UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NEW YORK

In re:

MARIE MOSCATO FOXTON, f/d/b/a Lakewood Natural Foods, and as an Officer of Four Sisters Natural Foods, Inc., a New York Corporation,

CASE NO. 04-22377

DECISION & ORDER

Debtor.

PETER SCRIBNER, As Trustee,

Plaintiff,

V.

AP. NO. 04-2154

MARIE MOSCATO FOXTON,

Defendant.

BACKGROUND

On June 2, 2004, Marie Moscato Foxton (the "Debtor") filed a petition initiating a Chapter 7 case. On the Schedules and Statements required to be filed by Section 521 and Rule 1007, the Debtor indicated that: (1) she had more than $124,000.00 in unsecured, priority tax debt and more than $369,000.00 of general unsecured debt, almost all of which was incurred in connection with two failed natural food businesses, Lakewood Natural Foods ("Lakewood"), conducted as a d/b/a in the State of Washington, and Four Sisters Natural Foods, Inc. ("Four Sisters"), conducted in

Rochester, New York, in which she and her three sisters were shareholders; (2) she owned no household goods and furnishings (Schedule B, Question 4); (3) she owned no furs or jewelry (Schedule B, Question 7); (4) she owned no other personal property of any kind not already listed in Schedule B (Schedule B, Question 33); and (5) she did not hold or control any property owned by another person (Question 14 of the Statement of Financial Affairs).

Peter Scribner, Esq., was appointed as the Debtor's Chapter 7 Trustee (the "Trustee"), and on July 8, 2004 he conducted an initial Section 341 Meeting of Creditors (the "Initial Meeting of Creditors") at which the Debtor and her attorney appeared.

On September 7, 2004, the Trustee filed an Adversary Proceeding objecting to the discharge of the Debtor pursuant to Sections 727(a)(2) and (a)(4). The Complaint in the Adversary Proceeding alleged that: (1) the Debtor was the owner of a valuable diamond ring (the "Unscheduled Ring"), which she failed to disclose on her Schedules and Statements or at the Initial Meeting of Creditors; (2) the Debtor had an ownership interest in the household goods and furnishings at 220 Willow Creek Lane, Rochester, New York, where the Debtor resided with her husband, which she failed to disclose in her Schedules and Statements; and (3) the Debtor sold valuable business assets within one year of the

filing of her petition, and failed to list that transfer at Question 10 of her Statement of Financial Affairs.

On March 15, 2005, the Court conducted a trial (the "Trial") at which the Debtor was the only witness who testified.

At Trial, the Debtor testified that: (1) in 1994, when her oldest daughter was married, her mother gave her the Unscheduled Ring and told her that she was to give it to that daughter when her oldest child was married; (2) the Ring was in her possession and under her control on the date she filed her petition; (3) she did not list the Ring on her Schedules or Statements because: (a) she signed her Schedules and Statements within three weeks of her father's passing and was not thinking clearly at the time; and (b) she did not consider the Unscheduled Ring to be an asset of hers, just something to pass down within the family, which really owned the Ring; (4) in completing her Schedules and Statements, she never focused on the Ring, which she acknowledged that she did wear on a number of occasions, including at the time of a 2002 interview that appeared in the Rochester *Democrat and Chronicle* about the Four Sisters Natural Foods business (Exhibit 12 at Trial), and in the second half of 2002 at a family gathering (Exhibit 13 at Trial); (5) she acknowledged that at her Initial Meeting of Creditors the Trustee advised her, and the other debtors who were present, of the importance of listing all assets and that the failure to do so

might result in their losing their bankruptcy discharge, however, she was very nervous at that Meeting; (6) neither she nor her attorney ever advised the Trustee of the Ring or any facts or circumstances relating to it at the Initial Meeting of Creditors; (7) confirmed that she obtained an appraisal of the Ring which indicated that it had an appraised estimated replacement cost of $2,450.00 and a fair market value of one-third of that amount ($816.67) (Exhibit 2 at Trial); (8) she indicated on her Schedules and Statements that she owned no household goods or furnishings, because she thought that the Schedules were looking for who purchased the property, and all of the household goods and furnishings she and her husband possessed had been purchased by her husband; (8) she was aware that when she and her spouse resided in the State of Washington and he purchased the majority of their household goods and furnishings, Washington was a community property state, but she believed that only made a difference with respect to ownership or other interests in the event of a dissolution of a marriage; (9) she had sold some of the assets used in the Lakewood business in September of 2003 for $10,220.00, and that she failed to list that transfer on her Statement of Financial Affairs, because she thought the Statement only dealt with her personal affairs, not any affairs directly or indirectly related to her business activities; (10) her bankruptcy was the first

bankruptcy filed by her attorney and all of her Schedules and Statements were prepared after she consulted with her attorney only by e-mail and telephone; (11) her attorney knew about her sale of business assets, including the September 2003 sale; (12) she had scheduled an interest in her deceased father's estate as a potential asset in her estate; and (13) when the Trustee learned of the Unscheduled Ring from one of her sisters, the Debtor did not deny its existence and has since turned the Ring over to the Trustee.

In a closing argument, the Debtor's attorney asserted that: (1) although the Unscheduled Ring was omitted from the Debtor's Schedules and Statements, it was not with the intent to defraud because: (a) the Debtor prepared her Schedules within a few weeks of her father's passing, so that she was in a very emotional state; and (b) she had an inexperienced attorney when she filed her bankruptcy, one who had never filed a case before, so she did not have the active assistance of counsel in preparing her Schedules and Statements; and (2) she simply did not think about the Unscheduled Ring when she completed her Schedules and Statements.

At the close of Trial, the Trustee asserted that: (1) panel trustees must be able to rely on debtors properly completing their Schedules and Statements so that the Trustee can properly administer bankruptcy cases based upon accurate and full

disclosure; (2) the Debtor used and displayed the Unscheduled Ring on various public occasions; (3) the Unscheduled Ring was not the only material problem with the Debtor's Schedules and Statements, since the Debtor also failed to schedule any interest in household goods and furnishings and to disclose the September 2003 transfer of business assets.

DISCUSSION

I. CASE LAW

From the cases which have been decided under Section 727(a)(4)(A), including this Court's Decisions & Orders in *In re Pierri,* Ch. 7 Case No. 97-20461, A.P. Case No. 97-2125 (W.D.N.Y. April 21, 1998) and *In re Ptasinski* (Chapter 7 Case No. 02-20524, A.P. Case No. 02-2172, W.D.N.Y., February 13, 2003), we know that for the Court to deny a debtor's discharge because of a false oath or account: (1) the false oath or account must have been knowingly and fraudulently made, *see Farouki v. Emirates Bank Int'l, Ltd.*, 14 F.3d 244 (4th Cir. 1994); (2) the required intent may be found by inference from all of the facts, *see 6 L.King, Collier on Bankruptcy*, ¶727.04[1][a] at 37 (15th ed. rev. 1996); (3) a reckless disregard of both the serious nature of the information sought and the necessary attention to detail and accuracy in

answering may rise to the level of the fraudulent intent necessary to bar a discharge, *see In re Diorio*, 407 F.2d 1330 (2d Cir. 1969); (4) a false statement resulting from ignorance or carelessness is not one that is knowing and fraudulent, *see Bank of Miami v. Espino (In re Espino)*, 806 F.2d 1001 (11th Cir. 1986); (5) the required false oath or account must be material; and (6) the required false oath or account may be a false statement or omission in the debtor's schedules or a false statement by the debtor at an examination at a creditor's meeting, *see In re Ball*, 84 B.R. 410 (Bankr. D.Md. 1988). Conversely, if items were omitted from the debtor's schedules because of an honest mistake or upon the honest advice of counsel, such a false declaration may not be sufficiently knowingly and fraudulently made so as to result in a denial of discharge.

II. THE UNSCHEDULED RING

A. General

It is undisputed that: (1) when the Debtor filed her petition, Schedules and Statements, and when she appeared and testified at her Initial Meeting of Creditors, she knew that she owned and possessed the Unscheduled Ring; (2) on her Schedules and Statements and in her testimony at her Initial Meeting of

Creditors, the Debtor failed to disclose that the Unscheduled Ring was either an asset of hers or property of another; and (3) it was only after one of the Debtor's sisters advised the Trustee that the Debtor possessed and often wore the Ring that the Debtor admitted her ownership and possession of the Unscheduled Ring.

B. <u>False Oath and Account</u>

From the evidence produced at the Trial and the pleadings and proceedings in the Debtor's bankruptcy case and in the Adversary Proceeding, I find that the Debtor knowingly and fraudulently failed to: (1) schedule the Unscheduled Ring as an asset or otherwise disclose her possession of the Ring; and (2) disclose her ownership or possession of the Ring at her Initial Meeting of Creditors. Furthermore, I find that, at a minimum, the actions of the Debtor indicate such a reckless disregard for the serious nature of: (1) complying with her duties under Section 521 to pay the necessary attention to the detail and accuracy required to properly complete her Schedules and Statements; and (2) responding correctly and completely to the questions of her Trustee, even after her Trustee gave her a detailed warning at her Initial Meeting of Creditors regarding the need to disclose any and all assets and things of value, as well as the consequences of a failure to disclose, that the necessary fraudulent intent has been demonstrated by a preponderance of the evidence.

The following observations and statements materially contribute to the Court's conclusion:

1. The Debtor owned and operated two prior businesses where she was required to review and enter into leases and other contracts, participate in the filing of business tax returns and attend to other business-related details unlike most ordinary consumers. As a result, the Debtor must be held to a higher standard of sophistication and responsibility when it comes to reading and accurately and fully completing her bankruptcy Schedules and Statements;
2. The Debtor wore the Unscheduled Ring at important family functions and at the time when she was interviewed for the *Democrat and Chronicle* article on the Four Sisters. As a result, it never was an asset that was "out of sight and out of mind";
3. The Debtor's testimony that the Unscheduled Ring was given to her by her mother with only oral instructions that she pass it down to future generations, apparently only if the Debtor ever had a grandchild who was later married, was uncorroborated at Trial. The Debtor also admitted that there was no paperwork entered into in connection with this gift. As a result, the Unscheduled Ring was: (a) clearly exclusively owned by the Debtor who could do with the Ring whatever she pleased, and

was accountable to no one for any oral representations that may or may not have ever been made by her mother; and (b) an asset of the Debtor's bankruptcy estate;

4. The Debtor's testimony that she did not schedule or otherwise disclose her ownership and possession of the Unscheduled Ring to her Trustee because she believed that it was a family asset, not her personal asset, is inconsistent with her attorney's assertion at Trial that she never even thought about the Ring at the time she reviewed and signed her bankruptcy Schedules and Statements and testified at her Initial Meeting of Creditors;

5. The Debtor's assertion that she did not focus on the Unscheduled Ring because she filed her bankruptcy petition within three weeks of her father's passing, is inconsistent with this Court's experience, given all of the facts and circumstances of the Debtor's family situation. The Debtor testified that, undoubtedly in large part because of the failure of Four Sisters, she was estranged from her family at the time her father passed away and she filed her bankruptcy case. This Court's experience is that, more often than not, when someone has been estranged from their family and there is a passing of a close family member, important contacts with the family become more, not less, prominent in one's

consciousness. The Unscheduled Ring from her mother would have been one of those contacts. Furthermore, there was no urgency for the Debtor to file. If she was too distraught, she could have waited until she was in a position to properly complete her Schedules and Statements;

6. The Trustee's warning to the Debtor, and the other debtors in attendance at the Debtor's Initial Meeting of Creditors, was so detailed and specific with respect to any undisclosed assets or items of value and the consequences of not disclosing them, that the Debtor could not reasonably have simply forgotten about her ownership and possession of the Unscheduled Ring. Her testimony that she was nervous is not credible for someone who had owned and operated two retail businesses and negotiated with the Internal Revenue Service concerning the inventory of Lakewood and her substantial tax obligations that resulted from the failure of that business;

7. Even if the Debtor did believe that the Unscheduled Ring was a "family asset," she failed to disclose that fact, as required by Question 14 of her Statement of Affairs. That question specifically asked her whether she held or controlled any property owned by another;

8. The Debtor testified that she was "not a jewelry person." As a result, having ownership and control of this item of jewelry

with a material and significant value (between $800.00 and $2,450.00) would simply not be something that, in this Court's experience, a "non jewelry person" would forget. This is especially true of an individual who also allegedly believed that she owned no household goods or furnishings because they were all purchased, and therefore owned, by her spouse;

9. Schedule B, Question 7, "Do you own any furs or jewelry," and Question 14 of the Statement of Affairs, "Do you hold or control any property owned by another person," are too specific, especially when considered together with the Trustee's clear warning at the Debtor's Initial Meeting of Creditors, for any debtor, especially one with this Debtor's business background, to have inadvertently not disclosed the Unscheduled Ring. It seems clear that with two failed businesses and an estrangement from her family, the Unscheduled Ring was something the Debtor wanted to keep from her Trustee; and

10. It is irrelevant how inexperienced the Debtor's attorney was in bankruptcy matters. Schedule B, Question 7, Question 10 of the Statement of Financial Affairs and the Trustee's warning at the Initial Meeting of Creditors could not have been more clear. Even an experienced bankruptcy attorney could not have said more to the Debtor to cause her to disclose the

Unscheduled Ring, which the Court believes she willfully concealed.

III. HOUSEHOLD FURNISHINGS AND TRANSFERS WITH ONE YEAR

Although it is equally difficult for the Court to understand how the Debtor could have failed to disclose any interest that she may have had in the household furnishings which she and her spouse shared at their Willow Creek Lane residence, or the transfer of the Lakewood business inventory in September 2003, it appears that those matters were discussed at the Initial Meeting of Creditors, and were otherwise likely to be discovered by a complete and thorough Trustee investigation. Nevertheless, those failures demonstrate a pattern of the Debtor's failure to properly complete her Schedules and Statements, an absolute requirement if, as the Trustee indicated at Trial, Trustees are to properly administer bankruptcy estates.

The Trustee has proved by a preponderance of the evidence that the Debtor has made a material false oath or account in completing her bankruptcy Schedules and Statements and Statement of Financial Affairs and testifying at her Initial Meeting of Creditors. This false oath with regard to the Unscheduled Ring was knowingly and fraudulently made, or made with such reckless disregard for both the serious nature of the information being sought and the

necessary attention to detail and accuracy required in completing her Schedules and Statement of Affairs and answering questions asked at her Initial Meeting of Creditors, that fraudulent intent is clearly indicated. Furthermore, there is no credible evidence that the false oaths or accounts were made by mistake, carelessness or inadvertence, or upon the honest advice of counsel. Any testimony of the Debtor to that effect I find, after hearing her testimony, observing her at Trial, and considering the other matters discussed in this Decision & Order, not to be credible.

CONCLUSION

The discharge of the Debtor, Marie Moscato Foxton, is hereby denied pursuant to Section 727(a)(4)(A).

IT IS SO ORDERED.

/s/
HON. JOHN C. NINFO, II
CHIEF U.S. BANKRUPTCY JUDGE

Dated: April 12, 2005