

1 **NOT FOR PUBLICATION**

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3
4 UNITED STATES BANKRUPTCY COURT
5 EASTERN DISTRICT OF CALIFORNIA
6

7 In re Case No. 07-11206
8 JAMES B. MASON
9 Debtor.

10 _____ Adv. No. 07-1162
11 PRIDE MOBILITY PRODUCTS
12 CORPORATION
13 Plaintiff,

14 vs.
15 JAMES B. MASON
16 Defendant.
17 _____/

18 **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

19 Trial in this adversary proceeding was held June 18, 2009.
20 Following the hearing, the court took the matter under
21 submission. This memorandum contains findings of fact and
22 conclusions of law required by Federal Rule of Bankruptcy
23 Procedure 7052 and Federal Rule of Civil Procedure 52. This is a
24 core proceeding as defined in 28 U.S.C. §157(b) (2) (J).

25 Prior to trial, plaintiff, Pride Mobility Products
26 Corporation ("Pride") and defendant, James B. Mason ("Mason")
27 entered into a Joint Pretrial Conference Statement that set forth
28 undisputed facts and the elements of jurisdiction. On March 11,

1 2009, the court entered an order approving the Joint Pretrial
2 Conference Statement. The court incorporates the undisputed
3 facts in the Joint Pretrial Conference Statement as findings of
4 fact. As relevant, those facts are set forth hereinbelow.

5 Undisputed Facts from Order Approving Joint Pretrial Conference
6 Statement.

7 **JURISDICTION IS NOT IN DISPUTE AND REQUIRES NO FURTHER PROOF**

8 1. This Court has jurisdiction over this adversary
9 proceeding pursuant to (i) 28 U.S.C. §1334, as a civil proceeding
10 arising under the Bankruptcy Code or arising in a case commenced
11 under the Bankruptcy Code; and (ii) 28 U.S.C. § 157 as a civil
12 proceeding which constitutes a core proceeding. Venue lies in the
13 Eastern District of California, pursuant to 28 U.S.C. §§ 1408(1)
14 and 1409(a), as this is a proceeding arising under the Bankruptcy
15 Code or arising in a case commenced by Defendant under Chapter 7 of
16 title 11 of the Bankruptcy Code in the Eastern District of
17 California.
18
19

20 **BENCH TRIAL IS NOT IN DISPUTE AND REQUIRES NO FURTHER PROOF**

21 2. Neither party has requested a jury trial. This shall be
22 a bench trial.
23

24 **UNDISPUTED FACTS AS AGREED TO BY PLAINTIFF AND DEFENDANT**

25 3. Defendant was a forty percent (40%) member and manager
26 of Sierra Home Medical, LLC ("Sierra"). Plaintiff sold motorized
27 wheelchairs on credit to Sierra, which open invoices totaled
28

1 \$481,303.19. Sierra was a distributor of motorized wheelchairs
2 and related products to the public. On March 10, 2005, Defendant
3 executed a personal guarantee of Sierra's debt to Plaintiff. On
4 December 22, 2006, Sierra paid its bankruptcy counsel a retainer
5 of \$2,500. At the end of January 2007, Defendant ceased working
6 for Sierra. On February 13, 2007, Sierra filed voluntary
7 petition for relief under Chapter 7 of the Bankruptcy Code.
8

9 4. Defendant filed for relief under Chapter 7 of the
10 Bankruptcy Code on April 27, 2007. The Trustee appointed is
11 James Edward Salven. Plaintiff filed an Adversary Complaint on
12 September 28, 2007, requesting that the Court deny Defendant
13 discharge under Chapter 7 of the Bankruptcy Code pursuant to §§
14 727(a)(2)(A) and 727(a)(4)(A) of the Bankruptcy Code.
15

16 **UNDISPUTED FACTS ESTABLISHED THROUGH PLAINTIFF'S MOTION FOR**
17 **SUMMARY JUDGMENT**
18

19 5. The following facts were established as **Undisputed Facts**
20 under the Court's order regarding Plaintiff's Motion for Summary
21 Judgment related to Plaintiff's first claim for relief in the
22 Complaint to deny discharge of Debtor pursuant to 11 U.S.C. §
23 727(a)(2)(A):
24

25 a. On January 3, 2007, Plaintiff filed a complaint
26 against Defendant for \$481,303.19 ("State Court Complaint") for
27 breach of personal guarantee in the Superior Court of California
28

1 for the County of Tulare ("State Court"), Case No. 06-222022.;

2 b. Defendant was personally served with the complaint
3 on January 8, 2008;

4 c. On January 11, 2007, Plaintiff filed and served an
5 Application for Writ of Attachment against Defendant;

6 d. Defendant executed his Declaration in Support of his
7 Opposition to the Application for Writ of Attachment on February 6,
8 2007;

9 e. On February 7, 2007, Defendant executed a loan
10 application ("Loan Application") for a loan of \$480,000 ("Cash-Out
11 Loan") to refinance and take equity out of the real property owned
12 by Defendant located at 675 E. Teal Circle, Fresno, California
13 93720;

14 f. On February 12, 2007, escrow closed on the Cash-Out
15 Loan, and Defendant received the Loan Proceeds of \$119,223.84;

16 g. On February 13, 2007, the State Court granted the
17 Application for Writ of Attachment in favor of Plaintiff and
18 against Defendant for \$481,303.19;

19 h. On February 13, 2007, Sierra Home Medical, LLC
20 ("Sierra") filed its bankruptcy petition;

21 i. Between February 7, 2007 and February 14, 2007,
22 Defendant paid \$7,500 towards his daughter's college tuition;

23 j. On February 12, 2007, Defendant and his wife,
24
25
26
27
28

1 Margaret Mason, made four deposits totaling \$19,920.00 to their
2 Individual Retirement Accounts (IRA) at Golden 1 Federal Credit
3 Union;

4
5 k. On February 15, 2007, Defendant paid BMW \$1,792.26
6 for the balance of the lease buy-out for his BMW convertible;

7 l. On February 15, 2007, Defendant paid for repairs to
8 his BMW in the amount of \$3,675.48 ("BMW Repairs"), which is the
9 car he claims as exempt in his Bankruptcy Schedules;

10
11 m. On February 17, 2007, Defendant entered into a
12 contract ("Pre-Paid Construction Contract") with Benson
13 Construction for improvements to the Real Property whereby
14 Defendant agreed to pre-pay the improvements totaling \$48,000;

15 n. Under the Pre-Paid Construction Contract, Benson
16 Construction began work on the Real Property on February 24, 2007,
17 and was scheduled to finish on April 18, 2007;

18
19 o. On February 22, 2007, Defendant paid the entire
20 \$48,000 to Benson Construction under the Pre-Paid Construction
21 Contract;

22
23 p. On February 22, 2007, Defendant entered into a
24 contract with Vern's Plumbing for the installation of a water
25 heater totaling \$990 at the Real Property;

26 q. On March 21, 2007, Defendant bought a clothes dryer
27 from Lowes for \$448.00;

1 r. On April 20, 2007, Defendant paid off an alleged
2 loan to his IRA in the amount of \$39,925.72;

3 s. In the Statement of Financial Affairs, Defendant
4 listed his income for 2006 at \$54,000 and his income for 2007 at
5 \$8,500; and

6 t. Defendant stopped working for Sierra at the end of
7 January 2007;

8
9 6. The following facts were established as **Undisputed Facts**
10 under the Court's order regarding Plaintiff's motion for summary
11 judgment related to Plaintiff's second claim for relief in the
12 Complaint to deny discharge of Debtor pursuant to 11 U.S.C. §
13 727(a)(4)(A):

14
15 a. Before obtaining the Cash-Out Loan on the Real
16 Property, Defendant owed a first mortgage to Countrywide Home Loan
17 Service LP of approximately \$271,000 and a second mortgage with
18 Chase Manhattan Mortgage of approximately \$76,000, for a total of
19 approximately \$347,000;

20
21 b. On January 31, 2007, Defendant had the Appraisal
22 prepared whereby the Real Property was appraised at \$600,000;

23
24 c. Defendant's Schedule A lists the Real Property with
25 a value of \$525,000;

26
27 d. Defendant listed in his bankruptcy schedules assets
28 of \$739,301, secured liabilities of \$523,000 and unsecured

1 liabilities of \$2,976,059.20;

2 e. Defendant's schedules list Thomas Sanchez as an
3 unsecured creditor of Defendant's with an unsecured claim against
4 Defendant in the amount of \$2,020,000;

5
6 f. Defendant is not a party to the Sanchez Action, and
7 Thomas Sanchez has not asserted a claim against Defendant's
8 bankruptcy estate;

9
10 g. Defendant lists 10 judgments or pending actions in
11 which he is or was a party in response to paragraph 4 of
12 Defendant's Statement of Financial Affairs that requests Defendant
13 to list all suits and administrative proceedings to which Defendant
14 is or was a party within one year immediately preceding the filing
15 of the bankruptcy case;

16
17 h. Defendant was a party to just one action, the State
18 Court Action filed by Plaintiff;

19
20 i. Defendant's Schedule F lists approximately 76
21 unsecured creditors with liabilities of \$2,976,059.20, and no
22 codebtors;

23
24 j. Thirteen claims totaling \$901,648.96 (including
25 Plaintiff's claim of \$510,256.36) have been filed against
26 Defendant's estate;

27
28 k. On June 11, 2007, Plaintiff filed a 2004 application
for production of documents from Defendant;

1 1. On July 27, 2007, Defendant filed an Amendment to
2 Schedules B, C and F, whereby Defendant added the asset of his
3 interest in the proceeds from a life insurance policy totaling
4 \$10,065.21 ("Life Insurance Proceeds");

5
6 m. On August 14, 2007, Defendant filed a Second
7 Amendment to Schedule B, whereby Defendant added the asset of a
8 loan ("Alleged Boat Loan") from July 3, 2006 to his son-in-law in
9 the amount of \$14,910.46; and

10
11 n. On December 6, 2007, the Trustee filed a motion for
12 order approving a compromise with Defendant whereby Defendant
13 waived any exemption to the Life Insurance Proceeds in exchange for
14 the Trustee's agreement not to seek recovery of the Alleged Boat
15 Loan or \$39,124.68 paid to the Defendant's IRA.

16 Applicable Law.

17
18 This adversary proceeding commenced with a complaint to deny
19 discharge under Bankruptcy Code § 727(a)(2)(A) and § 727
20 (a)(4)(A). Section 727(a)(2) states that:

21 "The court shall grant the debtor a discharge, unless

22 . . .

23
24 (2) the debtor, with intent to hinder, delay, or
25 defraud a creditor . . . , has transferred, removed,
26 destroyed, mutilated, or concealed, or has permitted to be
27 transferred, removed, destroyed, mutilated, or concealed -

28 (A) property of the debtor, within one year before
the date of the filing of the petition"

1 Collier on Bankruptcy states that the debtor may maximize
2 protection by converting non-exempt assets into exempt assets.
3 Thus, denial of discharge must be based on extrinsic evidence
4 beyond the conversion of assets from non-exempt into exempt
5 property. 6 Collier on Bankruptcy 727.02[3][g] (15th ed. Rev.
6 2009). "But if the debtor converts nonexempt property to exempt
7 property with the intent to defraud creditors, the conversion is
8 objectionable and may provide the basis for denying a discharge
9 under section 727(a)(2). Id. at § 727.02[3][f]. A denial of
10 discharge under these grounds may also justify disallowing the
11 debtor's exemption. Id.

12
13 One court found a conversion of non-exempt assets into
14 exempt assets to be fraudulent after a Debtor making \$180,000.00
15 per year (in 1976) converted every one of his nonexempt assets
16 into exempt assets under Texas law on the eve of bankruptcy. The
17 court found that allowing the debtor a discharge would be an
18 abuse of the bankruptcy process. First Texas Savings Ass'n, Inc.
19 v. Reed, 700 F.2d 986, 992 (5th Cir. 1983). In another case, a
20 homemaker converted her non-exempt home into cash, and then into
21 insurance policies within 6 months of filing for bankruptcy. The
22 debtor sold the property to relatives, and rented the home from
23 them after the sale. Despite the fact that the transactions
24 limited creditors' recoveries, the court found insufficient
25 extrinsic evidence of fraud. Bank of Pa. v. Adlman, 541 F.2d 999
26
27
28

1 (2d Cir. 1976).

2 Courts have relied on the following factors in determining
3 whether the conversion of non-exempt assets into exempt assets
4 constitutes fraud: (1) whether the debtor obtained credit to buy
5 the exempt property; (2) whether the conversion occurred after
6 entry of a large judgment against the debtor; (3) whether the
7 debtor engaged in a pattern of sharp dealing before bankruptcy;
8 (4) whether an unusually large amount of property was claimed as
9 exempt; (5) whether the debtor misrepresented the value of assets
10 and kept the transfers secret; and (6) whether the conversion
11 rendered the debtor insolvent. 6 Collier on Bankruptcy at
12 § 727.02[3][g].
13
14

15 Bankruptcy Code § 727(a)(4)(A) states that the court shall
16 not grant the debtor a discharge if "the debtor knowingly and
17 fraudulently, in or in connection with the case - (a) made a
18 false oath or account"

19 Generally, a misstatement under § 727(a)(4)(A) must be
20 material if the court is to deny the debtor a discharge because
21 of it. The subject matter of a false oath is material if it is
22 "related to debtor's business transactions, or if it concerns the
23 discovery of assets, business dealings, or the existence or
24 disposition of the debtor's property. If the estate would have
25 no interest in property that was omitted from a schedule, the
26 omission is not material." 6 Collier on Bankruptcy at
27
28

1 § 727.04[1][b].

2 The court's findings on the disputed issues of fact.

3 The only witness at trial was James Mason. The facts not
4 determined by stipulation or by summary adjudication primarily
5 revolved around Mason's intent when he applied for and obtained
6 the Cash-Out Loan. The Cash-Out Loan refinanced his preexisting
7 deeds of trust on his home and also resulted in him obtaining, on
8 February 12, 2007, cash proceeds of \$119,223.84. The Cash-Out-
9 Loan was in the context of plaintiff having sued Mason for breach
10 of personal guarantee on January 3, 2007, and having personally
11 served him on January 8, 2007. Further, on January 11, 2007,
12 plaintiff filed and served on Mason an application for writ of
13 attachment. On February 6, 2007, Mason executed a declaration in
14 support of opposition to the application for writ of attachment.
15
16

17 So much is undisputed. The question is whether Mason had
18 the intent to "hinder, delay, or defraud" Pride when he obtained
19 and then spent the Cash-Out Loan proceeds
20

21 The court generally finds Mason not to be a credible
22 witness. As will be set forth in greater detail, the court finds
23 that Mason intended to take the cash from the Cash-Out Loan to
24 utilize it for himself, his family, payment of other loans, and
25 remodeling/repairing his house. The timing of the Cash-Out Loan
26 was not coincidental. The court finds that Mason intended to use
27 the funds from the Cash-Out Loan to deprive Pride from obtaining
28

1 them in and through the attachment process.

2 Generally Mason was an evasive witness. He stated that he
3 decided to refinance his house in late December 2006 or early
4 January 2007. He was quite clear that the decision was not after
5 January 9, 2007. The court finds this statement to lack
6 credibility.
7

8 Mason's credibility was further eroded by the incorrect
9 statements in the loan application for the Cash-Out Loan. The
10 loan application stated that his income was \$13,000 a month. He
11 stated that while \$13,000 a month was not his income at the time
12 he applied for the loan, it had been his income in 2005.
13

14 However, in his Statement of Financial Affairs filed with
15 his bankruptcy case in April 2007 and executed under penalty of
16 perjury, he stated that his annual income in 2005 was \$54,000.
17 This inconsistency further shows Mason's lack of credibility.
18

19 Mason stated that he did not "recall" if the lender told him
20 he would not qualify for the loan if he put down his real income
21 on the loan application. According to Mason, he had applied for
22 a residential loan in 2004 and just put the same information in
23 the application he made in 2007. It is inherently incredible
24 that he made \$13,000 per month in 2004, considering the Statement
25 of Affairs and his testimony.
26

27 Mason did not read the loan application before he signed it
28 in February 2007.

1 Also, the loan application stated that he owned a boat. He
2 did not own a boat.

3 Mason obtained an appraisal of his residence dated January
4 31, 2007, that valued the property at approximately \$600,000.
5 Subsequently, he entered into a home improvement/repair contract
6 for which he prepaid \$48,000. When he filed his bankruptcy case
7 on April 27, 2007, he stated under penalty of perjury that he
8 believed the value of the residence to be \$525,000.
9

10 With the proceeds of the Cash-Out Loan, Mason paid in
11 advance for the home improvement/repair contract; he made repairs
12 to a car; he purchased appliances; he deposited \$19,920 to his
13 IRA and to his wife's; and he paid a "loan" to his IRA in the
14 amount of \$39,925.72. At the end of January 2007, Mason stopped
15 working for Sierra.
16

17 Mason testified that he made the expenditures using the
18 money from the Cash-Out Loan to take care of his family. A
19 disabled parent lived with him and his wife, and he thought it
20 was important to make the improvements/repairs to the home for
21 her care.
22

23 When asked why all the expenditures were made just prior to
24 the bankruptcy filing, Mason's answer was "Can you be more
25 specific?" He testified that he did not recall the date that he
26 decided to file bankruptcy. He had no answer for how he intended
27 to pay the Cash-Out Loan given that after late January 2007, he
28

1 did not have a job.

2 Mason's Schedules of Assets and Liabilities show many claims
3 for which he was not personally liable. He testified that his
4 attorney told him to list everything that might be a liability.
5 Therefore, he listed claims against Sierra that might potentially
6 turn into a claim against him.

7
8 Mason did not review the bankruptcy schedules. He just
9 signed them.

10 Under the circumstances, the court finds that Mason did
11 transfer property with the intent to hinder and delay Pride.
12 Mason borrowed on the equity in his house and used that money for
13 purchases that made it unavailable to his creditors. At the time
14 he obtained the Cash-Out Loan, he was aware that he was being
15 sued on his personal guarantee. He had been served with the
16 complaint. When the loan closed, he had been served with the
17 writ of attachment. Of course, Pride must have made a demand on
18 Mason prior to filing the complaint on the guarantee, but no
19 evidence about the date of that demand was introduced. Exhibit
20 "3" is the state court complaint against Sierra Home Medical LLC,
21 George E. Stafford, and James B. Mason. The seventh cause of
22 action is for breach of Mason's guarantee.
23
24

25 Paragraph 43 states that "plaintiff has demanded" that Mason
26 pay his guarantee. Therefore, the court infers that well before
27 the filing of the state court action on the guarantee, Mason was
28

1 aware that he was being asked to pay on the guaranteed obligation
2 and that Sierra had not paid the obligation which he had
3 guaranteed.

4 At the time Mason received the Cash-Out Loan proceeds, he
5 owed \$271,427.68 to Countrywide on the first deed of trust. He
6 owed \$77,127.86 to Chase Manhattan Mortgage on the second deed of
7 trust. Thus, the encumbrances on the residence were \$348,555.54.
8 The appraised value was \$600,000. Mason claimed an exemption of
9 \$50,000 on Schedule C under California Code of Civil Procedure
10 § 704.730(a)(1). (Amendment to schedules filed July 27, 2007.)
11 After the Cash-Out Loan, the total encumbrance on the residence
12 was \$480,000. Thus, in obtaining the Cash-Out Loan, Mason
13 converted non-exempt equity in the residence to cash which he
14 then utilized in a way that made it unavailable to his creditors.
15
16
17

18 The timing of the Cash-Out Loan is significant. It occurred
19 when Mason knew that he was being sued on his personal guarantee
20 and it closed at a time when he knew the creditor was seeking a
21 writ of attachment.
22

23 Immediately prior to the bankruptcy case, Mason utilized the
24 cash from the Cash-Out Loan to make funds unavailable to his
25 creditors. In addition to prepaying the construction contract,
26 he also contributed money to his IRA and to his wife's IRA and
27 repaid a "loan" to the IRA account.
28

1 Mason testified that he did not read the loan application
2 for the Cash-Out Loan and that he did not read his bankruptcy
3 schedules. Of course, the schedules are signed under penalty of
4 perjury.

5 For all the above reasons, the court finds and concludes
6 that the obtaining of the Cash-Out Loan and the use of the
7 proceeds to put them beyond the reach of his creditors is
8 behavior that constitutes actions of Mason with intent to hinder,
9 delay, and defraud Pride. Therefore, Mason's discharge will be
10 denied pursuant to Bankruptcy Code § 727(a)(2)(A).

11 The claim under § 727(a)(4)(A) is a closer case. Did the
12 misstatements in Mason's Schedules and Statement of Affairs
13 constitute false oaths? The court finds that they did. In
14 particular, listing the residence as having a value of \$525,000
15 four months after an appraisal showed it had a value of \$600,000
16 is a material misstatement. In many bankruptcy cases, debtors
17 must estimate the value of their residence. Most people who file
18 chapter 7 have not had an appraisal of their residence performed
19 right before they file bankruptcy. In this case, however, Mason
20 did have the benefit of that appraisal. Listing the house at
21 \$75,000 less than the appraisal showed is a material
22 misstatement.

23 On the other hand, listing numerous creditors in the
24 schedules does not constitute a material misstatement. Under the
25

