

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

IN RE:)	
)	
JOHN ANTHONY NAGEL,)	Case No. 01-14827
JUDITH LENORE NAGEL,)	Chapter 7
)	
Debtors.)	
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)	
EDWARD J. NAZAR, Trustee,)	
)	
Plaintiff,)	
)	
v.)	Adversary No. 02-5148
)	
JOHN ANTHONY NAGEL,)	
JUDITH LENORE NAGEL,)	
)	
Defendants.)	
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MEMORANDUM OPINION

The chapter 7 trustee Edward J. Nazar seeks to revoke the discharge of debtors John and Judith Nagel under 11 U.S.C. § 727(d)(2) for failing to disclose and turnover an inheritance received by Judith Nagel from her mother’s probate estate.¹ The trustee has moved for summary judgment on his adversary complaint.² The defendants, proceeding pro se, have filed a pleading titled “answer” in response to the summary judgment motion.³ The Court took the matter under advisement and issues

¹ All statutory references are to the Bankruptcy Code, 11 U.S.C. § 101, et seq. unless otherwise specified.

² Dkt. 34.

³ Dkt. 42.

the following ruling.

Jurisdiction

The Court has jurisdiction over this case.⁴ This is a core proceeding.⁵ Fed. R. Bankr. P. 7056 makes applicable to adversary proceedings the rules for summary judgment as found in Fed. R. Civ. P. 56.⁶

Statement of Facts

The defendants' response to the trustee's summary judgment motion is titled an "answer" and is signed by both defendants.⁷ The defendants' answer reads:

Defendants admit a small amount of resources were added after the bankruptcy was filed. The resource is insufficient to meet the plaintiff's demands. No settlement can be reached with the plaintiff, who refuses to negotiate. The Plaintiff's filings are full of errors and have been filed late on every event.

Defendants are without an attorney and apparently have never had sufficient representation. The debtor's discharge should stand as issued.⁸

The defendants' response does not comply with Fed. R. Civ. P. 56 or D. Kan. LBR 7056.1 in that defendants have failed to specifically controvert, with supporting references to the record, the separately numbered paragraphs of the trustee's statement of facts, and have failed to come forward with any genuine issues of material fact.⁹ The trustee's properly supported statements of fact are

⁴ 28 U.S.C. § 157(a) and (b)(1) and § 1334(a).

⁵ 28 U.S.C. § 157(b)(2)(J).

⁶ *See also* D. Kan. LBR 7056.1.

⁷ Dkt. 42.

⁸ *Id.*

⁹ Defendants' pro se status does not excuse their noncompliance with the summary judgment rules. *See Murray v. City of Tahlequah, Okla.*, 312 F.3d 1196, 1199 n. 3 (10th Cir. 2002) (Although courts liberally construe pro se pleadings, pro se litigants are not relieved of the obligation to comply with the rules of procedure); *United States v. Distefano*, 279 F.3d 1241, 1245 (10th Cir. 2002).

therefore deemed admitted and this Court adopts the same as the controlling facts in this proceeding.¹⁰

Defendant Judith Nagel is the daughter of Gladys McCrimmon. McCrimmon died testate September 16, 2001 in Canada. Judith Nagel was named the sole residual beneficiary under McCrimmon's will.

Defendants filed their chapter 7 bankruptcy petition on October 9, 2001. Defendants did not schedule or disclose as an asset, the possible bequest, devise, or inheritance from McCrimmon's estate.¹¹ On November 9, 2001, the first meeting of creditors pursuant to § 341 was held. At this time the trustee learned that Judith's mother had died prior to the bankruptcy filing and that Judith was a beneficiary under her mother's will. The trustee requested information from defendants concerning McCrimmon's estate.

In November 2001, the defendants received a notice from the attorney handling McCrimmon's probate estate advising that Judith was the residual beneficiary under the will and providing an inventory of the assets in the probate estate.¹² This was the first notification defendants received confirming Judith's interest in the McCrimmon estate.¹³

On November 26, 2001, the trustee wrote a letter to the attorney handling McCrimmon's estate

¹⁰ See Fed. R. Civ. P. 56(e); D. Kan. LBR 7056.1(b); *Reed v. Bennett*, 312 F.3d 1190, 1195 (10th Cir. 2002) (Nonmoving party who fails to respond to summary judgment motion waives the right to controvert the movant's statement of facts.).

¹¹ See Schedule B.

¹² Depo. Ex. 3. Although the notice is dated October 31, 2001, Judith testified that debtors received it shortly before Thanksgiving.

¹³ The Defendants did not disclose or provide the notice that they had received from the McCrimmon estate attorney to the trustee until more than a year later, in December of 2002, when the trustee examined defendants under Rule 2004. Judith testified, however, that she had provided the information to their attorney Michael Roach, although it is unclear when this information was provided.

and asserted his rights to Judith's interest in the McCrimmon estate.¹⁴ On this same date, the trustee sent a letter to Michael Roach, the attorney then representing defendants in their bankruptcy, and requested that defendants amend their bankruptcy schedules to list Judith's interest in her mother's estate as an asset of the bankruptcy estate and provide an accounting of any assets or monies that Judith was to receive.¹⁵ The trustee did not receive an accounting or further information concerning Judith's inheritance in response to either of these letters.

On January 15, 2002 the defendants filed a motion to dismiss their bankruptcy case, intending to deal with their creditors on their own outside of bankruptcy. An order denying defendants' motion to dismiss their bankruptcy case was entered on February 28, 2002. Defendants received their discharge on April 2, 2002.

On June 10, 2002 the trustee commenced this adversary proceeding to revoke the defendants' discharge. The trustee alleged that defendants had failed to disclose Judith's inheritance as an asset of the bankruptcy estate, failed to provide an accounting of her inheritance, and failed to turnover any inheritance received. On July 24, 2002, the trustee again wrote a letter to defendants, advising that Judith's inheritance was an asset of the bankruptcy estate and asserting his right to Judith's interest in the McCrimmon estate. Judith acknowledged her receipt of the trustee's letter. No information was provided by defendants in response to the trustee's letter. Defendants did not provide to the trustee the notice they had received from the probate attorney back in November.¹⁶

In September 2002, Judith received a check in the approximate amount of \$45,500 Canadian

¹⁴ See 11 U.S.C. § 541(a)(5)(A).

¹⁵ This Court ordered that debtors amend their bankruptcy schedules at a pretrial scheduling conference held on November 21, 2002. Dkt. 14. Defendants never amended their bankruptcy schedules to list Judith's interest under her mother's will.

¹⁶ See Depo. Ex. 3.

Dollars (“CAD”) or \$33,164.95 USD,¹⁷ and stock certificates as her inheritance from the McCrimmon estate. The defendants did not disclose to the trustee Judith’s receipt of her inheritance. The trustee conducted a Rule 2004 examination of defendants in December 2002. For the first time, the defendants came forward with information concerning Judith’s inheritance and the McCrimmon estate. The trustee further learned that Judith had received her distribution under the will in September. Judith acknowledged receipt of the check in Canadian money and the stock certificates. But when the trustee inquired as to the location of the check, whether the check had been negotiated, whether any monies from the check remained, or how the monies were utilized, Judith asserted her Fifth Amendment privilege against self-incrimination. To date, defendants have yet to surrender either the check, the stock certificates, or any proceeds thereof to the trustee.

A final pretrial order was entered on May 12, 2003.¹⁸ On July 1, 2003, the trustee filed his motion for summary judgment on the revocation complaint.

Analysis

Summary judgment is appropriate when there are no material factual controversies and the movant is entitled to judgment as a matter of law. Here, defendants’ “Answer” does not squarely meet the trustee’s statement of uncontroverted facts and the same are deemed admitted.¹⁹ The Court is left to review the statements of uncontroverted fact in the light most favorable to defendants, drawing all

¹⁷ As a point of reference only, the Court notes that the exchange rate for \$1.00 CAD was \$0.7289 USD as of September 12, 2003. *Wall Street Journal*, September 12, 2003, p. B7. The Court has not been supplied with the exchange rate at the time Judith received her distribution in September 2002.

¹⁸ Upon submission of the pretrial order, the debtors’ counsel Michael Roach was permitted to withdraw from representation of the debtors. *See* Dkt. 37.

¹⁹ *See* fn. 10, *supra*.

reasonable inferences against the plaintiff.²⁰

The trustee proceeds under § 727(d)(2), which provides in relevant part:

On request of the trustee, . . . and after notice and a hearing, the court shall revoke a discharge granted under subsection (a) of this section if –

(2) the debtor acquired property that is property of the estate, or became entitled to acquire property that would be property of the estate, and knowingly and fraudulently *failed to report* the acquisition of or entitlement to such property, *or to deliver or surrender such property* to the trustee;

(Emphasis added.). As the party seeking revocation of discharge, the trustee has the burden of proving his case under § 727(d)(2) by a preponderance of the evidence.²¹

Judith's bequest under her mother's will is property of the bankruptcy estate.²² Gladys McCrimmon died testate prior to the bankruptcy petition date and Judith was entitled to the bequest under her mother's will at the time of defendants' bankruptcy filing. The defendants knew by November 2001 at the latest, that Judith was the residual beneficiary under her mother's will when they acknowledge receiving notification from the probate attorney.²³

To prevail on his complaint, the trustee must show (1) that defendants knowingly and fraudulently failed to report Judith's interest in McCrimmon's probate estate; and (2) that defendants failed to surrender Judith's bequest to the trustee.

Failure to Report Inheritance

At the time the defendants' bankruptcy petition was being prepared in July of 2001, Mrs.

²⁰ *Harris v. Beneficial Oklahoma, Inc. (In re Harris)*, 209 B.R. 990, 995 (10th Cir. BAP 1997).

²¹ *See First Nat'l Bank of Gordon v. Serafini (In re Serafini)*, 938 F.2d 1156, 1157 (10th Cir. 1991); *In re Bowman*, 173 B.R. 922, 925 (9th Cir. BAP 1994).

²² *See* 11 U.S.C. § 541(a)(5)(A).

²³ This was confirmed by defendants' receipt of the notice dated October 31, 2001 from the attorney for McCrimmon's probate estate. *See* Depo. Ex. 3.

McCrimmon still lived. Even when the petition was filed on October 9, it is possible that defendants were unaware of Mrs. McCrimmon's bequest to Judith. But while the defendants' initial failure to schedule Judith's interest in the probate estate at the time of filing may have been excusable or explainable, the failure to amend their bankruptcy schedules after receiving confirmation of her inheritance interest is not.

The trustee learned of the potential inheritance at the first meeting of creditors in early November, 2001. Defendants knew that Judith was a beneficiary under her mother's will by late November when they received notice from the probate attorney. But defendants did not share this notice or information with the trustee. On November 26, 2001, the trustee made demand upon defendants' attorney to amend the bankruptcy schedules and to provide an accounting of the inheritance to be received.²⁴ Defendants responded to this request by seeking to dismiss their bankruptcy. They admitted that dismissal was sought due to the inheritance Judith expected to receive. Even viewed in defendants' best light, their tactic was an evasive one – as borne out by their subsequent conduct.

Even more disturbing is the fact that defendants knew that the trustee was asserting a right to the inheritance and still ignored the trustee's request for information. Even after the trustee commenced this proceeding to revoke their discharge in June of 2002, the defendants did not come forward with any information. The trustee corresponded *directly* with the defendants in July of 2002 and defendants acknowledge that they knew the trustee was asserting an interest in Judith's inheritance and was seeking information concerning the same at this time. The defendants did not respond to this letter and still did not provide the notice they had received nearly eight months earlier from the

²⁴ Nearly a year later at a pretrial scheduling conference held November 21, 2002, the defendants were again directed to amend their bankruptcy schedules to disclose the inheritance.

probate attorney.²⁵ When Judith actually received her distribution in September 2002, the defendants failed to disclose this fact to the trustee.

Not until the trustee took defendants' Rule 2004 examinations in December 2002 did he learn that Judith had received the inheritance in September 2002. And not until the Rule 2004 examinations did defendants provide *any* information concerning the inheritance. In fact, Judith still refused to answer some of the trustee's questions concerning the inheritance on Fifth Amendment grounds. Finally, defendants have never amended their bankruptcy schedules to disclose Judith's inheritance as an asset of the bankruptcy estate.²⁶

Under these circumstances, the Court concludes that the defendants knowingly and fraudulently failed to report Judith's inheritance from her mother's estate.²⁷ After defendants tried unsuccessfully to dismiss their bankruptcy case, they engaged in a course of conduct that can only be described as evasive and unresponsive, all the while knowing that Judith was going to receive an inheritance. And in September 2002, *after this proceeding was filed*, defendants failed to disclose Judith's receipt of her distribution under the will. Again, even viewed in defendants' best light, the uncontroverted facts show that they knew of the trustee's interest in Judith's inheritance from November 2001 and that they failed to cooperate in any way with his attempts to ascertain information concerning the same.

²⁵ The defendants imply that any fault in failing to report Judith's inheritance should be attributed to their attorney, with whom they apparently had difficulty communicating. However, defendants have supplied no evidence, whether by affidavit or otherwise that would establish their disclosure of the information to their attorney and the attorney's subsequent failure to report the same to the trustee. *See Watson v. Jackson (In re Jackson)*, 141 B.R. 702, 706 (Bankr. D. Ariz. 1992) (Generally a debtor's good faith reliance on the advice of counsel lacks the intent required to be denied a discharge).

²⁶ *Watson v. Jackson (In re Jackson)*, 141 B.R. 702, 706 (Bankr. D. Ariz. 1992) (concealment of assets alone is sufficient to deny discharge).

²⁷ *See Farmers Co-op. Ass'n of Talmage, Kan. v. Strunk*, 671 F.2d 391, 395 (10th Cir. 1982) (fraudulent intent may be inferred from the circumstances); *In re Yonikus*, 974 F.2d 901 (7th Cir. 1992) (fraud in failing to report a personal injury claim may be shown by defendant's awareness of omitted asset and knowing that trustee would be misled); *In re Jackson, supra* (debtor failed to disclose residence inherited from her mother).

The trustee's complaint seeks the revocation of John Nagel's discharge even though John was not the legatee under McCrimmon's will. John was cognizant of the gift, however, admitting he knew that the Notice to Beneficiary had been received by Judith.²⁸ Although he denied knowledge of the funds having been received, he did admit seeing the estate inventory and that Judith *and he* intended to use the "Canadian monies" to pay off creditors.²⁹ John also testified that he told attorney Roach of the funds' existence in early 2002.³⁰ In short, John knew of the existence of the bequest and Judith's entitlement to it. He joined in the motion to dismiss the bankruptcy. His position of knowledge affirmatively obligated him to disclose the receipt of the bequest and, at a minimum, he was required to amend the schedules and comply with the trustee's reasonable requests for information. John instead did nothing and, on that basis alone, should be held accountable under § 727(d)(2).

Failure to Surrender Inheritance

There is nothing in the record before the Court indicating that John Nagel ever received or came into possession of Judith's inheritance.³¹ This ground for revocation of discharge is therefore applicable only to Judith Nagel. It is undisputed that in September 2002, Judith received stock certificates and a check in the amount of \$45,400 CAD as her distribution under McCrimmon's will.³² She has failed to surrender the stock certificates, the check, or the proceeds thereof, to the trustee, knowing full well that the trustee was seeking this property before Judith ever came into possession

²⁸ See Ex. C, p. 6, l. 9-13 attached in support of trustee's summary judgment motion.

²⁹ *Id.* at p. 8, l. 21 – p. 9, l. 2; p. 9, l. 23-24.

³⁰ *Id.* at p. 10, l. 17 – p. 11, l. 1.

³¹ Only Judith was a named beneficiary under McCrimmon's will.

³² In their "answer" to the summary judgment motion, defendants acknowledge receipt of a "small amount" of inheritance.

of the inheritance.³³ Asserting her Fifth Amendment privilege against self-incrimination, Judith has refused to disclose the whereabouts or status of the inheritance that she received. Judith Nagel's discharge should therefore be revoked for failure to surrender the distribution under her mother's will, or the proceeds thereof.

Conclusion

The defendants have raised no genuine issues of material fact that would preclude the entry of judgment as a matter of law revoking their discharge. Even when the evidence against them is viewed in the light most favorable to the defendants, this Court can only conclude that both debtors were well-aware of Ms. McCrimmon's death on the date of filing and that they subsequently learned of a substantial inheritance forthcoming to Judith. Neither debtor complied with the trustee's appropriate requests for information concerning the inheritance or his request that their schedules be amended. Moreover, both debtors admit that Judith received the bequest. The debtors' pattern of failing to respond to the trustee's requests, even after this complaint was filed, makes clear that Judith not only acquired estate property and failed to report or deliver it to the trustee, but acted fraudulently in so doing. John was complicit in the debtors' ongoing refusal or failure to apprise the trustee of the existence of this valuable asset. Each debtor's conduct and omissions justifies the revocation of their discharges under § 727(d)(2) and the trustee's motion for summary judgment is therefore GRANTED. A Judgment on Decision will issue this day.

Dated this 19th day of September, 2003.

³³ See *Jensen v. Brink (In re Brink)*, 179 B.R. 726 (Bankr. M.D. Fla. 1995) (Debtors cashed annuity and spent proceeds after bankruptcy court had determined that debtors had no right to claim the annuity exempt and after trustee had filed revocation complaint demanding surrender of annuity).

ROBERT E. NUGENT
CHIEF BANKRUPTCY JUDGE
UNITED STATES BANKRUPTCY COURT
DISTRICT OF KANSAS

CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the **Memorandum Opinion** was deposited in the United States mail, postage prepaid on this 19th day of September, 2003, to the following:

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