

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEBRASKA

IN THE MATTER OF:)
)
BARBARA WICKMAN,)
)
Debtor(s).) CASE NO. BK02-83821
NATIONAL LOAN INVESTORS, L.P.,) A03-8015
)
Plaintiff,) CH. 7
)
vs.)
)
BARBARA WICKMAN,)
)
Defendant.)

MEMORANDUM

This matter is before the court on cross-motions for summary judgment by the plaintiff (Fil. #31) and the debtor (Fil. #91). Casey Quinn represents the debtor, and Scott Calkins represents the plaintiff. The motions were taken under advisement as submitted without oral arguments. This memorandum contains findings of fact and conclusions of law required by Federal Rule of Bankruptcy Procedure 7052 and Federal Rule of Civil Procedure 52. This is a core proceeding as defined by 28 U.S.C. § 157(b)(2)(I) and (J).

National Loan Investors ("NLI"), a successor in interest to a lender from whom Ms. Wickman and her then-husband borrowed \$188,443.42 in 1996, and who now holds a judgment on that promissory note, filed this adversary proceeding objecting to discharge under 11 U.S.C. § 727(a)(2), (3), (4), and (5), and alternatively seeking to have the debt declared non-dischargeable under 11 U.S.C. § 523(a)(2)(B). NLI now moves for summary judgment as to each of those causes of action. The debtor moves for summary judgment on the § 523(a)(2)(B) claim.

I. Background

The debtor and her husband were borrowers from FirstTier Bank from at least the late 1980s through the mid-1990s. They provided financial statements to the bank periodically, usually

every year to year-and-a-half. During that time, their net worth ranged from \$1.4 million to \$8.2 million. As of January 1, 1996, when the loan at issue here was made, the Wickmans represented to the bank that they had a net worth of \$6.3 million.¹

The loan subsequently went into default. The holder of the note filed a lawsuit in state court, and judgment was entered against the Wickmans for \$181,285.26. The balance due on that judgment as of the petition date was \$179,758.87.

The Wickmans divorced in June 2002. Mr. Wickman filed a Chapter 7 bankruptcy case in Arizona in June 2002. Ms. Wickman filed her bankruptcy case in November 2002. According to the plaintiff's analysis of their bankruptcy schedules, the Wickmans' assets are worth a total of \$1.5 million.

National Loan Investors ("NLI") acquired rights to the judgment. It alleges that Ms. Wickman should be denied a discharge of her debts because she concealed her interest in certain real property by transferring it, for no consideration, to her daughter, who transferred it back to her within one year of the petition date. NLI further alleges that Ms. Wickman cannot account - and failed to maintain or preserve records from which anyone else could account - for the \$5.8 million decline in asset value in the six-and-one-half years between the date of the financial statement upon which the lender relied in making the loan at issue and the petition date. Moreover, NLI alleges that Ms. Wickman knowingly and fraudulently made a false oath or account by signing bankruptcy schedules containing misrepresentations and omissions. Finally, NLI alleges that Ms. Wickman made materially false representations in the 1995 financial statement.

Ms. Wickman has moved for summary judgment on the 11 U.S.C. § 523(a)(2)(B) cause of action, based on res judicata, merger, waiver, and the Rooker/Feldman doctrine, asserting that because the debt being sued on here is the state court judgment, the underlying litigation should not be reopened.

¹In connection with the January 1, 1996, loan, the Wickmans submitted a financial statement dated March 10, 1995. Much of this case relies on assets and values contained in that financial statement. For purposes of this order, it will hereafter be referred to as "the 1995 financial statement."

II. Summary Judgment Standard

Summary judgment is appropriate only if the record, when viewed in the light most favorable to the non-moving party, shows there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. Fed. R. Civ. P. 56(c) (made applicable to adversary proceedings in bankruptcy by Fed. R. Bankr. P. 7056); see, e.g., Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249-50 (1986); Morgan v. Rabun, 128 F.3d 694, 696 (8th Cir. 1997), cert. denied, 523 U.S. 1124 (1998); Get Away Club, Inc. v. Coleman, 969 F.2d 664, 666 (8th Cir. 1992); St. Paul Fire & Marine Ins. Co. v. FDIC, 968 F.2d 695, 699 (8th Cir. 1992).

In ruling on a motion for summary judgment, the court must view the facts in the light most favorable to the party opposing the motion and give that party the benefit of all reasonable inferences to be drawn from the record. Widoe v. District No. 111 Otoe County Sch., 147 F.3d 726, 728 (8th Cir. 1998); Ghane v. West, 148 F.3d 979, 981 (8th Cir. 1998).

"Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Celotex, 477 U.S. at 322. "We look to the substantive law to determine whether an element is essential to a case, and only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." Williams v. Marlar (In re Marlar), 252 B.R. 743, 751 (B.A.P. 8th Cir. 2000) (quoting Ries v. Wintz Properties, Inc. (In re Wintz Cos.), 230 B.R. 848, 858 (B.A.P. 8th Cir. 1999)) (internal quotations omitted).

III. Discussion

Denial of discharge is "a serious matter not to be taken lightly by a court." McDonough v. Erdman (In re Erdman), 96 B.R. 978, 984 (Bankr. D.N.D. 1988). The provisions of § 727 are strictly construed in the debtor's favor, while remaining cognizant that § 727 exists to prevent a debtor's abuse of the Bankruptcy Code. Fox v. Schmit (In re Schmit), 71 B.R. 587, 589-90 (Bankr. D. Minn. 1987). The objecting party must prove each element by a preponderance of the evidence. Korte v. Internal

Revenue Serv. (In re Korte), 262 B.R. 464, 471 (B.A.P. 8th Cir. 2001).

A. 11 U.S.C. § 727(a)(2)(A)

Section 727(a)(2)(A) of the Bankruptcy Code denies a debtor a discharge if he or she, with intent to hinder, delay, or defraud a creditor, transferred, removed, destroyed, mutilated, or concealed property of the debtor or property of the estate within one year before the petition date.

To succeed on a § 727(a)(2) claim, the creditor must establish by a preponderance of the evidence that the debtor committed the act complained of, resulting in transfer, removal, destruction or concealment of property belonging to the debtor or the estate, within the statutory time period, with the intent to hinder, delay or defraud a creditor or officer of the estate. Kaler v. Craig (In re Craig), 195 B.R. 443, 449 (Bankr. D.N.D. 1996).

Asset concealment is often found to exist "where the interest of the debtor in property is not apparent but where actual or beneficial enjoyment of that property continued." Id. Concealment is also a continuing event, and concealment that began outside the requisite time period is within the reach of § 727(a)(2) if it continues into the statutory time period with the necessary intent. Id.

Factors considered by the courts in determining whether the debtor acted with actual intent to hinder, delay or defraud include: (1) lack or inadequacy of consideration; (2) family, friendship or other close relationship between transferor and transferee; (3) retention of possession, benefit or use of the property in question; (4) financial condition of the transferor prior to and after the transaction; (5) conveyance of all of debtor's property; (6) secrecy of conveyance; (7) existence of trust or trust relationship; (8) existence or cumulative effect of pattern or series of transactions or course of conduct after pendency or threat of suit; (9) instrument affecting the transfer suspiciously states it is bona fide; (10) debtor makes voluntary gift to family member; and (11) general chronology of events and transactions under inquiry. Riley v. Riley (In re Riley), 305 B.R. 873, 878-79 (Bankr. W.D. Mo. 2004).

In this case, the Wickmans owned a condominium on 120th Plaza in Omaha, Nebraska. It was listed on the 1995 financial

statement as their primary residence, valued at \$240,000 with a first mortgage of \$75,600 and a home equity loan of \$112,000 against it. In November 1997, within days after the mortgage holder filed a foreclosure action, the Wickmans deeded the property to their daughter as a gift.

The Wickmans then applied for a \$200,000 mortgage refinance loan on the property in May 1999. They indicated in the application that they held the title to the property, which they valued at \$310,000. The property appraised at \$370,000. The loan was made and the deed of trust securing the note was executed by the Wickmans and their daughter. This security interest attached to the property ahead of the judgment held by NLI, which did not attach until Ms. Wickman again became titleholder on the property.

As part of the property settlement in the Wickman's 2002 divorce, Mr. Wickman quit-claimed his interest in the residence to Ms. Wickman. On the same date, the Wickmans' daughter deeded the property back to Ms. Wickman, for no consideration. This all served the purpose of putting the home back into Ms. Wickman's possession as well as into her name as sole owner.

Ms. Wickman testified in her deposition that she and her husband had a home in Arizona for a number of years. They were living there in 1999 and 2000, evidently. Ms. Wickman testified that she moved back to Omaha approximately a year before the divorce in May 2002. The evidence indicates that she paid utility bills for the condo from May 2001 and following. The condo address appears as her address on the checks.

The transfer of title to the daughter may or may not have been legitimate. The fact that the Wickmans continued to treat the property as their own, even while the daughter owned it, is troubling. It appears that Ms. Wickman may have retained beneficial enjoyment of the asset even after transferring it, but her deposition testimony suggests that she signed the deed because her husband directed her to, not because she had any particular motivation to transfer the property at that time. Her statements are inconsistent with her actions regarding the property, such as paying the utility bills and refinancing the mortgage. The inconsistencies create a question of fact as to her intent to hinder, delay or defraud a creditor which cannot be decided on the documentary evidence. For that reason, summary judgment on this count is denied.

B. 11 U.S.C. § 727(a)(3)

Section 727(a)(3) denies a discharge to a debtor who has concealed, destroyed, mutilated, falsified, or failed to keep or preserve any recorded information, including books, documents, records, and papers, from which his financial condition or business transactions might be ascertained.

That section does not contain an intent element, but rather imposes a standard of reasonableness. The debtor is required "to take such steps as ordinary fair dealing and common caution dictate to enable the creditors to learn what he did with his estate." Davis v. Wolfe (In re Wolfe), 232 B.R. 741, 745 (B.A.P. 8th Cir. 1999) (quoting First State Bank of Newport v. Beshears (In re Beshears), 196 B.R. 468, 474 (Bankr. E.D. Ark. 1996)). When a plaintiff proves that a debtor's records are inadequate, the burden of production shifts to the debtor to establish that the failure to keep adequate records was justified under the circumstances. Floret, L.L.C. v. Sendecky (In re Sendecky), 283 B.R. 760, 764 (B.A.P. 8th Cir. 2002). Part of that involves a determination as to what records someone in the debtor's circumstances would keep. Id.

Debtors are to be able to provide records which provide creditors with enough information to ascertain the debtor's financial condition and track the debtor's financial dealings with substantial completeness and accuracy for a reasonable period preceding the petition date. Grau Contractors, Inc. v. Pierce (In re Pierce), 287 B.R. 457, 461 (Bankr. E.D. Mo. 2002) (citing In re Juzwiak, 89 F.3d 424, 427 (7th Cir. 1996)).

NLI complains that it has been unable to obtain financial records regarding business entities the Wickmans owned or operated or invested in. These entities are listed in the parties' tax returns and bankruptcy schedules. Ms. Wickman testified in her deposition that Mr. Wickman handled the couple's business affairs during their marriage and she has no substantive knowledge regarding their ownership interests or financial involvement in the entities. She included them in her bankruptcy schedules only because Mr. Wickman listed them on his bankruptcy schedules and she believed her name and/or signature may be on some of the business documents.

She also testified repeatedly that Mr. Wickman would be able to provide more information than she could about said entities. At Mr. Wickman's Rule 2004 examination, he testified that the

vast majority of those records had recently been destroyed. On the evidence now before the court, it is not clear that Ms. Wickman has violated the "reasonableness" standard for preservation of records. There is no evidence that Ms. Wickman participated in a meaningful way in the business operations during the marriage, or that she would have any reason to possess such records after the marriage. Summary judgment on this count is denied.

C. 11 U.S.C. § 727(a)(4)(A)

Section 727(a)(4) of the Bankruptcy Code denies a debtor a discharge if, in or in connection with the case, he or she knowingly and fraudulently made a false oath or account; presented or used a false claim; withheld any recorded information regarding his or her property or financial affairs; or 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.

A debtor's signatures, under penalty of perjury, on a bankruptcy petition, schedules of assets and liabilities, and the statement of financial affairs are written declarations which have the force and effect of oaths. Jordan v. Bren (In re Bren), 303 B.R. 610, 613-14 (B.A.P. 8th Cir. 2004) (citing Beshears, 196 B.R. at 476 and Fed. R. Bankr. P. 1008 ("All petitions, lists, schedules, statements and amendments thereto shall be verified or contain an unsworn declaration as provided in 28 U.S.C. § 1746.")).

Debtors are required to provide complete, accurate, and reliable information at the commencement of the case so that all parties may adequately evaluate the case and the estate's property may be appropriately administered. Bren, 303 B.R. at 614. Courts often will tolerate a single omission or error resulting from innocent mistake. However, multiple inaccuracies or falsehoods may rise to the level of reckless indifference to the truth, which is the functional equivalent of intent to deceive. Id. (citations omitted).

The creditor must show that (1) the debtor made a statement under oath; (2) the statement was false; (3) the debtor knew the statement to be false; (4) the debtor made the statement with fraudulent intent; and (5) the statement was material to the bankruptcy case. Taylor v. Montgomery (In re Montgomery), 309 B.R. 563, 567 (Bankr. W.D. Mo. 2004) (citing Sholdra v. Chilmark

Fin'l L.L.P. (In re Sholdra), 249 F.3d 380, 382 (5th Cir. 2001)).

The severity of § 727(a)(4) is most often imposed against debtors who, whether cavalierly or purposely, disregard their obligations under the Bankruptcy Code and fail to disclose all relevant information in their schedules. NLI maintains, in part, that Ms. Wickman incorporated too much information into her schedules of debt - information that she could not verify. NLI also alleges that Ms. Wickman listed incorrect valuations in her schedules of assets and completely omitted other assets.

As mentioned above, much of the information in Ms. Wickman's schedules and statement of financial affairs, particularly concerning business liabilities, came from Mr. Wickman's schedules and statement of financial affairs. This information is what NLI contends violates § 727(a)(4) because Ms. Wickman did not verify it. It appears that Ms. Wickman included all of that information in an effort to make complete disclosure of all debts she may be liable on. She has addressed some of NLI's concerns in that regard via an amended Schedule F.

NLI also believes that scheduled asset information about Ms. Wickman's personal property (specifically clothing and jewelry), real property, and an interest in her mother's estate is misleading. In particular, the 120th Plaza residence is valued at \$210,000 on Schedule A. Ms. Wickman testified that she based that on information from her mortgage company when she refinanced. However, the evidence indicates that at the time of the refinance, the property was worth in excess of \$300,000. NLI also notes that Ms. Wickman has been employed in various segments of the real estate industry for much of her adult life, suggesting that she would have a better idea of real estate values than many people who do not have such experience. NLI believes this to be an intentional misstatement of value.

NLI also disputes Ms. Wickman's assessment of the value of her wardrobe, jewelry, and furs. NLI notes that she listed debts of \$18,000 to various clothing stores in her schedule of unsecured creditors, suggesting that her clothing is probably worth more than the \$2,000 she listed on her Schedule B. However, used clothing is generally worth less than new clothing, under most circumstances, so without further evidence, it is impossible to say the discrepancy runs afoul of § 727(a)(4).

There is also a fact question with regard to the jewelry. The 1995 financial statement values "fine jewelry, gold, coin" at \$175,000. Schedule B lists jewelry worth \$8,400, which includes a diamond ring acquired after the divorce. Mr. and Ms. Wickman agree that most of the jewelry was sold and the proceeds used for living expenses. However, neither seems to know what pieces were sold or traded, how much they were sold for, or even which of the two of them handled the sales. Some of the items appear to be fairly significant pieces, in terms of worth, so their disposition presumably would have been memorable. Nevertheless, it would be speculative to find a § 727(a)(4) violation at this juncture.

There likewise is a fact question as to the automobile that was registered to her but does not appear on her bankruptcy schedules. She claims to know nothing about it. As above, this is a factual dispute that cannot be resolved on summary judgment.

NLI also contends that Ms. Wickman deliberately failed to include among her assets her interests in a number of business ventures she undertook with family members, as well as her beneficial interest in certain life insurance policies. She claims that she was unaware of the policies' existence until the discovery process in this case. She also indicates that she has little idea of the value of most of the businesses, and did not even list a couple of them because they never really amounted to anything beyond an idea and the formation of a company. Information about most of the businesses was provided to the Chapter 7 trustee, who did not pursue liquidation of Ms. Wickman's interests therein for her creditors.

NLI is correct that the schedules contain some omissions as well as some vagueness with regard to disclosed information. However, there is no evidence that she knew the information to be false or substantially untruthful, or that she had fraudulent intent when she completed and signed the schedules. She provided additional information to the trustee upon request, and she amended Schedule F after becoming aware of its shortcomings. Summary judgment on this count is denied.

D. 11 U.S.C. § 727(a)(5)

Section 727(a)(5) of the Bankruptcy Code denies a debtor a discharge if he or she has failed to explain satisfactorily any loss of assets or deficiency of assets to meet his or her

liabilities. Section 727(a)(5) does not contain an intent element as part of its proof. Beshears, 196 B.R. at 473.

Under section 727(a)(5), when the plaintiff demonstrates a loss of assets, the burden of proof shifts to the debtor to explain the loss. Sendecky, 283 B.R. at 766. If the debtor's explanation is too vague, indefinite, or unsatisfactory then the debtor is not entitled to a discharge. United States v. Hartman (In re Hartman), 181 B.R. 410, 413 (Bankr. W.D. Mo. 1995). Moreover, the debtor must "explain his losses or deficiencies in such a manner as to convince the court of good faith and businesslike conduct." Miami National Bank v. Hacker (In re Hacker), 90 B.R. 994, 996 (Bankr. W.D. Mo. 1987) (quoting 1A Collier on Bankruptcy ¶ 14.59 at 1436 (14th ed. 1976)). The explanation should be sufficient so the court does not have to speculate as to what happened to the assets or speculate as to the veracity of the explanation. Beshears, 196 B.R. at 473 (citing Bay State Milling Co. v. Martin (In re Martin), 145 B.R. 933 (Bankr. N.D. Ill. 1992), appeal dismissed, 151 B.R. 154 (N.D. Ill. 1993)).

An explanation based on the debtor's estimate, with nothing offered in the way of verification or affirmation by means of books, records, or otherwise is unsatisfactory. Hartman, 181 B.R. at 413 (citing Hacker, 90 B.R. at 997). Any loss of assets is sufficient to deny a discharge if the explanation for such loss is unsatisfactory. Id. The intention of the debtor is irrelevant, as is the credibility of the debtor, if the explanation is unsupported by sufficient documentation. Id. (citing Hacker, 90 B.R. at 1001-02).

NLI questions the failure to explain the decrease in net worth between the 1995 financial statement and the 2002 bankruptcy schedules, as well as the decrease or disappearance of specific assets such as pieces of jewelry, a boat, cash, and business investments. The basis for NLI's allegations under this section is the dearth of financial records available from either of the Wickmans. At her deposition, Ms. Wickman indicated that because her former husband handled the couple's business affairs, he would have the relevant records. At Mr. Wickman's Rule 2004 examination, he stated that he "threw everything away" when he "got bankrupt," and those records that he had not disposed of were damaged when his storage room was flooded just days before the examination, so there were few, if any, records he could produce.

Ms. Wickman is unable to explain exactly what happened to the jewelry and the boat, other than to say that most of it was sold, although a few pieces of jewelry "disappeared." She does not know the details of the sales. Likewise, regarding certain interests the Wickmans held in various partnerships or other business entities, Ms. Wickman indicated that the businesses no longer exist, but she does not know the details of the sale or dissolution and has no records thereof.

It is clear that some of the couple's assets were disposed of. It is not clear that Ms. Wickman was involved in or has much knowledge of that disposition. She relied on Mr. Wickman's bankruptcy schedules, which seem to be the only records available. She cannot produce what she does not have or testify about what she does not know. Summary judgment is denied on this count.

E. 11 U.S.C. § 523(a)(2)(B)

The test in the state courts as to whether the prior judgment decided the identical issue, and therefore whether collateral estoppel or res judicata precludes additional litigation, generally is whether or not the same evidence would be necessary in both actions. Marcus W., 649 N.W.2d at 910 (quoting Suhr v. City of Scribner, 207 Neb. 24, 27, 295 N.W.2d 302, 304 (1980)). However, in a non-dischargeability proceeding in a bankruptcy case, the question becomes whether the state court judgment establishes the elements of a prima facie case under § 523. Madsen, 195 F.3d at 989-90; Bankers Trust Co., N.A., v. Hoover (In re Hoover), 301 B.R. 38, 45-46 (Bankr. S.D. Iowa 2003).

In this situation, it does not. The state court summary judgment simply determined that the balance on the note was past due and unpaid. The Douglas County District Court petition contained no allegations of fraud. Therefore, the state court judgment does not establish the elements of a prima facie case under § 523(a)(2)(B) and the underlying conduct of the parties can be revisited in the context of this adversary proceeding.

To except a debt from discharge under 11 U.S.C. § 523(a)(2)(B), a creditor must prove, by a preponderance of the evidence, that (1) the debtor made (2) a statement in writing (3) respecting the debtor's financial condition (4) which was materially false and (5) made with the intent to deceive, and (6) which was reasonably relied upon by the creditor. Heritage

Bank of St. Joseph v. Bohr (In re Bohr), 271 B.R. 162, 167 (Bankr. W.D. Mo. 2001).

A financial statement is materially false if it "paints a substantially untruthful picture of a financial condition by a misrepresentation of the type which would normally affect the decision to grant credit." Id. Likewise, a financial statement is materially false if it falsely represents the debtors' overall financial condition or has major omissions. Id. In the Bohr case, a financial statement listing real property as an asset was materially false in light of the fact that debtors held only a remainder interest in the property, subject to a life estate, so the interest had no value. Without the real estate, the debtors' net worth dropped from \$270,000 to \$8,000, so the misrepresentation was material. The relevant subjective inquiry, although not dispositive, is whether the complaining creditor would have extended credit had it been apprised of the debtor's true situation. Fairfax State Sav. Bank v. McCleary (In re McCleary), 284 B.R. 876, 885 (Bankr. N.D. Iowa 2002).

For discharge to be barred, the debtor must have acted with intent to deceive. An intent to deceive does not mean that the debtors acted with a "malignant heart." Bohr, 271 B.R. 162, 169 (quoting Agribank v. Webb (In re Webb), 256 B.R. 292, 297 (Bankr. E.D. Ark. 2000)). A creditor may establish such intent by proving reckless indifference to or reckless disregard of the accuracy of the information in a debtor's financial statement. McCleary, 284 B.R. at 888. Factors to consider include whether the debtor was intelligent and experienced in financial matters, and whether there was a clear pattern of purposeful conduct. Id. (citations omitted). Once the creditor establishes that the debtor had actual knowledge of the false statement, the debtor cannot overcome the inference of the intent to deceive with unsupported assertions of honest intent. Bohr, 271 B.R. at 169. The court in Bohr found intent to deceive based on the debtors' admission that they knew the land did not belong to them and that the financial statements containing information to the contrary were submitted for the purpose of obtaining credit. The inference from those facts was that the debtors intended to deceive the lender. Id.

By contrast, the court in McCleary found no intent to deceive because the bank was so lax in obtaining full disclosure of the debtor's financial situation. "The Bank was content with the limited information it received about Debtor's financial picture. Debtor's failure to provide more relevant and accurate

information cannot be interpreted as an intent to deceive in these circumstances." 284 B.R. at 888.

The reasonableness of a creditor's reliance is to be determined in light of the totality of the circumstances. Guess v. Keim (In re Keim), 236 B.R. 400, 402-03 (B.A.P. 8th Cir. 1999) (citing First Nat'l Bank of Olathe v. Pontow, 111 F.3d 604, 610 (8th Cir. 1997)). Among the factors to consider is "whether there were any 'red flags' that would have alerted an ordinarily prudent lender to the possibility that the representations relied upon were not accurate; and whether even minimal investigation would have revealed the inaccuracy of the debtor's representations." Sinclair Oil Corp. v. Jones, 31 F.3d 659, 662 (8th Cir. 1994) (quoting Coston v. Bank of Malvern (In re Coston), 991 F.2d 257, 261 (5th Cir. 1993) (en banc)).

In this case, four of the six elements have been established. However, for many of the same reasons explained in previous sections of this order, material falsity and the debtor's intent to deceive raise fact issues that cannot be decided on this record. Summary judgment is denied on this count.

IV. Conclusion

The debtor's motion for summary judgment is denied because the state court judgment does not preclude a subsequent review of the facts to determine dischargeability.

The creditor's motion for summary judgment is denied because genuine issues of material fact exist.

Ms. Wickman's explanations are credible, at least on the basis of the present record. Of course, the opportunity to see her testify at trial may or may not cause me to reach another conclusion. For instance, her disavowal of any substantive knowledge about the couple's financial interests or transactions is plausible on the basis of the facts elicited in her deposition. However, if at trial it becomes clear that her business acumen or her involvement in the couple's business affairs is greater than it initially appears, denial of discharge may well be warranted. Nevertheless, at this juncture, her position is sufficient to survive summary judgment.

One gets the distinct impression from NLI's extensive and detailed arguments in support of denial of discharge that NLI is

aggrieved by Mr. Wickman's bankruptcy discharge and seeks an indirect recovery through Ms. Wickman. This is not a joint bankruptcy case, so Mr. Wickman's actions or statements or inability to produce records have little weight here. An intimation of fraudulent activity on his part will not create an inference of guilt as to this debtor. This adversary proceeding concerns only what Ms. Wickman knows or did in connection with the activities complained of by NLI.

Separate order will be entered.

DATED: October 8, 2004

BY THE COURT:

/s/ Timothy J. Mahoney
Chief Judge

Notice given by the Court to:

*Casey Quinn
*Scott Calkins
U.S. Trustee

Movant (*) is responsible for giving notice of this order to all other parties not listed above if required by rule or statute.

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FOR THE DISTRICT OF NEBRASKA

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vs.)
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BARBARA WICKMAN,)
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ORDER

This matter is before the court on cross-motions for summary judgment by the plaintiff (Fil. #31) and the debtor (Fil. #91). Casey Quinn represents the debtor, and Scott Calkins represents the plaintiff. The motions were taken under advisement as submitted without oral arguments.

IT IS ORDERED: For the reasons stated in the Memorandum of today's date, the plaintiff's motion for summary judgment (Fil. 31) is denied and the debtor's motion for summary judgment (Fil. #91) is denied. The matter will be set for trial by separate order.

DATED: October 8, 2004

BY THE COURT:

/s/ Timothy J. Mahoney
Chief Judge

Notice given by the Court to:

*Casey Quinn
*Scott Calkins
U.S. Trustee

Movant (*) is responsible for giving notice of this order to all other parties not listed above if required by rule or statute.