UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF NEW YORK

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In re: Case No. 800-80490-511

DINESH TREHAN, Chapter 7

Debtor.

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RITU TREHAN,

Plaintiff, Adv. Pro. No. 800-8146-511

- against -

DINESH TREHAN,

Defendant.

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APPEARANCES:

EDWARD A. CHRISTENSEN, ESQ.
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OYSTER BAY, NY 11771

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DECISION AFTER TRIAL

HON. MELANIE L. CYGANOWSKI, U.S.B.J.:

On April 8 and 10, 2003, the Court held a trial of the issues contested in the above-captioned adversary proceeding that was commenced by Ritu Trehan (the "Plaintiff") on April 28, 2000. At the trial, the Defendant-Debtor, Dinesh K. Trehan (the "Debtor"), appeared in opposition. After considering the evidence

presented, and upon having had the opportunity to weigh the credibility of the witnesses, the Court herein renders its findings of fact and conclusions of law in accordance with Fed. R. Bankr. P. 7052(a).

The Evidence at Trial

The following documents were received into evidence at the trial: Plaintiff's Exhibits A, D through H (inclusive), J, K, and N through Q (inclusive); and Defendant's Exhibits 1 through 4 (inclusive).

In addition, the parties stipulated in their Joint Pre-Trial Statement to the following:

> The Plaintiff and Defendant are married and are the parents of three minor children. The Plaintiff and Defendant are parties to an action for divorce pending in the Supreme Court of the State of New York. In the matrimonial action, the court entered a pendente lite award to the Plaintiff on account of child support, medical benefits coverage and life insurance and directing that the Defendant make mortgage payments and other carrying costs for the real property.

See Joint Pre-Trial Statement, filed on April 3, 2003 ("Jt. P-T Statement"), at ¶ 4. Moreover, at the beginning of the trial, the Debtor stipulated to the entry of judgment against him with respect to the first cause of action to the extent that the State Court orders directing him to pay alimony, maintenance and child support are non-dischargeable pursuant to 11 U.S.C. § 523(a)(5) or 11 U.S.C. § 523(a)(15). (April 8, 2003 Transcript ("April 8th Tr.") at 7-8). The parties agreed that the issue of a distributive or property award has not, to date, been determined by the State Court and that that issue must be deferred. (April 8th Tr. at 7-8).

At the trial, the Court also heard the sworn testimony of the Plaintiff and the Debtor.

Background of the Case

A detailed description of the circumstances with which the Trehans have been involved over the past years is found in the "Short Form Order" entered by Justice Paul J. Baisley, Jr., on January 31, 2000 in the consolidated proceedings then pending before him. Pl. Exh. D; *see also Ritu Trehan v. Dinesh Trehan*, Index No. 99-17110 (Sup. Ct. Suffolk County 1999); *Dinesh Trehan v. Ritu Trehan*, Index No. 99-15466 (Sup. Ct. Suffolk County 1999). In brief, the Trehans were married in 1983 in Jalandhar, India and had three children during their marriage. For over 11 years, the Trehans lived in their marital home in Centereach, New York.

By her allegations, the Plaintiff asserts that the Debtor made several charges to her credit accounts, without her permission, at a time when he knew he was insolvent and unable to repay them. She further asserts that the Debtor should be denied a discharge in his bankruptcy case because he allegedly (i) looted the corporations under his control to the detriment of his creditors, (ii) substantially increased his liabilities by causing a mortgage to be filed against the marital home without accounting for how he used those monies, and (iii) failed to disclose certain assets, including certain properties that he allegedly owned in India. For his part, the Debtor disagrees and contends that any monies taken by him were always

returned for the benefit of the corporations and their respective creditors, and that his wife is mistaken in her belief that he owns any undisclosed property.

DISCUSSION

A. The Second Cause of Action

By her second cause of action, the Plaintiff alleges that the Debtor

> obtained extensions of credit on the Credit Cards at a time the Defendant knew or should have known he did not have the ability to repay these obligations. [Accordingly,] Plaintiff seeks a judgment that these obligations were incurred under false pretenses and should be excepted from discharge pursuant to 11 U.S.C. § 523(a)(2)(A).

Amended Complaint, ¶¶ 45-46. In her part of the Joint Pre-Trial Statement, the Plaintiff states that the Debtor "used credit lines in the name of the Plaintiff and the Defendant with Wells Fargo Bank, Bank One, MBNA, Capital One and Advantage Credit." *See* Jt. P-T Statement at 4.

Section 523(a)(2)(A) of the Bankruptcy Code reads, in pertinent part, as follows:

> (a) A discharge under section 727 ... does not discharge an individual debtor from any debt -
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> (2) for money, property, services, or an extension, renewal or refinancing of credit, to the extent obtained by -
>
> (A) false pretenses, a false representation, or actual fraud, other than a statement respecting the debtor's ... financial condition.

The burden is on the Plaintiff to establish each element of the statute by a preponderance of the evidence. *See Grogan v. Garner*, 498 U.S. 279, 287 (1991);

In re Reisman, 149 B.R. 31 (Bankr. S.D.N.Y. 1993). To sustain a cause of action under Section 523(a)(2)(A), a creditor must establish the following:

(i) The debtor made a false representation;
(ii) At the time the representation was made, the debtor knew it was false;
(iii) The debtor made the representation with the intention of deceiving the creditor;
(iv) The creditor justifiably relied on the representation; and
(v) The creditor sustained loss or damage as the proximate consequence of the false, material misrepresentation.

See, e.g., *In re Hanna*, 163 B.R. 918, 925 (Bankr. E.D.N.Y. 1994); *In re Jacone*, 156 B.R. 740, 743 (Bankr. S.D.N.Y. 1993).

A review of the evidentiary record shows that the Plaintiff has failed to carry her burden. The only documents to which the Plaintiff points are Pl. Exhs. E, L and N. Exhibit E consists of an unorganized array of letters from attorneys for various creditors demanding that their respective clients be paid. There is no description of the debts underlying the demands. There is no statement as to when any of the debts were incurred, much less by whom. Although Mrs. Trehan testified that she did not incur any of these debts and that Mr. Trehan did, in the absence of any documentation, the testimony essentially devolves into a "she said, he said" format. *See Schaffer v. Dempster (In re Dempster)*, 182 B.R. 790, 798-99 (Bankr. N.D. Ill. 1995) ("In a classic 'he said, she said' case, the lack of definitive records harms the party with the burden of proof").

Exhibit L, which was marked for identification, but not admitted, is more specific and consists of the electronic receipts furnished by Macys. These two receipts show that on December 17, 1999, the Debtor purchased 4 gift cards: 3 in the amount of $1,000, and 1 in the amount of $500, for a total of $3,500 being charged to the Macys account. The Debtor testified that he used the Macys card bearing his name; that he believed that he purchased the gift cards as gifts for "business friends," and that he fully intended to repay the debt with monies from the "business" since he considered the expense as a "business expense." Because the business was then shut down the following month by the Chapter 7 Trustee, he was unable to repay the obligation from business funds and personally filed for bankruptcy.[1]

Exhibit L was not admitted into evidence and, for that reason, it should not be considered in evaluating whether the Plaintiff has satisfied her burden of proof on the second cause of action. However, even if Exhibit L had evidentiary

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[1] AMSS Corporation filed a voluntary petition seeking bankruptcy relief under Chapter 11 on February 9, 1994. *In re AMSS Corporation*, Case No. 94-70293. At the time, the Debtor was the President of AMSS. The case was converted to one under Chapter 7 by Order dated March 20, 1996. Allan B. Mendelsohn was appointed as the Chapter 7 Trustee by the Office of the United States Trustee. On May 8, 1997, the AMSS Chapter 7 Trustee commenced an adversary proceeding against the Trehans, C. Chase Corp. ("C. Chase") and certain unnamed corporations alleging, *inter alia*, that C. Chase was the alter ego of AMSS. *See Mendelsohn v. Dinesh Trehan, et al.,* Adv. Pro. 897-07085-511. On January 24, 2000, the same date on which the Debtor herein filed his Chapter 7 petition in bankruptcy, the AMSS Chapter 7 Trustee was granted an Order and Default Judgment determining that C. Chase was the alter ego of AMSS.

value, there has been no showing that the Debtor made a false representation upon which the Plaintiff relied.

Exhibit N is an American Express credit card sales receipt, dated July 12, 1999, from a company called Elegantz in Smithtown where it appears that the Debtor charged $5,825. The Plaintiff testified that Elegantz is a women's garment store owned by the Debtor's friend, Harmeet Ina, and it appeared to her that this was a cash withdrawal and not the purchase of goods. (April 8th Tr. at 49-50). The Plaintiff testified that this was a charge to her American Express account and she never authorized the Debtor to sign her name. (April 8th Tr. at 50). On cross-examination, the Plaintiff clarified that the Debtor was an additional member on her account and, in fact, the Debtor had opened multiple credit accounts in her name by forging her signature. (April 8th Tr. at 60 - 64). Despite this, the Plaintiff never attempted to cancel the credit cards and never protested any of the charges on her accounts. (April 8th Tr. at 65).

The Debtor testified that the Plaintiff was fully aware of the credit card purchases because the bills were mailed either to their home or the office during a period of time when the Plaintiff was handling "everything." (April 10th Tr. at 47, 48). He testified that "[s]he paid the bills all the time. She had been signing from 1993 onward, and she paid all the bills. I never even signed – very rarely I would sign any check." (April 10th Tr. at 49).

While the Court may be sympathetic to a spouse's use of a personal credit card for purported "business purposes," it is not sufficient to support a Section 523(a)(2)(A) claim. Despite the infirmities in the Plaintiff's case and her credibility as a result of her failure to cancel the credit cards or dispute the charges, a Section 523(a)(2)(A) cause of action is not properly alleged by a party other than the party from whom the credit was obtained. The case of *Apte v. Marathe (In re Marathe)*, 212 B.R. 56 (Bankr. D. Del. 1997), is factually similar. In that case, the debtor's ex-wife brought an action under Section 523(a)(2) seeking to declare certain credit card debt non-dischargeable because the debtor repeatedly forged her name on various credit applications. The court in *Marathe* found that "[a]lthough the banks may have had a cause of action under 523(a)(2), [the ex-wife] cannot meet the standards set forth in *Field v. Mans*, 516 U.S. 59 (1995), as she is not the creditor of the credit card debt." *Marathe*, 212 B.R. at 58. The case of *Cromer v. Cromer (In re Cromer)*, 164 B.R. 680 (Bankr. M.D. Fla. 1994), is also a case of an ex-wife seeking nondischargeability for credit card debt incurred by her debtor/ex-husband. That court found that,

> Even a cursory reading of [Section 523(a)(2)(A)] and consideration of the undisputed facts ... leaves no doubt that the Debtor did not obtain any money, property, services, credit or the extension or renewal of credit from [his ex-wife]. While it might be contended that the Debtor did in fact obtain credit, albeit indirectly, by using the credit card, this proposition does not bear close analysis and to accept same would be stretching the scope of §523(a)(2)(A) to an illogical limit.

Cromer, 164 B.R. at 682-83.

Accordingly, judgment in favor of the Debtor will be entered on the second cause of action.

The Third Cause of Action

By her third cause of action, the Plaintiff alleges that the Debtor,

> has purposely concealed the Real Property to defraud, hinder or delay his creditors or an officer charged with custody of property under the Bankruptcy Code ... and that based upon his transfer and/or concealment of property his discharge should be denied pursuant to 11 U.S.C. § 727(a)(2)(A).

Amended Complaint ¶¶ 47-49. The Real Property alleged to have been concealed consists of: (1) Plot No. 25, Aradhan Enclave, R.K. Puram, section XIII, New Delhi, India 110 066; (2) Building No. 22177 B & 2218B situated at Old Railway Road, Jallandhar City, India; (3) No. B-35 Section 30, Noida, Dist. Ghaziabad, Uttar Pardesh, India (together, the "Real Property"). *Amended Complaint* ¶¶ 33-35.

11 U.S.C. § 727(a)(2) provides:

> (a) The court shall grant the debtor a discharge, unless -
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> * * *
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> (2) the debtor, with intent to hinder, delay, or defraud a creditor or an officer of the estate charged with custody of property under this title, has transferred, removed, destroyed, mutilated, or concealed, or has permitted to be transferred, removed, destroyed, mutilated, or concealed -
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> (A) property of the debtor, within one year before the date of the filing of the petition; or
>
> (B) property of the estate, after the date of the filing of the petition.

The burden is on the plaintiff to establish each of the elements of the statute by a preponderance of the evidence. *See Grogan v. Garner*, 498 U.S. 279 (1991); *In re Kressner*, 164 B.R. 235 (Bankr. S.D.N.Y. 1994); *In re Stone*, 90 B.R. 71 (Bankr. S.D.N.Y.), *aff'd,* 94 B.R. 298 (S.D.N.Y. 1988). Section 727 is construed strictly against the objectant and liberally in favor of the Debtor. *In re Adlman*, 541 F.2d 999, 1003 (2d Cir. 1976); *In re Shapiro*, 59 B.R. 844, 847 (Bankr. E.D.N.Y. 1986).

Regarding the real property at 25 Aradhan Enclave in New Delhi, India, the Plaintiff testified that she believed that she and the Debtor owned the property jointly, and, in fact, the Debtor admitted ownership of that property in his Statement of Net Worth, dated in October 1999, in connection with the matrimonial action (April 8th Tr. at 38; Pl. Exh. K). Therefore, the Plaintiff argues that the Debtor concealed that interest when he did not include it in Schedule A to his bankruptcy petition. The net worth statement was the Plaintiff's only documentary "proof" that the Debtor owned the Aradhan Enclave property.

The Debtor testified that in 1989 or 1990 he was a part owner of the Aradhan Enclave property which property contains a structure with a basement and ground floor. He testified that he owned the basement level and Plaintiff owned the ground floor. (April 10th Tr. at 36, 46). In 1994, he says he transferred ownership of his interest in the property to his brother-in-law, Dr. Ramesh Khosla. (April 10th Tr. at 46, 61). He testified that he included his interest in this property in the

Statement of Net Worth only because of his claim of equitable distribution rights to the property; and that this property was listed in his bankruptcy schedules by virtue of his listing his interest in joint matrimonial property. (April 8th Tr. at 107-108). The Debtor did not produce any documentary evidence showing that he transferred his interest in the real property to his brother-in-law.

The Plaintiff further testified that she was told by the Debtor and/or the Debtor's father, Mr. Baldev Raj Verman, and/or "family members" that the Debtor owned the remainder of the Real Property alleged to have been undisclosed. (April 8th Tr. at 40, 55 - 58, 90). The Plaintiff produced no documentary support for her allegation that the Debtor owned this property.

As with the second cause of action, in the absence of any documentation other than the Debtor's Net Worth Statement and Petition, the testimony essentially devolves into a "she said, he said" format. Absent documentary proof that the Debtor had ownership interests in the Real Property, the Court finds that the Plaintiff has not sustained her burden of proof under Section 727(a)(2) that the Debtor transferred or concealed the Real Property. Having made such a threshold finding, the Court need not reach the remaining elements of Section 727(a)(2), *i.e.*, that the transfer or concealment was made with the intent to hinder, delay or defraud creditors or the trustee; that the transfer or concealment was done post-petition or within one year prior to bankruptcy.

Accordingly, judgment in favor of the Debtor will be entered on the third cause of action.

The Fourth Cause of Action

By her fourth cause of action, the Plaintiff alleges that the Debtor "has knowingly and fraudulently, in or in connection with this case made false oaths or accounts." *Amended Complaint* ¶¶ 50-52.

11 U.S.C. § 727(a)(4) provides:

> (a) The court shall grant the debtor a discharge, unless -
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> * * *
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> (4) the debtor knowingly and fraudulently, in or in connection with the case -
>
> (A) made a false oath or account ... ;

The creditor objecting to the discharge of a debtor pursuant to § 727(a)(4)(A) must thus establish the following elements by a preponderance of the evidence: (1) the debtor made a statement under oath, (2) such 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 Bodenstein*, 168 B.R. 23, 32 (Bankr. E.D.N.Y. 1994); *In re Sapru*, 127 B.R. 306, 314 (Bankr. E.D.N.Y. 1991); *In re Arcuri*, 116 B.R. 873, 880 (Bankr. S.D.N.Y. 1990).

A debtor's petition and schedules constitute a statement under oath for purposes of Section 727(a)(4)(A). *See In re Gannon*, 173 B.R. 313, 320 (Bankr. S.D.N.Y. 1994); *In re Arcuri*, 116 B.R. at 880; *In re Bailey*, 53 B.R. 732, 735 (Bankr. W.D. Ky. 1985). This element will be met if a debtor is shown to have misstated a material fact in or have omitted the same from his petition and/or schedules. Courts have held that when debtors omit assets from their petition because of their reckless disregard for the truth, it is fraud for the purposes of Section 727(a)(4)(A). *In re Kaiser*, 722 F.2d 1574, 1583 (2d Cir. 1983); *In re Henderson*, 134 B.R. 147, 159 (Bankr. E.D. Pa. 1991). Similarly, a debtor's reckless indifference to the truth is tantamount to fraud. *In re Diorio*, 407 F.2d 1330, 1331 (2d Cir. 1969); *In re Gugliada*, 20 B.R. 524, 528-29 (Bankr. S.D.N.Y. 1982).

The Amended Complaint alleges that the Debtor's failure to disclose assets in his petition and schedules is a false oath under Section 727(a)(4). The Court already has found that the Plaintiff failed to carry her burden of proof with respect to the Debtor's alleged ownership of the Real Property and that will not form a basis for denial of discharge under Section 727(a)(2) or (a)(4).

The Plaintiff also alleges that the Debtor failed to schedule his ownership interest in a company called Nikasi. The Plaintiff alleges that the Debtor told her that he owned and made loans to Nikasi, and yet he failed to schedule his interest in, or the loans to, Nikasi in his bankruptcy petition. (April 8th Tr. at 41-42, 81-82). She also testified that she only knows this because the Debtor told her so.

She has never seen the stock certificates nor has she undertaken an investigation as to the Debtor's ownership of property in India. (April 8th Tr. at 82).

The Debtor testified that Nikasi is owned by his brother and his cousin, and that any loans he made to Nikasi were "adjusted" by a setoff at the end of 1999, prior to the filing of his bankruptcy petition and prior to his signing the net worth statement in state court. (April 8th Tr. at 121 - 126). He testified:

> [I]n 1996 I loaned some money to [Nikasi], thinking that I can buy the equity in [Nikasi], when the whole thing started. Then I asked them to convert my share into the equity, and they checked with the government authorities in India; since I was living outside of India, I was not allowed to buy any equity in the company. So they had to send me a letter saying that you are not allowed to get the equity, but we will pay you back your loan ....

(April 10th Tr. at 40). The Court received into evidence three letters related to Nikasi. The first is a letter from the Debtor addressed to "whomsoever it may concern," dated October 18, 1999, acknowledging that during the fiscal year 1996 - 1997, the Debtor made a contribution towards the equity capital of Nikasi India Pvt. Ltd. (Pl. Exh. G). The second, is a letter to the Debtor from Nikasi, dated October 24, 1999, thanking the Debtor for his contribution but stating that they are unable to return the funds and the Debtor's characterization of the contribution as "equity" is wrong and they cannot convert the loan into equity. (Def. Exh. 3). The Debtor explained that even though Nikasi's October 24th letter said that they would not be able to return the funds to him, they arranged that the money would be repaid to the Debtor by Nikasi's agreement to satisfy certain other debts on the Debtor's behalf by way of setoff. The third exhibit is a letter to "whom so ever it may concern," dated May 5,

2000, from the accounting firm of Subhash, Madhu & Associates in New Delhi, India indicating that the equity of Nikasi is owned equally by Ashwani Duggal and Chander Prabha Trehan. (Def. Exh. 2).

Based on the testimony and documentary evidence, the Court finds that the Plaintiff has failed to establish her burden of proving that the Debtor had an ownership interest in Nikasi. The Plaintiff failed to present any documentary proof of the Debtor's ownership interest in Nikasi. The Debtor denied his ownership interest, and produced a letter from Nikasi stating that the Debtor's contribution was a loan and not a participation in equity. Consequently, the only support for the Plaintiff's claim is her testimony that she was told that the Debtor owned the company. The Court finds that that is not enough to sustain the Plaintiff's burden of proof under Section 727(a)(4).

As for the Debtor's alleged failure to list loans to Nikasi as an asset, the Court similarly finds in favor of the Debtor. The documentary evidence suggests that the Debtor made what he thought to be an equity infusion to Nikasi (later characterized by Nikasi as a loan). However, the Debtor testified that prior to bankruptcy, that loan was repaid through an adjustment or a setoff. Although the Debtor's testimony in this regard was vague and unsubstantiated by documentary proof, the Court is required to construe Section 727 strictly against the Plaintiff and liberally in favor of the Debtor. *In re Adlman*, 541 F.2d 999, 1003 (2d Cir. 1976); *In*

re Shapiro, 59 B.R. 844, 847 (Bankr. E.D.N.Y. 1986). Absent rebuttal, the plaintiff's proof is insufficient to carry her burden.

Accordingly, judgment in favor of the Debtor will be entered on the fourth cause of action.

The Fifth Cause of Action

By her fifth cause of action, the Plaintiff alleges that the Debtor "has failed to explain satisfactorily for the loss of assets or deficiency of assets to meet his liabilities." *Amended Complaint* ¶¶ 53-55.

11 U.S.C. § 727(a)(5) provides:

> (a) The court shall grant the debtor a discharge, unless -
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> * * *
>
> (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 ...;

Section 727(a)(5) requires a creditor to prove that the debtor no longer has assets which the debtor previously owned and that the debtor has failed to explain the loss. *In re Colodner*, 147 B.R. 90, 94 (Bankr. S.D.N.Y. 1992); *In re Gannon*, 173 B.R. 313 (Bankr. S.D.N.Y. 1994). The objecting party is not required to establish that the debtor acted with fraudulent intent. *See In re Young*, 346 B.R. 597, 618 (Bankr. E.D.N.Y. 2006). Plaintiff has the burden of introducing evidence of the disappearance of assets. The burden then shifts to the debtor to satisfactorily

explain the loss or deficiency of assets. *In re Wolfson*, 139 B.R. 279, 286 (Bankr. S.D.N.Y. 1992), *aff'd*, 152 B.R. 830 (S.D.N.Y. 1993); *In re Silverstein*, 151 B.R. 657, 663 (Bankr. E.D.N.Y. 1993). "Whether a debtor has satisfactorily explained a loss of assets is a question of fact for the bankruptcy court , overturned only for clear error. *In re Hawley*, 51 F.3d 246, 248 (11th Cir.1995) (per curiam); *Farouki v. Emirates Bank Int'l, Ltd.*, 14 F.3d 244, 251 (4th Cir.1994). 'This standard is adhered to because the trial judge is best able to assess the credibility and evidentiary content of the testimony of the witnesses before him.' *In re Hawley*, 51 F.3d at 248 (citing *In re Chalik*, 748 F.2d 616, 619 (11th Cir.1984))." *In re MacIntyre*, No. 95-55617, 1996 WL 102577 at *5 (9th Cir. March 6, 1996).

To be satisfactory, the explanation must convince the court that the debtor "has not hidden or improperly shielded assets," *In re Bodenstein*, 168 B.R. 23, 33 (Bankr. E.D.N.Y. 1994), and "must convince the court of the debtor's business like conduct and good faith ... [and] must appear reasonable such that the court 'no longer wonders' what happened to the assets." *Id*. at 289 (*quoting In re Trogdon*, 111 B.R. 655, 659 (Bankr. N.D. Ohio 1990)); *see In re Gannon*, 173 B.R. 313 (Bankr. S.D.N.Y. 1994). The Code does not require that the Debtor's explanation be meritorious, or "that the loss or other disposition of assets be proper; it only requires that the explanation satisfactorily account for the disposition." *Bodenstein*, 168 B.R. at 33; *In re Silverstein*, 151 B.R. 657, 663 (Bankr. E.D.N.Y. 1993) (the question is "whether the explanation satisfactorily describes what happened to the assets, not whether what happened to the assets was proper").

Although some courts require that the Debtor's explanation be corroborated by documentary proof, *see In re Wolfson*, 139 B.R. 279, 286 (Bankr. S.D.N.Y. 1992), *aff'd*, 152 B.R. 830 (S.D.N.Y. 1993) ("Vague and indefinite explanations of losses that are based upon estimates, uncorroborated by documentation are unsatisfactory"), others do not where the Debtor's testimonial explanation is credible. *Bodenstein*, 168 B.R. at 34.

The Plaintiff has alleged that the Debtor refinanced the mortgage on the marital residence and took out a $30,000 second mortgage with Household Finance in February 1999. (April 8th Tr. at 17). In her contention of facts in the Joint Pretrial Statement, the Plaintiff asserts that "[w]ithin one year of the Filing Date the Defendant [] substantially increased his liabilities by causing a mortgage to be filed against the marital home ... and failed to account for the use of these funds. Upon information and belief the Debtor has secreted these funds in the names of others." At trial, the Plaintiff testified to the same and the Debtor concedes that he took a second mortgage on the home. Under the shifting burden standard outlined above, this is sufficient for the Plaintiff to show that there was a loss or deficiency in the Debtor's assets. The burden then shifts to the Debtor to explain the loss.

At trial, the Debtor testified that he used the proceeds of the second mortgage to pay the Plaintiff's $36,000 credit card debt. (April 8th Tr. at 137). However, his testimony was not substantiated by documentary proof, and the Court is left with only his word against the Plaintiff's. The Debtor has thus far escaped

denial of his discharge by virtue of the Plaintiff's failure to carry her burden of proof by lacking documentary evidence to corroborate her testimony. Indeed, the Court finds the Debtor's testimony to be less credible than the Plaintiff's and further finds, having had the opportunity to assess the demeanor of the Debtor and consider his background as a sophisticated businessman, his utter lack of record-keeping and failure to account for assets inexcusable.

In particular, the Debtor's testimony has shown that he has consistently failed to maintain any formal distinction between his personal and business assets and liabilities (April 8th Tr. at 116-17), and he has consistently failed to maintain or produce documentation supporting important business transactions such as with the Nikasi setoff discussed above, or the C. Chase/AMSS/BKP transactions, discussed below. For example, the Debtor testified that his failure to provide documentation for certain business transactions was the result of being locked out of his building. (April 8th Tr. at 137-38). Moments later, the Debtor testified that he had the ability to get copies, but didn't know he would need them. (April 8th Tr. at 139). Discovery was conducted in this case and the Debtor was represented by able counsel throughout the process. For the Debtor to claim that he did not know he would need copies of documents supporting his defense does not ring true. Moreover, these deficiencies are not directly relevant to the fifth cause of action, but are relevant to the Court's assessment of the credibility of the Debtor's testimony. For all the reasons noted above, the Debtor's testimony in opposition to the fifth cause of action, particularly as it is neither credible nor with supporting

documentary proof of his assertions, is insufficient to carry the burden of proof which falls upon him and the Court thus concludes that the Debtor has failed to explain the loss. *See, e.g., In re Colodner*, 147 B.R. at 94; *In re Gannon*, *supra*, 173 B.R. 313; *In re Wolfson*, 139 B.R. at 286; *In re Silverstein*, 151 B.R. at 663.

Accordingly, judgment in favor of the Plaintiff will be entered on the fifth cause of action and the Court directs that the Order of Discharge must be denied under Section 727(a)(5).

The Sixth Cause of Action

By her sixth cause of action, the Plaintiff alleges that,

> On or after one year before the Filing Date the Defendant in connection with the bankruptcy case of AMSS committed acts specified in 11 U.S.C. Section 727 (a)(2), (3), (4), (5) or (6) .... As a result of these acts the Defendant hindered and delayed the Trustee in recovering assets for the benefit of the creditors of AMSS .... The Defendant unnecessarily increased the expenses of administering the estate of AMSS, resulting in a diminution in the recovery of the creditors of AMSS. ... By secreting assets from the Trustee in the AMSS case, the Defendant decreased the recovery by the Trustee in the AMSS case. ... As a result of the diminution in recovery in AMSS, creditors, including the Internal Revenue Service, will have claims against this estate which would have been reduced by a distribution in the AMSS case. Plaintiff seeks a determination that defendants [sic] discharge should be denied pursuant to 11 U.S.C. §727(a)(7).

Amended Complaint ¶¶ 56-62.

11 U.S.C. § 727(a)(7) provides:

> The court shall grant the debtor a discharge, unless ... the debtor has committed any act specified in paragraph (2), (3), (4), (5), or (6) of this

> subsection, on or within one year before the date of the filing of the petition, or during the case, in connection with another case, under this title or under the Bankruptcy Act, concerning an insider.

Therefore, in order to succeed on the Section 727(a)(7) cause of action, the Plaintiff must show by a preponderance of the evidence that the Debtor: (1) in connection with another case with respect to which the Debtor was an insider (*i.e.*, AMSS Corporation), (2) within one year before the date of the filing of the petition (*i.e.*, from January 24, 1999 through January 24, 2000, the petition date), (3) committed one of the acts specified in Section 727(a)(2), (3), (4), (5), or (6).[2] "The purpose of

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[2] Section 727(a)(2), (3), (4), (5) and (6) provides as follows:

> (a) The court shall grant the debtor a discharge, unless –
> . . .
> (2) the debtor, with the intent to hinder, delay or defraud a creditor or an officer of the estate charged with custody of property under this title, has transferred, removed, destroyed, mutilated, or concealed, or has permitted to be transferred, removed, destroyed, mutilated or concealed
> (A) property of the debtor, within one year before the date of the filing of the petition; or
> (B) property of the estate, after the date of the filing of the petition; [or]
>
> (3) the debtor has concealed, destroyed, mutilated, falsified, or 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; [or]
>
> (4) the debtor knowingly and fraudulently, in or in connection with the case –
> (A) made a false oath or account;
> (B) presented or used a false claim;
> (C) gave, offered, received, or attempted to obtain money, property, or advantage or a promise of money, property, or advantage, for acting to forbear to act; or
> (D) withheld from an officer of the estate entitled to possession under this title, any recorded information, including books, documents, records, and papers, relating to the debtor's property or financial affairs; [or]
>
> (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

Section 727(a)(7) is to bind 'related cases together so that misconduct in one case by an individual may be chargeable against that individual in other related proceedings.' *Whiteside F.S., Inc. v. Siefkin*, 46 B.R. 479, 480-81 (N.D.Ill.1985). [Citation omitted]. Section 727(a)(7) is designed so as to prevent debtors who are involved in several bankruptcy proceedings from failing to cooperate in a proceeding in which their own discharge is not at issue such as a corporate proceeding involving a partner or relative and then, subsequently or simultaneously, obtaining an individual discharge in another case. *Siefkin*, 46 B.R. at 480-81." *In re Transportation Management Inc.,* 278 B.R. 226 (Bankr. M.D. Ala. 2002). Although the ultimate burden of proof is on the objecting party, "the debtor cannot prevail if he fails to offer credible evidence after the creditor makes a prima facie case." *Farouki v. Emirates Bank Intern., Ltd.*, 14 F.3d 244, 249 & n.16 (4th Cir. 1994) .

The Plaintiff alleges that after the Debtor's corporation, AMSS Corporation ("AMSS"), filed bankruptcy in February 1994, the corporate

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to meet the debtor's liabilities; [or]

(6) the debtor has refused, in the case –
- (A) to obey any lawful order of the court, other than an order to respond to a material question or to testify,
- (B) on the ground of privilege against self-incrimination, to respond to a material question approved by the court or to testify, after the debtor has been granted immunity with respect to the matter concerning which such privilege was invoked; or
- (C) on a ground other than the properly invoked privilege against self incrimination, to respond to a material question approved by the court or to testify. ...

opportunities and assets of AMSS were diverted to C. Chase Corp., and then to BKP Corp and DJ World Corp, all entities controlled by the Debtor.

AMSS filed a voluntary Chapter 11 petition on February 9, 1994. The case was converted to Chapter 7 on March 20, 1996 and Allan B. Mendelsohn was appointed to serve as Chapter 7 Trustee in the case. On May 8, 1997, Trustee Mendelsohn filed a complaint against Dinesh Trehan, Ritu Trehan, C. Chase and several unnamed corporations, alleging, in pertinent part, that Dinesh and Ritu Trehan wrongfully and fraudulently transferred the assets of AMSS to C. Chase and other businesses owned or controlled by the Trehans; that C. Chase was capitalized with AMSS funds and was the alter ego of AMSS; that the transfers to C. Chase and other related corporations, of which AMSS did not keep any formal records, were intended to enrich the Trehans and their businesses to the detriment of AMSS; that the Trehans funneled apparel sales either to AMSS or C. Chase based upon the available corporate credit; and that the Trehans breached their fiduciary duties as directors and officers of AMSS by mismanaging AMSS and squandering AMSS assets.

On January 24, 2000, Trustee Mendelsohn obtained a judgment by default against C. Chase on all causes of action in the complaint, including that C. Chase was the alter ego of AMSS and that all of C. Chase assets belonged to the bankruptcy estate of AMSS. The judgment also provided that all assets of C. Chase could be seized, attached and liquidated by Trustee Mendelsohn to satisfy claims

against the AMSS estate. Shortly thereafter, the Trustee discontinued the lawsuit as against the Trehans without prejudice, in part, because Mr. Trehan filed his personal bankruptcy which stayed the lawsuit.

In support of her Section 727(a)(7) cause of action, the Plaintiff testified that she began working at AMSS at the Debtor's request in October 1993 and gradually learned the business. (April 8th Tr. at 24). By 1999, the Plaintiff testified that she was managing imports, paying bills, generating bills, managing part-time labor and handling the bank accounts for AMSS. (April 8th Tr. at 24-25). At some point in time, AMSS stopped doing business and the business transactions of AMSS were shifted into the name of C. Chase, which maintained the same phone number and business location as AMSS. (April 8th Tr. at 26). The Plaintiff testified that the Debtor never advised Trustee Mendelsohn that he was transacting business under the name of C. Chase. The Plaintiff also testified that C. Chase maintained a bank account at the Bank of New York and that she and the Debtor were both signatories on that account. On or about January 1, 1996, the Debtor resigned as President of C. Chase and transferred 100 shares of common stock to the Plaintiff. At that time, the Plaintiff became the President of C. Chase and both the Plaintiff and the Debtor were signatories on the C. Chase bank accounts. (Exhibit I).

Plaintiff further testified that sometime around June or July of 1999, C. Chase stopped doing business, the Debtor changed the locks on the building and denied the Plaintiff access to C. Chase business offices. (April 8th Tr. at 28). This

was shortly after the Plaintiff and Debtor separated in April 1999. In response, the Plaintiff apparently froze the bank accounts of C. Chase.

The Plaintiff testified that she eventually gained access to C. Chase offices but most of the C. Chase files were missing and she found documents regarding an entity called BKP Corporation. Plaintiff's counsel introduced Exhibit J into evidence which is a series of invoices, an invoice register and a cover letter from Allied Shipping Impex dated July 20, 1999, stating that at the Debtor's direction, BKP Corporation[3] was substituted in place of C. Chase as the shipper on a certain delivery order. The attached invoices show the name of C. Chase crossed out and BKP substituted. The Plaintiff testified that C. Chase was never paid for certain of the goods in the invoices, but rather the goods shipped by C. Chase on that particular invoice were billed by Excel Sports, which is a sporting goods company owned by Mr. Raj Malik, a friend of the Debtor's. (April 8th Tr. at 33-34). On cross-examination, when questioned about the invoice register for C. Chase contained in Exhibit J, the Plaintiff testified that there exists a separate chart which shows that C. Chase did not receive payment for its invoices. (April 8th Tr. at 67). Plaintiff testified that she did not have access to that chart which is why it was not introduced at trial. She further testified that she believed that C. Chase funds were diverted to different bank accounts based upon the Debtor's own statements to her,

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[3] The Plaintiff introduced Exhibit K into evidence which is a Net Worth Statement from the Debtor and Plaintiff's matrimonial action. Exhibit K shows that the debtor claimed a 100% ownership interest in BKP Corporation and DJ World. (April 8th Tr. at 36-37).

but that she did not have any documentation in her possession to support her belief. (April 8th Tr. at 68).

For his part, the Debtor testified that there was never any money diverted from C. Chase that did not ultimately go back to C. Chase. "Whatever I did, it was all for the benefit of the C. Chase and the family, and there [was] no money that was diverted from C. Chase and it had been looked into over and over again, and there was not even a single penny did not come out of C. Chase. Eventually it went back to C. Chase." (April 10, 2003 Tr. at 50). He particularly claimed in his testimony that the Allied Shipping invoice that was introduced as Exhibit J was paid to C. Chase. Although the money may have been initially paid to BKP, it was, he says, ultimately transferred to C. Chase.

The Plaintiff has not specified which subsection of § 727(a) that the Debtor allegedly violated in connection with the AMSS bankruptcy. Nonetheless, in keeping with Federal Rule of Civil Procedure 15(b), as made applicable to adversary proceedings by Federal Rule of Bankruptcy Procedure 7015, issues not raised by the pleadings may be tried by express or implied consent of the parties and "shall be treated in all respects as if they had been raised in the pleadings." Based on the evidence presented, the Court believes that the parties tried the issues as if the pleadings had alleged that the Debtor violated Section 727(a)(2) in connection with the prior bankruptcy case.

At trial, the only documentary evidence to support a violation of Section 727(a)(2) in connection with the AMSS bankruptcy was Exhibit J which shows that the Debtor, in or about July 1999, deliberately transferred the business opportunities of C. Chase to BKP. This was at a time when the Debtor and the assets of C. Chase and AMSS were being actively investigated by the Chapter 7 Trustee of AMSS. The letter from Allied Shipping Impex, included in Exhibit J states in part: "[O]n July 15, 1999 we received instructions from Mr. Dinesh [Trehan] to show B.K.P. Corporation as the shipper on the delivery order [in place of C. Chase]." In addition to this documentary evidence, the Court takes judicial notice of the allegations against the Debtor and C. Chase by Trustee Mendelsohn in the AMSS bankruptcy, and the fact that a default judgment was entered against C. Chase which was not appealed. Standing alone, Exhibit J might not be sufficient to prove the Plaintiff's case under Sections 727(a)(2) and 727(a)(7). However, the Court finds that Exhibit J, together with the detailed allegations of the complaint and the judgment from the AMSS bankruptcy case, as well as with this Court's assessment of the credibility and demeanor of the witnesses are enough to satisfy the Plaintiff's burden of proof under Sections 727(a)(2) and (7).

The Debtor had the opportunity to rebut the Plaintiff's allegations but did not offer any documentary evidence to support his testimony that C. Chase funds were ultimately returned to C. Chase.

Given this Court's familiarity with the long and tortured history of the AMSS bankruptcy and the allegations raised by Trustee Mendelsohn therein, and having had the opportunity assess the credibility of the Debtor's testimony in this case, the Court fully believes that the Debtor freely transferred assets among his corporate entities without any corporate formalities and without regard to the creditors of the respective corporations. The Court also believes that the Debtor transferred assets of C. Chase (alter ego of AMSS) to BKP within one year of filing his personal bankruptcy and thus concludes that the Plaintiff has met her burden of proof on the sixth cause of action.

Accordingly, judgment will enter in favor of the Plaintiff on the sixth cause of action and the Court directs that the Order of Discharge must be denied under Section 727(a)(7).

Conclusion

For all of the foregoing reasons, judgment will enter in favor of the Plaintiff on the first, fifth and sixth causes of action of the Amended Complaint. Judgment in favor of the Debtor will enter on the second, third and fourth causes of action. A separate Order and Judgment consistent with this Decision will be entered by the Court.

DATED: Central Islip, New York
October 12, 2006

/s/ Melanie L. Cyganowski
HON. MELANIE L. CYGANOWSKI
United States Bankruptcy Judge