



Entered on Docket  
July 01, 2008

Hon. Mike K. Nakagawa  
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT  
DISTRICT OF NEVADA

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8	In re:	)	BK-S-07-10823-MKN
9	CAROL E. RICE,	)	Chapter 7
10	Debtor.	)	
11	DAVID P. BOLD, INDIVIDUALLY	)	Adv. Proceeding No.: 07-01081-MKN
12	AND AS TRUSTEE OF	)	
13	DAVE'S TRUST DATED 5/30/01,	)	Date: June 11, 2008
14	Plaintiff,	)	Time: 2:30 p.m.
15	v.	)	
16	CAROL E. RICE,	)	
17	Defendant.	)	

**MEMORANDUM DECISION ON MOTION FOR SUMMARY JUDGMENT  
RE: FALSE OATH CLAIM**

This matter was heard on June 11, 2008. It was taken under submission after oral argument was presented. The appearances of counsel and the parties were noted on the record.

**BACKGROUND<sup>1</sup>**

Carol E. Rice ("Debtor") filed a voluntary Chapter 7 petition on February 21, 2007. On May

<sup>1</sup> In the text and footnotes of this Memorandum Decision, all references to "Section" shall be to the provisions of the Bankruptcy Code appearing in Title 11 of the United States Code, unless otherwise indicated. All references to "Rule" shall be to the Federal Rules of Bankruptcy Procedure, unless otherwise indicated. All references to "FRCP" shall be to the Federal Rules of Civil Procedure.

1 29, 2007, David P. Bold, Individually and as Trustee of Dave’s Trust Dated 5/30/01 (“Bold”) filed an  
2 adversary complaint (“Complaint”) against the Debtor. (ADkt# 1)<sup>2</sup> The complaint is styled as two  
3 separate causes of action. The first cause of action alleges that the Debtor made a false oath in  
4 connection with her bankruptcy case under Section 727(a)(4)(A). The second cause of action alleges  
5 that the Debtor should be denied a discharge of all debts in bankruptcy because she concealed,  
6 destroyed, or failed to keep and preserve financial information under Section 727(a)(3).<sup>3</sup> Debtor filed  
7 an Answer to the Complaint on August 27, 2007 (ADkt# 15) and then an Amended Answer on August  
8 31, 2007. (ADkt# 17)

9 On December 19, 2007, Debtor’s counsel filed a motion to withdraw from further representation  
10 of the Debtor in this adversary proceeding, alleging a breakdown in the attorney-client relationship.  
11 (ADkt# 22) On January 18, 2008, an order was entered granting the motion to withdraw. (ADkt#25)  
12 On April 22, 2008, after Debtor’s counsel withdrew, Bold filed a motion for summary judgment (“SJ  
13 Motion”). (ADkt# 32) On May 22, 2008, Debtor filed an “answer” in pro se (ADkt# 36) that simply  
14 denies the allegations set forth in the SJ Motion. The matter was taken under submission after a  
15 hearing was completed.

16 **APPLICABLE LEGAL STANDARDS**

17 Rule 56 of the Federal Rules of Civil Procedure is applicable in adversary proceedings  
18 pursuant to Bankruptcy Rule 7056. See In re Silva, 190 B.R. 889, 891 (B.A.P. 9<sup>th</sup> Cir. 1995).  
19 Summary judgment is proper where “the pleadings, depositions, answers to interrogatories, and  
20 admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any  
21 material fact and that the moving party is entitled to a judgment as a matter of law.” Fed. R. Civ. P.

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23 <sup>2</sup> References in this Memorandum Decision to “Dkt#” are to documents filed in the Chapter  
24 7 case while references to “ADkt#” are to documents filed in the adversary proceeding.

25 <sup>3</sup> For some reason, Bold includes false oath allegations in both his first and second causes  
26 of action even though only the first cause of action is brought under Section 727(a)(4). See Complaint  
¶85 and ¶96.

1 56(c). A fact is "material" for summary judgment purposes if it might affect the outcome of suit  
2 under the governing substantive law. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248  
3 (1985).

4 The moving party must identify the portions of the record that it believes establish the  
5 presence or absence of a material fact. See T.W. Electrical Service, Inc. v. Pacific Electrical  
6 Contractors Association, 809 F.2d 626, 630 (9<sup>th</sup> Cir. 1987). The nonmoving party cannot rest upon  
7 mere denials or allegations in pleadings, but must set forth specific facts, by affidavit or otherwise,  
8 sufficient to raise a genuine issue of fact for trial. See Celotex Corporation v. Catrett, 477 U.S. 317,  
9 324 (1986). Inferences, however, must be drawn in the light most favorable to the nonmoving  
10 party. See Anderson v. Liberty Lobby, supra, 477 U.S. at 255.

#### 11 DISCUSSION

12 As previously noted, the Complaint seeks to deny discharge under Sections 727(a)(3 and 4).  
13 Bold seeks summary judgment only under Section 727(a)(4)(A), i.e., the false oath claim set forth  
14 in the First Cause of Action set forth in the complaint. See SJ Motion at 7:14 to 10:16.<sup>4</sup> Attached  
15 to the SJ Motion are six exhibits: the Complaint (Exhibit "1"), the Amended Answer (Exhibit "2"),  
16 Debtor's Schedules of Assets and Liabilities (Exhibit "3")<sup>5</sup>, Debtor's Statement of Financial Affairs  
17 (Exhibit "4")<sup>6</sup>, Debtor's individual income tax return for 2005 (Exhibit "5"), and excerpts from a  
18 transcript dated April 27, 2007 (Exhibit "6"). The SJ Motion is accompanied by the Declaration of  
19 Brian D. Shapiro ("Shapiro Declaration") (ADkt# 33) wherein he attests that the copy of the 2005

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21 <sup>4</sup> Citations to the written argument and declaration submitted by Bold will refer to the page  
22 number and then line separated by a colon, e.g., 4:10-15 would refer to page 4, line 10 to line 15 of  
the document.

23 <sup>5</sup> Exhibit "3" is a copy of the Schedule of Assets and Liabilities that the Debtor filed on March  
24 8, 2007 (Dkt# 15). Debtor filed an Amended Schedule "B" of Personal Property on August 27, 2007  
(Dkt# 63), after the Complaint was filed.

25 <sup>6</sup> Exhibit "4" is a copy of the Statement of Financial Affairs that the Debtor filed on March  
26 8, 2007 (Dkt# 17). Debtor filed an Amended Statement of Financial Affairs on August 27, 2007 (Dkt#  
64), after the Complaint was filed.

1 tax return was obtained by request made on the Debtor or her then-counsel.

2 The Shapiro Declaration provides an evidentiary foundation with respect to the 2005 tax  
3 return but not of any of the other exhibits attached to the SJ Motion. Pursuant to Rule 201 of the  
4 Federal Rules of Evidence, the Court does take judicial notice that the Complaint, the Amended  
5 Answer, the Schedules of Assets and Liabilities, and the Statement of Financial Affairs were filed  
6 with the Court in the adversary proceeding and in the underlying bankruptcy case. The Court  
7 cannot take judicial notice of the excerpts of the April 27, 2007 transcript, however, inasmuch as it  
8 is not accompanied by a reporter's certification nor is there any representation that it is a true and  
9 accurate copy of an official transcript.<sup>7</sup>

10 There are no other declarations or affidavits accompanying the SJ Motion. There are no  
11 responses to interrogatories, requests for admissions, or requests for production of documents.  
12 There are no authenticated copies of deposition transcripts. In short, other than the 2005 tax return,  
13 there is no evidence beyond the Schedules and Statement of Financial Affairs filed by the Debtor,  
14 on which the false oath cause of action is already pled, that would serve as a basis to grant the SJ  
15 Motion.

16 **I. Elements of Bold's False Oath Claim.**

17 The first cause of action in the Complaint seeks to bar Debtor's discharge under  
18 Section 727(a)(4)(A), asserting that the Debtor has knowingly and fraudulently made a false oath or  
19 account by inaccurately portraying her assets and liabilities in her Schedules and Statement of  
20 Financial Affairs. To deny discharge under this provision, the creditor must demonstrate (1) a  
21 false statement made by the debtor under oath or under penalty of perjury, (2) that the debtor made  
22 the false statement knowingly and fraudulently, and (3) that the statement was regarding a material  
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24 <sup>7</sup> It also is not clear what the transcript is since Bold's motion only refers to it as "the  
25 applicable pages of her transcript", see SJ Motion at 2:16-17, and the unauthenticated excerpt attached  
26 as Exhibit "6" does not identify the legal proceeding in which it was taken. The alleged relevance of  
the transcript is to establish the address of the Debtor's mother, see SJ Motion at 4:11-12, and that the  
Debtor won \$2,500 through gambling in January 2007. Id. at 5:11.

1 fact. See In re Searles, 317 B.R. 368, 377 (B.A.P. 9<sup>th</sup> Cir. 2004).

2 **II. Material Facts in Genuine Dispute.**

3 There is no genuine dispute that the Debtor signed her Schedules and Statement of  
4 Financial Affairs under penalty of perjury. Bold alleges that Debtor's Schedules and Statement of  
5 Financial Affairs contain a number of material inaccuracies, including an incorrect mailing address  
6 for Debtor's mother, Gertrude Rice. See SJ Motion at 4:1-12. More importantly, Bold alleges that  
7 the Debtor omitted material information, including: (1) a bank account held jointly between the  
8 Debtor and her mother, (2) a rental property ("the Morton Building") located in Holland, New  
9 York, (3) \$2,500 in gambling income received in January 2007, (4) gifts to her daughter purchased  
10 with the gambling winnings, (5) the sale of certain real property ("the Chestnut Property")  
11 apparently located in Las Vegas, Nevada<sup>8</sup>, and the disposition of the sale proceeds, and (6) the  
12 payment of creditors within 90 days of commencing the bankruptcy case if the proceeds from the  
13 sale of the Chestnut Property were received within that period. See SJ Motion at 4:1 to 6:10 and at  
14 7:25 to 8:4.

15 In her Amended Answer, Debtor denies that her Schedules and Statement of Financial  
16 Affairs contain false information, see Amended Answer at ¶2 (denying Paragraph 80 of the  
17 Complaint), and denies that she knowingly and fraudulently made a false oath by submitting false  
18 Schedules and Statements. Id. (denying Paragraph 83). As a second "affirmative defense", Debtor  
19 alleges that she "complied as fully as possible with the requirement of the bankruptcy code given  
20 her medical condition before the filing of the bankruptcy petition, and afterwards."

21 It is well-established that summary judgment is not appropriate in a Section 727 action  
22 where there are genuine issues as to the debtor's intent. See In re Wills, 243 B.R. 58, 65 (B.A.P. 9<sup>th</sup>  
23 Cir. 1999). Under Section 727(a)(4)(A), that a debtor "knowingly" and "fraudulently" made a false  
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25 <sup>8</sup> The Complaint, the Amended Answer, and the SJ Motion do not indicate where the  
26 "Chestnut Property" is located, but it appears from Item 10 of Debtor's Amended Statement of  
Financial Affairs to be in Las Vegas, Nevada..

1 statement requires proof of actual intent. See In re Devers, 759 F.2d 751, 753 (9<sup>th</sup> Cir. 1985).  
2 Actual intent may be established by circumstantial evidence or inferences drawn from the debtor's  
3 conduct. Id. at 753-54. The value of any asset omitted from a debtor's schedules is not alone  
4 determinative of an intention to make a false oath. See In re Wills, supra, 243 B.R. at 64.

5 At this juncture, the only circumstantial evidence of the Debtor's actual intent as to any  
6 inaccuracies in the Schedules and Statement of Financial Affairs is the copy of the 2005 tax return.  
7 Bold argues that the 2005 tax return discloses Debtor's treatment of the Morton Building as a rental  
8 property for which a loss deduction was taken. See SJ Motion at 5:5-9. In her response to the  
9 Complaint, however, Debtor denied that she had an interest in the Morton Building on the  
10 bankruptcy petition date or that she was even required to disclose the property in her Schedules.  
11 See Amended Answer at ¶2 (denying Paragraphs 38 and 39). The 2005 tax return, without more,  
12 does not establish that the Debtor knowingly and fraudulently intended to conceal an interest in the  
13 Morton Building, if any.

14 Nothing in the materials offered by Bold in support of the motion address the other alleged  
15 omissions of information that form the basis of his claim under Section 727(a)(4)(A). The materials  
16 do not address whether the Debtor knowingly and fraudulently included an incorrect mailing  
17 address for her mother or omitted information about the joint bank account. Nor do they address  
18 whether the Debtor knowingly and fraudulently omitted information regarding her gambling  
19 winning in January 2007 or the gifts she purchased for her daughter. Finally, the materials do not  
20 address the Debtor's actual intent with respect to the sale of the Chestnut Property and the  
21 disposition of the sale proceeds, including the payment of creditors within the 90-day preference  
22 period.

23 Whether the deficiencies in the Debtor's initial Schedules and Statement of Financial  
24 Affairs can be explained by the "medical condition" referred to in the second "affirmative defense"  
25 in the Amended Answer filed by her then-counsel, is not known. Likewise, Debtor's explanation  
26 for filing of her Amended Statement of Financial Affairs and her Amended Schedule of Personal

1 Property after the commencement of the adversary proceeding is not before the Court at this time.

2 Under these circumstances, Bold simply has not met his burden on summary judgment of  
3 demonstrating the absence of genuine issues regarding the Debtor's actual intent. Determination of  
4 the false oath cause of action under Section 727(a)(4)(A) must await proof at trial.

5 **CONCLUSION**

6 Bold's motion for summary judgment will be denied for the reasons set forth above. A  
7 separate order has been entered concurrently herewith.

8  
9 Copies noticed through ECF to:

10 BRIAN D. SHAPIRO ecf@brianshapirolaw.com,  
11 tiffany@brianshapirolaw.com;brianshapiroesq@yahoo.com;bshapiro@brianshapirolaw.com;marjorie@brianshapirolaw.com

12 and sent to BNC to:

13 CAROL E RICE  
14 3785 ANCESTRAL HILLS LANE  
15 LAS VEGAS, NV 89110

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