

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ROANOKE DIVISION**

In re:)	
)	Chapter 7
FRANK C. BROWN, III)	
)	Case No. 7-99-01582-7
Debtor.)	

FRANK C. BROWN, III,)	
)	Civil Action No. 7:01CV00334
Appellant,)	
)	
v.)	<u>Memorandum Opinion</u>
)	
PRESIDENTIAL FINANCIAL CORPORATION)	
)	By: Samuel G. Wilson
)	Chief U.S. District Judge
Appellee.)	

Appellant Frank C. Brown, III (“Brown”) appeals the April 4, 2001 order of the United States Bankruptcy Court for the Western District of Virginia that (1) denied the discharge of Brown’s debt pursuant to 11 U.S.C. §§ 727(a)(2)(A) and 727 (a)(4)(A), and (2) awarded appellee Presidential Financial Corporation (“Presidential”) sanctions against Brown in the form of costs and attorney’s fees for Brown’s failure to respond to discovery requests. The court has jurisdiction over the appeal under 28 U.S.C. § 158 and affirms.

I.

The following facts are undisputed. On April 26, 1999, Brown was served with process which placed him on notice of the following: (1) an action pending in the Superior Court of Pickens County, Georgia, in which Presidential was seeking to recover from him on a Guaranty

Agreement which the parties had previously executed; (2) the Georgia Superior Court of Pickens County's order (pursuant to Presidential's petition for a Writ of *Ne Exeat*) requiring that Brown either post a \$50,000 bond to assure his appearance in the proceeding or be committed to jail. Later that day, with knowledge of the action pending against him and the order of the Georgia Superior Court, Brown closed on the sale of his Georgia residence receiving sale proceeds of approximately \$36,000, paid some of his creditors (excluding Presidential), and departed to Virginia with the remaining proceeds. On the following day, April 27, 1999, Brown deposited \$20,000 of the sale proceeds in his wife's account at the Federal Credit Union in Roanoke, Virginia.

Brown filed his Chapter 7 petition on May 4, 1999, eight days after closing on the sale of his Georgia residence. In the statement of financial affairs, voluntary petition, and schedules that he filed in that proceeding, Brown failed to disclose the sale of his Georgia property, the payment of sale proceeds to creditors, and the transfer of sale proceeds to his wife. Brown also falsely testified at the section 341 creditors' meeting that he paid the Internal Revenue Service \$8,000 from the proceeds of the sale of his Georgia residence. (Exhibit L at 8-9.)

Presidential filed its complaint to object to Brown's discharge on September 9, 1999, and its initial requests for discovery on October 25, 1999. On December 9, 1999, Presidential moved to compel discovery and later amended its motion to compel by leave of the court. On that amended motion and subsequent similar ones, the bankruptcy court ordered Brown, on three separate occasions (April 3, 2000, June 23, 2000 and September 11, 2000) to produce documents requested by Presidential in its initial discovery requests. (R. at 12-14.) The latter two orders indicate Brown's failure to adequately comply with previous orders. The June 23 order provided

Brown with 30 days to comply with its provisions. However, Brown did not produce the materials requested by Presidential until September 6, 2000. Those materials disclosed that Brown never made an \$8000 payment to the IRS and, thus, that his testimony at the section 341 creditors' meeting to the contrary was false.

On April 4, 2001, the bankruptcy court denied the discharge of Brown's debt under 11 U.S.C. § 727(a)(2)(A) and 11 U.S.C. § 727(a)(4)(A) and awarded sanctions against Brown, consisting of costs including attorney's fees, related to Brown's failure to properly respond to Presidential's requests for discovery. Brown filed a notice of appeal in the bankruptcy court on April 16, 2001. Both parties have submitted briefs to this court. The bankruptcy court's decision is, therefore, ripe for review.¹

II.

The bankruptcy court found that Brown intended to hinder, delay, or defraud Presidential in violation of 11 U.S.C. § 727(a)(2)(A) by the following actions: (1) leaving Georgia with the proceeds from the sale of his residence with the knowledge of the legal action pending against him and the Superior Court's order to post bond; (2) paying creditors to the exclusion of Presidential with his residential sale proceeds despite his notice of the legal action and court order; and (3) failing to report the sale of his Georgia residence, the payment of creditors, and the transfer of sale proceeds to his wife on the schedules and statement of affairs filed in his Chapter 7 action.

11 U.S.C. § 727 (a)(2)(A) provides in pertinent part that "(a) The court shall grant the debtor a discharge, unless . . . (2) the debtor, with the intent to hinder, delay, or defraud a creditor

¹This court reviews the bankruptcy court's factual determinations under a "clearly erroneous" standard. Bankr. R. 8013; Yadkin Valley Bank & Trust, Co. v. McGee, 819 F.2d 74, 75 (4th Cir. 1987).

. . . has transferred, removed, destroyed, mutilated, or concealed . . . (A) property of the debtor, within one year before the filing of the petition.” A court may find fraudulent intent by circumstantial evidence. Williamson v. Fireman’s Fund Ins. Co., 828 F.2d 249, 252 (4th Cir. 1987).

Brown has stipulated that he committed all the acts upon which the bankruptcy court relied in finding his intent to hinder, delay, or defraud Presidential (R. at 7.), and he does not dispute them in his brief to this court. Brown committed all these acts within eight days prior to filing his Chapter 7 petition. Accordingly, this court concludes that the record adequately supports the bankruptcy court’s finding that Brown intended to hinder, delay, or defraud Presidential in violation of 11 U.S.C. § 727(a)(2)(A).

Next, the bankruptcy court determined that Brown violated section 727 (a)(4)(A) by (1) failing to disclose in his chapter 7 schedules and statement of affairs the sale of his Georgia residence, the payment of creditors with sale proceeds, and the transfer of sale proceeds to his wife; and (2) falsely testifying at the section 341 creditors meeting that he paid \$8000 of his residential sale proceeds to the Internal Revenue Service.

11 U.S.C. § 727(a)(4)(A) provides in pertinent part as follows: “(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 subject matter of a false oath under section 727(a)(4)(A) must be “material” to bar the discharge of debt. Williamson 828 F.2d at 252. A false oath is material “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.” Id. (quotations omitted) “Whether a debtor has made a false oath within the

meaning of § 727(a)(4)(A) is a question of fact” and, therefore, the bankruptcy court’s findings “may not be set aside unless they are clearly erroneous.” Id. at 251.

The record adequately supports the bankruptcy court’s determination that Brown knowingly and fraudulently made a false oath in connection with Presidential’s claim against him. Brown stipulated to all the facts relied on by the bankruptcy court in finding that he violated section 727(a)(4)(A), and he does not now dispute them. Instead, he cites tangential facts and contends simply that the bankruptcy court erred in its decision. The omissions in Brown’s schedules and statement of affairs were material because they related directly to the discovery of Brown’s assets. Similarly, Brown’s false testimony at the section 341 creditor’s meeting was material because it falsely construed the disposition of Brown’s property. The court, therefore, finds that the bankruptcy court’s determination was a reasonable one.

Finally, the bankruptcy court awarded Presidential sanctions in the form of its costs and attorney’s fees “from the date of the first return required of the debtor of responses to Presidential discovery [requests (December 7, 1999)], through September 6, 2000.” (R. at 7, pp. 6-7.) Federal Rule of Civil Procedure 37(a)(4)(A) and (b)(2) provides that a court shall award sanctions against a party who fails to comply with motions to compel discovery and orders enforcing those motions unless the party’s nondisclosure under the circumstances was substantially justified. Those sanctions consist of the reasonable costs and attorney’s fees associated with the failures.

Paragraphs 30 through 43 of the Stipulations of Facts and Documents report Browns repeated failure to comply with Presidential’s multiple motions to compel discovery and the April 3 and June 23 Orders to turn over the requested materials. (R. at 7.) Brown contends that the documents he failed to turn over, specifically his 1997-99 tax returns, were not included in

Presidential's initial requests. The record indicates, however, that Presidential's initial interrogatories, propounded on October 25, 1999, requested a detailed disclosure of documents related to Brown's income, including his tax returns. (Exhibit M at 2; Exhibit V at 2-3.) Brown further contends that he had not prepared tax returns for five years and that his wife refused to provide his accountant with the information required to prepare his returns in a manner timely with the court's requirements. The court notes that Brown, in his initial responses, did not indicate that he had not filed his tax returns, but rather stated that he "did not have copies" to provide Presidential at that time. (Exhibit M at 2.) The court further notes that the last tax return Brown provided was the one revealing his false testimony at the section 341 creditors meeting. Thus, in light of all the relevant facts, the bankruptcy court's determination that Brown should be sanctioned for his failure to comply with discovery requests was not clearly erroneous.

III.

Accordingly, for the reasons stated, this court will affirm the decision of the bankruptcy court.

ENTER: this ___ day of October, 2001.

CHIEF UNITED STATES DISTRICT JUDGE

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FRANK C. BROWN, III,)	
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v.)	<u>FINAL ORDER</u>
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PRESIDENTIAL FINANCIAL CORPORATION)	
)	By: Samuel G. Wilson
)	Chief U.S. District Judge
Appellee.)	

In accordance with the memorandum opinion entered this day, it is hereby **ORDERED** and **ADJUDGED** that the bankruptcy court's decision is hereby **AFFIRMED**. The court further **ORDERS** that this case be stricken from the court's docket.

ENTER: this ____ day of October, 2001.

CHIEF UNITED STATES DISTRICT JUDGE