



SO ORDERED.

SIGNED this 15 day of September, 2004.

Janice Miller Karlin

JANICE MILLER KARLIN
UNITED STATES BANKRUPTCY JUDGE

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF KANSAS**

In re:)
JOHN FREDRICK WILLIAM THIEDE)
and CASSIE MARIE THIEDE)
Debtor.)

Case No. 02-42533-7

_____)
FIRST NATIONAL BANK OF STRATTON,)
COLORADO)
Plaintiff,)

v.)
JOHN FREDRICK WILLIAM THIEDE)
and CASSIE MARIE THIEDE)
Defendant.)

Adversary No. 03-7023

**MEMORANDUM AND ORDER GRANTING IN PART, AND DENYING IN PART,
PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT, AND SUSTAINING
OBJECTION TO HOMESTEAD EXEMPTION**

This matter is before the Court on Plaintiff's Motion for Summary Judgment (Doc. 27). Plaintiff is seeking a denial of discharge pursuant to 11 U.S.C. § 727, a determination of nondischargeability pursuant to 11 U.S.C. § 523, and an order sustaining an objection to the exemption of Debtors' homestead, pursuant to K.S.A. 60-2301. The Court has reviewed the briefs filed by the parties and is now prepared to rule. The Court has jurisdiction to hear this matter as it is a core proceeding.¹

I. FINDINGS OF FACT

As a preliminary matter, the failure of either party to provide a list of exhibits by exhibit number, to number the pages of their voluminous exhibits (160 pages for Plaintiff and 95 pages for Defendants), or to consistently refer to them by exhibit and page number in their reference to over 84 numbered fact paragraphs, unnecessarily complicated this Court's consideration of this motion.² The local rule requires that parties "refer with particularity to those portions of the record upon which movant relies."³ This Court is not obligated to comb the record to ferret out evidence to support or defend a motion, and should not do so, as bankruptcy courts have a limited and neutral role in the adversarial process, and should be wary of becoming advocates to make a party's case for it.⁴

¹28 U.S.C. § 1334(b) and 28 U.S.C. § 157(b).

²Exhibit tabs extending from the edges of pages were not used in this case, and made the Court's review more difficult, especially when coupled with a lack of page numbers. Now that electronic filing is mandatory (these pleadings preceded mandatory electronic filing), this Court will likely require parties to sequentially number voluminous exhibits and provide a list of exhibits and the page number where that exhibit starts in future filings.

³D. Kan. Rule 56.1(a).

⁴*Adler v. Wal-Mart Stores, Inc.*, 144 F.3d 664, 672 (10th Cir. 1998).

That said, the Court has vigilantly tried to locate the relevant evidence the parties suggest exists within the 255 pages of exhibits,⁵ and thus makes the following findings of fact. All facts are either uncontroverted or viewed in the light most favorable to Debtors,⁶ who are the non-moving parties.

1. Debtors, John Fredrick William Thiede and Cassie Marie Thiede (“Debtors”) filed a Chapter 7 bankruptcy petition on September 25, 2002.
2. Several months prior to filing bankruptcy, John Thiede served as president of Thiede Corporation and held one-third of its shares, served as president of Thiede Brothers, Inc. and held one-third of its shares, served as general partner of Thiede Farms Company and held a one-third interest in that entity, and served as general partner and business partner of Thiede Trucking, L.L.C. and held a one-half interest in that entity. There is no allegation that Cassie Thiede held any office or owned any interest in any of these entities.

⁵This was not a simple task, as, for example, both parties referred to deposition transcript pages that were not attached to either submission.

⁶The Court is also disturbed that Debtors habitually designated “controverted” in response to the vast majority of the 84 numbered facts (with subparts), when a close reading of their response indicated they were actually admitting the statement, but then qualifying it with additional, and frequently, irrelevant information—and without citation to admissible evidence. For example, Plaintiff’s Fact No. 3 was that prior to initiating bankruptcy, John Thiede served as President of DST. Debtors’ response was: “Controverted. Although John Thiede was the president of DST, he held no position as a board of director nor was he a shareholder.” Occasionally, Debtors’ entire response to a fact was the one-word sentence “Controverted,” without reference to a single supporting document. For example, Fact No. 74 says Debtors were indebted to the Bank at the time they deposited \$80,000 with their attorney. They have admitted they deposited the money with their attorney and the date, and they have admitted that by that date, the Bank held over a \$300,000 judgment against them. Thus, the Court is unaware of any way Debtors could truthfully controvert the statement. Such responses are, frankly, disingenuous, and this conduct also unduly complicated this matter. The Court cautions Debtors’ counsel to more closely follow the rules regarding summary judgment motions in the future.

3. John Thiede made all of the business decisions regarding Thiede Corporation, Thiede Brothers, Inc., Thiede Farms Company and Thiede Trucking, L.L.C. and was in complete control of those businesses.
4. Thiede Brothers and Thiede Farms borrowed sizeable sums from the First National Bank of Stratton, Colorado (hereinafter the "Bank") pursuant to the terms of a number of promissory notes and security agreements executed by John Thiede in his corporate and general partner capacities.
5. To further secure Thiede Brothers and Thiede Farms promissory notes to the Bank, Thiede Trucking executed and delivered its security agreement granting the Bank a security interest in accounts, accounts receivable, tangible and intangible property, general intangibles, income, issues, products, proceeds, and a tractor-trailer.
6. Debtors also personally guaranteed payment of Thiede Brothers and Thiede Farms loans to the Bank.
7. In September 2000, First National Bank, Goodland, Kansas filed a foreclosure action naming the Bank, Thiede Farms, Thiede Brothers, and John and Cassie Thiede among the party defendants, seeking money judgment and foreclosure of its real estate mortgage and security interest.
8. In October 2000, the Bank filed its cross-claim against Thiede Farms, Thiede Brothers, and John and Cassie Thiede, seeking judgment on the balance of its loans and foreclosure of its liens.

9. In November 2001, the state court entered judgment in favor of First National Bank of Goodland, Kansas, foreclosing its real estate mortgage and personal property security interest in Thiede Brothers and Thiede Farms collateral.
10. First National Bank of Goodland's judgment was satisfied at a foreclosure sale held in January 2002.
11. In March 2002, the state court entered Default Judgment in favor of the Bank on its cross-claim against Thiede Brothers, Thiede Farms, Thiede Trucking, John and Cassie Thiede in the principal amount of \$303,489.03 plus interest, and ordered foreclosure of the Bank's security interest in all of the machinery, equipment, livestock, crops, feed, grains, accounts, accounts receivable, general intangibles, and products of Thiede Farms and Thiede Brothers, and foreclosure of its security interest in Thiede Trucking's accounts, accounts receivable, general intangibles, equipment, machinery, and the tractor-trailer.
12. As a result of the foreclosure proceeding and the seizure of proceeds from the sale of certain cattle, Thiede Brothers, Thiede Farms, Thiede Trucking, and John and Cassie Thiede were rendered insolvent.⁷

⁷Debtors attempt to controvert this statement by noting that Thiede Trucking was still "operational," and cite to their Answer, Doc. No. 5 in support. Fed. R. Civ. P. 56(e), made applicable to adversary proceedings by Fed. R. Bankr. P. 7056, states "an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading." Rule 56(c) further notes the facts must be identified by reference to affidavits, deposition transcripts, or specific exhibits incorporated therein. *Mitchell v. City of Moore, Okla.*, 218 F.3d 1190, 1197 (10th Cir. 2000). This Court must ignore Debtors' unsworn answer in evaluating this summary judgment motion, unless it contains an admission against interest, because it is not the kind of document that can be used to defeat summary judgment.

13. Debtors also lost their Burlington, Colorado, residence in the foreclosure proceeding, and moved to a rental home in Burlington. In December 2001, they moved their family to property on Toulon Road near Hays, Kansas (the “Toulon Road property”), and thereafter claimed it as their exempt homestead under K.S.A. 60-2301.
14. In December 2001, Darlene Thiede, Walter Thiede and John Thiede were the shareholders of Thiede Corporation.⁸
15. The Toulon Road property was the sole asset of Thiede Corporation.
16. In September 1998, John Thiede had obtained an appraisal that valued the Toulon Road property at \$738,000; John Thiede admitted he thought the property was only worth \$200,000 because of certain environmental problems, although he used the \$738,000 number in making applications for financing with other entities.
17. On December 26, 2001, Darlene Thiede, Walter Thiede, John Thiede, Thiede Corporation (by its President John Thiede) and Cassie Thiede each executed a quitclaim deed to transfer any interest they had in the Toulon Road property to John and Cassie Thiede.
18. At the time the quitclaim deeds were executed, the property was titled solely in the name of Thiede Corporation.

⁸Debtors attempt to controvert this statement by pointing to the tax returns filed by Thiede Corporation in 2001. However, the statements on the tax return do not controvert the direct sworn testimony of John Thiede, where he admitted that Darlene Thiede, Walter Thiede and John Thiede were the shareholders of Thiede Corporation in December 2001. Debtors’ answer also admits they were all shareholders.

19. On December 31, 2001, five days after the execution of the quitclaim deeds, Thiede Corporation filed Articles of Dissolution.
20. Other than the original Articles of Incorporation and Articles of Dissolution, no other paperwork was filed with the Secretary of State regarding Thiede Corporation.
21. No sales contract was drawn or executed to transfer the Toulon Road property to Debtors, and they paid no money to Thiede Corporation or the grantors of the quitclaim deeds, all relatives, for the transfers.
22. Pursuant to the Articles of Incorporation, for an officer or director of Thiede Corporation to engage in a transaction with Thiede Corporation, said transaction must be approved or ratified at a Board of Directors' meeting by a sufficient vote of directors not interested in the transaction.
23. No minutes of meetings or other documents of Thiede Corporation exist.
24. Between August 2001 and March 2002, while the Bank was prosecuting its cross claim to judgment against Thiede Farms, Thiede Brothers, Thiede Trucking, and Debtors, John Thiede withdrew \$67,900 in funds from Thiede Trucking checking account at First National Bank of Lamar, Colorado, by writing checks to himself. They were written in round numbers, instead of in specific amounts that would be expected if the amounts were for reimbursement of discrete trucking company expenses.
25. John Thiede wrote another \$2,100 in checks to himself immediately post-judgment, between April 15 and May 22, 2002.

26. He now claims, but not in an affidavit or other sworn pleading presented to the Court, that these checks represented reimbursement to him for expenses he incurred for the trucking company's operating expenses. He has no documentation, in the form of receipts, canceled checks, ledgers, or anything else, to support that claim.⁹
27. The checks John Thiede made payable to himself were not approved by the other general partner of Thiede Trucking, and there are no records or documents of any type authorizing these transfers.
28. At the time John Thiede wrote the checks to himself, he was aware that the Bank had filed a cross-claim against Thiede Trucking, and that by March 25, 2002, the Bank had received a Journal Entry of Default against Thiede Trucking.
29. Other than the tractor-trailer, the accounts, accounts receivable and general intangibles of Thiede Trucking were its only assets.
30. During the time John Thiede paid himself \$70,000 from Thiede Trucking checking account, he paid nothing to his brother, Walter Thiede, the other shareholder in Thiede Trucking, nor to any of Thiede Trucking's own creditors, other than \$28.45 to Merrit Trailer Company, \$2.40 to the State of New Mexico, and \$27.71 to the Colorado Department of Revenue.
31. Prior to the Bank repossessing Thiede Trucking's trailer, John Thiede removed the aluminum wheels (subject to the Bank's security interest) from the tractor and replaced

⁹Debtors again attempt to controvert this statement of fact (and many others) by merely citing to their Answer. Their answer is not admissible evidence in this summary judgment proceeding.

them with less valuable steel wheels. He contends the originals were defective, and that he left them “somewhere in Colorado.”

32. The Bank contends that Debtors engaged in certain improper transactions shortly before filing for bankruptcy, and that they failed to disclose certain property and assets on their schedules and statements of financial affairs.

II. STANDARDS FOR SUMMARY JUDGMENT

Summary judgment is appropriate if the moving party demonstrates that 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.”¹⁰ The rule provides that “the mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact.”¹¹ The substantive law identifies which facts are material.¹² A dispute over a material fact is genuine when the evidence is such that a reasonable jury could find for the nonmovant.¹³ “Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment.”¹⁴

¹⁰ Fed. R. Civ. P. 56(c).

¹¹ *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986) (emphasis in original).

¹² *Id.* at 248.

¹³ *Id.*

¹⁴ *Id.*

The movant has the initial burden of showing the absence of a genuine issue of material fact.¹⁵ The movant may discharge its burden “by ‘showing’ – that is, pointing out to the . . . court – that there is an absence of evidence to support the nonmoving party’s case.”¹⁶ The movant need not negate the nonmovant's claim.¹⁷ Once the movant makes a properly supported motion, the nonmovant must do more than merely show there is some metaphysical doubt as to the material facts.¹⁸ The nonmovant must go beyond the pleadings and, by affidavits or depositions, answers to interrogatories, and admissions on file, designate specific facts showing there is a genuine issue for trial.¹⁹ Rule 7056(e) requires the Court to enter summary judgment against a nonmovant who fails to make a showing sufficient to establish the existence of an essential element to that party's case, and on which that party will bear the burden of proof.²⁰

III. CONCLUSIONS OF LAW

The Pretrial Order in this case reveals that Plaintiff seeks a determination that 1) Debtors cannot exempt certain real property deeded to them by Thiede Corporation, because the transfer to them was fraudulent, 2) that they should be denied a discharge pursuant to 11 U.S.C. § 727(a)(2),²¹ (3), (4) and (5),

¹⁵ *Shapolia v. Los Alamos Nat'l Lab.*, 992 F.2d 1033, 1036 (10th Cir. 1993).

¹⁶ *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986).

¹⁷ *Id.* at 323.

¹⁸ *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986).

¹⁹ *Celotex*, 477 U.S. at 324.

²⁰ *Id.* at 322.

²¹All future statutory references are to the Bankruptcy Code, 11 U.S.C. § 101, et seq., unless otherwise specified.

and 3) the debt owed to Plaintiff by John Thiede is non-dischargeable pursuant to 11 U.S.C. § 523(a)(4). Plaintiff has sought summary judgment on all these bases except for § 727(a)(5).

A. The transfer of the Toulon Road property

The Bank contends that Debtors cannot claim the Toulon Road property as their homestead, and thus exempt property, because the attempted conveyance of the property to them was defective, and they are not the owners of the property.

1. The transfer of the property by the shareholders of Thiede Corporation, John, Cassie, Walter and Darlene Thiede, to Debtors was ineffective.

It is undisputed that prior to December 26, 2001, the Toulon Road property was solely owned by Thiede Corporation, which was organized under the laws of the state of Colorado. On December 26, 2001, John, Cassie, Walter and Darlene Thiede each executed a separate Kansas Joint Tenancy Quitclaim Deed in an attempt to transfer the Toulon Road property to Debtors. It goes without saying that a debtor cannot exempt property that he does not own.²² Because title to the real estate was held by Thiede Corporation, and not the individuals who executed the quitclaim deeds, this attempted transfer of the property by these individuals was ineffective.²³

²²K.S.A. 60-2301 expressly restricts the homestead exemption to the “owner” of the property.

²³*Michaelson v. Michaelson*, 939 P.2d 835, 841 (Colo. 1997) (holding that “equitable title” to real property owned by a corporation does not pass to the shareholders upon dissolution of that corporation. Title remains in the corporation pending distribution to the shareholders of the remaining assets, in cash or in kind, after creditors of the corporation are satisfied). *See also* C.R.S. § 7-114-105(2)(a).

2. The transfer of the property by Thiede Corporation to Debtors was also ineffective.

On December 26, 2001, John Thiede, acting in his corporate capacity as president of Thiede Corporation, also executed a Kansas Joint Tenancy Quitclaim Deed on behalf of Thiede Corporation in favor of himself and his wife, who are the Debtors herein. Pursuant to Article 6 of the Articles of Incorporation of Thiede Corporation, however, any contract or other transaction between the corporation and an interested party of the Corporation is valid “so long as the contract or transaction is authorized, approved or ratified at a meeting of the Board of Directors by sufficient vote thereon by directors not interested therein.”²⁴

The Bank argues that there is no evidence that the Board of Directors ever voted to approve or ratify this transaction, and Debtors do not dispute that fact. Instead, in their response to the Bank’s Statement of Fact No. 31, Debtors merely claim that Darlene Thiede and Walter Thiede, the only disinterested directors, tacitly acquiesced to the transfer by signing individual quitclaim deeds. They thus infer that this tacit acquiescence is equivalent to a Board of Directors meeting with a vote, and attendant minutes of the meeting.

Signing a quitclaim deed that only had the effect of transferring any personal interest Darlene Thiede and Walter Thiede had in the Toulon Road property to the Debtors, however, does not satisfy the requirement of a vote to approve or ratify the transfer of the corporation’s interest in the real estate at a

²⁴Emphasis added.

meeting of the corporation's Board of Directors.²⁵ Thiede Corporation did file Articles of Dissolution a few days after the stockholders' attempted to quitclaim their personal interest, if any, in the subject real property. Pursuant to Colorado law, however, under which Thiede Corporation was incorporated, dissolution of a corporation does not automatically transfer corporate property to the stockholders.²⁶

The Court finds that the attempted transfer of the Toulon Road property by John Thiede, acting as president of Thiede Corporation, to himself and his wife, was in violation of the Articles of Incorporation of Thiede Corporation, and therefore invalid.²⁷ Because the transfer was invalid, title still remains with Thiede Corporation. Because the Debtors were not the owners of the real estate on the date of filing their bankruptcy petition, they cannot exempt it as their homestead.

3. Bank has not demonstrated it is entitled to Summary Judgment on the issue of whether the transfer of the Toulon Road property was fraudulent under Kansas common law or under the Kansas Uniform Fraudulent Transfer Act (KUFTA).

Although the Court need not decide the issue, because it has already found the transfer invalid, it will nevertheless address the Bank's contention that the transfer of the Toulon Road property should be voided because it was fraudulent under Kansas common law or under the Kansas Uniform Fraudulent

²⁵Other than the brief statement made by Debtors in response to Statement of Fact No. 31, Debtors fail to respond in any other way regarding the attempted transfer of the Toulon Road property.

²⁶*Michaelson*, 939 P.2d at 841 and C.R.S. § 7-114-105(2)(a).

²⁷*Cf. Sampsell v. Imperial Paper & Color Corp.*, 313 U.S. 215 (1941) (holding that the shifting of assets by a debtor to a corporation he fully controls is a badge of fraud).

Transfers Act (“KUFTA”).²⁸ Under both Kansas common law and the KUFTA, the Bank is required to prove that Debtors acted with intent to defraud the Bank in connection with the transfer.²⁹

The Tenth Circuit Court of Appeals has consistently held that “[f]raud is a question of fact to be determined by the trier of fact.”³⁰ Although Fed. R. Bankr. P. 7056(e) generally requires a non-moving party to “set forth specific facts showing that there is a genuine issue for trial,” which Debtors have failed to do by even attempting to address this issue in their summary judgment response, the Court is required to enter summary judgment only “if appropriate.”

The Bank provides an extensive argument concerning the badges of fraud that have been developed by the Kansas legislature and the Kansas Supreme Court in an effort to show that John Thiede had the requisite fraudulent intent when transferring this property from Thiede Corporation to himself and his wife. Although this circumstantial evidence of fraud may be sufficient to prevail at trial, the Court finds it is not sufficient to establish that there is no genuine issue of material fact for trial. Given the fact that a claim of fraud requires the Court to determine Debtors’ state of mind, it is nearly impossible for the Court to find that there is no question of fact absent some direct evidence of fraud, such as an admission by Debtors. Since Debtors deny within their depositions any intent to defraud, the Court denies the Bank’s motion for summary judgment on this ground.

B. Denial of discharge under § 727

²⁸K.S.A. 33-201, *et seq.*

²⁹*See Alires v. McGehee*, 277 Kan. 398, 403 (2004) (stating that one of the elements of a fraud claim is intent to deceive) and K.S.A. 33-204(a) (stating that a debtor must have actual intent to defraud).

³⁰*See Thrifty Rent-A-Car Sys., Inc. v. Brown Flight Rental One Corp.*, 24 F.3d 1190, 1195 (10th Cir. 1994).

The Bank has moved for an order denying Debtors' discharge pursuant to §§ 727(a)(2)(A), 727(a)(3) and 727(a)(4)(A). The Bank has the burden of proof, by a preponderance of the evidence standard.³¹ The provisions of § 727 are generally construed liberally in favor of debtors and strictly against creditors.³²

1. Bank has not shown it is entitled to summary judgment on its motion to deny discharge pursuant to § 727(a)(2)(A).

According to the Bank, Debtors' discharge should be denied pursuant to § 727(a)(2)(A) because, within one year of filing for bankruptcy, Debtors transferred, removed, and concealed certain property with the intent to defraud the Bank. The purpose of this section is to deny a discharge to those debtors who, with the intent to defraud, transfer without consideration, property that would have become property of the estate.³³ In support of this position, the Bank lists numerous transactions that Debtors failed to disclose in their bankruptcy schedules and Statement of Financial Affairs, as well as items of property for which Debtors have failed to account. Debtors do not dispute the fact that there were errors and omissions in their schedules, but deny the fact that they acted with the requisite intent to defraud the Bank, and in some instances, that the property would have ever become property of the estate.

³¹*Cf. Grogan v. Garner*, 498 U.S. 279 (1991); *First National Bank of Gordon v. Serafini (In re Serafini)*, 938 F.2d 1156 (10th Cir. 1991). The Court notes that the attempted transfer of the Toulon Road property to the Debtors does not fit this definition, because that property is not owned by Debtors, and thus would not have become property of this estate. Plus, John Thiede was transferring property to him and his wife, not away from him and his wife.

³²*Gullickson v. Brown (In re Brown)*, 108 F.3d.1290, 1293 (10th Cir. 1997).

³³*National Bank of Pittsburgh v. Butler (In re Butler)*, 38 B.R. 884, 887 (Bankr. D. Kan. 1984) (citations omitted).

In order to deny a bankruptcy discharge, evidence of actual intent to hinder, delay or defraud creditors must be shown.³⁴ Absent a specific intent to defraud creditors, a discharge should not be denied.³⁵ Although actual intent must be shown, a finding of actual intent may be based on circumstantial evidence or on inferences drawn from a course of conduct.³⁶ Intent is normally a question of fact and is often not susceptible to summary judgment.³⁷

The Bank provides a detailed analysis of evidence that could be used to establish fraud on the part of Debtors, but has failed to show that the issue of fraud is undisputed. Debtors claim that the errors and omissions were unintentional and not made with the intent to defraud the Bank, and the Court finds that the circumstantial evidence presented in this motion is not sufficient to meet the preponderance of the evidence standard. Because all factual issues must be resolved in favor of Debtors, as the non-moving party, the Court must find, for purposes of this motion, that Debtors did not intend to defraud the Bank. Therefore, summary judgment is not appropriate on the Bank's request for an order denying discharge pursuant to § 727(a)(2)(A), because there is a dispute of material fact surrounding Debtors' actual intent.

2. Bank is entitled to summary judgment on its motion to deny discharge pursuant to § 727(a)(3) against Debtor John Thiede, only.

³⁴*Farm Credit Bank of Wichita v. Hodgson (In re Hodgson)*, 167 B.R. 945, 952 (D. Kan. 1994).

³⁵*In re Brown*, 108 F.3d at 1292.

³⁶*Farmers Co-Op Ass'n. v. Strunk*, 671 F.2d 391 (10th Cir. 1982).

³⁷*First National Bank v. Davidson (In re Davison)*, 296 B.R. 841 (Bankr. D. Kan. 2003); *cf. Hampton v. Dillard Dep't Stores, Inc.*, 247 F.3d 1091 (10th Cir. 2001).

The Bank next moves for summary judgment on its claim that both Debtors should be denied a discharge pursuant to § 723(a)(3) on the basis that they failed to keep certain records from which their financial condition or business transactions might be ascertained. As previously noted, Bankruptcy Rule 4005 places the burden on Plaintiff of proving an objection to discharge.³⁸ However, “once an objecting creditor shows by a preponderance of the evidence that the debtor has failed to keep or produce adequate books or records, the burden shifts to the debtor to prove that the failure to do so was justified.”³⁹ A debtor’s obligation to preserve records and financial information is intended to protect the trustee and creditors by enabling them to determine or confirm a debtor’s financial condition, and to trace a debtor’s financial history for a reasonable period of time.

The undisputed evidence in the case shows that John Thiede received \$70,000 in cash from the bank account of Thiede Trucking shortly before filing for bankruptcy, and over only a seven month period. John Thiede, in his deposition, generally stated that these checks represented reimbursement to him for money he spent to run the trucking company. One would thus assume Debtor would have fuel, maintenance, tolls, mileage and other travel receipts to corroborate his statements.

John Thiede wholly failed to keep any records relating to these cash transactions, thereby depriving the creditors, including Plaintiff who asserts a security interest in Thiede Trucking’s cash collateral, from examining these transactions and determining whether the transactions were proper. In addition, John Thiede has provided no argument why his failure to keep such records was justified. In fact, Debtor

³⁸ Fed. R. Bankr. P. 4005.

³⁹ *Clark v. Kearns (In re Kearns)*, 149 B.R. 189, 190 (Bankr. D. Kan. 1992).

completely failed to even address this issue in his response to the Bank's motion for summary judgment.⁴⁰

John Thiede had a duty to take reasonable efforts to preserve records that would show the funds were withdrawn for legitimate business expenses, such as receipts, and canceled checks for expenditures. He wholly failed to do so.⁴¹ The presumption of intent is heightened when the withdrawals occur in the face of imminent creditor actions, as here, and shortly before the filing of bankruptcy. Both instances increase the probability that Debtor's dominant motive was simply to deny creditors access to the property.⁴²

Even if the Court could accept as evidence the information contained in Debtor's unsworn answer that he generally used this money to live on and run the trucking company, such explanation based solely on his estimates, and not founded on any books or records, is simply insufficient. A debtor cannot refuse to provide actual records, and then attempt to supplement the information that is absent with oral testimony.⁴³ Therefore, once the Bank introduces circumstantial evidence indicating intent to deceive,

⁴⁰The failure to address the issue of denial of discharge under § 727(a)(3) was noted by the Bank in its reply brief in support of its motion for summary judgment. Debtors made no attempt to amend their response or to file a supplemental response addressing this issue. As the Court notes below, however, the Bank has presented no evidence, and makes no real argument, that Cassie Thiede was required to keep the books and records of Thiede Trucking, and thus her failure to respond, as it relates to a claim against her, is at least somewhat understandable.

⁴¹Debtor suggests Thiede Trucking tax return would show these expenditures, but without receipts or documentation, the Court questions how a tax preparer could prepare such returns. These are not old records that might have long-since been discarded in the normal operation of a business; these are expenses allegedly incurred within less than one year of bankruptcy.

⁴²3 W. Norton, *Bankruptcy Law and Practice* 2d § 74:5, p. 74-10(1998).

⁴³*See Chalik v. Moorefield (In re Chalik)*, 748 F. 2d 616 (11th Cir. 1984) (rejecting debtor's undocumented assertion that he had spent \$50,000 - \$60,000 on his business and \$10,000 - \$20,000 for living expenses); *First Texas Sav. Assn., Inc. v Reed*, 700 F2d 986 (5th Cir. 1983) (rejecting debtor's explanation that \$20,000 was consumed by undocumented expenses; *In re Kearns*, 149 B.R. at 190-91 (debtor cannot supplement the information that is absent from the actual records with oral testimony); *In*

Debtor must respond with more than an unsupported assertion of honest intent. Debtor has completely failed to offer any reason which justifies the failure to keep adequate books and records, and thus the Bank is entitled to an order denying Debtor John Thiede's discharge pursuant to § 727(a)(3).

Although the Court finds that there is sufficient undisputed evidence to establish that Debtor John Thiede failed to keep adequate books and records relating to the transfer of \$70,000 in cash from Thiede Trucking, the Court finds there is insufficient evidence to make such a finding as it relates to Debtor Cassie Thiede. The Bank has presented no evidence demonstrating that Cassie Thiede was involved in any way in Thiede Trucking. There is no evidence she had any duty to keep receipts and canceled checks, and her failure to do so, therefore, creates no inference of bad faith on her part. Therefore, the Court will grant the Bank's motion for summary judgment as it relates to the request for an order denying Debtor John Thiede's discharge pursuant to § 727(a)(3), but denies summary judgment on this ground against Debtor Cassie Thiede.

3. Bank is not entitled to summary judgment on its motion to deny discharge pursuant to § 727(a)(4)(A).

Pursuant to § 727(a)(4)(A), the court shall grant the debtor a discharge, unless – “(4) the debtor knowingly and fraudulently, in or in connection with the case – (A) made a false oath or account.” The Bank's final claim that Debtors should be denied a discharge is based upon an allegation that Debtors knowingly and fraudulently made numerous false oaths in connection with this bankruptcy proceeding.⁴⁴ The Bank lists numerous items that it claims were intentionally omitted from Debtors' schedules and

re Folger, 149 B.R. 183, 188 (D. Kan. 1992).

⁴⁴See 11 U.S.C. § 727(a)(4).

statements of financial affairs, under oath, in an attempt to defraud creditors. Debtors do not contest the fact that they failed to list certain assets and make certain disclosures, but deny the fact that the omissions were made knowingly and fraudulently.

“In general, the court is reluctant to grant summary judgment on a cause of action under § 727(a)(4) inasmuch as the element of fraudulent intent usually involves questions of fact involving the debtor's state of mind.”⁴⁵ This reluctance is especially relevant in cases such as this, where Debtors not only amended their schedules and statements of financial affairs to correct the omissions, but have provided a fairly detailed explanation for the omissions in response to the motion for summary judgment. The Bank’s briefs in support of its motion for summary judgment present considerable analysis as to the issue of fraudulent intent, and may contain sufficient evidence to enable the Bank to prevail if this case were to proceed to trial. However, given the fact that all factual disputes must be resolved in favor of Debtors, as the non-moving parties, the Court finds that summary judgment is not appropriate. Whether Debtors acted with the requisite intent is a factual determination that cannot, at least at this juncture, be determined on summary judgment. Therefore, the Court denies the Bank’s motion for summary judgment as it relates to a denial of discharge under § 727(a)(4).

C. Nondischargeability of debt under § 523(a)(4)

The Bank contends that John Thiede, as president of Thiede Trucking, violated his fiduciary duty owed to the Bank to safeguard \$70,000 which constituted inventory or proceeds, and was pledged to the

⁴⁵*In re Davison*, 296 B.R. at 847.

Bank as collateral. As a result, the Bank claims that at least \$70,000 of its debt is non-dischargeable pursuant to § 523(a)(4).

Section 523(a)(4) excepts from discharge any debt that arises from “fraud or defalcation while acting in a fiduciary capacity, embezzlement or larceny.” In order to prevail on this claim, the Bank must prove that a fiduciary relationship existed between it and Mr. Thiede and second, it must prove that Mr. Thiede committed fraud or defalcation in the course of that fiduciary relationship.⁴⁶

The Bank notes that on March 25, 2002, it received judgment against Thiede Trucking and John and Cassie Thiede. There is no factual dispute that John Thiede was the president of Thiede Trucking, was in complete control of its assets and executed the security agreement on behalf of Thiede Trucking to secure payment of Thiede Brothers’ and Thiede Farms’ notes to the Bank. According to the Bank, John Thiede’s actions created a fiduciary duty on his part in favor of the bank to preserve Thiede Trucking’s collateral for payment of the notes, which it claims he violated by transferring \$70,000 from Thiede Trucking to himself. John Thiede has not accounted for the whereabouts or disposition of that money. The Bank contends that John Thiede violated his duty to safeguard the \$70,000 value of the collateral he pledged to the Bank, and that he committed further defalcation by failing to account for the funds he transferred from Thiede Trucking to himself.

John Thiede failed to provide any response to the Bank’s § 523(a)(4) dischargeability claim. In fact, although the Bank noted such failure to respond in its reply brief, Mr. Thiede still did not respond by seeking leave to file a surreply. The Court finds that there is a sufficient factual and legal basis provided

⁴⁶*Fowler Bros. v. Young (In re Young)*, 91 F.3d 1367, 1371 (10th Cir. 1996) (holding that creditor bears the burden of proof in a 523(a)(4) proceeding).

by the Bank to justify a finding that a \$70,000 debt is non-dischargeable pursuant to § 534(a)(4). Based upon a review of the pleadings, and because John Thiede has not attempted to refute any of the Bank's arguments, the Court finds that summary judgment should be granted, and that a \$70,000 debt owed by John Thiede to the Bank is also non-dischargeable under § 523(a)(4).

IV. CONCLUSION

The Court finds that the Bank's motion for summary judgment should be granted in part and denied in part. The Bank has met its burden of showing that there are no material issues of fact, and that it is entitled to judgment as a matter of law, on its objection to the exemption of the Toulon Road property. The transfer to Debtors was ineffective, and thus Debtors cannot properly exempt it. Debtor John Thiede should also be denied a discharge pursuant to § 727(a)(3), and his \$70,000 obligation to the Bank is non-dischargeable pursuant to § 523(a)(4). The Court finds that there are material questions of fact remaining as to the other bases for the Bank's motion for summary judgment, and that they must be denied.

The Court finds the following claims have survived summary judgment: §727(a)(2)(A) claim against both Debtors, §727(a)(3) claim against Cassie Thiede, §523(a)(4) claim against Cassie Thiede, and § 727(a)(5) claim against both Debtors. Because Debtor John Thiede's discharge has been denied under § 723(a)(3), it would be futile to try the remaining § 727 claims against John Thiede, accordingly, the remaining claims against Cassie Thiede will be set for trial forthwith.

IT IS, THEREFORE, BY THIS COURT ORDERED that Plaintiff's Motion for Summary Judgment (Doc. 27) is granted in part and denied in part. The motion is granted insofar as it seeks an order finding (1) that the transfer of the Toulon Road property by Thiede Corporation to Debtors is ineffective, and that the Bank's objection to the exemption of the Toulon Road property is sustained; (2) Debtor John

Thiede should be denied a discharge pursuant to 11 U.S.C. § 727(a)(3); and (3) that a \$70,000 debt owed by Debtor John Thiede to Plaintiff is non-dischargeable pursuant to 11 U.S.C. § 523(a)(4). The motion is denied in regard to all other relief sought therein, as well as relief sought in the Pretrial Order under § 727(a)(5).

IT IS SO ORDERED this _____ day of September, 2004.

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