UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK
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In re:

ROBERT E. COHEN, Chapter 7
Case No. 01-11748 (PCB)

Debtor
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ROBERT L. GELTZER,
Chapter 7 Trustee

Plaintiff,

- against - Adv. Pro. No. 01-03570 (PCB)

ROBERT E. COHEN

Defendants.
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APPEARANCES:

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MEMORANDUM DECISION GRANTING TRUSTEE'S MOTION
FOR SUMMARY JUDGMENT AND DENYING DEBTOR'S DISCHARGE

Beatty, Prudence Carter, U.S.B.J.:

The trustee of this Chapter 7 case commenced this adversary proceeding against the debtor, objecting to the debtor's discharge pursuant to Bankruptcy Code §727(a). The trustee has moved for summary judgment on two counts of the complaint on the grounds that the debtor failed to preserve records in violation of Bankruptcy Code § 727(a)(3) and that the debtor failed

to explain the loss of his assets in violation of Bankruptcy Code § 727(a)(5). The debtor, who appears pro se, has filed papers in opposition to the trustee's motion. For the reasons that follow, the Court grants the trustee's motion and denies the debtor's discharge.

STATEMENT OF FACTS

The Petition

On March 27, 2001 (the "Filing Date"), Robert Cohen (the "Debtor") filed a voluntary petition under Chapter 7 of the Bankruptcy Code (the "Code"). Robert Geltzer was appointed Chapter 7 trustee (the "Trustee"). The Debtor received an MBA in finance from Seton Hall University in 1971 and as of the Filing Date, he was a financial consultant and investor.

In his Schedules and Statement of Financial Affairs (together, the "Schedules"), the Debtor states that he owned a two-bedroom co-op at 312 East 50th Street in Manhattan (the "Co-op"). The Debtor valued the Co-op at $400,000 and stated that it was encumbered by secured claims in the amount of $350,000, with an outstanding mortgage held by Indymac Mortgage Holdings in the amount of $280,000 and a $70,000 lien held by John Stathatos ("Stathatos"). The Debtor listed personal property such as clothing and furniture, which he valued at $2,600 and a 1998 Hyundai, which he valued at $6,000. He did not list any other automobiles or motorcycles in his Schedules. The Debtor also stated that he owned 100% of the stock in the financial consulting firms Magna Financial Corporation and Metropolitan Computer Corporation, which interests he valued at $0. The Debtor did not list interests in any other businesses. The Debtor did not list any boats.

The Schedules further list unsecured priority claims totaling $115,000, comprised of child support and tax obligations as well as unsecured non-priority claims, totaling $277,900, which include among other things, credit card bills, loans and legal fees. Additionally, the

Debtor listed a $797,500 judgment obtained by the Securities and Exchange Commission (the "SEC") on April 20, 2000 (the "SEC Judgment"). He reported monthly income of $600 from all sources, with monthly expenses of $580, and that his income from 1999 to the Filing Date was $0.

I. The 2004 Exam

By stipulation between the Debtor and the Trustee, the Debtor consented to an examination under Bankruptcy Rule 2004 (the "2004 Exam"), which took place on September 20 and 25, 2001. In connection with the 2004 Exam, the Trustee requested that the Debtor produce all financial information and documents relating to his personal and business interests.[1] The Debtor submitted written responses to the Trustee's requests, but he did not provide the Trustee with any of the requested documents. At the 2004 Exam, the Debtor testified to having transferred or disposed of numerous personal possessions, motorcycles, automobiles, boats and business interests.

A. Personal Possessions

The Debtor testified that his personal possessions included antique furniture, music boxes and computer equipment, which he valued at over $23,000. He testified that Irene Vasilakos[2],

[1] More specifically, the Trustee requested "any and all financial statements, summaries of assets, liabilities and/or earnings or potential earnings submitted by the Debtor to any third party, including without limitation, banks, financial institutions, brokerage firms, clients, potential clients and landlords, federal and state tax returns of the Debtor for the years 1995 up to and including 2000, stock brokerage account statements, bank account statements (expressly including cancelled checks), credit card statements from any other financial or other institution that holds or held assets and/or liabilities belonging to the Debtor, leases entered into, whether for personal or residential property, or residential or commercial use, documents relating to or referring to transactions of any kind between the Debtor and Magna Financial Corporation, Metro Computer Corporation, Creative Financial Consultations and All American Food, documents relating to the action and settlement of the lawsuit commenced against the Debtor, *SEC v. Robert Cohen, et al.*, Case No. 99-5822, Debtor's financial documents not otherwise identified above, copies of any documents relating to or referring to the Debtor's lease, use or ownership of any automobile, boat or any other luxury vehicle ownership, documents relating to the ownership of the Co-op, including payment history of loans, liens, encumbrances and fees relating to the Co-op and Debtor's ownership of same." *See Transcript of 2004 Exam, attached as Exhibit 4 at 15-19 to the Declaration of Jonathan L. Flaxer in Support of Motion for Summary Judgment ("Flaxer Decl.")* (A.P. Document No. 9).

[2] Ms. Vasilakos is the sister of John Stathatos.

the second mortgagee on the Co-op, sold these assets to "a company that would go to these kinds of houses and buy merchandise." See *Flaxer Decl. Ex. 4* at 20-27. However, Ms. Vasilakos is not listed as a creditor in the Schedules. The Debtor also testified that at one time he kept all of his documents in the Co-op, but that he had "no clue what happened to them." *Flaxer Decl. Ex. 4* at 23.

B. Motorcycles and Automobiles

The Debtor testified that prior to the Filing Date he owned four custom motorcycles, a 1994 Jeep, a 1956 T-Bird, a 1984 Porsche, and the 1998 Hyundai. *Id.* at 190-91, 196, 199. In regard to the motorcycles, the Debtor explained that one was stolen in the summer of 2000, one was given to Stathatos in 1999 and the other two were sold to individuals whose names he could not recall. The Debtor had no documentation evidencing any of these transactions.

The Debtor also failed to provide documentation regarding his cars. He stated that the Porsche had been sold four years prior to the 2004 Exam to an individual whose name he could not recall. *Id.* at 197-98. With respect to the Hyundai, the Debtor testified that "signed for" the car for his niece in California, however he could not recall whether he leased or purchased it. *Id.* at 199-201. The Hyundai had since been repossessed but the Debtor could not provide any details about the repossession. *Id.* Moreover, he was unable to provide an address for the niece for whom he stated he obtained the car. *Id.* at 202-203. Finally, the Debtor testified that he transferred title and possession of the 1956 T-Bird, which he valued at $20,000, to Stathatos in 1999 as collateral for investment projects in the Bahamas. *Id.* at 105, 197.

C. Boats

The Debtor further testified that prior to the Filing Date, he and/or his company Metropolitan Computer Corporation, owned several boats, including a speedboat, a sailboat and

"a couple of jet skis." *Id*.at 183-86. The Debtor stated that a broker sold the speedboat around 1997. He claimed not to know the name of the broker or purchaser. The Debtor stated that he gave the sailboat, which he valued at approximately $100,000, to a creditor identified as Patricia Weltman ("Weltman") in 1999. *Id.* at 186-87.

D. Business Ventures

At the 2004 Exam, the Debtor also discussed numerous investments for which he had no documentation. The Debtor testified that he loaned $400,000 to All American Food Group and that he ultimately lost $1.5 million in stock he held in that company. The Debtor did not have any documentation evidencing the loan. *Id.* at 84-85. He also stated that in August 1997 he invested $50,000 in the Coral Harbor Resort, an investment project in the Bahamas (the "Bahamas Project"). Again, he failed to provide documentation. *Id.* at 30-31. The Debtor further testified that in 1997 he invested $200,000 in a restaurant named Aja and that he subsequently transferred his interest to an individual whose name he could not recall. *Id* at 110-17. He also stated that he was unable to locate documents regarding that investment. *Id.* Finally, the Debtor testified that in 1997 he invested $20,000 in a music company known as "No Mystery Records." He claimed not to recall with whom he negotiated at No Mystery Records and he provided no documentation as to that alleged investment. *Id.* at 125-27.

II. <u>The Adversary Proceeding</u>

On November 9, 2001, the Trustee commenced this adversary proceeding, filing a complaint objecting to the Debtor's discharge pursuant to Code § 727(a) on the grounds that the Debtor : (1) knowingly and fraudulently made a false account in making the statements in the Petition and Schedules under penalty of perjury in violation of Code §727(a)(4)(A); (2) knowingly and fraudulently withheld records and information from the Trustee in violation of

Code §727(a)(4)(D); (3) transferred, removed, destroyed, mutilated or concealed this property within one year prior to the Filing Date with intent to hinder, delay or defraud the Trustee in violation of Code §727(a)(2); (4) concealed, destroyed, mutilated, falsified, or failed to keep or preserve records in violation of Code §727(a)(3); and (5) failed to explain satisfactorily his loss of assets or deficiency of assets in violation of Code §727(a)(5).

On October 25, 2004, the Trustee filed a motion for summary judgment (the "Motion") on counts four and five of the Complaint under Federal Rule of Civil Procedure 56 ("FRCP 56"), as made applicable to adversary proceedings by Bankruptcy Rule 7056.

The Debtor filed an answer[3] opposing the Motion, asserting that he submitted everything requested by the Trustee that was in his possession and that he did not attempt to mislead or misinform the Trustee as to his financial condition. The Debtor stated that that he gave the Internal Revenue Service (the "IRS") every check he wrote since 1988 and that the checks were never returned. *Cohen Mem*. at 2 The Debtor also asserted that the Trustee has copies of his bank account statements as well as a copy of his SEC settlement, which included a listing of every check over $1,000 written by him since 1994. In addition, the Debtor stated that in order to encourage Stathatos to invest in the Bahamas Project he assigned Stathatos title to the 1956 T-Bird as well as title to one of his motorcycles and that he granted Stathatos a lien on Co-op. The Debtor also states that in consideration of Weltman loaning him approximately $300,000 for the Bahamas Project, he assigned to her title to his sailboat, a vacation timeshare worth $12,500 and one of his motorcycles. *Cohen Mem*. at 3. The Debtor asserts that copies of those agreements and assignments were given to the Trustee. *Id*. The Debtor further asserted that neither Stathatos nor Weltman actually put title of his collateral in their names because of the expense,

[3] References to *Cohen Mem*. at __" are to the *Debtor's Answer to Plaintiff-Trustee's Motion for Summary Judgment*, at the indicated page(s). (A.P. Document No.13).

and that while the subsequent sales transferring title did take place within a year prior to the Filing Date, he did not list these items in his Schedules because he ceded physical possession approximately eighteen months before the Filing Date. *Id*.

As to his boats, the Debtor defends not having receipts for their sale and disposition by stating that the transactions occurred more than four years prior to the Filing Date and that a bill of sale is "for the buyer's records more so than the seller's." *Cohen Mem.* at 4. Finally, the Debtor stated that he has no records of certain investments, including those in All American Food Group and Aja because the entities are no longer in existence and his attorney, who probably would have some documents, is a creditor in this case and "was unlikely to cooperate in handing over supporting documentation." *Id.*

DISCUSSION

Bankruptcy's premise of a fresh start for the honest debtor underlies the concept of the discharge. Generally, an individual debtor is entitled to a discharge unless one of the enumerated grounds for denying discharge specified in Code § 727(a) are established. For purposes of this decision, the Trustee has sought to have the Debtor's discharge denied pursuant to Code §§ 727(a)(3) and (a)(5). As to the Code § 727(a)(3) cause of action, the Trustee alleges that the Debtor has failed to preserve any books and records from which the Debtor's financial condition can be ascertained. As to the Code § 727(a)(5) cause of action, the Trustee alleges that the Debtor has failed to satisfactorily explain the loss of his assets.

While most of the other objections to discharge are predicated on the fraudulent intent of the debtor, intent to defraud or conceal one's financial condition is not a necessary element for denial of discharge under Code §§ 727(a)(3) and (a)(5).

Standard for Summary Judgment

FRCP 56, made applicable to adversary proceedings by Bankruptcy Rule 7056, provides that summary judgment "shall be rendered forthwith if the pleadings * * * together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). A fact is material only if it affects the result of the proceeding and a fact is in dispute only when the opposing party submits evidence such that a trial would be required to resolve the differences. *In re CIS*, 214 B.R. 108, 118 (Bankr. S.D.N.Y. 1997). When ruling on a motion for summary judgment, the court is required to draw all factual inferences in favor of, and take all factual assertions in the light most favorable to, the party opposing summary judgment. *Chambers v. TRM Copy Centers Corp.* 43 F.3d 29, 36 (2d Cir. 1994). The court can consider the content of all submitted affidavits in determining whether a proponent's affidavit is sufficient to give rise to a dispute as to material issue of fact. *See* FRCP 56(e); *In re CIS*, 214 B.R. at 118. The nonmoving party is also required to put forth all of its evidence or risk the grant of the motion for summary judgment.

The Debtor has Failed to Keep or Preserve Sufficient Records Pursuant to Code § 727(a)(3)

Code § 727(a)(3) denies a debtor a discharge where "the debtor has concealed, destroyed, mutilated, falsified, or failed to keep or preserve any recorded information, including books, documents, records, and papers, from which the debtor's financial condition or business transactions might be ascertained, unless such act or failure to act was justified under all of the circumstances of the case."

The purpose of Code § 727(a)(3) is to provide the court and the creditors with "complete and accurate information concerning the debtor's affairs and to test the completeness of the disclosure relevant to discharge." *In re Gannon*, 173 B.R. 313, 321 (Bankr. S.D.N.Y. 1994). Additionally, Code § 727(a)(3) "ensure[s] that the trustee and creditors receive sufficient information to trace a [d]ebtor's financial history for a reasonable period past to present." *In re Jacobowitz*, 309 B.R. 429, 435 (S.D.N.Y. 2004).

The party objecting to discharge under Code §727(a)(3) must show that the debtor failed to keep or preserve adequate records and that such failure makes it impossible to ascertain the debtor's financial condition and material business transactions. *Id*. Once the objecting party has shown that the debtor's failure to keep records has made it impossible to ascertain the debtor's financial condition and material business transactions, the burden shifts to the debtor to demonstrate that the failure to keep records was justified. *Id*. Explanations given by the debtor as to the justification of the deficiencies must be "more than vague and general oral assertions that the assets are no longer available." *In re Joseph*, 1992 WL 96324 at *3 (N.D.N.Y. 1992); *see also In re Sperling*, 72 F.2d 259, 261 (2d Cir. 1934).

In making the determination as to whether sufficient records have been kept, the court must conduct a case-by-case analysis, and the sufficiency of a debtor's record keeping is a matter of judicial discretion. *In re Joseph*, 1992 WL 96324 at *3. Several factors to be considered include, but are not limited to (1) the debtor's education, business experience and sophistication, (2) the complexity and volume of the debtor's business, (3) the amount of the debtor's obligations, (4) the amount of credit extended to the debtor, (5) whether the failure to keep or preserve records was due to the debtor's fault, (6) customary business practices for record keeping in the debtor's business, and all other circumstances that should be considered in the

interest of justice. *In re Jacobowitz*, 309 B.R. at 436; *In re Blonder*, 258 B.R. 534, 538-39 (Bankr. D. Conn. 2001).

Here, the record is devoid of any facts demonstrating that the Debtor kept or preserved adequate records enabling the Trustee to trace his financial history, ascertain his financial condition and to reconstruct his business transactions. On the contrary, the record clearly establishes that the Debtor has failed to maintain, preserve or produce any meaningful documentation or records from which his financial condition can be ascertained, from which his business transactions can be reconstructed, and from which his numerous transfers and disposals of his assets can be analyzed.

The Trustee identified 15 specific categories of documents and requested the Debtor to produce them. *See* Footnote 1. While the Debtor submitted written responses to the Trustee's document requests, he did not provide the Trustee with any of the requested documents. In fact, the Debtor admitted that although he did have the documents at one time, he had "no clue" what happened to them.

During the 2004 Exam, the Debtor testified about numerous transfers and disposals of his assets, including personal possessions, motorcycles, automobiles, boats and business interests. The Trustee explicitly asked for information and documents about such alleged transfers and disposals, but the Debtor failed to provide any documentation or specific information about them. Rather, the Debtor offered a litany of excuses as to why he could not provide the requested information. Moreover, many of his excuses directly contradict the information in his Schedules and his testimony at the 2004 Exam.

The Debtor is a sophisticated businessman with an MBA in finance from a well-regarded university. He was previously involved in the business of financial consulting and he has

invested hundreds of thousands of dollars of his own funds, as well as funds received from others, in various business ventures. His failure to maintain, preserve or produce documents concerning his purported asset transfers or his business ventures is inexcusable.

Equally without merit is the Debtor's explanation that the requested documents are in the possession of others, including the SEC, the IRS and his former attorney. It is not Trustee's duty to obtain these records. *In re Jacobwitz,* 309 B.R. at 438. The fact that the Debtor can direct the Trustee where he might obtain the records does not relieve the Debtor of his responsibility to provide the adequate records himself. *Id*.

The Court finds that the undisputed facts make clear that the Debtor has failed to maintain, preserve and provide adequate records enabling the Trustee to trace his financial history, to ascertain his true financial condition and to reconstruct his business affairs. Summary Judgment as to Count 4 of the Complaint is granted.

The Debtor has Failed to Satisfactorily Explain the Loss of his Assets Pursuant to Code § 727(a)(5)

Code § 727(a)(5) provides that a discharge shall be denied when "the debtor has failed to explain satisfactorily * * * any loss of assets or deficiency of assets to meet the debtor's liabilities." Code § 727(a)(5) gives the court broad power to decline to grant a discharge in bankruptcy where the debtor does not adequately explain a shortage, loss or disappearance of assets. *In re Handel*, 266 B.R. 585, 590 (Bankr. S.D.N.Y. 2001); *In re Gannon*, 173 B.R. at 317. The allegations required to support a claim under Code § 727(a)(5) are closely related to those necessary to support a claim under Code § 727(a)(3). *In re Wolfson*, 139 B.R. 279, 288 (Bankr. S.D.N.Y. 1992).

In a Code § 727(a)(5) action, once the moving party has met the burden of establishing the existence of an unexplained loss or deficiency of assets, the burden shifts to the debtor to provide a satisfactory explanation. *Handel*, 266 B.R. at 590. The debtor's explanation "must convince the court of the debtor's business like conduct and good faith. The explanation must appear reasonable such that the court 'no longer wonders' what happened to the assets." *Wolfson*, 139 B.R. at 288-89. In that regard, "vague and indefinite explanations of losses that are based upon estimates, uncorroborated by documentation, are unsatisfactory." *Handel*, 266 B.R. at 590.

In the instant case, the undisputed facts demonstrate that the Debtor has failed to adequately explain the loss or disposition of his assets. During the 2004 Exam, he testified about numerous assets, including personal possessions, motorcycles, cars, boats and substantial business interests. With respect to his personal possessions, boats and several of his motorcycles and cars, the Debtor testified that the assets were either sold or transferred to individuals or entities. However, when pressed for details, he provided vague answers and in many instances, could not recall precisely when the transfers took place or the identity of the alleged purchasers. Additionally, the Debtor failed to provide any documentation regarding the alleged transfers or sales of his assets.

The Debtor's testimony with respect to his business ventures is equally problematic. The Debtor testified that he invested hundreds of thousands of dollars in connection with All American Food Group, the Bahamas Project, Aja and No Mystery Records. Yet, despite his extensive business experience, he has failed to maintain, preserve or offer any documents or records evidencing his investments, his business agreements or the approximately $1.8 million in losses he claims in connection with those investments.

The Debtor's explanations are uncorroborated and vague and have not allowed the Trustee, or the Court, to reconstruct his business transactions. *See In re Underhill*, 82 F.2d 258, 260 (2d Cir. 1936) ("[r]ecords of substantial completeness and accuracy are required so that they may be checked against the mere oral statement or explanations made by the bankrupt."); *In re Blonder*, 258 B.R. at 540 ("[a] vague, indefinite and uncorroborated hodge-podge of financial transactions will not suffice under [Code] § 727(a)(5)").

The Court finds no material facts in dispute. While the Debtor offered weak explanations regarding his business losses and boat transfers, his failure to offer any credible explanation and documentary corroboration as to the disposition of his personal possessions, motorcycles and automobiles is material and sufficient enough to sustain the Trustee's Motion.[4] The Trustee is not required to take the Debtor's word that he no longer has the property or cash. *In re Delancey*, 58 B.R. 762, 769 (Bankr. S.D.N.Y 1986). Summary Judgment as to Count 5 of the Complaint is granted.

CONCLUSION

For the foregoing reasons, the Court GRANTS Summary Judgment in favor of the Trustee for counts Four and Five of the Complaint and DENIES the Debtor's discharge.

SETTLE ORDER.

Dated: New York, New York
March 6, 2007

/s/ Prudence Carter Beatty
UNITED STATES BANKRUPTCY JUDGE

[4] The Court notes that its findings in large measure mirror the District Court's findings in the SEC Judgment.