

**UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION**

In re:

ANTHONY ROBERT MURGIO,
Debtor.

CASE NO.: 12-40231
CHAPTER: 7

TALLAHASSEE CENTER CONDOMINIUM
ASSOCIATION, INC.,

Plaintiff,

v.

ADV. PRO. NO.: 12-04016

ANTHONY ROBERT MURGIO,
Defendant.

FINAL JUDGMENT FOR PLAINTIFF

This matter came before the Court for a duly noticed trial on July 9, 2013. Upon due consideration of the testimony and evidence presented at trial, the pleadings, applicable case law, and argument of the *pro se* Defendant and counsel for the Plaintiff, and for the reasons set forth below, the Court finds that the Plaintiff is entitled to a Final Judgment in its favor denying the Defendant's discharge pursuant to 11 U.S.C. §§ 727(a)(4)(A) and 727(a)(2)(A).

FINDINGS OF FACT

1. The Defendant, Anthony Robert Murgio, was engaged in various business ventures in Tallahassee, Florida, including leasing condominium units in the Tallahassee Center Condominiums and then subleasing the same condominium units; ideally at a net profit. The Defendant was able to net approximately \$400 a month from his condo rentals de-

pending on the amount of utility expenses he had to pay. In addition to this subleasing venture, the Defendant owned and operated Droid Marketing, Inc. (“Droid Marketing”), a marketing and advertising business.

2. The Defendant owes the Plaintiff \$105,727.62 on account of a final judgment for attorneys’ fees entered by the Circuit Court for Leon County, Florida on September 1, 2011.
3. On April 11, 2012 the Defendant filed a voluntary petition for Chapter 7 relief. Along with his petition, the Defendant filed his Schedules and Statement of Financial Affairs (“SOFA”). The Plaintiff, Tallahassee Center Condominium Association, Inc., filed this adversary proceeding on July 19, 2012 objecting to the Defendant’s discharge pursuant to 11 U.S.C. §§ 727(a)(2)(A) and (4)(A).
4. When he filed his Chapter 7 petition the Defendant had interests in certain lease and sublease agreements (collectively the “Rental Agreements”) of units in the Tallahassee Center Condominium Building that he did not list in his Schedules or SOFA:
 - a. A month-to-month lease of unit 401 between the Defendant as lessee and JCK Properties as lessor dated May 9, 2011 and a one-year sublease of this unit to Neil Rosenberg dated June 14, 2011. The Defendant was entitled to gross sublease payments of \$2,500.00 per month from Neil Rosenberg for unit 401.
 - b. A one-year lease of unit 806 from Marc Catalano dated June 9, 2010, renewed on July 1, 2011, and the sublease of this unit to Brad Westerhold. The Defendant was entitled to gross sublease payments of \$1,800.00 per month from Brad Westerhold for unit 806.¹
5. Although at all times prior to 2011 the Sublease Payments were being made to and collected by the Defendant, by the time the Defendant filed his Chapter 7 petition all Sub-

¹ The sublease payments due to the Defendant on units 401 and 806 are collectively the “Sublease Payments”

lease Payments were being paid to Droid Marketing rather than to the Defendant personally. The Defendant testified at trial that during the beginning of 2011, several months pre-petition, he had directed his sub-tenants to pay Droid Marketing rather than himself. In his pleadings and at the trial the Defendant explained that he had diverted these Sublease Payments from himself to Droid Marketing to help Droid Marketing pay its operating expenses.

6. The Defendant's explanation for why he did not list these subleases, or his diversion of the Sublease Payments to Droid Marketing, in his Schedules or SOFA was twofold: 1) that he felt he did not have to because he was not receiving any net income from them, and 2) that by the time he filed bankruptcy they were in the name of, and being paid to, Droid Marketing anyway.

CONCLUSIONS OF LAW

Denial of Discharge - § 727(a)(4)(A)

Section 727(a)(4)(A) of the Bankruptcy Code provides that a defendant's discharge will be denied if the defendant "knowingly and fraudulently, in or in connection with the case – made a false oath or account." The purpose of § 727(a)(4)(A) is to make certain that sufficient facts are available to all interested persons in the administration of the estate without requiring the need for investigations to determine whether the information provided by a defendant is correct. *In re Ingersoll*, 124 B.R. 116, 122 (M.D. Fla. 1991). A party objecting to a defendant's discharge under § 727(a)(4)(A) must establish the following by a preponderance of the evidence: (1) the defendant made a false statement under oath; (2) the defendant knew that the statement was false; (3) the statement was material to the bankruptcy case; and (4) the defendant made the statement with fraudulent intent. *In re Eigsti*, 323 B.R. 778, 783-84 (Bankr. M.D. Fla. 2005).

The Defendant knowingly made false statements under oath

As is customary in these cases, the Defendant insists that he did not knowingly make false statements under oath. He asserts that his omissions from the Schedules and SOFA should be met without consequence because they were, essentially, unintentional. This Court does not find the Defendant's testimony on this subject credible. The Defendant's explanation of his failure to list assets and income, and his intentional diversion of income to his closely held corporation for no consideration prior to filing bankruptcy, even if credible, is insufficient to overcome the requirements of the Code.

The Bankruptcy Code is clear that debtors must put all of their "cards on the table" in order to obtain their discharge. This Court has previously held that a defendant's explanation that some interests were not scheduled due to oversight or because the defendant believed the omitted interests had little to no value is unavailing. *In re Mitchell*, Adv. No. 12-04014-KKS, 2013 WL 3760111 at *4-12 (Bankr. N.D. Fla. July 15, 2013); *In re Hoflund*, 163 B.R. 879, 883 (Bankr. N.D. Fla. 1993). The Defendant failed to properly disclose the Rental Agreements and Sublease Payments in his Schedules and SOFA. Schedule E, in particular, required the Defendant to list all executory contracts of any nature and all unexpired leases of real property. Despite the instructions on Schedule E and the Defendant's firsthand knowledge of his Rental Agreements, the Defendant failed to list the agreements. The Defendant was also required to disclose in his SOFA all income he had received during the past two years and any transfers of assets within the past year. The Defendant did not list his prior income from the Sublease Payments in his SOFA, nor did he list his diversion of the Sublease Payments, and in fact the transfers of the subleases themselves, to Droid Marketing. The evidence showed that during a Rule 2004 examination the Defendant testified that he did not have any income other than money from his parents. The Defendant also declared under oath on his Schedule I that his only income when he filed his Chap-

ter 7 petition was from his parents. In reality, the sub-lessors were making monthly payments to Droid Marketing that were contractually owed to the Defendant and that, but for specific instructions by the Defendant to the sub-lessees to pay Droid Marketing, would have been paid to the Defendant.

If the Defendant had been candid and his goal was to be completely honest, then he would have (and should have) disclosed in answer to Question 10 on his SOFA that he had transferred the subleases and the income they generated to Droid Marketing pre-petition. Instead, the Defendant did not disclose or list any information whatsoever about any of the subleases, the income they were generating, or the fact that he had transferred them to Droid Marketing just a few months pre-petition. Had it not been for the Plaintiff's "inside" knowledge of the Defendant's business activities – his subleasing of these condominium units in particular – it is unlikely that the Plaintiff, the Trustee or any other creditor would have discovered these assets or this income. For this reason the Court is compelled to conclude that the Defendant knowingly made false statements under oath.

The Defendant's false statements made under oath were material

A false statement is material and thus sufficient to deny a discharge if it "bears a relationship to the bankrupt's business transactions or estate, or concerns the discovery of assets, business dealings, or the existence and disposition of his property." *In re Chalik*, 748 F.2d 616, 618 (11th Cir. 1984). The Defendant's omission of the Rental Agreements and Sublease Payments directly relate to his business transactions and the existence of property of the estate. Therefore, the Defendant's false statements made under oath were material.

The Defendant made false statements with the requisite fraudulent intent

The Court may look to the totality of circumstances, including the recklessness of a defendant's behavior, to infer whether a defendant submitted a statement with fraudulent intent. *In re*

Phillips, 476 Fed. App'x 813, 816 (11th Cir. 2012). A party objecting to a defendant's discharge under § 727(a)(4) may show the defendant's fraudulent intent either by establishing that the defendant engaged in a pattern of concealment, or that the defendant possessed reckless indifference to the truth. *In re Eigsti*, 323 B.R. at 784. "While an isolated omission may be attributed to oversight, a pattern of omissions clearly warrants the conclusion that the omissions from the Statement of Financial Affairs and the Schedules were made with the requisite fraudulent intent."

In re Shahid, 334 B.R. 698, 710 (Bankr. N.D. Fla. 2005).

The Defendant insisted that he never intended to deceive or commit fraud when he failed to include various subleases, income and transfers on his Schedules and SOFA. The Defendant's admission that he did not disclose the Sublease Payments because the payments were being made to Droid Marketing rather to himself personally, while true, makes his situation worse. This testimony made it abundantly clear that the Defendant's diversion of income to his closely held corporation was in anticipation of filing bankruptcy and was intentional. In spite of admitting his intentional diversion of the subleases and income Droid Marketing, the Defendant never gave a credible explanation as to why he did so.² For example, the Defendant had no explanation for why he could not still receive the income from the Rental Agreements and then contribute (or loan) money to Droid Marketing on an as-needed basis.

The Defendant's non-disclosure of the Rental Agreements and Sublease Payments, taken together with his unexplained and non-disclosed diversion of rental income to Droid Marketing, demonstrate at worst a pattern of concealment and at best a reckless indifference to the truth.

² The Defendant, as lessee and now as representative of Droid Marketing and JCK Properties as lessor, entered into another lease of unit 401 on August 16, 2012 for two years for \$1750 per month. Prior to this lease, the Defendant as lessor individually entered into a month-to-month sublease with Junnis Hugger as lessee on July 6, 2012. Hugger was to pay the Defendant \$1900 per month. After the original lease was renewed on unit 806 on July 1, 2011, at an unknown date post-petition, the Defendant entered into a sublease with May Mendez and instructed her to make lease payments to Droid Marketing. Post-petition, the Defendant leased another unit in the Tallahassee Center Condominium Building, unit 903, on May 1, 2012 from Bruce Harrell for \$1500 per month for a 12 month period. On August 15, 2012, the Defendant "or Droid Marketing" entered into a sublease with Samantha Kelly for \$1900 per month for an eight month period.

The Court finds that the Defendant made false statements under oath as to material facts with the requisite fraudulent intent and that the Plaintiff has met its burden of proof on all of the elements of § 727(a)(4)(A).

Denial of Discharge – 727(a)(2)(A)

For the same reasons this Court deems it appropriate to deny the Defendant’s discharge under § 727(a)(4)(A), the Defendant’s discharge should be denied pursuant to § 727(a)(2)(A).

Section 727(a)(2)(A) provides that a defendant’s discharge will be denied if the defendant “with intent to hinder, delay, or defraud a creditor . . . has transferred . . . or concealed . . . property of the debtor within one year before the date of the filing of the petition.” Similar to a § 727(a)(4) action, the defendant’s intent under § 727(a)(2) may be inferred from circumstantial evidence. *In re Hoflund*, 163 B.R. at 883.

It is clear that the Defendant concealed the Rental Agreements and transferred the Sublease Payments within one year before the date of his petition. The Defendant admitted that the Rental Agreements and Sublease Payments were his property before he diverted them to Droid Marketing. The critical remaining issue is whether the concealment and transfer were “made with the intent to hinder, delay, or defraud a creditor of the estate.”

The omission of property and/or transfers from a Defendant’s schedules and SOFA may be both a false oath under § 727(a)(4) and fraudulent concealment under § 727(a)(2). *Id.* The Defendant’s failure to disclose the Rental Agreements and the income they were generating, coupled with his untrue testimony that his only income was from his family, evidences a pattern of concealment or, at a minimum a reckless disregard for the truth. The Defendant’s actions, taken together, are sufficient to prove his intent to hinder, delay or defraud creditors.

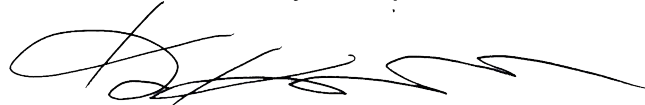
Denial of the Defendant’s discharge is appropriate under § 727(a)(2)(A).

For the reasons stated, it is:

ORDERED:

1. Final Judgment is granted in favor of the Plaintiff and against the Defendant on all Counts of the Complaint.
2. The Court will enter a separate order in the administrative Chapter 7 case denying the Defendant's discharge.

DONE AND ORDERED at Tallahassee, Florida this 23rd day of September, 2013.



KAREN K. SPECIE
United States Bankruptcy Judge

I HEREBY CERTIFY that this is a true and correct copy of the original on file in the office of the Clerk, United States Bankruptcy Court for the Northern District of Florida.

TRACI ABRAMS, Clerk, Bankruptcy Court

By 
Deputy Clerk

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Recipients submitted to the BNC (Bankruptcy Noticing Center):

pla	Tallahassee Center Condominium Association, Inc.	c/o Kristin A. Gardner	2065 Thomasville
	Road Suite 102	Tallahassee, FL 32308	
dft	Anthony Robert Murgio	215 West College Ave., Unit 706B	Tallahassee, FL 32301
aty	Thomas B Woodward	P.O. Box 10058	Tallahassee, FL 32302
ust	United States Trustee	110 E. Park Avenue	Suite 128 Tallahassee, FL 32301

TOTAL: 4