Honorable Mike K. Nakagawa
United States Bankruptcy Judge

Entered on Docket
February 28, 2019

UNITED STATES BANKRUPTCY COURT

DISTRICT OF NEVADA

* * * * *

In re: STEVEN ISADORE SNIDER, Debtor.	Case No. 17-11075-MKN Chapter 7
TIM RADECKI, Plaintiff, v. STEVEN ISADORE SNIDER, Defendant.	Adv. Proc. No. 17-01194-MKN Date: February 21, 2019 Time: 9:30 a.m.

MEMORANDUM DECISION AFTER TRIAL[1]

On February 21, 2019, a trial was conducted in the above-captioned adversary proceeding. The appearances of counsel were noted on the record. After conclusion of the trial, the matter was taken under submission. This Memorandum Decision constitutes the court's findings of fact and conclusions of law pursuant to FRBP 7052 and FRCP 52.

[1] In this Memorandum Decision, all references to "ECF No." are to the number assigned to the documents filed in the main bankruptcy case as they appear on the docket maintained by the clerk of court. All references to "AECF No." are to the numbers assigned to the documents filed in the above-captioned adversary proceeding as they appear on the adversary docket maintained by the clerk of the court. All references to "Section" are to the provisions of the Bankruptcy Code, 11 U.S.C. §§ 101-1532. All references to "FRBP" are to the Federal Rules of Bankruptcy Procedure. All references to "FRCP" are to the Federal Rules of Civil Procedure.

BACKGROUND

On March 9, 2017, a Chapter 7 petition ("Petition") was filed by Steven Isadore Snider ("Debtor") along with his schedules of assets and liabilities ("Schedules"), his statement of financial affairs ("SOFA"), and other required information. (ECF No. 1). The Petition, Schedules, SOFA, and other information were prepared by the Debtor's bankruptcy counsel, Dorothy G. Bunce ("Attorney Bunce"). Administration of the Debtor's Chapter 7 proceeding was assigned to panel trustee Victoria L. Nelson ("Chapter 7 Trustee").

A notice was sent to all parties in interest that a meeting of creditors ("Creditors Meeting") would be conducted by the Chapter 7 Trustee on April 7, 2017, and that the deadline for objecting to the Debtor's discharge would be June 6, 2017 ("Bankruptcy Notice"). (ECF No. 7). The Bankruptcy Notice also instructed creditors not to file proofs of claim in the Debtor's proceeding because there did not appear to be assets available to pay creditors.

On April 11, 2017, after the Creditors Meeting was completed, the Chapter 7 Trustee reported that there are no assets available for distribution to creditors. (ECF No. 12).[2]

On June 2, 2017, Plaintiff commenced the instant adversary proceeding against the Debtor by filing a "Complaint Objecting to Discharge Under 11 U.S.C. 523 AND 727" ("Complaint"). (AECF No. 1). By his Complaint, Plaintiff seeks to deny the Debtor a discharge of any of his prebankruptcy debts under Section 727.[3] Alternatively, the complaint seeks a determination that a prior judgment obtained by the Plaintiff is excepted from discharge under Section 523. Among other things, Plaintiff alleges that the Schedules, SOFA, and other materials provided by the Debtor under penalty of perjury, were false, and that his testimony at the Creditors Meeting also was false. Plaintiff also alleges that the Debtor is unable to explain the absence of assets on the petition date that were known to exist before the petition date. In addition, the Complaint alleges that the Debtor damaged certain real property that he had rented

[2] As a result, none of the creditors listed by the Debtor in his Schedules filed proofs of claim.

[3] As a result of the objection, the Debtor has not received a Chapter 7 discharge of any of his debts until a final disposition of this adversary proceeding.

from the Plaintiff, and that the prior default judgment for such damage should be excepted from discharge.

On October 19, 2017, Debtor filed an answer ("Answer") to the Complaint. (AECF No. 11).[4] Thereafter, the parties attempted to reach a settlement over many months, but ultimately were unsuccessful.[5]

On October 26, 2018, an order was entered scheduling a pre-trial conference for January 24, 2019, and a half-day trial for February 21, 2019. (AECF No. 28).

On January 10, 2019, Plaintiff filed his trial statement ("Plaintiff Trial Statement"). (AECF No. 30). In that statement, Plaintiff withdrew his request to determine the prior default judgment to be nondischargeable under Section 523 and elected to proceed solely on his objection to discharge under Section 727.[6]

On January 11, 2019, Debtor filed his trial statement ("Debtor Trial Statement"). (AECF No. 31).

On January 24, 2019, the pre-trial conference was completed.

APPLICABLE LEGAL STANDARDS

Denying a discharge under Section 727 is an extreme result. As such, an objection to discharge must be construed strictly against the objecting party and liberally in favor of the debtor. See First Beverly Bank v. Adeeb (In re Adeeb), 787 F.2d 1339, 1342 (9th Cir. 1986); Cheung v. Fletcher (In re Cheung), 551 B.R. 455, 460 (Bankr. E.D. Cal. 2016); Shapiro v. Smith (In re Smith), 481 B.R. 633, 637 (Bankr. D. Nev. 2012).

[4] The Answer was filed by Attorney Bunce, who has represented the Debtor throughout this adversary proceeding.

[5] On January 13, 2018, the Chapter 7 Trustee passed away. Because the case has been fully administered, no successor bankruptcy trustee was appointed.

[6] After the close of evidence, Plaintiff sought to amend his Complaint according to proof, to assert Section 727(a)(3) as an additional basis to deny the Debtor's discharge. Debtor did not object to the amendment.

Section 727(a) provides that an individual debtor shall be granted a discharge unless at least one of twelve different circumstances are present. In the instant case, the relevant circumstances under Section 727(a) state in pertinent part:

> (3) the debtor has . . . failed to keep or preserve any recorded information, including books, documents, records, and papers, from which the debtor's financial condition or business transactions might be ascertained, unless such act or failure to act was justified under all of the circumstances of the case;
>
> (4) the debtor knowingly and fraudulently, in connection with the case - (A) made a false oath or account . . . ;
>
> (5) the debtor has failed to explain satisfactorily, before determination of denial of discharge under this paragraph, any loss of assets or deficiency of assets to meet the debtor's liabilities.

11 U.S.C. § 727(a)(3, 4(A) and 5) (Emphasis added). An objection based on a failure to keep or preserve records under Section 727(a)(3), a false oath under Section 727(a)(4)(A), or a failure to explain under Section 727(a)(5), must be timely raised through commencement of an adversary proceeding. Fed.R.Bankr.P. 7001(4).

Under Section 727(a)(3), the objecting party bears the initial burden of establishing that the debtor has failed to keep or preserve sufficient records to ascertain the debtor's financial condition. See Samson v. Retz (In re Retz), 606 F.3d 1189, 1196 (9th Cir. 2010). Once the objecting party does so, the burden shifts to the debtor "to justify the inadequacy . . . of the records." Sun Communities Operating L.P v. Caneva (In re Caneva), 550 F.3d 755, 761 (9th Cir. 2008). "The issue of justification is decided under an objective standard and depends on what a normal, reasonable person would do under similar circumstances. Id. at 763 ("'Justification for [a] bankrupt's failure to keep or preserve books or records will depend on ... whether others in like circumstances would ordinarily keep them.'")." Chen v. U.S. Trustee (In re Chen), 2017 WL 4768104, at *6 (B.A.P. 9th Cir. Oct. 17, 2017), quoting In re Caneva, 550 F.3d at 763. It is well established that the exception to dischargeability '"should be strictly construed in order to serve the Bankruptcy Act's purpose of giving debtors a fresh start.'" In re Caneva, 550 F.3d at 761, quoting Industrie Aeeronautiche v. Kasler (Matter of Kasler), 611 F.2d 308, 310 (9th Cir. 1979).

Section 727(a)(5) operates in a similar fashion. The objecting party has the initial burden of demonstrating: (1) that the debtor at one time not too long before the petition date, owned identifiable assets, (2) that the debtor no longer owned the assets on the petition date, and (3) that the bankruptcy schedules and statements do not adequately explain the disposition of the assets. See In re Retz, 606 F.3d at 1205. Once the objecting party meets this burden, the debtor must provide "credible evidence regarding the disposition of the missing assets." Id. at 1205, citing Devers v. Bank of Sheridan (In re Devers), 759 F.2d 751, 754 (9th Cir. 1985). Because Section 727(a)(5) does require recorded information, however, the debtor's oral testimony may constitute credible evidence explaining the disposition of assets. Id. at 754.

Unlike Sections 727(a)(3) and 727(a)(5), the burden on the objecting party under Section 727(a)(4)(A) is not merely to establish that the written and oral statements and representations of a debtor are false. Rather, the objecting party must prove that the debtor "knowingly" and "fraudulently" made a false oath, which requires proof of actual intent. See In re Devers, 759 F.2d at 753. Actual intent may be established by circumstantial evidence or inferences drawn from the debtor's conduct. Id. at 753-54.

A false oath may be a false statement or an omission in the schedules and statements filed by the debtor. See Riley v. Searles (In re Searles), 317 B.R. 368, 377 (B.A.P. 9th Cir. 2004). A debtor has a duty to prepare his or her schedules "carefully, completely and accurately." In re Mohring,142 B.R. 389, 394 (Bankr. E.D. Cal.1992), aff'd mem., 153 B.R. 601 (B.A.P. 9th Cir. 1993), aff'd mem., 24 F.3d 247 (9th Cir. 1994).

A person acts knowingly if he or she acts deliberately and consciously. See Roberts v. Erhard (In re Roberts), 331 B.R. 876, 883 (B.A.P. 9th Cir 2005), aff'd, 241 Fed.Appx. 420 (9th Cir 2007). A debtor's education and experience may be considered in evaluating the debtor's knowledge of a false statement. See Montey Corporation v. Maletta (In re Maletta), 159 B.R. 108, 112 (Bankr. D. Conn. 1993); Perrine v. Speier (In re Perrine), 2008 WL 8448835, at *8 (B.A.P. 9th Cir. 2008).

That a debtor knows his or her schedules are false does not mean that the debtor intends to defraud, however, since Section 727(a)(4) requires proof of both knowledge and fraudulent

conduct. See Khalil v. Developers Surety and Indemnity (In re Khalil), 379 B.R. 163, 174 (B.A.P. 9th Cir. 2007). To prove that the debtor acted fraudulently, the objecting party must show that the false oath was made, that the debtor knew the oath was false at the time, and that the oath was made with the intention and purpose of deceiving creditors. Id. at 173.

A debtor's fraudulent intent may be inferred from his or her reckless indifference to the truth contained or omitted from the schedules and statements. See In re Khalil, 379 B.R. at 175-76. Proof of the debtor's motive to conceal information, while not required, may provide additional evidence of fraudulent intent. Id. at 176. The appellate court in Khalil observed:

> A bankruptcy court might find that a debtor's reckless indifference to the truth is part of an attempt to fly "below the trustee's radar screen" . . . or to protect family or friends from intrusive discovery or preference or fraudulent transfer actions, or simply to make investigation difficult for the bankruptcy trustee or creditors. Alternatively, the court might never know the debtor's motive, but the number of misstatements or omissions, or the size of nature of a single one, might suffice to support a finding that a debtor knowingly and fraudulently made a false oath or account.

Id. (Emphasis added.)

Generally, a debtor who relies in good faith on the advice of counsel lacks the intent necessary to deny a discharge. See United States Trustee v. Killian (In re Killian), 2008 WL 5834017 at *4 (Bankr. D. Or. 2008), citing, e.g., In re Adeeb, 787 F.2d at 1343 and Kavanagh v. Leija (In re Leija), 270 B.R. 497, 503 (Bankr. E.D. Cal. 2001).

PLAINTIFF'S ALLEGATIONS

Plaintiff alleges that the Schedules signed by the Debtor on March 9, 2017, were inaccurate. In particular, Plaintiff alleges that Schedule "G" failed to list a retention agreement that the Debtor entered with a criminal defense attorney. See Complaint at ¶¶ 25, 25, 27, 28.[7]

[7] In response to Question 28 in his Schedule "A/B," Debtor listed a "2016 tax refund with EIC." At trial, Debtor testified that H&R Block, a consumer tax preparation service, prepared his 2016 tax return that was listed in that Schedule. During his testimony, his recollection as to when he received that tax refund varied. Debtor testified that he may have documents reflecting when he received the tax return and how the funds were spent.

Plaintiff also alleges that the SOFA signed by the Debtor on March 9, 2017, was inaccurate. In particular, Plaintiff alleges that in response to Question 9 of the SOFA, Debtor failed to disclose the criminal matter that was pending within one year of the bankruptcy case. See Complaint at ¶¶ 18, 19, 20, 21. Additionally, Plaintiff alleges that in response to Question 6 of the SOFA, Debtor inaccurately listed only Dollar Loan Center as having been paid $600 or more within 90 days of the bankruptcy case. Id. at ¶¶ 51, 52.

Plaintiff further alleges that the Bankruptcy Questionnaire signed by the Debtor on March 10, 2017, was inaccurate. In particular, Plaintiff alleges that in response to Question 15 of the Bankruptcy Questionnaire, Debtor referred only to his response to Question 6 of the SOFA, which allegedly did not accurately list the creditors payment of $600 or more within 90 days of the bankruptcy case. See Complaint at ¶¶ 48, 49, 50, 51, 52. Additionally, Plaintiff alleges that in response to Question 2 of the Bankruptcy Questionnaire, Debtor inaccurately represented that his Schedules, SOFA, and other documents were true, complete, and accurate. Id. at ¶¶ 46, 47, 48.[8]

Plaintiff further alleges that the Debtor inaccurately testified under oath at the Creditors Meeting that the Schedules, SOFA, and Bankruptcy Questionnaire were true, complete and accurate. See Complaint at ¶¶ 38, 39, 40, 41, 53, 54, 55.

Plaintiff further alleges, on information and belief, the following: (1) that the Debtor entered into an executory contract for legal services of a criminal defense attorney on or before March 9, 2017, for representation in the criminal matter, (2) that on or about February 22, 2017, Debtor received a refund on his 2016 federal income taxes in the approximate amount of $6,005.00 ("Tax Refund"),[9] and, (3) that the Debtor used his Tax Refund to pay his criminal

[8] In Part IV, Item 13 of the Bankruptcy Questionnaire, Debtor described the disposition of the 2016 tax refund. At trial, Plaintiff questioned the accuracy and sufficiency of that description.

[9] Debtor admits this allegation in his response to the Complaint. See Answer at 1:22-24.

defense attorney. See Complaint at ¶¶ 27, 34, 35.[10] Plaintiff also alleges that the Debtor has failed to satisfactorily explain what he did with the Tax Refund. Id. at ¶ 63.

THE EVIDENTIARY RECORD

Debtor was the only witness who testified at trial. In addition to the Debtor's live testimony, six exhibits offered by the Plaintiff were admitted into evidence by stipulation of counsel. Exhibit "1" is a set of documents consisting of copies of the Petition, Schedules, and SOFA, signed by the Debtor on March 9, 2017. Exhibit "2" is a copy of a Bankruptcy Questionnaire & Document Request ("Bankruptcy Questionnaire") signed by the Debtor on March 10, 2017. Exhibit "3" is a copy of a Default Judgment entered on or about March 25, 2016, in Tim Radecki v. Mark Frink, Mark Rosich, and Steve Snider, Case No. A-14-69680, Eighth Judicial District, Nevada ("Default Judgment"). Exhibit "4" is a copy of the Complaint commencing this adversary proceeding. Exhibit "5" is a copy of the Answer filed in this adversary proceeding. Exhibit "6" is a copy of a Register of Actions in State of Nevada v. Steven I. Snider, Case No. 16M04685X, Justice Court for Clark County, Nevada ("Case Register"), in connection the Debtor's criminal prosecution for driving under the influence of alcohol ("DUI Action").[11]

DISCUSSION

There is no dispute that the Debtor commenced this voluntary Chapter 7 proceeding on March 9, 2017, on the advice and representation of Attorney Bunce. There is no dispute that all of the Debtor's bankruptcy papers were prepared by Attorney Bunce.

According to his Petition, Debtor has not filed a prior bankruptcy case within the past eight years. Additionally, Debtor is not a sole proprietor of any business and has primarily consumer debts. According to his property Schedule "A/B," Debtor has no interest in any real property and has $3,060 in personal property. The same Schedule discloses that the Debtor has

---

[10] In responding to these allegations "on information and belief", Debtor responded by admitting that he received the Tax Refund prior to commencing his bankruptcy case, but denying the other allegations. See Answer at 1:22-24 and 2:15-16.

[11] Debtor's Schedules do not list any debts for death or personal injury resulting from his DUI offenses. Under Section 523(a)(9), Debtor would not be discharged from any such debts.

no business assets, nor interests in any businesses. In his Schedule "C," Debtor claimed all of his personal property as exempt under applicable Nevada law. According to his Schedule "H," Debtor's former spouse lived with him during the same eight-year period but is not a co-debtor with respect to the debts listed in his Schedules. According to his Schedule "I," Debtor is a security guard at the Orleans Hotel & Casino in Las Vegas and has been employed in that capacity since October 1998. Debtor receives $1,850.00 in additional income each month. According to his Schedule "J," Debtor's household includes two dependent minors.

According to Part II of his Bankruptcy Questionnaire, Debtor is a widower, whose current household includes four people, including himself and his two minor children. According to Question 5 of his SOFA, Debtor has been receiving Supplemental Security Income ("SSI") benefits since at least January 1, 2015.[12] According to Question 27 of his SOFA, Debtor did not own any businesses within four years of the bankruptcy filing.

None of the foregoing information in the Petition, Schedules, SOFA, and Bankruptcy Questionnaire, all admitted into evidence, is disputed. All of that information, however, is material to the discharge objections raised by the Plaintiff.

According to the docket in the bankruptcy case, the Debtor filed his "debtor education" certificate on March 27, 2017. (ECF No. 11). Additionally, the Chapter 7 Trustee completed the Creditors Meeting on April 7, 2017, and submitted a "no asset" report on April 11, 2017. Plaintiff timely filed this adversary proceeding on June 2, 2017. Thus, although the Debtor has fulfilled the statutory requirements for bankruptcy relief, he has not received a Chapter 7 discharge due to the commencement of this adversary proceeding. Trial of this adversary proceeding has been completed and the evidentiary record is closed.

[12] It is not clear whether the Debtor's receipt of SSI benefits is based on the prior death of his spouse, or are received on behalf of the surviving minor children of the marriage. A minor's eligibility for SSI benefits can arise upon the death of a parent. That eligibility often terminates, however, when the minor turns 18 years old. On the petition date, Debtor listed his minor children as 14 and 17 years old.

The court has considered the Debtor's testimony along with the documents admitted into evidence. The court finds the Debtor's testimony to be credible in the context of the materials presented, and the evidence insufficient to warrant denial of a Chapter 7 discharge.

1. Denial of Discharge under Section 727(a)(4)(A) is Not Supported by the Record.

As summarized above, the evidence in the record is limited. There appear to be inaccuracies in the Schedules, SOFA, and Bankruptcy Questionnaire, but the court finds credible the Debtor's testimony that he did not intentionally misstate or omit information in his Schedule G, his responses to Questions 6 and 9 of the SOFA, nor his responses to Questions 2 and 15, and Part IV, of the Bankruptcy Questionnaire. Debtor testified that he relied on his bankruptcy counsel in preparing the subject documents, and that he did not believe any of them to be false. Debtor's bankruptcy counsel, Attorney Bunce, was present throughout the trial, but was not called to testify,[13] neither to corroborate the Debtor's testimony, nor to contradict the Debtor's testimony.[14]

In this connection, the court also finds that the Debtor's reliance on his bankruptcy counsel was in good faith. On direct examination of the Debtor, Plaintiff established that in his

---

[13] Debtor appears to have waived the attorney-client privilege with respect to any communications with Attorney Bunce. In the trial statement she submitted on behalf of the Debtor, Attorney Bunce takes responsibility for deficiencies in Schedule G, the responses to Questions 6 and 9 of the SOFA, and the responses to Questions 2 and 15 of the Bankruptcy Questionnaire. See Debtor Trial Statement at 2:24 to 3:1 ("Debtor/Defendant's counsel believed and therefore advised him he was not required to disclose a pending criminal case that was more than one year old, nor to disclose payment of a legal retainer for the criminal representation as payment of a debt, and that payment for future services was not an executory contract because there was no obligation to pay unless and until the services were provided beyond what has been paid as a retainer."); 4:18-22 ("Debtors, and indeed, sometimes their legal counsel, do make innocent mistakes. Debtor and his counsel do not and did not believe that payment made to retain a defense attorney was a payment of an unsecured debt, or that an agreement to pay for legal services to be provided in the future is an executory contract. If this belief was mistaken, it is a reasonable mistake."). While the arguments of counsel ordinarily do not constitute evidence, the court has discretion to treat counsel's factual representations as judicial admissions.

[14] Plaintiff apparently took the Debtor's deposition before trial and sought documents from the Debtor through discovery. At trial, Debtor testified that he did not recall whether documents had been provided to Attorney Bunce in response to discovery. Attorney Bunce was not called to testify. Moreover, a copy of the discovery propounded by the Plaintiff, including any interrogatories or document requests, was not introduced into evidence.

occupation as a casino security guard, Debtor understood the importance of contemporaneously preparing accurate incident reports. On those occasions, Debtor testified that he personally prepared the reports rather than relying on a separate professional to do so. In this bankruptcy proceeding, however, Debtor attested that he relied on Attorney Bunce, an experienced bankruptcy attorney, to advise him and to prepare the subject bankruptcy documents. Debtor's reliance on legal counsel in his bankruptcy case is consistent with his other testimony that he relied on legal counsel to represent him in another DUI criminal matter in 2010, to respond to a wage garnishment commenced by the Plaintiff prior to the bankruptcy filing, and to respond to the pending DUI Action.

Under these circumstances, the court concludes that the Plaintiff has failed to meet his burden of proving that the misstatements and omissions in the Schedules, SOFA, and Bankruptcy Questionnaire, were knowingly and fraudulently perpetrated by the Debtor. Accordingly, denial of discharge under Section 727(a)(4)(A) is unwarranted.

2. <u>Denial of Discharge under Sections 727(a)(3) and 727(a)(5) is Unwarranted.</u>

The limited evidentiary record also shapes the court's conclusions with respect to the Tax Refund. In his Answer to the Complaint, Debtor admits that he received the Tax Refund in the amount of $6,005.00 on or about February 22, 2017. Debtor filed his voluntary Chapter 7 petition fifteen days later on March 9, 2017. At trial, he testified that he may have received all or part of his Tax Refund through a "rapid refund" process used by H&R Block, his tax preparation service.

In Part IV, Item 13 of the Bankruptcy Questionnaire, Debtor attested that he used the Tax Refund check "to pay legal fees on bankruptcy and other pending legal matters to other attorneys." That response to Item 13 also listed several documents attached to the Bankruptcy Questionnaire, including an income analysis, current income records, and "2 most recent 1040 Tax returns – Debtor received 2016 Refund Prior to Filing, Used Refund check to pay legal fees on bankruptcy and other pending legal matters to other attorneys."[15] At trial, Debtor testified

[15] The attachments referenced in Item 13 to the Bankruptcy Questionnaire are not included as part of Plaintiff's trial Exhibit "2."

that prior to the filing of the bankruptcy case, he had paid attorney Sandra Rebolledo up to $1,200.00, originally for services in connection with the wage garnishment, and attorney Mace Yampolsky up to $1,800.00,[16] for services in connection with the DUI Action.[17] At the time the Petition was filed, Attorney Bunce attested that she had received from the Debtor the amount of $1,289.00 as her flat fee and an additional $335.00 to pay the filing fee for the Debtor's case.[18] At trial, Debtor testified that he has no idea where he would have had the funds to retain his criminal defense attorney other than from the proceeds of his Tax Refund. Additionally, Debtor testified that at the time he filed his petition, he had $1,000 in cash on hand according to his Schedule "A/B."

As previously mentioned, only the Debtor was called to testify at trial. Prior to the trial, Plaintiff listed only himself and the Debtor as potential witnesses, see Plaintiff Trial Statement at 2:2-8, while the Debtor listed himself, an apparent successor to the Chapter 7 Trustee, and "any person with knowledge of the retainer agreement and payment of fees" from the law office of Attorney Yampolsky, his criminal defense attorney. See Debtor Trial Statement at 2:15-20. Also, as previously mentioned, see note 16, supra, Plaintiff objected to the introduction of testimony from the criminal defense attorney and no such testimony was offered at trial. This is

---

[16] Prior to trial, Debtor listed as a potential witness "Any person with knowledge of retainer agreement and payment of fees from the Law Office of Mace Yampolsky, 625 S Sixth Street, Las Vegas, Nevada 89101." Debtor Trial Statement at 2:19-20. Plaintiff filed a motion in limine to prevent such testimony (AECF No. 32), but that motion was denied without prejudice at the pre-trial conference, subject to being renewed in the event such a witness was called by the Debtor.

[17] According to the Case Register, the DUI Action had commenced on February 26, 2016, with the filing of a criminal complaint against the Debtor for a second DUI offense. Debtor apparently failed to appear at an arraignment on March 29, 2016, and was not arraigned until January 24, 2017, after the issuance of a bench warrant. After the arraignment, further proceedings on an amended DUI complaint were scheduled for March 14, 2017.

[18] Exhibit "1" includes a "Disclosure of Compensation of Attorney for Debtor(s)" signed by Attorney Bunce under penalty of perjury. In his response to Question 18 of his SOFA, Debtor also attested that he paid $1,289.00 to Attorney Bunce for legal fees.

unfortunate because testimony from Attorney Yampolsky could have corroborated or disputed the Debtor's testimony as to his pre-bankruptcy payment of a retainer to defend the DUI Action.

Similarly, the attorney hired by the Debtor to respond to the Plaintiff's wage garnishment, Attorney Rebolledo, never testified at trial, nor was she listed by either party as a potential witness. This too is unfortunate because testimony from Attorney Rebolledo could have corroborated or disputed the Debtor's testimony as to his pre-bankruptcy payments to address the wage garnishment.

At trial, Debtor testified that he does not have a bank account and that the paychecks he receives from his casino employer are cashed at the Orleans casino or at some other casino.[19] According to his Schedule "I", Debtor's combined net monthly income, including the SSI benefits for his minor children, is $3,922.65.[20] He testified that he pays his living expenses, such as food and rent, with cash, and that he provides cash to his sister to pay for utilities.[21] Debtor was not asked, nor did he testify, as to how he pays for legal services, including the amounts paid prior to bankruptcy for the services of Attorney Rebolledo, Attorney Yampolsky, and Attorney Bunce. Without a bank account, Debtor presumably made those payments with cash.

---

[19] Debtor was not asked and did not state whether he is paid by his employer on a weekly, bi-weekly, or monthly basis. Additionally, no evidence was presented as to the frequency in which he is paid. Any earnings from post-bankruptcy services that he received after he filed his Chapter 7 petition, of course, were not property of his bankruptcy estate. 11 U.S.C. § 541(a)(6). In other words, Debtor was free to make post-petition payments to his attorneys from his post-petition earnings after March 9, 2017. Arguably, it should not have been necessary to make such payments to Attorney Rebolledo because the wage garnishment should have ceased as a result of the automatic stay as soon as the bankruptcy petition was filed. Because the DUI Action was not subject to the automatic stay, however, it may have been necessary to make continuing post-petition payments to Attorney Yampolsky. Unfortunately, neither Attorney Rebolledo nor Attorney Yampolsky were called to testify, nor were any records from such counsel offered into evidence.

[20] This figure reflects net monthly employment income of $2,072.65, plus SSI benefits of $1,850.00.

[21] No evidence was presented as to whether the Debtor shares a residence with his sister, or rents his residence from his sister, or, if the utility service at his residence is under his sister's name.

According to his Schedule "J," Debtor's average monthly living expenses, including rent, are $4,031.59, leaving him a deficit of $108.94 each month.[22] Debtor also testified that prior to filing for bankruptcy, twenty-five percent of his wages were being garnished by the Plaintiff.[23] He also testified he has gambling losses which, according to his response to Question 15 of his SOFA, average from $200 to $300 per month, totaling approximately $3,000 in the prior year.[24] In response to Question 18 of his SOFA, Debtor also attested that he had pawned two watches in October 2016 that he redeemed in February 2017.

Against this limited record of written and oral testimony solely from the Debtor, the court concludes that denial of discharge under both Section 727(a)(3) and Section 727(a)(5) is unwarranted.

A. Section 727(a)(3).

As previously discussed at 4, supra, Section 727(a)(3) places the burden on the objecting party to establish that the debtor has failed to keep or preserve sufficient records to ascertain the debtor's financial condition or business transactions. At trial, Plaintiff's counsel represented that he had not received any records from the Debtor. In this instance, however, there is nothing in the record establishing that the Debtor was requested in discovery to produce any recorded information whatsoever. A party's failure to produce records may infer that such records do not exist, but without evidence of the request being made, no such inference can be drawn. Debtor testified at trial that he may have provided documents to his bankruptcy counsel, Attorney

---

[22] Debtor's monthly expense Schedule "J" indicates that he has a four-person household that includes his two teenage children. The same Schedule also indicates that the Debtor pays monthly rent of $1,140, as well as $500 per month in legal fees for "ongoing noncivil suits." Debtor testified at trial that he did not recall whether the $500 monthly payment was being made to Attorney Rebolledo, who he hired primarily to respond to the wage garnishment.

[23] In his response to Question 10 of his SOFA, Debtor indicates that the Plaintiff's wage garnishment occurred over a five-month period from July to November 2016. It is not clear from the Debtor's testimony whether the wage garnishments also occurred in the three months immediately preceding the commencement of the bankruptcy case.

[24] Debtor testified that he has no records of his gambling losses, and does not believe that he had gambling losses in February 2017 that approached $3,000.

Bunce, but she was never called to testify. Moreover, the tragic passing of the Chapter 7 Trustee more than a year before trial, see note 5, supra, prevented the introduction of her testimony as to the records she received from the Debtor in response to the Bankruptcy Questionnaire; those records apparently included at least an income analysis, current income records, and the two most recent tax returns. See discussion at 11, supra.[25] Because Section 727(a)(3) imposes a threshold burden on the objecting party to prove a negative, this evidentiary gap results in factual chasm: the court cannot find that the Debtor has failed to keep or preserve records. See, e.g., U.S. Trustee v. Shoemaker (In re Shoemaker), 2018 WL 300524, at *11 (Bankr. C.D. Cal. Jan. 4, 2018) (United States Trustee failed to provide sufficient evidence that records constructively turned over to the debtor's Chapter 7 trustee were inadequate under Section 727(a)(3)); Pointe San Diego Residential C v. Weingarten (In re Weingarten), 2013 WL 309061 (Bankr. C.D. Cal. Jan. 25, 2013) (Creditor failed to prove what documents should be kept under the circumstances of the individual debtor's business).

But even if the court finds that the Debtor's recorded information is limited, the court must determine whether "others in like circumstances would ordinarily keep" different recorded information. See discussion at 4, supra. The focus in the instant case is on the disposition of a Tax Refund that did not exceed $6,005.00.

There is no dispute that the Debtor is an individual wage earner with no business interests or business operations as a source of income.[26] Other than his wages as a security guard, he receives, for now, SSI benefits on a monthly basis. Debtor has no prior history of seeking or obtaining bankruptcy relief. He has no extraordinary living expenses other than the legal expenses arising from the wage garnishment issued under the Default Judgment and arising from

---

[25] Likewise, there was no evidence introduced that any records previously in the possession of the Chapter 7 Trustee were obtained or attempted to be located by either party to this adversary proceeding.

[26] Individual debtors who have significant business experience and business assets typically have and are expected to have more recorded information from which their business transactions might be ascertained. See, e.g., In re Weingarten, 2013 WL 309061, at *3 ("The Ninth Circuit also agreed…that 'when a debtor is sophisticated and carries on a business having substantial assets, 'creditors have an expectation of greater and better record keeping.'").

his second DUI offense. Debtor testified that he needed the services of the criminal defense attorney in his DUI Action to keep his job and to stay out of jail. What a "normal, reasonable person would do in similar circumstances," see discussion at 4, supra, informs whether the Debtor's failure to keep other recorded information, if any, is justified in this case.

No evidence was adduced as to the Debtor's education or personal background. Other than what is represented in the Petition, Schedules, SOFA, and Bankruptcy Questionnaire, Debtor appears to be a typical wage earner with minor children and primarily consumer debts. There is no evidence to suggest, nor has any argument been made, that the Debtor has any business experience or a level of financial sophistication that would lead him to treat the Tax Refund other than as an immediate source to meet his pressing financial needs.[27]

Because the materials that apparently were provided to the Chapter 7 Trustee have not been offered or admitted as evidence, the court also cannot find that the Debtor failed to keep information that a "normal, reasonable person would do in similar circumstances." Moreover, Debtor's testimony that he may have recorded information or that such information may have been provided to his bankruptcy counsel, remains uncontradicted because Attorney Bunce was never called to testify. Thus, even if the Plaintiff had met his initial burden under Section 727(a)(3), the court finds that the alleged failure to keep or preserve additional recorded information by this typical, consumer debtor was justified under the circumstances of this case. Accordingly, denial of discharge under Section 727(a)(3) also is inappropriate.

[27] The urgency of the Debtor's financial needs during the weeks immediately preceding his bankruptcy filing is demonstrated by the record. Debtor had been arraigned in the DUI Action on January 24, 2017, and further proceedings in the criminal prosecution were scheduled for March 14, 2017. See note 17, supra. Presumably, Debtor received his W-2 for the 2016 tax year from his employer before the end of January 2017. He admittedly received all or a portion of the Tax Refund by February 22, 2017. Debtor, therefore, must have visited H&R Block after he received his W-2, but before February 22, 2017. Through Attorney Bunce, he filed his Chapter 7 petition on March 9, 2017. When the Debtor signed the Bankruptcy Questionnaire on March 10, 2017, he attested that copies of his "2 most recent 1040 Tax returns" were attached to the document. Presumably, those returns would have included the 2016 return prepared by H&R Block. Unfortunately, the copy of the Bankruptcy Questionnaire admitted into evidence as Exhibit "2" appears to be incomplete and does not include the documents that were attached. See note 15, supra.

B. Section 727(a)(5).

Also, as previously discussed, Section 727(a)(5) places the burden on the objecting party to establish that the debtor had assets prior to bankruptcy, the disposition of which are not adequately explained by the information provided in the debtor's bankruptcy documents or testimony. Also, as previously discussed, the focus in the instant case is on the disposition of a Tax Refund that did not exceed $6,005.00.

Debtor admitted that he received the Tax Refund on or about February 22, 2017, and testified at trial that he may have received portions of the Tax Refund under the "rapid advance" process used by H&R Block. The latter testimony might have been confirmed, one way or the other, if the copy of the Debtor's 2016 tax return, apparently attached to the Bankruptcy Questionnaire, had been admitted into evidence. But that return was not admitted.

Debtor also testified that he paid $1,289.00 plus $335.00 in attorney's fees and costs to Attorney Bunce for her bankruptcy services, that he paid up to $1,200.00 to Attorney Rebolledo for her wage garnishment services, and that he paid up to $1,800.00 to Attorney Yampolsky for his criminal representation. On their own, those amounts total $4,624.00, which would leave $1,381.00 remaining from the Tax Refund. Given the Debtor's testimony that he had $1,000.00 in cash on hand when he filed his Petition on the March 9, 2017, he appears to have explained the disposition of substantially all of the Tax Refund in question.

But the Debtor also is employed as a security guard and also receives SSI benefits each month. He was never asked at trial how often he gets paid by his employer, see note 19, supra, nor how often he receives government checks for the SSI benefits. Debtor testified that he had no way to pay his attorneys and still have $1,000 in cash on hand when he filed his Petition on March 9, 2017, other than by using whatever funds he received by that date from his Tax Refund. There was no testimony from Attorney Rebolledo nor Attorney Yampolsky to contradict the Debtor's explanation as to the timing and source of the payments for their non-bankruptcy services. Nor was Attorney Bunce called to testify to corroborate or contradict the timing or source of the funds she received for her bankruptcy services.

The court having observed and listened to the Debtor at trial finds his testimony to be credible. His testimony occasionally was inconsistent with some of the documents prepared by his bankruptcy counsel, but the court construes Section 727(a)(5), like all other exceptions to discharge, strictly in favor of providing the Debtor a fresh start. The court therefore finds that the Debtor has satisfactorily explained, by a preponderance of the evidence, the disposition of the Tax Refund. Accordingly, denial of discharge under Section 727(a)(5) also is inappropriate.

CONCLUSION

Based on the foregoing, the court concludes that the Plaintiff's objections to discharge under Sections 727(a)(3), 727(a)(4)(A), and 727(a)(5) should be overruled. A judgment in accordance with this Memorandum Decision shall be entered contemporaneously herewith. Each party to this adversary proceeding shall bear their own attorney's fees and costs.

Copies sent via CM/ECF ELECTRONIC FILING

Copies sent via BNC to:
STEVEN ISADORE SNIDER
6130 W FLAMINGO RD #439
LAS VEGAS, NV 89103-2280

# # #