INTAKE BINDER

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NEW YORK

In re:

CASE NO. 99-20709

WILLIAM H. WACKERMAN,

Debtors. DECISION & ORDER

ROCHESTER LUMBER COMPANY,

Plaintiffs,

V. AP #99-2307

WILLIAM H. WACKERMAN,

Defendants.

BACKGROUND

On March 16, 1999, William H. Wackerman (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: (1) indicated that he was the Vice President of Wackerman-Guchone Custom Builders, Inc. ("Wackerman-Guchone"), which had ceased operations in 1998; (2) scheduled unsecured claims in the amount of $7,879,394.89, including a claim due to Rochester Lumber Company ("Rochester Lumber") in the amount of $597,918.04; (3) scheduled all of his unsecured claims as "Disputed"; (4) on Schedule B, indicated that he had no: (a) accounts receivable, Question 15; (b) other liquidated debts owing to him, Question 17; or (c) other personal property of any kind not already listed,

Question 33; and (5) on his Statement of Financial Affairs, indicated that he had: (a) no income from employment or the operation of a business in 1998 or 1999, Question 1; (b) $6,976.00 of income other than from employment or the operation of a business in 1999, which was generated from social security, the withdrawal of IRA funds and some return of loans to the corporation, Question 2; and (c) made no gifts or charitable contributions within one year immediately preceding the commencement of his case, except ordinary and usual gifts to family members aggregating less than $200.00 in value per individual family member and charitable contributions aggregating less than $100.00 per recipient, Question 7.

On November 8, 1999, Rochester Lumber commenced an Adversary Proceeding against the Debtor to have the Court determine that: (1) the amounts due it pursuant to its pre-petition judgment against the Debtor were nondischargeable pursuant to Section 523(a)(2)(B);[1]

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[1] Section 523(a)(2)(B) provides that:

> (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-
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> > (2) for money, property, services, or an extension, renewal, or refinancing of credit, to the extent obtained by-
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> > > (B) use of a statement in writing-
> > >
> > > (i) that is materially false;
> > >
> > > (ii) respecting the debtor's or an insider's financial condition;

and (2) the Debtor's discharge should be denied pursuant to Sections 727(a)(3), 727(a)(4)[2] and 727(a)(5).

The Complaint in the Adversary Proceeding alleged that: (1) in connection with obtaining extensions or renewals of credit from Rochester Lumber for Wackerman-Guchone, the Debtor had provided

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> (iii) on which the creditor to whom the debtor is liable for such money, property, services, or credit reasonably relied; and
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> (iv) that the debtor caused to be made or published with intent to deceive[.]

11 U.S.C. § 523(a)(2)(B) (2000).

[2] Section 727(a) provides, in relevant part, that:

> (a) The court shall grant the debtor a discharge, unless-
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> (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;
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> (4) the debtor knowingly and fraudulently, in or in connection with the case-
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> (A) made a false oath or account;
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> (B) presented or used a false claim;
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> (C) gave, offered, received, or attempted to obtain money, property, or advantage, or a promise of money, property, or advantage, for acting or forbearing to act; or
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> (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[.]

11 U.S.C. § 727(a)(3)-(4) (2000).

Rochester Lumber with personal financial statements in 1995, 1997 and 1998; (2) there were a substantial number of stocks and bonds listed on each of the Debtor's financial statements which had significant value; (3) each of the financial statements in the preprinted portion of the statement indicated that none of the assets listed on the statement had been assigned, pledged or mortgaged; (4) at his Section 341 Meeting of Creditors, the Debtor testified that a substantial portion of the stocks and bonds set forth on the financial statements had been pledged to M&T Bank ("M&T") prior to the delivery of the statements to Rochester Lumber; (5) on the 1997 and 1998 financial statements, one of the assets listed was an $87,000.00 note receivable (the "Receivable"); (6) the Debtor's Schedules and Statements filed with the Court did not disclose the existence of the Receivable as one of the Debtor's assets; (7) at his Section 341 Meeting of Creditors, the Debtor testified that the Receivable represented amounts sent to his son-in-law, Steven Serio ("Serio"), but that he had always considered the monies sent to have been a gift to Serio and his daughter, Amy; (8) the Debtor's Federal Income Tax Returns for the calendar years 1996, 1997 and 1998 reported interest income from "Steve Serio Note"; and (9) the Debtor's discharge should be denied pursuant to Section 727(a)(4), because he had knowingly and fraudulently made

false oaths and false statements in connection with his bankruptcy case.[3]

On May 1, 2000, Rochester Lumber filed a Motion for Summary Judgment (the "Motion for Summary Judgment"). On July 12, 2000, the Court denied the Motion for Summary Judgment and scheduled the matter for trial on September 22, 2000. On the date of the trial, the Court heard the testimony of: (1) the Debtor; (2) Gerald Stahl, President of Rochester Lumber; and (3) Glenn Stahl, an Executive Vice President of Rochester Lumber.

During the trial: (1) for the first time in the Adversary Proceeding, the Court and the parties focused on the schedules attached to the financial statements (the "Stock Schedules"),[4] and the detailed information set forth for the stocks and bonds reported on the financial statements; (2) it was pointed out by the Debtor's attorneys that for a number of the stocks reported on the Stock Schedules there appeared the notation, "M&T" in the column labeled "Account #"; (3) a copy of the Debtor's 1995 Federal Income Tax Return, which listed interest income of $2,270.00 from the

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[3] The Complaint in the Adversary Proceeding included a substantial number of other allegations and causes of action under Section 523(a) and Section 727(a). However, after discovery and a number of pretrial conferences, Rochester Lumber elected to proceed only on its causes of action under Section 523(a)(2)(B) and Section 727(a)(3) and (4).

[4] Plaintiff's Exhibits 9, 10 and 11 at trial.

Steve Serio Note on Schedule B, was admitted into evidence;[5] (4) a copy of the Debtor's 1996 Federal Income Tax Return, which listed interest income of $2,103.00 from the Steve Serio Note on Schedule B, was admitted into evidence;[6] (5) a copy of the Debtor's 1997 Federal Income Tax Return, which listed interest income of $7,554.00 from the Steve Serio Note on Schedule B, was admitted into evidence;[7] (6) the Court learned that the Debtor's son, Daniel Wackerman, was employed by, had an ownership or financial interest in, or received income from, the Peccadillo Theatre Company ("Peccadillo"), and that the Debtor and his former spouse had helped their son, whose financial livelihood was at least in part dependent upon the success of Peccadillo, by making tax deductible contributions to Peccadillo, including $19,000.00 in 1994,[8] $48,000.00 in 1995,[9] $1,500.00 in 1996,[10] $16,000.00 in 1997,[11] and

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[5] Plaintiff's Exhibit 14 at trial.

[6] Plaintiff's Exhibit 13 at trial.

[7] Plaintiff's Exhibit 12 at trial.

[8] Plaintiff's Exhibit 19 at trial.

[9] Plaintiff's Exhibit 18 at trial. This Exhibit indicated that in 1995 the Debtor and his former spouse had contributed $16,000.00 to the Peccadillo production of a show entitled "The LoopHole."

[10] Plaintiff's Exhibit 17 at trial.

[11] Plaintiff's Exhibit 16 at trial.

$8,000.00 in 1999;[12] (7) the Court also learned that in 1995, Serio operated a business under the name of Lotus Motorsports, Inc. which had lost its lease; (8) the Court further learned that the Debtor and his spouse had "helped" Serio acquire a new location for the business by forwarding the following checks: (a) a bank check, dated June 13, 1995, in the amount of $10,000.00, made payable to Lotus Motor Sports; (b) a bank check, dated August 17, 1995, in the amount of $60,000.00, made payable to Lotus MotorSports, Inc.; (c) a bank check, dated October 12, 1995, in the amount of $18,500.00, made payable to Lotus MotorSports;[13] (9) the Court learned that various checks had been drawn on the Debtor's checking account which included the following: (a) check number 6113, dated August 6, 1998, in the amount of $500.00, made payable to Daniel Wackerman, which indicated that it was for his birthday; and (b) three checks, dated March 28, 1998, June 25, 1998 and October 5, 1998, each in the amount of $524.48, made payable to Dance Theater Workshop, which indicated that they were for Daniel Wackerman's health insurance;[14] and (10) the Debtor testified that when his daughter, Kathy Gustafson, needed help in purchasing a home, the Debtor and his former spouse purchased the home in their own name

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[12] Plaintiff's Exhibit 15 at trial.

[13] Plaintiff's Exhibit 3 at trial.

[14] Plaintiff's Exhibit 20 at trial.

and made a financial arrangement with their daughter and son-in-law, William Gustafson, which did not include a transfer of ownership to the Gustafsons.

DISCUSSION

I Overview and Summary of Decision

After having heard the testimony of the witnesses at trial, observed the witnesses and their demeanor, formed an opinion as to the credibility of the witnesses, and reviewed the documentary evidence admitted at trial, I find that Rochester Lumber has failed to prove by a preponderance of the evidence each of the required elements necessary to establish a cause of action under Section 523(a)(2)(B), in that: (1) I believe that at the time the Debtor delivered his 1996 and 1997 financial statements to Rochester Lumber, one of his assets did include the Receivable, since the underlying transaction was consistently treated, reported and documented by the Debtor as a loan transaction, and, therefore, in listing the transaction on his financial statements as resulting in a note receivable, he did not make a false statement to Rochester Lumber; (2) even if the Receivable was not an asset of the Debtor when he delivered his 1996 and 1997 financial statements to Rochester Lumber, because it was found that the funds sent to Lotus Motorsports, Inc. was a gift to the Serios, the totality of the

circumstances presented, including the testimony of Gerald and Glenn Stahl at trial, indicates that there was not, as required by Section 523(a)(2)(B)(iii), reasonable reliance on the existence of the Receivable in making credit extensions to Wackerman-Guchone; (3) the M&T notations on the Stock Schedules sufficiently disclosed the Debtor's pledge of the stocks and bonds in question to M&T, notwithstanding the boilerplate non-pledge language included in the financial statements, so that the Debtor did not make false statements that certain stocks and bonds were not pledged to M&T; and (4) even if it were found that there were false statements that certain stocks and bonds were not pledged to M&T: (a) by attaching the Stock Schedules which included the M&T notation, I cannot find that the Debtor made those false statements to Rochester Lumber with the intent to deceive it; and (b) because of the M&T notation, when considering the totality of the circumstances, I cannot find that Rochester Lumber could have reasonably relied on the boilerplate representations that none of the stocks and bonds were pledged, without making further inquiries to clarify the significance of the notation, especially when: (i) Rochester Lumber knew that M&T was Wackerman-Guchone's primary lender and that it was likely that the Debtor executed a guaranty to M&T in connection with the business; and (ii) in many instances there was listed, in

addition to the M&T notation, a number of shares which were less than all of the shares reported as owned.

After having heard the testimony of the witnesses at trial, observed the witnesses and their demeanor, formed an opinion as to the credibility of the witnesses, and reviewed the documentary evidence admitted at trial, I find that the Debtor's discharge should be denied under Section 727(a)(4)(B) because: (1) the Debtor made a knowing and fraudulent false oath within the meaning and intent of Section 727(a)(4)(B) when he indicated on his Statement of Financial Affairs that he had not made any gifts in the preceding year to any family member in an amount in excess of $200.00, when he had made gifts to or on behalf of his son, Daniel Wackerman, in an amount in excess of $2,000.00; (2) the Debtor made a knowing and fraudulent false oath within the meaning and intent of Section 727(a)(4)(B) when he failed to list on his Schedule of Assets the transaction entered into among the Debtor, his former spouse, Lotus Motorsports, Inc. and Serio (the "Serio Transaction") because: (a) he had reported that Transaction as resulting in a Note Receivable asset on the financial statements he delivered to M&T and Rochester Lumber, which was inconsistent with any claim that the Transaction was a gift transaction; (b) he had reported interest income in connection with the Transaction on his individual income tax returns, which was also inconsistent with any

claim that the Transaction was a gift transaction; (c) the history of various transactions between the Debtor and his children indicated that he, individually or with the assistance of his professional or family advisors, was very sophisticated in channeling funds to his children in a form structured to maximize any possible tax benefits to him and also minimize any gift tax liability; (d) no gift tax returns were filed in connection with the Transaction; (e) the funds were forwarded to Lotus Motorsports, Inc., rather than to the Serios, which was further inconsistent with any claim that the Transaction was a gift to the Serios; (f) Serio, or Lotus Motorsports, Inc., had made repayments to the Debtor, which evidenced that the funds had not been accepted as a gift; and (g) with the overwhelming, credible evidence presented which indicated that the Transaction was a loan, the only evidence presented to the Court that the Transaction was a gift was the Debtor's testimony which was: (i) not credible; (ii) self-serving; and (iii) unsupported by any other evidence such as corroborating statements from Serio, William Gustafson or the Debtor's accountant.

If it were found that the Serio Transaction was a gift transaction, I find that the Debtor's discharge should be denied under Sections 727(a)(3) and 727(a)(4)(D) because he initially failed to voluntarily report the Transaction and concealed and

withheld from the Trustee copies of: (1) the 1997 and 1998 financial statements which he delivered to M&T and Rochester Lumber; and (2) his 1996, 1997 and 1998 individual income tax returns, that consistently treated, reported and documented the Transaction as a loan. Given the manner in which the Debtor had reported the Serio Transaction on those statements and returns, voluntarily delivering copies to the Trustee before any questions were raised by the Trustee or the Debtor's creditors was necessary for him to have fully and accurately disclosed his financial condition.[15]

The Debtor structured and consistently treated, reported and documented the Serio Transaction pre-petition in a manner that would be the most beneficial to him and his family, including avoiding any possible gift tax liability. The Debtor then failed to report the Transaction in his bankruptcy schedules so that it would once again be beneficial to him and his family. The only problem for the Debtor was that in order for him to do that: (1) he had to claim that the Transaction was a gift, which was contrary to his consistent pre-petition treatment of the Transaction as a loan; and

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[15] The fact that the Debtor: (a) listed all of his debts as disputed, probably on advice of counsel; and (b) failed to specifically list non-taxable interest income from his IRA accounts while fully listing the IRA accounts themselves, does not warrant the denial of his discharge.

(2) claiming that the Transaction was a gift was prejudicial to his creditors.

Furthermore, I do not believe that the Debtor was a passive participant in the way the Serio Transaction was treated, reported and documented pre-petition or post-petition. I believe that the Debtor actively and knowingly participated in the structure and consistent reporting of the Serio Transaction as a loan pre-petition, and knowingly participated in the failure to report the Transaction on his bankruptcy schedules. Although the Debtor claimed that depression and memory loss from brain surgery affected his reporting of the Transaction, I do not find that claim in any way to be credible.

As a result, the Debtor is not the "honest debtor" worthy of a "fresh start" that a Bankruptcy Code discharge is intended for. Furthermore, the failure of the Debtor to report his gifts to his son, Daniel, in the year before the filing of his petition is a continuation of the Debtor's pattern of benefitting his family to the prejudice of others.

II Section 727(a) Causes of Action

A. CASE LAW

From the cases which have been decided under Section 727(a)(4)(A), 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 Michael H. Goldstein et al., Collier on Bankruptcy*, §727.04[1][a] (Lawrence P. King ed., 15th ed. 1998); (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 fraudulent intent necessary to bar a discharge, see *Diorio v. Kreister-Borg Constr. Co.*, 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; (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 creditors meeting, *see In re Ball*, 84 B.R. 410 (Bankr. D.Md. 1988); and (7) 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.

B. OVERVIEW OF SECTION 727(A)(4)(A) CAUSE OF ACTION

As this Court has often stated, the benefits received by an honest debtor in a bankruptcy case, including a discharge of all dischargeable debts, a "fresh start," are extraordinarily disproportionate to the few demands and expectations placed upon a debtor by the Bankruptcy Code and Rules. One of these few, but very important duties, which is seemingly easy for any debtor, even a consumer or typical individual debtor to perform, is to ensure that all of their assets are properly scheduled and all of the questions asked on the Statement of Financial Affairs are correctly and fully answered.

Further, as this Court has clearly stated on numerous occasions to debtors and their attorneys, notwithstanding all of the financial and perhaps personal difficulties that a debtor may be experiencing, the Bankruptcy Code expects that when debtors and their attorneys are finalizing and signing their schedules, they will devote their full attention to them in order to ensure that they are complete and accurate to the best of the debtors' knowledge and information. Complete and accurate schedules are necessary for a trustee and creditors to be able to fully understand a debtor's financial affairs so that non-exempt assets can be realized upon, and, if appropriate, prior transactions of a debtor avoided for the benefit of the estate. If the schedules are

not complete and accurate, Section 727 was enacted, in part, to prohibit a discharge and a fresh start for those who "play fast and loose with their assets or with the reality of their affairs." *In re Tully*, 818 F.2d 106, 110 (1st Cir. 1987).

C. GIFTS TO OR ON BEHALF OF DANIEL WACKERMAN WITHIN THE YEAR PRECEDING THE FILING OF THE DEBTOR'S PETITION

From the testimony and evidence presented at trial, it is clear that for at least the five years prior to the filing of his petition, the Debtor had made significant funds available to his children in various transactions. It is also clear that in making funds available for the benefit of his children, the Debtor had received sophisticated tax planning advice as to the best way to benefit his children while maximizing any tax benefit that might be available to him and minimizing the possibility that a gift tax liability would result.

When confronted with the inconsistent facts that: (1) he had answered "None" on his Statement of Financial Affairs to the question of whether he had made any gifts to a family member in excess of $200.00 within the preceding year; and (2) "gift" checks had been written on his personal checking account to or on behalf of his son, Daniel Wackerman, for in excess of $2,000.00, the Debtor testified that he thought the gifts being inquired about

were sophisticated estate planning gifts, not regular and ordinary gifts to family members for holidays and such.

The Debtor's answer: (1) indicates that he read the question carefully at the time he signed the Statement of Affairs; (2) indicates that he knew that the question asked about gifts; and (3) is not credible. The question asked could not be more direct and simple. It clearly excepts from reporting only ordinary and usual gifts to family members aggregating less than $200.00 in value per individual family member and charitable contributions aggregating less than $100.00 per recipient. It specifically inquires about ordinary and usual gifts to family members, not sophisticated estate or gift tax planning transactions. Furthermore, for the Debtor to testify, as he essentially did at trial, that the payment of health insurance premiums for his son, Daniel, who is in his forties, was not a gift, is also not credible. The Debtor is far too sophisticated, in general and in his history of structuring transactions to make funds available to or for the benefit of his children, to even suggest such ignorance.

It is interesting to note that, although the Debtor had made substantial donations to Peccadillo in 1994, 1995, 1996, 1997 and 1999, for 1998, the year prior to the filing of his petition, the Debtor made no contributions to Peccadillo. If this failure to make a 1998 contribution was the result of pre-bankruptcy planning, it

is unfortunate for the Debtor that the pre-bankruptcy planning was not comprehensive enough to prevent him from making in excess of $2,000.00 in gifts to or on behalf of his son, Daniel, in the year preceding the filing of his petition.

I find that the Debtor's failure to disclose the gifts which he made to or on behalf of his son Daniel within the year preceding the filing of his bankruptcy was knowing and fraudulent or, at a minimum, demonstrated such a reckless disregard of the serious nature of complying with his duties under Section 521,[16] that fraudulent intent has been demonstrated by a preponderance of the evidence. I also find that the failure to advise the Court and the Trustee of these gifts is material, since the gifts were for a substantial amount of money and the Debtor's Trustee might be able to recover those gifts as avoidable fraudulent conveyances.

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[16] Section 521 provides, in part, that:

> The debtor shall—
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> (1) file a list of creditors, and unless the court orders otherwise, a schedule of assets and liabilities, a schedule of current income and current expenditures, and a statement of the debtor's financial affairs;
>
> (3) if a trustee is serving in the case, cooperate with the trustee as necessary to enable the trustee to perform the trustee's duties under this title;

11 U.S.C. § 521 (2000).

D. THE RECEIVABLE

By answering "None" to Questions 15, 17 and 33 on Schedule B, I find that the Debtor made a knowing, fraudulent and material false oath, because I believe that the Receivable was a loan receivable and an asset of the Debtor's estate at the time of the filing of his petition.

The Debtor treated, reported and documented the Serio Transaction as a loan and not as a gift in the years 1996, 1997 and 1998, because the Receivable was reported in full on his 1997 and 1998 financial statements and repayments were made and reported as taxable income on the Debtor's Federal income tax returns.[17]

Although the Debtor testified that he never really read his income tax returns after they were prepared, the Court finds this testimony not credible. Even if this were technically true, it is not credible that the Debtor's accountant was not directed by the Debtor to treat the Serio Transaction in the manner that it was, or that the accountant did not specifically discuss with the Debtor the reporting of the repayments made by Serio as income. Taxpayers have accountants prepare their tax returns for a variety of

[17] At the time of the trial, the Debtor had not yet filed his 1999 income tax returns. Therefore, it remains unknown: (1) whether Serio made any further repayments in 1999; (2) whether there was any attempt to document a forgiveness of portions of the "loan" during 1998 and 1999; or (3) whether the Debtor might have to report imputed income in 1999 if there were no repayments even if some formal gifting transactions were attempted in 1998 and 1999.

reasons, one of which is always to ensure that the taxpayer will not pay any unnecessary income taxes. Clearly, the Debtor's accountant would not have reported the Serio repayments as interest income, thus requiring the Debtor to pay income taxes on them or to receive less of a tax refund, without having specifically discussed the underlying transaction and the reporting election with the Debtor. No accountant would have reported the repayments as income for three years on the Debtor's tax returns without having ensured that this family-related transaction was being treated as it was intended to be by the Debtor.

The Debtor's self-serving testimony that he intended the funds sent to Serio through Lotus Motorsports, Inc. to be a gift to the Serios is inconsistent with: (1) his scheduling of the Serio Transaction as a Note Receivable on the financial statements he delivered to M&T and Rochester Lumber; (2) the manner in which the Transaction was reported on his individual income tax returns for the years 1996, 1997 and 1998; (3) the fact that the funds were disbursed directly to Lotus Motorsports, Inc., rather than to the Serios; (4) the actions of Serio in making repayments to the Debtor, which may have also been deducted as a business expense on the books and tax returns of Lotus Motorsports, Inc.; and (5) the failure of the Debtor to file a gift tax return in connection with the transaction, since even if it were found to be a gift made

completely during 1995 by the Debtor and his former spouse to the Serios, the Debtor and his former spouse would have had to report any gift over $40,000.00 on a gift tax return. This evidence is clear and convincing that the Transaction was a loan transaction.

In addition, Serio's repayments are inconsistent with his acceptance of the funds as a gift, one of the necessary elements to establish a gift. The Debtor testified that it was his intent that the funds were a gift, but that is not controlling and is just one of the elements necessary to establish a gift. See *Mortellaro v. Mortellaro,* 92 A.D.2d 862 (4th Dept. 1982).

Even if it were found that there was a gift made by the Debtor to the Serios during 1995, or at some point after the Debtor received the repayments which Serio made in 1998 and reported the Receivable on the financial statements he delivered to M&T and Rochester Lumber, the Debtor's Schedules and Statements could not be accurate and complete, as required by Section 521, given the prior treatment of the Serio Transaction on his financial statements and tax returns, unless the Debtor disclosed the details of the Transaction to his Trustee. Therefore, even if the Serio Transaction were found to have been a gift transaction, which somehow became finalized before the filing of his petition on March 16, 1999, because of the history of the Transaction and how the Debtor had previously treated, reported and documented it, the

Debtor was required to disclose the Transaction on his Schedules and Statements. Reporting would have permitted the Trustee and the Debtor's creditors to: (1) be fully informed about the Transaction and the Debtor's financial affairs; and (2) scrutinize the Transaction to determine whether it might result in assets being brought into the Debtor's estate. In my view, the failure to have voluntarily: (1) reported the details of the Transaction; and (2) provided the Trustee with copies of: (a) his 1996, 1997 and 1998 individual tax returns; and (b) the financial statements delivered to M&T and Rochester Lumber for 1997 and 1998, where information was set forth which indicated that the transaction was a loan, warrants the denial of the Debtor's discharge pursuant to Section 727(a)(3) and 727(a)(4)(D). These tax returns and financial statements were necessary to ascertain the Debtor's financial condition and the Debtor knowingly and wrongfully withheld and concealed them.

III <u>The Financial Statements</u>

For the reasons set forth in the Overview and Summary of Decision, I find that Rochester Lumber has failed to prove by a preponderance of the evidence each of the required elements necessary to establish a cause of action under Section 523(a)(2)(B) with regard to the financial statements which the Debtor delivered to Rochester Lumber.

The Debtor's testimony with regard to the reporting of the Receivable on the 1997 and 1998 financial statements delivered to M&T and Rochester Lumber, however, further demonstrates the Debtor's lack of credibility. The Debtor testified that: (1) the financial statements delivered to M&T and Rochester Lumber were actually prepared by his accountant and son-in-law, William Gustafson, and not by himself; (2) he did, however, sit down individually or together with his accountant or William Gustafson to discuss the various items reported on the financial statements; (3) he did not recall having a specific conversation with his accountant or William Gustafson with respect to the reporting of the Serio Transaction on his financial statements; and (4) although he signed the financial statements after they were prepared, he never really read them when he signed them, or, if he did, he read them in such a general way that he never really focused on the Receivable. Once again, I do not find it credible that there were no specific conversations about the reporting of the Receivable on the financial statements, which was completely consistent with its reporting on the Debtor's income tax returns and necessary to avoid any gift tax liability. Therefore, the treatment of the Serio Transaction pre-petition was perfectly consistent. It was a loan transaction to avoid gift taxes and possibly result in other benefits to the family.

In my experience, sophisticated and successful businessmen like the Debtor do not sit down with their accountants and advisors to discuss the preparation of financial statements which they must provide to a lending institution, and fail to focus on the reporting of a family transaction which could have significant tax and financial consequences, and then, once those financial statements and tax returns are prepared, fail to revisit the reporting of that family transaction when the financial statements are signed. Furthermore, as I previously stated, it is my experience that an accountant, after having prepared financial statements which reported a significant family transaction, would not permit a client to sign them without revisiting the treatment of that transaction.

CONCLUSION

The Debtor's indebtedness to Rochester Lumber is not nondischargeable under Section 523(a)(2)(B). The Debtor's discharge is denied under Section 727(a)(4) for the reasons set forth in this Decision & Order.

IT IS SO ORDERED.

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

Dated: November 27, 2000