

**UNITED STATES BANKRUPTCY COURT  
WESTERN DISTRICT OF NEW YORK**

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**In Re:**

**BK. NO. 95-20524**

**ROBERT G. BUONO,**

**Debtor.**

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**Steuben Trust Company,**

**Plaintiff,**

**A.P. NO. 95-2400**

**vs.**

**DECISION & ORDER**

**Robert G. Buono,**

**Defendant.**

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**BACKGROUND**

On March 14, 1995, Robert G. Buono (the “Debtor”) filed a petition initiating a Chapter 7 case. On his Schedule A, the Debtor listed his ownership, as a tenant by the entirety, of a residence at R.D. #1, Box 139, Arkport, New York (the “Arkport Residence”) as having a value of \$17,500.00, subject to a first mortgage in favor of Steuben Trust Company (“Steuben”) in the approximate amount of \$35,200.00 (the “Steuben Mortgage”) and real estate taxes of approximately \$3,660.00. On his Schedule F, the Debtor listed unsecured non-priority claims totaling \$6,808.00 owed to approximately ten creditors.

On May 10, 1995, Steuben filed a motion (the “Steuben Motion”) for relief from the automatic stay to allow it to continue a pre-petition State Court mortgage foreclosure proceeding with respect to the Arkport Residence. The Steuben Motion alleged that the Debtor had no equity

in the Arkport Residence, since the Steuben Mortgage had an outstanding balance of in excess of \$34,000.00, and the Property had a fair market value of only \$15,000.00 pursuant to an April, 1994 appraisal. The Steuben Motion was filed under the Court's default procedure, so that on May 25, 1995, after no opposition had been received on behalf of the Debtor within the time required, an Order was entered modifying the automatic stay to allow Steuben to proceed with its pending State Court foreclosure proceeding.

On June 19, 1995, Steuben commenced an Adversary Proceeding (the "Steuben Adversary Proceeding") against the Debtor requesting that the amounts due on the Steuben Mortgage be determined by the Court to be nondischargeable pursuant to Section 523 or that the Debtor's discharge be denied pursuant to Section 727(a).

The Complaint in the Steuben Adversary Proceeding alleged that: (1) the Steuben Mortgage, by its express terms, covered all buildings and fixtures at the Arkport Residence; (2) within one year of the filing of his petition, the Debtor, with intent to hinder, delay or defraud Steuben, had removed, destroyed, mutilated or concealed parts of the Arkport Residence; and (3) the Debtor's discharge should be denied, or, in the alternative, the amounts due on the Steuben Mortgage should be determined by the Court to be nondischargeable.

On July 20, 1995, the Debtor interposed an Answer in the Steuben Adversary Proceeding. The Answer admitted that the Debtor had removed certain items of property from the Arkport Residence within one year of the filing of his petition, but the Answer asserted that: (1) the items were not functional, were installed by the Debtor, or did not constitute fixtures; and (2) the Debtor

had offered to return and install the items in the same condition as when removed.

After the Court had conducted several pretrial conferences, the matter was tried on February 2, 1996.

From the testimony of the witnesses and the documents admitted into evidence at trial and the post-trial submissions of the parties (a Defendant's Trial Brief received by the Court on March 8, 1996 and the Plaintiff's Proposed Findings of Fact received by the Court on February 14, 1996), the Court makes the following findings of fact:

- (1) In the Spring of 1993, the Debtor and Susan K. Buono, who were husband and wife, owned the Arkport Residence as tenants by the entirety, and were liable on the Steuben Mortgage.
- (2) In 1993, the Debtor and Susan K. Buono were experiencing marital difficulties, and at some point in 1993, Susan K. Buono left the Arkport Residence.
- (3) Between the Spring of 1993 and April, 1994, the Arkport Residence was listed for sale with a broker and the Debtor continued to reside there.
- (4) In April, 1994, an offer of \$39,000.00 was received for the Arkport Residence which was not accepted by both of the Buonos, and thereafter the Debtor vacated the Residence.
- (5) In approximately December, 1994, the Debtor removed from the Arkport Residence certain property, including: two interior windows and moldings; an interior door and casing; a toilet; a vanity; a water pump; a furnace gun; a shower head; and various amounts of wall-to-wall carpeting.
- (6) In December, 1994, Steuben demanded full payment of the amounts due on the Steuben Mortgage which was in default.
- (7) In December, 1994 or early January, 1995, employees of Steuben became aware from a real estate broker that various items of property had been removed from the Arkport Residence, and they inspected the Residence along with Susan K. Buono.

- (8) On January 23, 1995, Steuben filed the necessary papers to commence a State Court mortgage foreclosure proceeding covering the Arkport Residence, and the pleadings in that proceeding were served upon the Debtor on or about February 7, 1995.
- (9) On March 14, 1995, the Debtor filed his petition initiating a Chapter 7 case.
- (10) On June 19, 1995, Steuben filed its Complaint in the Steuben Adversary Proceeding.
- (11) On July 20, 1995, an Answer was interposed in the Steuben Adversary Proceeding on behalf of the Debtor.
- (12) Prior to June 19, 1995, when the Steuben Adversary Proceeding was commenced, the Debtor had not returned or replaced any of the property which he had removed from the Arkport Residence in December, 1994.
- (13) In December, 1994 when the Debtor removed property from the Arkport Residence, he knew that there would not be either a voluntary sale or a foreclosure sale of the Arkport Residence which would result in sufficient proceeds to pay the amounts due on the Steuben Mortgage in full.
- (14) In December, 1994 when the Debtor removed property from the Arkport Residence, he knew that its removal would reduce the price that would be received in connection with either a voluntary sale or a foreclosure sale of the Arkport Residence.
- (15) In December, 1994 when the Debtor removed property from the Arkport Residence, he was not working but was receiving Workman's Compensation.
- (16) The Debtor testified that he consulted with an attorney, whose name he would not disclose, in connection with his desire to remove items of property from the Arkport Residence, and further testified that the undisclosed attorney advised him that he could remove items of property as long as the removal did not "deface the property".
- (17) There was no evidence produced at trial which indicated that in December, 1994, when the Debtor removed property from the Arkport Residence, the Debtor had any expectation of paying any deficiency which might be due on the Steuben Mortgage after the disposition by either a voluntary sale or a foreclosure sale of the Arkport Residence.
- (18) If it were not for some action on the part of Steuben, in this case the commencement of the Steuben Adversary Proceeding, the Debtor would not have replaced the items

- of property which he removed from the Arkport Residence.
- (19) There was testimony from the Debtor at trial that the wall-to-wall carpeting which he removed was soiled because of animals which had gotten into the Arkport Residence between April, 1994 when he vacated the premises and December, 1994 when he removed various items of property.
- (20) There was testimony at trial that the total cost to replace and reinstall the items which the Debtor removed from the Arkport Residence, including the carpeting, would have been less than \$10,000.00, and that the cost to properly reinstall and re-hook up the various items of property which the Debtor returned to the Arkport Residence was less than \$1,300.00.

### **DISCUSSION**

One of the fundamental policies of the Bankruptcy Code is to afford honest, individual Chapter 7 debtors a fresh start by granting them a discharge of their debts pursuant to Section 727. However, the Bankruptcy Code also limits an individual Chapter 7 debtor's fresh start in that: (1) Section 523(a) currently sets forth sixteen kinds of debt which are excepted from a discharge granted under Section 727; and (2) Sections 727(a)(2) through 727(a)(10) set forth circumstances which result in the debtor's discharge and fresh start being denied even though the debtor's non-exempt assets are still marshaled, liquidated and distributed to creditors in accordance with the provisions of the Bankruptcy Code.

Steuben has alleged that the actions of the Debtor in removing property from the Arkport Residence was done with the necessary intent for the Court to determine that the provisions of

Section 727(a)(2)(A)<sup>1</sup> have been met and the Debtor's discharge should be denied. Steuben has further alleged that the actions of the Debtor in removing property from the Arkport Residence constituted a wilful and malicious injury to Steuben, in that the proceeds from the foreclosure sale of the Arkport Residence available for application to the Steuben Mortgage were less than they would have been had the Debtor not removed the property from the Residence, and, therefore, the Court should find all or a part of the remaining balance due on the Steuben Mortgage to be nondischargeable pursuant to Section 523(a)(6).<sup>2</sup>

**I. Section 727(a)(2)(A)**

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<sup>1</sup> Section 727(a)(2)(A) provides:

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

<sup>2</sup> Section 523(a)(6) provides:

- (a) A discharge under section 727, 1141, 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt—
  - (6) for willful and malicious injury by the debtor to another entity or to the property of another entity.

I believe that on all of the facts and circumstances presented in this case, including the evidence presented at trial, especially the Debtor's own testimony, Steuben has met its burden to prove by a preponderance of the evidence<sup>3</sup> that the Debtor removed the items of property from the Arkport Residence, many of which were clearly "fixtures" and covered by the Steuben Mortgage, with the actual intent to hinder Steuben, and, therefore, the Debtor's discharge must be denied.<sup>4</sup>

It is clear that a discharge of debts may be denied under Section 727(a)(2)(A) only upon a finding of actual intent to hinder, delay or defraud creditors. Constructive fraudulent intent cannot be the basis for denial of a discharge. However, intent may be established by circumstantial evidence or by inferences drawn from a course of conduct. *See In re Devers*, 759 F.2d 751, 753-54 (9th Cir. 1985).

At trial, the Debtor asserted that he removed the items of property from the Arkport Residence after consulting with an unnamed attorney<sup>5</sup> who advised him that he could remove any

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<sup>3</sup> Contrary to the assertion by the Debtor that the standard of proof is clear and convincing evidence, in 1991, the Supreme Court settled a conflict among the Circuit Courts regarding the appropriate standard of proof in discharge matters. Citing the legislative history of §727, the Court determined the applicable standard to be ordinary preponderance of the evidence. *See Grogan v. Garner*, 498 U.S. 279, 289 (1991); *In re Wolfson*, 139 B.R. 279, 283-285 (Bankr. S.D.N.Y. 1992), *aff'd*, 152 B.R. 830 (S.D.N.Y. 1993), *reh'g denied*, 1994 WL 191967 (S.D.N.Y. May 12, 1994).

<sup>4</sup> Based on the facts and circumstances of this case, such a conclusion is unavoidable even when full consideration is given to the principle that Section 727 is to be literally and strictly construed against the creditor and liberally in favor of the debtor. *In re Bodenstein*, 168 B.R. 23, 27 (Bankr. E.D.N.Y. 1994).

<sup>5</sup> When requested by the Court, the Debtor refused to disclose the name of the attorney he alleged to have discussed this matter with.

items from the Residence as long as the Residence was not defaced. There is law to the effect that a debtor who acts in reliance on the advice of his attorney lacks the intent required to deny him a discharge of his debts. *See Hultmen v. Tevis*, 82 F.2d 940, 941 (9th Cir. 1936); *In re Nerone*, 1 B.R. 658, 660 (Bankr. S.D.N.Y. 1979). However, those cases also require that the debtor's reliance on the advice of an attorney must be in good faith. Assuming that the conversation which the Debtor alleges in fact took place with the unnamed attorney, I believe that the conversation itself was not in good faith and the Debtor's interpretation of the conversation was clearly not in good faith. I believe that the Debtor intended to remove as much property as possible from the Arkport Residence for his own personal use elsewhere, notwithstanding that it would be at the ultimate economic expense of Steuben, and he was looking for cover. If the alleged conversation took place, I have no doubt that it was intentionally very carefully worded<sup>6</sup>, and that the Debtor's alleged understanding of the conversation was the result of "selective hearing"; he heard what he wanted to hear. Furthermore, for the Debtor to have interpreted the alleged statement by the unnamed attorney (that he could remove anything as long as it did not deface the Residence) as one which would allow him to remove a toilet, windows or an interior door, is simply not a good faith interpretation. Such an interpretation would be absolutely inconsistent with any experience that the Debtor could have had with respect to individuals removing property from a residence, either in connection with a voluntary sale of the property or otherwise.

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<sup>6</sup> For example, the Debtor could not have related to the attorney that he intended to remove a toilet, windows and casings and doors and have received the attorney's confirmation that the removal of those items was permissible.

At the time he removed the property, the Debtor knew that the Arkport Residence would not be sold, either voluntarily or at foreclosure, for an amount sufficient to pay the Steuben Mortgage and the other liens against the Residence in full. Therefore, the Debtor knew that there would be a balance due to Steuben, and he also knew that he would not ultimately pay that balance. The Debtor was on workman's compensation and knew he would most likely go bankrupt, if he had not formed the specific intention at that time to file a bankruptcy petition.

It is also clear to me that in this case the Debtor would not have returned any of the removed property if Steuben had not commenced its adversary proceeding. Section 727(a)(2)(A) looks to a debtor's pre-petition conduct to determine whether the debtor is that "honest debtor" who should receive a discharge and fresh start. Post-petition actions to cure wrongful pre-petition conduct are not relevant when determining whether the requirements of Section 722(a)(2)(A) have been proven.

The fact that the overall value of the property removed from the Arkport Residence was not that great or that the amount of damage to Steuben in terms of an increased deficiency may not have been significant, since much of the property was returned before the foreclosure sale, is not a necessary element of proof under Section 727(a)(2)(A).

In the Court's view, the Debtor's actions of removal were so egregious that it would not be possible to characterize him as the "honest debtor" which the Bankruptcy Code contemplates should receive a fresh start and a discharge from his debts. To allow mortgagors to remove the kinds of property that this Debtor removed from a mortgaged premises at a time when it is certain that a

disposition of the property by foreclosure or otherwise will bring less than the outstanding mortgage balance due, cannot be encouraged or permitted.

I am sure that the Debtor suffered great pain and frustration as a result of his marital difficulties and the inability, apparently in part because of those marital difficulties, to sell the Arkport Residence for an amount which would either generate some excess proceeds or at least pay off the liens against the property, including the Steuben Mortgage. However, the pain and frustration he experienced as a result of his matrimonial difficulties could never justify his egregious actions in removing the kinds of property that he removed from the Arkport Residence with the knowledge that as a result of the removal the value of the Residence would further diminish to the detriment of Steuben. Steuben was not responsible for his matrimonial difficulties.

Clearly within the year before the filing of his petition, this Debtor knowingly, intentionally and without good faith, acted in a manner which hindered Steuben. He knew that his actions would diminish the value of the Arkport Residence and therefore hinder Steuben in realizing the maximum value on its collateral. The Debtor testified in response to questions by the Court that had he still been attempting to sell the Residence, he never would have removed the items that he removed, since clearly their removal would significantly reduce the value of the Residence and any amount that could be expected to be obtained on its disposition.

**II. Section 523(a)(6)**

\_\_\_\_\_ Since I have determined that the Debtor's discharge should be denied, he will remain liable for any valid and enforceable obligation which he owes to Steuben in connection with the amounts

due on the Steuben Mortgage.<sup>7</sup> As a result, it is not necessary to determine whether all or any part of any such valid and enforceable obligation due to Steuben is nondischargeable pursuant to the provisions of Section 523(a)(6). However, it is clear that to the extent that less proceeds were obtained at the foreclosure sale of the Arkport Residence than would have been obtained had the Debtor not removed the items of property, including moldings which were not returned and items not properly returned and installed in working condition, that difference was a willful and malicious injury caused by the Debtor to Steuben. It was an injury which resulted from an act that was willful, deliberate and/or intentional, malicious, wrongful and without just cause or excuse. *See In re Chapin*, 155 B.R. 323, 326-27 (Bankr. W.D.N.Y. 1993). As discussed above: (1) the Debtor's testimony at trial indicates that he knew that his removal of the items of property from the Arkport Residence would decrease the collateral value of the Residence to Steuben; and (2) the Debtor's reliance on the alleged advice of an unnamed attorney was not in good faith.

### **CONCLUSION**

The request by Fidelity and Deposit Company of Maryland, successor in interest to the claim of Steuben Trust Company as the holder of the Steuben Mortgage, that the Debtor's discharge be denied pursuant to the provisions of Section 727(a)(2)(A) be, and the same hereby is, granted, and the Debtor's discharge is denied.

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<sup>7</sup> The validity and enforceability of any such obligation is a matter to be determined under State Law, not under Federal Law or by this Court in this adversary proceeding.

**BK NO 95-20524**  
**A. P. NO 95-2400**

**12**

**IT IS SO ORDERED.**

\_\_\_\_\_/s/\_\_\_\_\_  
**HON. JOHN C. NINFO, II**  
**U.S. BANKRUPTCY JUDGE**

**Dated: June 10, 1996**