

United States Bankruptcy Court
Eastern District of Michigan
Southern Division

In re:

Gregory and Jennifer Cutler,
Debtors.

Case No. 04-50943-R
Chapter 7

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George P. Dakmak, Trustee,
Plaintiff,

v.

Adv. No. 04-4796

Gregory and Jennifer Cutler,
Defendants.

_____/

Opinion Regarding Trustee's Motion for Summary Judgment

George Dakmak, the chapter 7 trustee, filed an adversary proceeding to deny the Cutlers' discharge pursuant to 11 U.S.C. § 727(a)(3). The trustee asserts that the Cutlers have failed to keep or preserve recorded information from which their financial condition and business transactions might be ascertained. The trustee filed a motion for summary judgment. The Cutlers filed a response and a cross-motion for summary judgment. The Court conducted a hearing on April 11, 2005, and took the matter under advisement.

I.

The Cutlers filed for chapter 7 relief on April 14, 2004. On their schedules, they disclosed unsecured debts of \$1,464,407 and assets of \$4,650. On May 19, 2004, the first meeting of creditors was conducted. On July 13, 2004, the Cutlers amended their schedule F to add two omitted creditors. This increased their scheduled unsecured debt to \$2,564,407.

On May 27, 2004, the trustee issued a subpoena requiring the Cutlers to appear for an examination and produce certain documents.

On August 31, 2004, the trustee filed this complaint objecting to the discharge under § 727(a)(3). In the complaint, the trustee alleges that the debtors owned and managed in excess of eighteen rental properties. The trustee alleges that in connection with this business the Cutlers received loans and investments from various parties in excess of \$1,000,000. The trustee alleges that the Cutlers have failed to provide requested bank statements, check registers, and cancelled checks for the years from 1999 to the present, which would assist the trustee in tracing the funds that the debtors received. The trustee also alleges that the debtors have failed to account for the invested monies and cannot explain what they did with the proceeds of the loans. The trustee alleges that the Cutlers provided some documents, but they were wholly inadequate in establishing the location or disposition of the funds.

On November 11, 2004, the Court conducted an initial status conference. The discovery completion date was set for February 11, 2005. On February 28, 2005, the trustee moved for summary judgment. The trustee asserts that the Cutlers did not produce adequate records, and have failed to cooperate and to keep or preserve recorded information. Accordingly, the trustee argues that the Cutlers' discharge should be denied pursuant to § 727(a)(3).

The Cutlers assert that many of the debts listed in their schedules are overstated. They contend that they listed the amount that the creditor asserted was owed and that they dispute many of those amounts. The Cutlers contend that they have cooperated with the trustee and have produced all of the documentation that they can. They argue that it would be too expensive to request bank records and that if the trustee wants such records, he can subpoena them from the bank.

The Cutlers attached numerous cashier check receipts to their response and supplemental response. These checks total approximately \$2,842,969. Mr. Cutler contends that, unknown to him, several of the loans he obtained were backed by “the mob.” In an effort to repay these loans, Mr. Cutler asserts that he was forced to borrow money from friends and family and to refinance his rental properties at high interest rates. He also asserts that he was forced to borrow money from other individuals who charged excessively high interest rates. Mr. Cutler contends that many of these loans did not have promissory notes.

Before the trustee filed this motion, the Cutlers produced the following documents:

1. Closing papers and appraisals for ten of the debtors’ previously owned properties. These properties were purchased between December, 1993 and June, 2000. The properties have all apparently been foreclosed upon or sold. However, there is no documentation to reflect their disposition.
2. A July 15, 2002, settlement agreement between James Mangner and Mr. Cutler for \$636,000 to be paid over a period of five years. This was to pay off loans Mangner made to Mr. Cutler during the previous three years.
3. An envelope of grocery receipts totaling \$1,321, indicating that they were for approximately one month.
4. Eight miscellaneous cell phone bills, cable bills and insurance bills.
5. A pay stub for Jennifer Cutler dated May 28, 2004, showing year to date income of \$15,668.09.
6. A residential lease for March 2003 through March 2004 showing monthly rent of \$1,600.

7. Monthly statements for an Oppenheimer account for the period February 1, 1999, through December 31, 1999.
8. Monthly statements for a Merrill Lynch account for the period December 29, 2000 through July 27, 2001.
9. Tax returns for 2000 through 2003. The return for 2000 shows an adjusted gross income of \$18,903 plus money from family of \$11,833. The return for 2001 shows an adjusted gross income of \$50, plus money from family of \$61,833. The return for 2002 shows an adjusted gross income of (\$14,500), plus money from family of \$35,000. The return for 2003 shows an adjusted gross income of \$22,009.
10. A statement on behalf of the U.S. Department of Education showing a student loan for Mrs. Cutler with a balance of \$6,194.43.
11. Miscellaneous state court papers, including a judgment for Comerica Bank for \$5,408; a judgment for Retailers National Bank for \$3,235; a motion for default judgment in a suit filed by Insurance Services Construction Corp. based on an \$80,000 NSF check written by Mr. Cutler; a case evaluation statement in a suit filed by John Claeys against Mr. Cutler seeking \$91,370.50 for loans and NSF checks; a judgment for James Goulooze against Mr. Cutler for \$130,000; a default judgment for Jane Repko against Mr. Cutler in the amount of \$96,131.58; and a cross-complaint filed by Federal Mortgage Corporation, Inc. against Mr. Cutler.

II.

11 U.S.C. § 727 provides in pertinent part:

- (a) The court shall grant the debtor a discharge, unless—

(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[.]

11 U.S.C. § 727(a)(3).

The purpose of this provision is “to give creditors and the bankruptcy court complete and accurate information concerning the status of the debtor’s affairs and to test the completeness of the disclosure requisite to a discharge.” *Meridian Bank v. Alten*, 958 F.2d 1226, 1230 (3d Cir. 1992); *see also Turoczy Bonding Co. v. Strbac (In re Strbac)*, 235 B.R. 880, 882 (B.A.P. 6th Cir. 1999). It also ensures that “creditors are supplied with dependable information on which they can rely in tracing a debtor’s financial history.” *Meridian Bank*, 958 F.2d at 1230. However, the bankruptcy code “does not operate in a ‘draconian fashion to require maintenance, preservation, and production of comprehensive records of every minute detail of a debtor’s financial and business activity as a precondition to a grant of discharge.’” *AG Credit, ACA v. Walton (In re Walton)*, 165 B.R. 610, 616 (Bankr. N.D. Ohio 1994) (citing *James v. McCoy (In re McCoy)*, 114 B.R. 489, 500 (Bankr. S.D. Ohio 1990)).

The case law establishes that “[d]epending on the sophistication of the debtor and the extent of his activities, different record keeping practices are necessary.” *Meridian Bank*, 958 F.2d at 1231. Further, “[a]lthough a full accounting of every business transaction is not required, debtor should maintain some written records from which present and past financial condition of debtor may be ascertained with substantial completeness and accuracy.” *Phillips v. Nipper (In re Nipper)*, 186 B.R.

284, 289 (Bankr. M.D. Fla. 1995). “The adequacy of debtor’s records must be determined on a case by case basis. Considerations to make this determination include debtor’s occupation, financial structure, education, experience, sophistication and any other circumstances that should be considered in the interest of justice.” *United States v. Trogdon (In re Trogdon)*, 111 B.R. 655, 658 (Bankr. N.D. Ohio 1990).

“The party seeking denial of a discharge has the burden of proving the inadequacy of the debtor’s records.” *Strbac*, 235 B.R. at 882 (quoting *Wazeter v. Michigan Nat’l Bank (In re Wazeter)*, 209 B.R. 222, 227 (W.D. Mich.1997)). “However, ‘[o]nce a debtor’s records are determined to be inadequate, the burden is on the debtor to establish any justification therefor.’” *Strbac* at 883 (quoting *Trogdon*, 111 B.R. at 658).

III.

The trustee filed an affidavit that he has not been provided with adequate records from which to ascertain the Cutlers’ financial condition or business transactions. The trustee served a subpoena on the Cutlers that required the production of the following documents at their examination:

1. Tax returns for 2000, 2001, 2002 and 2003;
2. Bank account records for both checking and savings, including but not limited to, bank statements, check register and cancelled checks for the years 1999 to date;
3. Titles to all vehicles held, individually, and/or jointly;
4. All lawsuits and judgments filed by you or against you from 2000 to present;
5. All leases held, by you and your wife, for real estate and automobiles;
6. All pay records for 2004;
7. All documents necessary to evidence expenses in Schedule J; and,

8. All financial records for So Clean Company and Equity First Company, and any other companies or corporations both you and/or your wife have had an interest from 1999 to date.

The trustee asserts that the Cutlers attended the examination, but failed to produce the requested bank account records for both checking and savings accounts, including, but not limited to, bank statements, check registers and cancelled checks for the years 1999 to date. Additionally, the trustee asserts that at the examination, he requested that the Cutlers provide a summary for all persons who loaned them money since 1999, including:

1. The date and amount of the loan;
2. What the loan proceeds were used for;
3. Documentation for each loan;
4. Documentation of repayment of the loan, if the loan was repaid; and
5. If the loan or repayment thereof was in dispute with the creditor, the basis of the dispute.

The trustee asserts that in response to this request he has received only a few random promissory notes, cashier's checks, real estate closing statements, and real estate appraisals. The trustee further asserts that these documents reflect only a small portion of the assets and liabilities in question, and do not assist him in the investigation of the disposition of the proceeds of the loans.

In response, Mr. Cutler filed an affidavit that he provided the trustee with approximately three feet of documents, primarily related to his real estate holdings. He also asserts that during the time period in question he dealt almost exclusively in cashier's checks, as he was unable to open a checking account. Cutler contends that he provided the trustee with all records relating to any

properties he owned and gave the trustee copies of receipts from the amount of money spent on food and other bills.

Upon review of the documents that the debtors provided to the trustee, including those provided in response to the trustee's motion, the Court agrees with the trustee that they are inadequate to permit a full investigation of debtors' financial condition. Even assuming that the debtors' cashiers checks were in repayment of loans, there is little or no documentation regarding the loans - the dates or amounts of the loans, the debtors' use of the loan proceeds, or the source of the funds to repay the loans. Further, although the debtors contend that some of the debts are overstated in their schedules, they do not indicate which are overstated nor the actual amount of their debt. The debtors have failed to keep or preserve records from which their financial condition and business transactions can be ascertained.

As noted, the burden then shifts to the debtors to establish a justification for this failure. However, the debtors have failed to offer or prove any such justification.

Accordingly, the trustee's motion for summary judgment is granted and the debtors' discharge is denied pursuant to 11 U.S.C. § 727(a)(3).

Steven Rhodes
Chief Bankruptcy Judge

Entered: May 31, 2005

cc: Drew S. Norton
Jeffrey H. Bigelman

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