

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

U. S. BANKRUPTCY COURT SOUTHERN DISTRICT OF MISSISSIPPI FILED	
MAR 19 1993	
BY	MOLLIE C. JONES- CLERK DEPUTY

IN RE: MICHAEL A. KLAUDER AND
GLORIA D. KLAUDER

CASE NO. 91-02377JC

AMERICAN EXPRESS TRAVEL
RELATED SERVICES, CO. INC.

PLAINTIFF

VS.

ADVERSARY NO. 91-0242JC

MICHAEL A. KLAUDER AND
GLORIA D. KLAUDER

DEFENDANTS

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Edward Ellington, Bankruptcy Judge

MEMORANDUM OPINION

This adversary proceeding came on for trial upon the Complaint To Determine Dischargeability Of Debt And Objection To Discharge filed by American Express Travel Related Services, Co., Inc. against Michael and Gloria Klauder, wherein American Express seeks either a determination of dischargeability of a particular debt pursuant to Bankruptcy Code¹ § 523(a)(2)(A), or a denial of discharge pursuant to §§ 727(a)(2)(A), (a)(4)(A), or (a)(5). After considering the evidence presented at trial along with arguments of

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

counsel, this Court finds that the Klauders should be denied a discharge pursuant to Bankruptcy Code § 727(a)(5), and in so finding makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

This adversary proceeding arises out of certain charges for goods and services purchased by both Michael and Gloria Klauder on two separate American Express accounts, for which payment was never made. Although evidence was presented at trial regarding numerous charges made by the Klauders, only those relevant to the Court's ruling will be discussed.

The first of the two American Express accounts was opened by Michael Klauder in May, 1988. On September 20, 1990 Michael Klauder ordered a "CEO Ring" from American Express for a purchase price of \$ 3,995. The ring was shipped to him on October 4, 1990. On September 28, 1990, Michael Klauder also ordered a "Saratoga Watch" from American Express for a purchase price of \$ 2,690.00. The watch was shipped to him on October 10, 1990. Both the ring and the watch were to be billed in 25 monthly installments. The first charges for these two items appeared on a statement of account dated November 13, 1990. No payment was ever made for either the watch or the ring. In March, 1991, American Express accelerated the debt, billing Michael Klauder for the entire purchase price of the jewelry.

The second of the two American Express accounts was opened by Gloria Klauder in February, 1986. On September 28, 1990, Gloria Klauder ordered a men's 18kt gold "Saratoga Watch" from American Express for a purchase price of \$ 8,900. The watch was shipped to her on October 9, 1990. The watch was to be billed in 25 monthly installments. The first charge for the watch appeared on a statement of account dated November 16, 1990. No payment was ever made for the watch, and in March of 1991 American Express accelerated the debt, billing Gloria Klauder for the entire purchase price of the watch.

On June 26, 1991 Michael and Gloria Klauder filed their joint petition for relief under Chapter 7 of the Bankruptcy Code. In response to the question of whether the Debtors had suffered any losses due to theft during the year preceding the filing of their petition, the Klauers' statement of financial affairs stated the following: "Between Nov. 3rd & 15th, 1990, jewelry stolen from their home in 2345 Forest Park Drive, Jackson, Ms." In response to the question of whether the loss was covered by insurance, the statement of financial affairs further states, "Yes. \$ 500.00 jewelry coverage, but did not file claim."

On November 8, 1991, American Express commenced this adversary proceeding against Michael and Gloria Klauder seeking a determination of dischargeability of their debt to American Express, and objecting to their receiving a discharge in bankruptcy.

At trial both Michael and Gloria Klauder testified regarding the alleged theft of the two watches and the ring. They both stated that after receiving the ring and two watches they decided that they did not need to keep them, and packaged them for return to American Express within the 30 day time period allowed for returns. However, they did not manage to return the jewelry to American Express because during October of 1990, Michael Klauder's father became very ill and subsequently died on November 6, 1990. During his illness numerous relatives and friends were in their home.

The Klauers further testified that during the time that friends and relatives were in their home they discovered that the ring and two watches were missing, in addition to a Rolex watch and another watch which were not obtained from American Express. When asked if they reported the incident to the police, the Klauers testified that they called a friend who is a policeman to find out what could be done about the theft. Their friend informed them that they would need to file a police report, and that everyone who had been in their home would have to be questioned. Both Michael and Gloria Klauder testified that they were unwilling to have their friends and relatives questioned, so they did not file a police report. The Klauers also testified that they did not file a claim on their insurance, even though they had \$ 500 worth of coverage. Their only explanation was that \$ 500 would not cover the debt, so they did not file a claim.

CONCLUSIONS OF LAW

While American Express bases its complaint on Bankruptcy Code §§ 523(a)(2)(A), 727(a)(2)(A), (a)(4)(A), and (a)(5), a finding by the Court that the Debtors have failed to satisfactorily explain the loss of the ring and two watches mandates a denial of discharge under § 727(a)(5), and renders findings under the remaining grounds asserted by American Express unnecessary. See Beaubouef v. Beaubouef (Matter of Beaubouef), 966 F.2d 174, 177 (5th Cir. 1992); Hibernia National Bank v. Perez (Matter of Perez), 954 F.2d 1026, 1027 (5th Cir. 1992).

Section 727(a)(5) of the Bankruptcy Code provides as follows:

11 USC § 727

§ 727. Discharge.

(a) The court shall grant the debtor a discharge unless-

...

(5) the debtor has failed to explain satisfactorily, before determination of denial of discharge under this paragraph, any loss of assets or deficiency of assets to meet the debtor's liabilities;

Rule 4005 of the Federal Rules of Bankruptcy Procedure provides that "[a]t the trial on a complaint objecting to a discharge, the plaintiff has the burden of proving the objection." Additionally, American Express must prove its case by a preponderance of the evidence. Grogan v. Garner, 111 S.Ct. 654 (1991). However, "once that party meets the initial burden by producing evidence establishing the basis for his objection, the burden shifts to the debtor to explain satisfactorily the loss."

Chalik v. Moorefield (In re Chalik), 748 F.2d 616, 619 (11th Cir. 1984) (citing 4 Collier on Bankruptcy ¶ 727.08 (15th ed. 1984)).

Furthermore, the Fifth Circuit Court of Appeals has stated as follows regarding the proof necessary to sustain an action under § 727(a)(5):

While the burden of persuasion rests at all times on the creditor objecting to discharge, it is axiomatic that the debtor cannot prevail if he fails to offer credible evidence after the creditor makes a prima facie case. The creditor's burden of persuasion does not obviate the necessity that the debtor provide a satisfactory explanation of the loss of his assets.

First Texas Savings Ass'n, Inc. v. Reed (Matter of Reed), 700 F.2d 986, 992-3 (5th Cir. 1983).

"The question of whether a debtor satisfactorily explains a loss of assets is a question of fact." Chalik v. Moorefield (In re Chalik), 748 F.2d 616, 619 (11th Cir. 1984).

At trial Michael Klauder testified that he did receive the \$ 2,690 "Saratoga Watch" and the \$ 3,995 "Ceo Ring" from American Express. Likewise, Gloria Klauder testified that she received the \$ 8,900 "Saratoga Watch" from American Express. Both Debtors also testified that they no longer had possession of the ring and two watches.

As previously stated, the explanation offered by both Debtors for the loss of the ring and two watches is that they were stolen by someone who was in their home during the illness of Michael Klauder's father. The Debtors have offered no evidence to corroborate their testimony. Instead they testified that although

jewelry having a purchase price of more than \$ 15,000 was stolen from their home, they were unwilling to file a police report for fear of offending their guests, and further, that they did not file a claim on their insurance since the policy limits would not satisfy the debt.

The Debtors have offered an explanation for the loss of the ring and two watches, but this Court does not believe that they have "satisfactorily" explained the loss. In construing the term "satisfactorily" the Fifth Circuit restated the test first set forth in In re Shapiro & Ornish, 37 F.2d 403 (N.D. Tex. 1929), aff'd, 37 F.2d 407 (5th Cir. 1930):

The word "satisfactorily[,]" ... may mean reasonable, or it may mean that the court, after having heard the excuse, the explanation, has that mental attitude which finds contentment in saying that he believes the explanation-he believes what the bankrupts say with reference to the disappearance or shortage. He is satisfied. He no longer wonders. He is contented.

First Texas Savings Ass'n v. Reed (Matter of Reed), 700 F.2d 986, 993 (5th Cir. 1983) (quoting In re Shapiro & Ornish, 37 F.2d 403, 406 (N.D. Tex. 1929), aff'd, 37 F.2d 407 (5th Cir. 1930)).

"Explanations of losses provided by debtors which are generalized, vague, and uncorroborated by documentation are unsatisfactory." Pyramid Technology Corp. v. Cook (In re Cook), 146 B.R. 934, 941 (Bankr. E.D. Penn. 1992). Where one debtor claimed that two Rolex watches and other items were stolen from his home by a "drug crazed relative" and a worker installing a home security system, but produced no documentation regarding the

thefts, the court denied the debtor's discharge under § 727(a)(5), stating that "[a]t a minimum, he should have introduced some official record of the alleged thefts from his home" McGowan v. Beausoliel (In re Beausoliel), 142 B.R. 31, 37 (Bankr. D. R.I. 1992).

It is the opinion of this Court that American Express has met its burden or proof, and that both Michael and Gloria Klauder have failed to offer a satisfactory explanation as to the loss of the ring and two watches having a purchase price of more than \$ 15,000. Therefore, in accordance with Rules 7054 and 9021 of the Federal Rules of Bankruptcy Procedure, a separate judgement will be entered consistent with this opinion denying the discharge of Michael and Gloria Klauder pursuant to Bankruptcy Code § 727(a)(5).

Dated this the 19th day of March, 1993.


UNITED STATES BANKRUPTCY JUDGE

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FINAL JUDGMENT

Consistent with the opinion dated contemporaneously herewith, it is hereby ordered and adjudged that the discharge of Michael and Gloria Klauder is hereby denied pursuant to 11 U.S.C. § 727(a)(5).

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 19TH day of March, 1993.


UNITED STATES BANKRUPTCY JUDGE