

**United States Bankruptcy Appellate Panel
FOR THE EIGHTH CIRCUIT**

No. 02-6023MN

In re:	*	
	*	
Thomas Michael Sendecky,	*	
	*	
Debtor.	*	
	*	
Floret, L.L.C.,	*	Appeal from the United States
Michele Lea Eggert,	*	Bankruptcy Court for the
	*	District of Minnesota
Plaintiffs-Appellants,	*	
	*	
v.	*	
	*	
Thomas Michael Sendecky	*	
	*	
Defendant-Appellee.	*	

Submitted: September 10, 2002
Filed: October 10, 2002

Before KOGER, SCHERMER, and FEDERMAN, Bankruptcy Judges
FEDERMAN, Bankruptcy Judge

Plaintiff/appellants Floret, L.L.C. and Michele Lea Eggert (Appellants) appeal an order of the bankruptcy court¹ granting debtor Thomas M. Sendecky a discharge

¹The Honorable Nancy C. Dreher, United States Bankruptcy Judge for the District of Minnesota.

and denying Appellants' motion for sanctions based upon the inadequacy of Mr. Sendecky's pre-trial brief. While this appeal was pending, Appellants filed a motion for sanctions with this Panel, based on statements contained in Mr. Sendecky's appellate brief. For the reasons set forth below, we affirm the rulings of the bankruptcy court, and we also grant Appellants' post-trial motion for sanctions.

ISSUES

There are three issues before us. Appellants argue that the bankruptcy court committed reversible error by granting Mr. Sendecky a discharge despite Appellant's allegations that he failed to keep adequate records, and that he failed to satisfactorily explain a deficiency of assets. They also appeal the bankruptcy court's denial of sanctions for the inadequacy of Mr. Sendecky's pre-trial brief. Finally, Appellants ask for sanctions based upon counsel for Mr. Sendecky's alleged "malicious and libelous falsehood" contained in his appellate brief. We conclude that the bankruptcy court did not commit reversible error when it found that Appellants failed to sustain their burden of proof as to the 11 U.S.C. § 727(a)(2) and (4) Counts. We also conclude that the bankruptcy court did not commit reversible error when it found that Mr. Sendecky's failure to keep adequate books and records was justified under the circumstances. We further conclude that the bankruptcy court did not commit reversible error when it found that Mr. Sendecky adequately explained any deficiency of assets alleged by Appellants.

We conclude that the bankruptcy court did not abuse its discretion when it failed to award sanctions for the alleged inadequacy of Mr. Sendecky's pre-trial brief. We also conclude, however, that Mr. Sendecky's appellate brief did contain a statement that is unbecoming to a member of the bar. As such, we grant Appellants' post-trial motion for sanctions.

BACKGROUND

At one time, Mr. Sendecky operated a family construction business, Sendecky Concrete, Inc. While engaged in that business, Mr. Sendecky installed some flooring for Appellants. On June 5, 2001, the District Court of Hennepin County, Minnesota entered judgment in the amount of \$16,253.19 in favor of Appellants for Mr. Sendecky's breach of an oral contract to properly install the flooring. On June 18, 2001, Appellants served a Notice of Garnishment on Mr. Sendecky's employer, and on June 25, 2001, Mr. Sendecky filed a Chapter 7 bankruptcy petition.

On September 24, 2001, Appellants filed an adversary proceeding objecting to Mr. Sendecky's discharge. Appellants filed the Complaint in four Counts: Count I, Violation of 11 U.S.C. § 727(a)(2); Count II, Violation of 11 U.S.C. § 727(a)(3); Count III, Violation of 11 U.S.C. § 727(a)(4)(A); and Count IV, Violation of 11 U.S.C. § 727(a)(4)(B).² In his opening statement at the trial, however, Appellants' counsel indicated that in Count IV he intended to proceed under 11 U.S.C. § 727(a)(5).³ For purposes of this appeal, we find that Appellants sufficiently, if inartfully, pled an 11 U.S.C. § 727(a)(5) Count.

STANDARD OF REVIEW

We review a bankruptcy court's conclusions of law de novo and its findings of fact for clear error.⁴ We will not, however, overturn a bankruptcy court's factual

²We note that 11 U.S.C. § 727(a)(4)(B) provides that the court will not grant a debtor a discharge if the debtor "knowingly and fraudulently, in or in connection with the case . . . presented or used a false claim." Count IV of the Complaint, however, requests relief for debtor's failure to satisfactorily explain any loss of assets or deficiency of assets. That request should have been pled pursuant to 11 U.S.C. § 727(a)(5).

³Trial Transcript, Appellants' Appendix 318 at 325.

⁴*Korte v. United States of America Internal Revenue Service (In re Korte)*, 262 B.R. 464, 469 (8th Cir. B.A.P. 2001).

findings as clearly erroneous unless, on the basis of all of the evidence, we are left with a “definite and firm conviction that a mistake has been committed.”⁵ We review a bankruptcy court’s denial of a motion for sanctions for an abuse of discretion.⁶

DISCUSSION

The denial of a debtor’s discharge is a “harsh sanction,” therefore, the provisions of 11 U.S.C. § 727(a) are “strictly construed in favor of the debtor.”⁷ The burden of proof is on the objecting party to prove each element of a section 727 Complaint by a preponderance of the evidence.⁸ Appellants argue that the bankruptcy court committed reversible error by ruling in favor of Mr. Sendecky on all four Counts of their Complaint. We will address each Count in turn.

11 U.S.C. § 727(a)(2)(A)

Section 727(a)(2)(A) provides that the court should deny a debtor a discharge if he concealed assets that might otherwise be made available to satisfy the claims of creditors:

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

...

⁵*Id. citing Anderson v. Bessemer City*, 470 U.S. 564, 573, 105 S. Ct. 1504, 1511, 84 L. Ed. 2d 518 (1985).

⁶*Eastern Equipment and Serv. Corp. v. Factory Point Nat’l Bank, Bennington*, 236 F.3d 117, 120 (2nd Cir. 2001).

⁷*Korte*, 262 B.R. at 471 (citations omitted).

⁸*Id.*

(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—

(A) property of the debtor, within one year before the date of the filing of the petition.⁹

Appellants alleged that Mr. Sendecky concealed a Corvette and a “diamond grinder.” At the trial, however, one of the plaintiffs admitted that the Corvette belonged to Mr. Sendecky’s father. The bankruptcy court correctly found that a debtor cannot conceal assets that do not belong to him. As to the diamond grinder, the bankruptcy court found that Appellants failed to prove that Mr. Sendecky owned such a piece of equipment, or what the value of such a piece of equipment might be. Based upon these factual findings, we affirm the bankruptcy court as to the 11 U.S.C. § 727(a)(2)(A) Count.

11 U.S.C. § 727(a)(3)

Section 727(a)(3) provides that the court will deny a debtor a discharge if he unjustifiably fails to keep adequate records:

(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

⁹11 U.S.C. § 727(a)(2)(A).

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