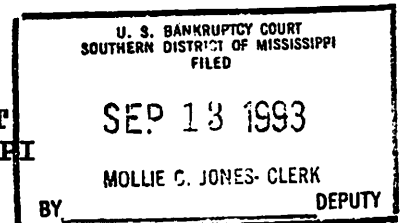


IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION



IN RE: MARY JO BUETO FREDERICKS

NO. 8802613JC

E-Z SERVE OF LOUISIANA, INC. and
FRANK M. YOUNGBLOOD, TRUSTEE

PLAINTIFFS

VS.

ADV. NO. 880260JC

MARY JO BLAND BUETO FREDERICKS a/k/a
MARY JO BLAND BUETO, MARY W. BLAND,
RONALD E. BUETO, KIMBERLY KAY BUETO,
and COPIAH BANK, N.A. OF HAZLEHURST,
MISSISSIPPI

DEFENDANTS

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Edward Ellington, Bankruptcy Judge

MEMORANDUM OPINION

This adversary proceeding came on for trial on the Second Amended Complaint of E-Z Serve of Louisiana, Inc. and Frank M.

Youngblood, wherein the Plaintiffs request that the Court set aside a conveyance of real property made by the Debtor, Mary Jo Bueto Fredericks, and deny the discharge of the Debtor pursuant to § 727(a)(2), § 727(a)(3), and § 727(a)(4)(A) of the Bankruptcy Code.¹ All issues regarding the portion of the Plaintiffs' complaint pertaining to the alleged fraudulent conveyance have been resolved, and the sole remaining issue before the Court is whether the Debtor is entitled to a discharge in bankruptcy.

After considering the evidence presented at trial along with the arguments of counsel, this Court holds that the Debtor's discharge will be denied pursuant to § 727(a)(4)(A). In so holding, the Court makes the following findings of fact and conclusions of law.

FINDINGS OF FACT

The Debtor, Mary Jo Bueto Fredericks, filed a petition for relief under Chapter 7 of the Bankruptcy Code on September 7, 1988. E-Z Serve of Louisiana, Inc. subsequently commenced this adversary proceeding against the Debtor, and all additional parties were added by amendment to the complaint.

In their Second Amended Complaint, E-Z Serve and Frank M. Youngblood, the Chapter 7 Trustee, request essentially two forms of relief. First, they request that this Court set aside a conveyance of property which they allege was fraudulently made by the Debtor

¹ Hereinafter, all code sections refer to the Bankruptcy Code found at Title 11 of the United States Code unless specifically noted otherwise.

and the other Defendants. Secondly, the Plaintiffs seek a denial of the Debtor's discharge pursuant to § 727(a)(2), § 727(a)(3) and § 727(a)(4)(A) of the Bankruptcy Code.

The names and relationships of the individual Defendants in this adversary proceeding are somewhat confusing and therefore are set forth below with all aliases appearing in the record:

<u>NAME</u>	<u>RELATIONSHIP</u>
Mary Jo Bueto Fredericks a/k/a	Debtor
Mary Jo Bueto a/k/a	
Mary Jo Bland Bueto a/k/a	
Mary Jo Fredericks a/k/a	
Mary Jo Moak	
Mary W. Bland a/k/a	Debtor's mother
Mary Bland Norwood	
Ronald E. Bueto	Debtor's son, Mary Bland's grandson
Kimberly Kay Bueto	Debtor's (ex)daughter-in-law, Ronald Bueto's (ex)wife

The alleged fraudulent transfer involves a house in Copiah County, Mississippi, which is situated on a 26 acre parcel of real property. The Debtor, Mary Jo Bueto Fredericks, transferred the property to her mother, Mary W. Bland, who subsequently conveyed the property to her grandson and his wife, Ronald Bueto and Kimberly Bueto. Ronald and Kimberly Bueto then granted a deed of trust on the property in favor of Copiah Bank, N.A. of Hazlehurst, Mississippi.

Prior to the trial of this matter a default judgment was entered against Ronald Bueto. Also prior to trial, an Agreed Order was entered establishing the priority of Copiah Bank's deed of

trust on the property. After the conclusion of the trial, the Trustee entered into a compromise and settlement agreement with Kimberly Bueto, agreeing to dismiss the fraudulent conveyance portion of the Second Amended Complaint for \$ 10,000 consideration. An order was entered approving the compromise and settlement agreement, and dismissing the fraudulent conveyance portion of the Second Amended Complaint as to all Defendants.

Therefore, the only issue remaining for decision is whether, based on the evidence presented at trial, the Debtor should be denied a discharge under the provisions of § 727(a)(2), § 727(a)(3) or § 727(a)(4)(A) of the Bankruptcy Code.

At trial extensive, but inconsistent, testimony was given by the Debtor, by her mother, Mary Bland, and by her former daughter-in-law, Kimberly Bueto, regarding the circumstances surrounding the transfer of the house and 26 acres of real property located in Copiah County, Mississippi. Although the Court need not go into every detail, some understanding of the facts is helpful.

Prior to their divorce, the Debtor, then Mary Jo Bueto, and her husband, Theo Bueto owned and operated a truck stop in Copiah County, Mississippi known as the Country Junction Truck Stop. E-Z Serve supplied fuel to the truck stop. In January of 1987, Mary Jo Bueto obtained a divorce from Theo Bueto, in the Chancery Court of Lincoln County, Mississippi. In the judgment of divorce, the Debtor agreed to assume liability for the payment of all indebtedness due E-Z Serve arising out alleged wrongful acts

committed by Theo Bueto. In return, Theo Bueto conveyed his entire interest in the truck stop to the Debtor.

Also in January of 1987, E-Z Serve commenced an action against Theo Bueto in the Chancery Court of Copiah County. In July of 1987, E-Z Serve obtained a judgment against Theo Bueto in the approximate amount of \$ 86,000. The Debtor is liable for Theo Bueto's debt to E-Z Serve pursuant to her judgment of divorce.

In March of 1987, after E-Z serve had commenced the action against Theo Bueto, the Debtor transferred her home located on approximately 26 acres in Copiah County to her mother, Mary Bland, for ten dollars consideration. Up until the time of the transfer, Mrs. Bland had lived for the past 40 years in her own home situated on a parcel of real property adjoining the 26 acres. The Debtor testified that she transferred the property and her house to her mother because she was living in Lincoln County with a man named Guy Fredericks, whom she subsequently married and divorced. After the transfer, the Debtor's mother moved out of her longtime home and into the Debtor's house.

In November of 1987 E-Z Serve filed a complaint against the Debtor and her mother, Mary Bland, in the Chancery Court of Copiah County, Mississippi seeking to have the conveyance of the real property and house set aside as a fraudulent conveyance.

In June of 1988, while the fraudulent conveyance action was pending in the Chancery Court of Copiah County, Mary Bland conveyed the house and 26 acres to her grandson (the Debtor's son), Ronald Bueto, and his wife, Kimberly Bueto. Prior to obtaining the

property from Mary Bland, Ronald and Kimberly Bueto lived in a double-wide trailer on an additional parcel of property located near the 26 acres. In connection with the transfer of the 26 acres and house, Ronald and Kimberly Bueto transferred title to the double-wide trailer, which was encumbered with approximately \$ 18,000 in debt to Copiah Bank, to Mary Bland. Also in connection with the transfer, Ronald and Kimberly Bueto obtained a loan in the amount of \$ 41,500 by executing a note in favor of Copiah Bank secured by a deed of trust on the house and 26 acres. The loan proceeds were paid to Mary Bland, who then used a portion of the loan proceeds to satisfy the \$ 18,000 debt owed by Ronald and Kimberly Bueto to Copiah Bank on the double-wide trailer.

After the transfer of the house and 26 acres to Ronald and Kimberly Bueto, Mary Bland moved back into her original home adjoining the 26 acre parcel. Some time in July 1988, Mary Bland sent the double-wide trailer to Summit, Mississippi so that the Debtor and her soon to be next husband, Wayne Moak, could live in it.

Ronald and Kimberly Bueto subsequently divorced, and Ronald transferred his interest in the home to Kimberly Bueto, who presently resides there with her two children.

On September 7, 1988 the Debtor filed her petition for relief and in connection therewith filed her statement of financial affairs and schedules of assets and liabilities. The Debtor's schedules do not reflect that the Debtor owned any real property at the time she filed her petition for relief, or that she has amended

her schedules to reflect the ownership of any real property. However, at trial the Debtor testified that she presently resides on a two acre parcel of real property adjacent to the 26 acres. When questioned by counsel for E-Z Serve regarding the ownership of the two acre parcel, the Debtor testified as follows:

Q. All right. How long have you lived back at Wesson -- we're back at Wesson. At Route Two, Wesson?

A. I moved back up there the first of June of this year.

Q. How long have you owned that property?

A. It belonged to my mother. She put my name on the deed with her a few years back. I don't recall when.

Q. Before your bankruptcy?

A. Oh, yes, sir.

Q. Before the --

A. I guess, I don't know.

Q. Well, I notice from listing your schedules, you don't have that property listed.

A. I don't know when she put it on there.

Q. Well, you've answered it was before the bankruptcy.

A. Well. I don't know. It could have been. It could not have been. I'd have to have a copy of the deed. I'm sure the deed will show you.

Q. And do you agree with me it was not listed as a piece of property owned by you in the bankruptcy?

A. I don't know.

(Transcript, vol. 2, pp. 117-18).

Counsel for E-Z Serve then introduced into evidence a warranty deed executed by the Debtor's mother, Mary Bland, on February 2, 1981, granting to the Debtor an interest as a joint tenant in 4 acres located in Copiah County. Also introduced into evidence was a warranty deed dated August 27, 1988, executed by the Debtor and by her mother, Mary Bland, conveying 1.66 of the 4 acres to Billy Jo and Nell Bueto. When questioned regarding the deeds, the Debtor testified as follows:

Q. I want to hand you a certified copy of a Warranty Deed, dated February 2nd, 1981, and ask you if, in fact, that's the deed which gave you title to that four acres to you?

A. I would have to say that it is.

....

Q. Out of that four-acre tract of land that was deed to Billy Joe and Nell Bueto, 1.66 Acres, correct? And that's the deed which is Exhibit 10? Answer yes or no, please, ma'am.

A. Correct.

Q. And, of course, you signed that deed. You had to because you owned it.

A. That's right. That's when I became aware of it. Whatever that date is right there is when I became aware.

Q. I See. Your testimony is that you owned four acres of land in Copiah County and didn't know it?

A. Probably so. Must have been because I became aware of it when I had to sign to give a portion of that land to one of my grandchildren.

Q. We both agree that you did not list it in your bankruptcy petition as an asset owned by you, right?

A. I -- I guess so.

(Transcript, vol. 2, pp. 120-21).

In addition to the Debtor's omission in her schedules of the two acres of real property which she owned at the time of filing and upon which she presently resides, the Debtor's statement of financial affairs reflect that she has no books or records pertaining to her financial affairs prior the filing of her petition. Specifically, the Debtor's statement of financial affairs, which bear the Court Clerk's stamp, dated September 7, 1988, state: "I do not have books and records. The books and records were destroyed by fire some time ago."

However, when questioned by counsel for E-Z Serve regarding her records, the Debtor testified as follows:

Q. All right. When you -- you've shown in here that you don't have any records because you had a fire.

A. No. My papers were at my mother's.

Q. All right. So that was on November the 8th of 1988?

A. Yes, sir.

Q. And that was the date that you lost all your records, right?

A. Yes, sir.

Q. Your mother remembers that date well, doesn't she?

A. It was election day.

Q. Is that the only fire that you had stuff burned up in?

A. Yes, sir.

Q. That's the only fire at all?

A. No, sir. No. Several years ago we had a mobile home. We were traveling. It caught on fire while we were going down the highway, in fact.

Q. When was that?

A. Oh, goodness, '76 or '77.

Q. Okay. Any other fires?

A. No, sir.

Q. All right. In your bankruptcy petition, when you're asked about books or records, you say, "I do not have books or records. They were destroyed by fire some time ago."

Is that -- which fire were you talking about? The one at your mother's

A. At my mothers. Uh-huh. In '88.

Q. On November 8th of 1988, right? Election day?

A. Yeah.

Q. The date of that [indicating to statement of financial affairs] is September the 9th, 1988. The fire had not even occurred, had it?

A. Huh-uh.

Q. So your book and records couldn't have been burned up when you said they had in this petition.

A. Well, sir, most of them must have been.

Q. I mean, you see this stamp? The Bankruptcy Court's real careful about when they stamp these things. See there, there it is again. September the 3rd of '88.

And here it is again. Your lawyer dated that September 3rd of '88. And that's what the Bankruptcy Court -- that's the date -- they even put the time on there, 9:37 a.m. That fire had not even occurred, had it?

A. No, sir.

Q. You were lying to the Bankruptcy Court, weren't you?

A. No sir, I was not.

Q. Well, Ms. Bueto, can you explain how you would have said a fire had already happened that didn't happen for two months?

A. No, sir. It's a possibility that the paper you asked for me to -- whoever asked me to get had been destroyed.

Q. I didn't ask for the paper, Ms. Bueto. The Bankruptcy Court asked for them.

A. Okay. The Bankruptcy Court.

(Transcript, vol. 2, pp. 137-39).

Immediately after the Debtor testified to the foregoing, the Court announced that it was going to take a recess. It directed the attorney for the Debtor to use the recess to confer with his client about the seriousness of testifying under oath.

Later in the trial, when questioned again regarding the fire, the Debtor attempted to further explain by testifying as follows:

Q. Do you still contend, ma'am, that you had a fire that burned up records in September of '88 when you swore that you didn't have any books and records? Do you continue to -- do you stick by that?

A. Sir, I have -- me having a fire and somebody else destroying my records by fire is two different things.

Q. Oh.

A. I went to the truck stop to ask for some ICC Credit Card forms. ICC had not paid some of the credit cards that were outstanding. I wanted to go and see if I could get a copy of those.

And I was informed by the employees that all the records that you are required to keep for the five years and that I kept on the top of the cake shop shelves, were taken down, taken our back; and they presumed they were burned.

Q. All right. Oh, okay. All right. Would your personal checking account have been in there?

A. Personal? No, sir.

Q. All right. Would any of your personal records have been up there and taken out back and burned?

A. No, sir. My personal records -- some of them would have been, yes. Some of them would have been at my mother's when her house burned.

Q. Now, you've earlier said that all the records were in your mother's home.

A. All of the records were not -- could not have been kept there. We had five years that we kept everything from the business. We kept five years on the top shelf in the cake shop.

Q. Uh-huh.

A. But after I got out of the truck stop, I had to keep my records there at her house.

(Transcript, vol. 2, pp. 160-61).

Based on the foregoing, the Court will consider, in light of the Debtor's testimony and § 727 of the Bankruptcy Code, the impact of the Debtor's failure to list as an asset in her schedules the two acre parcel of real property, and the Debtor's response in her statement of financial affairs that her books and records had been destroyed by fire.

CONCLUSIONS OF LAW

As previously stated, the Plaintiffs seek a denial of the Debtor's discharge pursuant to § 727(a)(2), § 727(a)(3) and § 727(a)(4)(A) of the Bankruptcy Code. Since the Court holds that the Debtor's discharge should be denied under § 727(a)(4)(A), the Court need not decide whether additional grounds for denying the Debtor's discharge under §727(a)(2) or § 727(a)(3) exist.

Section 727 of the Bankruptcy Code pertains to the granting of a discharge in chapter 7 cases, and set forth certain exception to the granting of a discharge, providing in pertinent part as follows:

11 USC § 727
§ 727. Discharge.

(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;

.....

In an action under § 727(a)(4)(A) the Plaintiff must prove its case by a preponderance of the evidence. Grogan v. Garner, 498 U.S. 279, 289 (1991).

The elements which must be proved are that the Debtor made a statement under oath; the statement was false; the Debtor knew the statement was false; the statement was made with fraudulent intent; and the statement related materially to the Debtor's bankruptcy case. Beaubouef v. Beaubouef (Matter of Beaubouef), 966 F.2d 174, 178 (5th Cir. 1992).

ELEMENT I: STATEMENT UNDER OATH

The statements upon which the Plaintiffs base their objection to discharge are found in the Debtor's statement of financial affairs and in her schedules of assets and liabilities. The Debtor's schedules of assets and liabilities reflect that the Debtor owns no real property, and have never been amended to show the Debtor's ownership of the two acre parcel on which she presently resides. Also, in her statement of financial affairs the Debtor stated in response to question 5(a) regarding books and

records, "I do not have books and records. The books and records were destroyed by fire some time ago."²

Rule 1008 of the Federal Rules of Bankruptcy Procedure provides that "[a]ll petitions, lists, statements and amendments thereto shall be verified or contain an unsworn declaration as provided in 28 USC § 1746."

"False oaths sufficient to justify the denial of discharge include '(1) a false statement or omission in the debtor's schedules or (2) a false statement by the debtor at the examination during the course of the proceedings.'" Beaubouef v. Beaubouef (Matter of Beaubouef), 966 F.2d 174, 178 (5th Cir. 1992)(citing 4 Collier on Bankruptcy ¶ 727.04[1], at 727-59 (15th ed. 1992)). However, a denial of discharge cannot be based on an omission in the Debtor's schedules that is the result of an honest mistake. Id. at 178.

This Court holds that the statements contained in the Debtor's schedules of assets and liabilities and in her statement of financial affairs constitute statements under oath.

ELEMENT II: THE STATEMENT WAS FALSE

Clearly the Debtor's failure to list in her schedules her ownership of the two acres parcel of real property which she owned

² The Court notes that in addition to the foregoing statements, the Debtor's statement of financial affairs reflect that no transfers of real property were made during the year preceding the filing of the Debtor's petition, although the evidence at trial showed that the Debtor transferred 1.66 acres of real property to her grandson and his wife less than 2 weeks before she filed her petition for relief. However, the Plaintiffs have not raised this issue, and therefore, the Court makes no findings regarding the transfer.

at the time of filing and on which she presently resides amounts to a false statement. As previously stated, a warranty deed executed in 1981 by the Debtor's mother conveying an interest as a joint tenant in four acres was admitted into evidence at trial. Although the Debtor conveyed away 1.66 of the 4 acres less than two weeks before she filed her petition for relief, no evidence was offered to show that she did not hold title to the remainder of the 4 acres at the time she filed her petition.

Additionally, in light of the Debtor's testimony at trial, this Court does not believe the Debtor's response in her statement of financial affairs that at the time the Debtor filed her petition for relief all of her books and records had been destroyed by fire. Therefore, this Court finds that the second element of an action under § 727(a)(4)(A), that the statement was false, has been satisfied.

ELEMENT III: THE DEBTOR KNEW THE
STATEMENT WAS FALSE

The Court also finds that the third element, that the Debtor knew the statement was false, has been satisfied. On August 27, 1988, less than two weeks before the Debtor filed her petition for relief, she executed a warranty deed conveying 1.66 acres out of a 4 acre parcel to her grandson and his wife, Billy and Nell Bueto. The Debtor's signature appears on the warranty deed. There can be no question that the Debtor was aware that she owned the property.

Also, the Court finds that the Debtor knew that her statement that her books and records were destroyed by fire was

false. At trial, the Debtor first testified that the fire which destroyed her books and records occurred at her mother's house. However, the fire at her mother's house did not even occur until two months after the Debtor filed her petition for relief. It was not until after counsel for E-Z Serve pointed out the impossibility of her books and records being destroyed in the fire at her mother's house, and after the Debtor had an opportunity to confer with her counsel, that the Debtor explained how she believes her business records were burned after she sold the truck stop. The Court does not find the Debtor's testimony regarding her books and records to be credible.

ELEMENT IV: THE STATEMENT WAS MADE
WITH FRAUDULENT INTENT

The fourth element which the Plaintiffs must prove is that the statement was made with fraudulent intent. Fraudulent intent may be established by circumstantial evidence. March v. Sanders (In re Sanders), 128 B.R. 963, 972 (Bankr. W.D. La. 1991). Furthermore, "statements made with reckless indifference to the truth are regarded as intentionally false". Id. at 972 (citing In re Tully, 818 F.2d 106 (1st Cir. 1987)).

This Court holds that the Debtor has demonstrated, at the very least, a reckless indifference to the truth. Her testimony at trial was totally inconsistent from one minute to the next, and she utterly failed to offer a plausible explanation why she failed to list as an asset the two acres of real property. The Debtor further failed to offer a believable explanation why her statement of affairs reflect that her books and records were destroyed by

fire when the only fire that she knew about for certain occurred two months after she filed her statement of financial affairs. Therefore, this Court holds that the Plaintiffs have shown that the statements were made with fraudulent intent.

ELEMENT V: THE STATEMENT RELATED MATERIALLY
TO THE DEBTOR'S BANKRUPTCY CASE

The final element which the Plaintiffs must show is that the statement related materially to the Debtor's bankruptcy case. Regarding materiality, the Fifth Circuit has held:

[t]he subject matter of a false oath is "material," and thus sufficient to bar 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.

Beaubouef v. Beaubouef (Matter of Beaubouef), 966 F.2d 174, 178 (5th Cir. 1992) (quoting In re Chalik, 748 F.2d 616, 617 (11th Cir. 1984)).

The ownership of real property, and the existence of books and records undoubtedly bear a relationship to the Debtor's estate and business transactions. This Court holds that the Debtor's false statements were materially related to her bankruptcy case.

CONCLUSION

This Court holds that the Plaintiffs have met their burden of proof under § 727(a)(4)(A) of the Bankruptcy Code. They have demonstrated as to the two acre parcel of real property and as to the Debtor's books and records that the Debtor has knowingly and

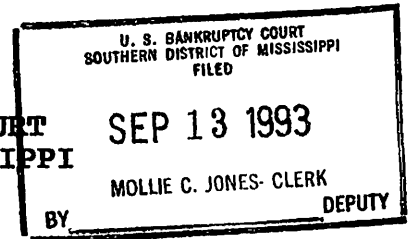
fraudulently made a false oath or account in connection with her bankruptcy case. Therefore, the Debtor's discharge in bankruptcy will be denied.

A separate judgment consistent with this opinion will be entered in accordance with Rules 7054 and 9021 of the Federal Rules of Bankruptcy Procedure.

Dated this the 13th day of September, 1993.


UNITED STATES BANKRUPTCY JUDGE

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION



IN RE: MARY JO BUETO FREDERICKS

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and COPIAH BANK, N.A. OF HAZLEHURST,
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DEFENDANTS

FINAL JUDGMENT

Consistent with the Court's opinion dated contemporaneously herewith, it is hereby order and adjudged that the discharge in bankruptcy of the Debtor, Mary Jo Bueto Fredericks, shall be and hereby is denied pursuant to Bankruptcy Code § 727(a)(4)(A).

This is a final judgment for the purposes of Rules 7054 and 9021 of the Federal Rules of Bankruptcy Procedure.

ORDERED AND ADJUDGED this the 13th day of September, 1993.


UNITED STATES BANKRUPTCY JUDGE