloquially known as "the wild card exemption," may be used for any property. As this Court has previously held:

> Indeed, the Vermont Supreme Court has recognized, and this Court has agreed, that the phrase "any property" as used in the Vermont "wild card" exemption authorizes a debtor who has not used up his or her exemptions for various types of personal property to claim an exemption in "any property" of his or her choice, and is broad enough to include both personal and real property. *See* Licursi v. Sweeney, 157 Vt. 599, 603 A.2d 342 (1991); *accord* In re Christie, 139 B.R. 612 (Bankr. D. Vt. 1992); *see also* In re Parrotte, 22 F.3d 472 (2d Cir. 1994) (Vermont exemption statutes are remedial in nature and should receive liberal construction in favor of debtors).

In re LaFerriere, No. 01-10643, slip op. at 2-3 (Bankr. Vt. Feb. 5, 2002).

In this case, the Brickers have presented two arguments to support their objection: (1) the statute does not permit the Debtor to claim the proceeds from the lawsuits under 12 V.S.A. § 2740(7); and (2) it would be inequitable and unjust to allow the Debtor to prosecute the lawsuits against the Brickers. Neither argument is persuasive. First, the Court finds that the Debtor may use the wild card exemption to shield the proceeds of a lawsuit from his creditors as such proceeds falls within the broad definition of "any property;" the Brickers' argument as to the applicability of 12 V.S.A. § 2740(7) is of no avail. Second, the Court finds the Brickers have failed to demonstrate a factual or legal basis for denying the claimed "wild card" exemption based upon equitable grounds. Accordingly, the Brickers' objection to exemption is overruled.

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execution, by the debtor:

. . .

(7) The debtor's aggregate interest in any property, not to exceed $400.00 in value, plus up to $7,000.00 of any unused amount of the exemptions provided under subsections (1), (2), (4), (5) and (6) of this section;

. . .

[9] **4003. Exemptions.**

. . .

(c) Burden of Proof. In any hearing under this rule, the objecting party has the burden of proving that the exemptions are not properly claimed. After hearing on notice, the court shall determine the issues presented by the objections.

. . .

VI. CONCLUSION

Debtor Robert Patrick Mick, in connection with his bankruptcy case, knowingly and fraudulently made a false oath by failing to include the correct amount that Atlantic Cascade of Vermont, LLC owed to him, and by failing to list Atlantic Cascade of Vermont, LLC as an entity in which he had a management role, on his Statement of Financial Affairs. The Debtor had no credible explanation for these false statements, which constituted material statements made in connection with his bankruptcy case. Accordingly, pursuant to § 727(a)(4)(A), Mr. Mick shall not be granted a discharge in this case.

Notwithstanding the Brickers' objection, the Debtor may exempt any proceeds from the lawsuits he has pending against Gary Bricker and Gary Bricker and Valley View Construction, up to the limit imposed by 12 V.S.A. § 2740(7), because the Brickers have failed to carry their burden of proof on their objection to this exemption.

This Memorandum of Decision shall constitute the Court's findings of fact and conclusions of law.

September 24, 2003
Rutland, Vermont

Colleen A. Brown
United States Bankruptcy Judge