IN THE UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF ARKANSAS
FAYETTEVILLE DIVISION

In re: PATSY SIMMONS, Debtor **No. 5:10-bk-73737**
Ch. 7

BOKF, N.A. **PLAINTIFF**

v. **No. 5:11-ap-07011**

PATSY SIMMONS **DEFENDANT**

ORDER

Before the Court is the complaint filed by BOKF, N.A. [BOKF][1] on January 31, 2011, and the debtor's answer filed on March 3, 2011. In its complaint, BOKF objects to the discharge of the debtor, Patsy Simmons [Simmons], under § 727(a)(2), § 727(a)(3), and § 727(a)(5), and seeks determination of the dischargeability of its debt under 11 U.S.C. § 523(a)(2)(A). The Court heard the complaint and answer on November 29, 2011, and January 13, 2012, at which time BOKF informed the Court that it was proceeding only as to the § 727(a)(2), (a)(3), and (a)(5) causes of action. At the conclusion of the proceeding, the parties agreed to present their arguments in post-trial briefs and the Court took the matter under advisement. Both parties subsequently filed their post-trial briefs on February 22, 2012. For the reasons stated below, the Court denies BOKF's objections to discharge under § 727(a)(3) and (a)(5) and finds that BOKF abandoned its § 727(a)(2) claim. The Court also denies BOKF's objection to discharge under § 727(a)(4), which BOKF argued for the first time in its post-trial brief.[2]

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[1] BOKF is successor in interest to Bank of Arkansas, N.A. [Bank of Arkansas] by merger. BOKF now is the holder of the promissory notes between Bank of Arkansas and Patsy Simmons that are referenced in this opinion.

[2] In its complaint, BOKF alluded to § 727(a)(4) only once, in the brief section under the heading of "Jurisdiction, Venue and Statutory Predicate." A claim under § 727(a)(4) was not included as a separate count, as were the claims under § 523(a)(2)(A) and § 727(a)(2), (a)(3), and (a)(5). Section 727(a)(4) also was never alleged or argued at

Jurisdiction

The Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1334 and 28 U.S.C. § 157, and it is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(J). The following findings constitute findings of fact and conclusions of law in accordance with Federal Rule of Bankruptcy Procedure 7052.

Background

Central to BOKF's objections to discharge is the diminution of Simmons's assets prior to the filing of bankruptcy as the result of multiple property transfers made from Simmons or her corporation, Patsy Simmons LP [Simmons LP], to her son Walter White [Walter] and her former husband, Charles Simmons. In particular, BOKF's evidence introduced at trial focused on the disposition–and related discrepancies in the claimed ownership–of the following assets: (1) Ride Rite, Inc. [Ride Rite], a used car dealership; (2) Walter White, LLC, a corporation that owned parcels of real property underlying and adjacent to the Ride Rite business; and (3) property subject to a prenuptial agreement entered into between Simmons and Charles Simmons on August 11, 2008.

A. Ride Rite, Inc., real property at the Ride Rite locations, and the "Rogers Machine Shop property"

Ride Rite is a used car dealership that was started in 1985 by one of Simmons's sons. It currently has locations at 2110 S. 8th Street in Rogers, Arkansas [Rogers location], and 2161 N. Thompson in Springdale, Arkansas [Springdale location]. In the early 1990s, Simmons took possession of Ride Rite and later transferred control of the business to another son, Walter. Simmons testified that she did not receive income or maintain any control of the business after the transfer to Walter, and her only involvement was to submit monthly payments to the mortgage holder of the real property with funds provided by Walter from the Ride Rite business. Despite her lack of involvement in Ride Rite,

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the trial as a basis for objecting to Simmons's discharge. Nevertheless, the Court shall address the § 727(a)(4) claim as argued in BOKF's post-trial brief.

Simmons retained "title to all 100% of stock and all tax liabilities and benefits from Ride Rite Inc" according to a handwritten "Business Agreement" dated January 1, 1997, and signed by both Simmons and Walter. The Business Agreement specified that 100% of the stock of Ride Rite would transfer to Walter 10 years from the date of the agreement. In 1997 or 1998, the underlying real property on which Ride Rite was situated was transferred from Simmons to Walter White, LLC, a corporation that Simmons created in 1997 at the advice of an estate planning attorney.[3] Simmons testified that the real property may have originally been transferred to a related "Walter White trust." Simmons also stated that she did not initially transfer Ride Rite or the real property to Walter because he had recently married and Simmons did not want the business involved in any property disputes if the marriage was unsuccessful.[4]

Walter White, LLC was more than 99% owned by Simmons and less than 1% owned by Walter, and its only assets were the Ride Rite real properties at the Rogers and Springdale locations until 2008. Simmons testified that on January 1, 2008, she transferred a third piece of real property (referred to as the "Rogers machine shop property"), which adjoined the Ride Rite real property in Rogers, from Simmons LP to Walter White, LLC. Simmons stated that the property was transferred to Walter White, LLC to compensate Walter for his interest in another piece of property (referred to as the "Harp's property") that Walter and Simmons had owned together and Simmons later sold.[5] However, Simmons still owned more than 99% of Walter White, LLC. To

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[3] It is not clear from the record whether the Springdale or the Rogers location–or both–was transferred to Walter White, LLC, in 1997 or 1998. The Rogers location was the place of the Ride Rite business at least as early as 1992, according to the testimony of Walter. The Springdale location was acquired sometime after January 1, 1997, according to Simmons. Regardless, both Simmons and Walter indicated that Walter White, LLC owned the real property at both locations as of 2008.

[4] Simmons also testified that she drew up the Business Agreement for Walter in order to protect his interest in the Ride Rite business from her other children.

[5] Simmons stated that at the time of the sale of the "Harp's property," she did not pay Walter his half of the proceeds but promised to either pay him in money or deed him

effectuate the transfer of the Ride Rite real property and the "Rogers machine shop property" to Walter, Simmons testified that she "stepped down" or "removed" herself from Walter White, LLC so that Walter became the owner of the corporation.[6] In addition, on January 1, 2008, Simmons transferred 100% of the Ride Rite stock to Walter according to a document entitled Minutes of the Directors and Shareholders Meeting of Ride-Rite, Inc.[7] In summary, the claimed effect of these multiple property transfers was that as of January 2008, Walter owned the Ride Rite business, the underlying real property (both the Rogers and Springdale locations), and a parcel of real property adjacent to the Ride Rite Rogers location.

Despite the alleged transfer of these assets on January 1, 2008, various documents listed Simmons as having an ownership interest in Ride Rite in 2008 and 2009. In a Used Motor Vehicle Dealers Application received by the Arkansas State Police on February 27, 2008, for renewal of the dealership license for the Ride Rite Springdale location, both Walter and Simmons were listed in one section as having an ownership interest. However, Walter was listed as the sole owner in all other places on the application. The following year, in a renewal application received by the Arkansas State Police on March 4, 2009, for the Ride Rite Rogers location, Simmons again was listed in one section as having an ownership interest. In addition, she was listed as designated to receive legal service for the business. Walter was listed as the owner in all other parts of the application. Conversely, later the same month, a renewal application for the Ride Rite Springdale location included a handwritten and notarized document signed by both Simmons and Walter stating that Simmons no longer had any interest in the Springdale

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the Rogers machine shop property later.

[6] The 2009 tax return for Walter White, LLC reflected that Walter owned 80% of the corporation and his wife owned 20%.

[7] The transfer of Ride Rite from Simmons to Walter occurred 11 years from the date of the Business Agreement entered into on January 1, 1997, rather than 10 years as stated in the Business Agreement.

location.[8] Walter testified that he had prepared the renewal applications and that Simmons's name had remained in the sections referencing bond information because bonds for Ride Rite previously had been purchased in Simmons's name, prior to the transfer of Ride Rite. Federal tax returns for Simmons, Ride Rite, and Walter White, LLC also reflected that Simmons retained an ownership interest in both Ride Rite and Walter White, LLC during 2008. Simmons testified that even though she had no ownership in either entity after January 1, 2008, she assumed the tax liability for those entities in 2008 in order to correct a mistake in prior accounting practices. She stated that this was necessary in order to comply with the terms of the January 1, 1997, Business Agreement between her and Walter that specified that Ride Rite would be transferred to Walter "free of any liabilities, liens, or encumbrances."[9]

Some documents provided to or created by various banks also show a discrepancy in the ownership of Ride Rite during 2008 and 2009. In a financial statement of "Patsy Simmons LP and Charlie and Patsy Simmons," which was dated June 16, 2008, and created by Bank of Arkansas, Ride Rite is listed as an asset valued at $2,000,000 and the "Rogers machine shop property" is listed as an asset valued at $700,000. However, the two underlying parcels of real property (the Rogers and Springdale locations) are not listed.[10] Conversely, in two identical financial statements in the name of Simmons only, also dated June 16, 2008, which Simmons provided to Simmons Bank and First Western Bank, none of the properties in dispute are listed as assets. Simmons stated at the trial

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[8] The 2010 renewal application for the Ride Rite real property at the Rogers location included a similar handwritten document stating that Simmons no longer had any interest in that location.

[9] Specifically, Simmons testified that Ride Rite's taxes had been mistakenly calculated according to the cash method rather than the accrual method.

[10] As a point of reference, the Ride Rite business and the underlying real properties (the Rogers and Springdale locations) were always listed separately in financial statements. Prior to the financial statements dated June 16, 2008, all four assets appeared in each financial statement provided to banks with the exception of one financial statement.

that Bank of Arkansas had, in fact, received the same financial statement that Simmons Bank and First Western Bank did–neither of which included Ride Rite or the associated real properties–but that Bank of Arkansas subsequently generated its own financial statement and improperly included Ride Rite and the real properties. Internal memos and e-mails of both Bank of Arkansas and Simmons First that were prepared after January 1, 2008, referenced Simmons as owner of Ride Rite. In addition, a Term Loan Agreement between Simmons and Simmons First Bank, dated March 4, 2009, included the following provision: "(f) Borrower will not transfer or sell Ride Rite Inc. until performance of hotel justifies release of negative pledge." A subsequent Term Loan Agreement dated June 4, 2009, did not contain that provision or any other reference to Ride Rite.

B. Property transferred pursuant to Prenuptial Agreement

On August 11, 2008, Simmons and Charles Simmons entered into a handwritten and signed prenuptial agreement in anticipation of their third marriage to each other. The agreement listed nine real properties, owned at that time by Simmons LP, that would be transferred to Charles Simmons in the event of Simmons's death or their subsequent divorce. The second page of the agreement listed an estimated total value of the nine properties as $3,418,000 with a total liability of $240,000. An additional column listed seven properties presumably to be retained by Simmons (or her estate) in the event of their divorce or her death, with an estimated total value of $27,050,000 and a total liability of $17,856,000.

On November 16, 2009, Simmons filed for divorce, and the decree of divorce was entered on February 22, 2010. Pursuant to a February 19, 2010, settlement agreement, substantially the same property listed in the prenuptial agreement was agreed to be allocated between Simmons and Charles Simmons as a result of the divorce. On July 19, 2010, Simmons filed her chapter 7 bankruptcy petition.

Analysis

If the Court finds that the elements of § 727(a)(2), (3), (4), or (5) have been met with

regard to a debtor, the Court must deny that debtor a discharge under chapter 7. BOKF, as the objecting party, has the burden of proving by a preponderance of evidence each element required under § 727(a)(2), (3), (4), and (5). *See Korte v. U.S. Internal Revenue Serv.* (*In re Korte*), 262 B.R. 464, 471 (B.A.P. 8th Cir. 2001). "Denying a discharge to a debtor is a serious matter not to be taken lightly by a court." *McDonough v. Erdman* (*In re Erdman*), 96 B.R. 978, 984 (Bankr. D.N.D. 1988). Generally, a denial of a discharge is a "'harsh and drastic penalty.'" *Korte*, 262 B.R. at 471 (quoting *American Bank v. Ireland* (*In re Ireland*), 49 B.R. 269, 271 n.1 (Bankr. W.D. Mo. 1985)). Because of the severe nature of the remedy provided for in § 727, the statute's provisions "'are strictly construed in favor of the debtor.'" *Id.* at 471 (quoting *Fox v. Schmit* (*In re Schmit*), 71 B.R. 587, 589-90 (Bankr. D. Minn. 1987)). The Court will discuss and analyze the elements of § 727(a)(2), (3), (4), and (5) separately.

A. 727(a)(2)

In its complaint, BOKF seeks denial of Simmons's discharge pursuant to § 727(a)(2) and counsel for BOKF reiterated its intent to proceed under that provision in opening statements at the trial. However, in its post-trial brief, which served as its closing argument, BOKF made no mention of § 727(a)(2) and instead substituted an argument for denial of Simmons's discharge under § 727(a)(4). BOKF's prayer for relief at the conclusion of its post-trial brief specifically asks the Court to deny Simmons's discharge under § 727(a)(3), (a)(4), and (a)(5). Therefore, the Court finds that BOKF abandoned its § 727(a)(2) claim because of its failure to argue or reference that claim in its post-trial brief. *See Faulkner v. Kornman* (*In re The Heritage Organization, L.L.C.*), 2012 WL 136898, at *14 (Bankr. N.D. Tex. 2012).[11]

[11] Even if BOKF had chosen to pursue its original objection to discharge under § 727(a)(2), there is no evidence that a transfer occurred within one year of the date of Simmons's filing bankruptcy. Accordingly, BOKF would not have succeeded in that claim regardless.

B. 727(a)(3)

In both its complaint and post-trial brief, BOKF alleges that Simmons failed to keep records by which creditors can ascertain her financial condition or business transactions, and, accordingly, BOKF argues that the Court should deny Simmons her discharge under § 727(a)(3). Section 727(a)(3) states that a debtor's discharge should be denied if

> 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.

There is no intent element within § 727(a)(3)–instead, the standard is reasonableness. *Davis v. Wolfe* (*In re Wolfe*), 232 B.R. 741, 745 (B.A.P. 8th Cir. 1999). The objecting party has the initial burden of showing that the debtor failed to maintain and preserve adequate records, and that as a result, it is impossible to determine the debtor's financial condition and business transactions. *In re Keller*, 322 B.R. 127, 132 (Bankr. E.D. Ark. 2005). "Although the Bankruptcy Code does not require an impeccable system of bookkeeping, 'the records must sufficiently identify the transactions [so] that intelligent inquiry can be made of them.'" *In re Keller*, 322 B.R. at 132 (quoting *Razzaboni v. Schifano* (*In re Schifano*), 378 F.3d 60, 69 (1st Cir. 2004)). Once the objecting party has made a prima facie case of deficient record keeping, the burden shifts to the debtor to provide some justification for this failure. *Wolfe*, 232 B.R. at 745.

The Court finds that BOKF failed to meet its initial burden of showing that Simmons's record keeping was so deficient as to make it impossible to determine her financial condition and business transactions. BOKF's focus throughout this matter has been on the transfer of various assets to her son, Walter, and her former husband, Charles Simmons–and her resulting loss of net equity prior to filing bankruptcy. In relation to those transfers, Simmons has provided records and documents that allow creditors and the trustee to determine Simmons's financial condition and business transactions. When considered together, various documents over a span of 11 years show that it was Simmons's long-time intention to fully transfer the Ride Rite business and the Ride Rite

real properties to her son, Walter, who has been working at or managing the business with little, if any, input or work by Simmons since at least the mid-1990s and for which any gains in the value of the business were attributable almost exclusively to Walter's efforts:

> (1) the January 1, 1997, contract between Simmons and Walter that stated that Ride Rite was to be transferred to him in 10 years on the condition that he continue managing the business;
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> (2) the August 15, 2005, addendum to that contract stating the "Rogers machine shop property" was to be deeded to Walter White LLC at the end of 2007, when the Ride Rite stock was to be transferred; and
>
> (3) the January 1, 2008, minutes of the Ride Rite director/shareholder meeting during which the Ride Rite stock was transferred to Walter.

In the same way, the prenuptial agreement between Simmons and Charles Simmons, dated August 11, 2008, clearly allocated assets in the event of their divorce, which subsequently occurred in 2010. While all of these documents were handwritten and signed only by Simmons and Walter or Charles Simmons, the Court has no reason to doubt the authenticity of the documents.[12] In addition, Simmons provided tax returns for herself; Walter White, LLC; and Ride Rite; as well as the original books for the Ride Rite business that included a document entitled Resignation of Managing Member dated January 1, 2008, and signed by Simmons that stated that she was resigning as managing member of Walter White, LLC and appointing Walter as managing member.

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[12] At the hearing, BOKF entered into evidence an e-mail chain between employees of Simmons Bank dated December 4, 2009, that memorialized a meeting with Simmons at which she allegedly stated that she did not have a prenuptial agreement. The author of the e-mail, David Bartlett, did not testify. Greg Lindly, another Simmons Bank employee who allegedly was at that meeting, testified that he recalled Simmons stating that she did not have a prenuptial agreement. However, his recollection of the meeting appears to be based primarily on a review of the e-mail chain. In addition, Simmons testified that though she disclosed the upcoming divorce at the meeting, she did not discuss the prenuptial agreement. Based on these considerations, the statement within the e-mail is not sufficient evidence to make the Court doubt the authenticity of the prenuptial agreement.

In its post-trial brief, BOKF repeatedly refers to the financial statements submitted by Simmons to various banks, including itself, between 2005 and 2009. BOKF argues that the format of the financial statements is sufficient evidence of Simmons's failure to keep adequate records. BOKF cites to the fact that while some financial statements are in the name of Simmons alone, others are also in the name of Charles Simmons; Simmons, LP; or some combination of all three. BOKF states that this treatment of the assets and liabilities listed in the financial statements makes it impossible for creditors to glean an understanding of Simmons's financial condition.

BOKF's true objection appears to concern its prior reliance on those financial statements in making the decision to provide loans to Simmons. While BOKF did originally object to the dischargeability of its debt under § 523(a)(2)(A) in relation to the financial statements, it later withdrew that claim at trial, conceding that it would fail on the reliance element. Regardless, the alleged confusing nature of the financial statements is not sufficient to deny Simmons her discharge when she has otherwise provided records from which her financial condition or business transactions may be determined. Accordingly, the Court denies BOKF's objection to discharge under § 727(a)(3).

C. 727(a)(4)(A)

Section 727(a)(4) states, in relevant part, that a debtor's discharge should be denied if "the debtor knowingly and fraudulently, in or in connection with the case–(A) made a false oath or account." To prevail under § 727(a)(4)(A), BOKF, as the objecting party, must establish by a preponderance of evidence that–

(1) the debtor made a statement under oath;
(2) the statement was false;
(3) the statement was made with fraudulent intent;
(4) the debtor knew the statement was false; and
(5) the statement related materially to the debtor's bankruptcy.

Helena Chem. Co. v. Richmond (*In re Richmond*), 429 B.R. 263, 307 (Bankr. E.D. Ark. 2010). An omission in the schedules may constitute a false oath under § 727(a)(4)(A).

In re Guajardo, 215 B.R. 739, 741 (Bankr. W.D. Ark. 1997). The bankruptcy code, through § 727(a)(4)(A), "'requires nothing less than a full and complete disclosure of any and all apparent interests of any kind.'" *Korte*, 262 B.R. at 474 (quoting *Fokkena v. Tripp* (*In re Tripp*), 224 B.R. 95, 98 (Bankr. N.D. Iowa 1998)).

In its post-trial brief, BOKF argues that Simmons should be denied her discharge under § 727(a)(4)(A) for failure to disclose certain transfers of assets in questions 7 and 10 of her Statement of Financial Affairs. Question 7 of the Statement of Financial Affairs, entitled "Gifts," requires a debtor to "[l]ist all gifts or charitable contributions made within one year immediately preceding the commencement of this case" with the exception of gifts to family members less than $200 and charitable contributions less than $100. Question 10, entitled "Other transfers," requires a debtor to "[l]ist all other property . . . transferred either absolutely or as security within two years immediately preceding the commencement of this case." BOKF argues that the transfer of the Ride Rite business and Walter White, LLC (which owns the "Rogers Machine Shop property" as well as Rogers and Springdale real property at the Ride Rite locations) occurred within the requisite periods listed in questions 7 and 10, and that Simmons knowingly failed to list those transfers.

The Court finds that BOKF failed to prove by a preponderance of evidence the first two elements required under § 727(a)(4)(A)–that Simmons made a statement under oath and the statement was false. Therefore, consideration of the other elements is irrelevant. The evidence shows that Simmons transferred the properties in question to Walter in January 2008 pursuant to several handwritten agreements entered into between her and Walter, as well as documents within Ride Rite's corporate books. BOKF alleges that the 2008 tax returns of Simmons and Walter White, LLC; the Used Motor Vehicle Dealers Applications submitted to the Arkansas State Police in 2008; the bank memos and e-mails; and the Term Loan Agreement between Simmons and Simmons First Bank show that Simmons actually retained some ownership interest in the Ride Rite business and Walter White, LLC as late as 2009. However, Simmons offered reasonable explanations

for these discrepancies, and the Court is satisfied that the properties were transferred in January 2008. Because Simmons did not file bankruptcy until July 19, 2010, a little more than two and a half years later, these transfers were not required to be listed in either question 7 or 10 of the Statement of Financial Affairs. Accordingly, the Court denies BOKF's objection to discharge under § 727(a)(4)(A).

BOKF also suggests that if the transfer of Ride Rite and related real property did occur in January 2008, Simmons knowingly made false representations to the IRS and Simmons Bank in contravention of § 727(a)(4)(A). However, past representations made to the IRS in tax returns and to Simmons First Bank through loan documents–even if false–do not fall within the purview of § 727(a)(4)(A) because those representations were not made "in or in connection with the case."

D. 727(a)(5)

Section 727(a)(5) states that a debtor's discharge should be denied if **"**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.**"** The objecting party has the burden of showing that the debtor previously owned substantial, identifiable assets that are no longer available to the creditors. *In re Gray*, 295 B.R. 338, 345 (Bankr. W.D. Mo. 2003). Once the objecting party shows a deficiency of assets, the burden of proof shifts to the debtor to explain the loss satisfactorily. *Floret v. Sendecky* (*In re Sendecky*), 283 B.R. 760, 766 (B.A.P. 8th Cir. 2002). "'If the explanation is too vague, indefinite, or unsatisfactory then the debtor is not entitled to a discharge.'" *Id.* (quoting *Diamond Bank v. Carter* (*In re Carter*), 203 B.R. 697, 707 (Bankr. W.D. Mo. 1996)). The debtor's explanation does not have to be meritorious or show "'that the loss or disposition of assets be proper; it only requires that the explanation satisfactorily account for the disposition.'" *In re Bakker*, 2006 WL 240519 at *5 (Bankr. N.D. Iowa 2006) (quoting *In re Caulfield*, 192 B.R. 808, 821 (Bankr. E.D.N.Y. 1996)); *see also In re Silverstein*, 151 B.R. 657, 663 (E.D.N.Y. 1993) ("The court need only decide whether the explanation satisfactorily describes what happened to the assets, not whether what

happened to the assets was proper.") Whether an explanation is satisfactory is in the discretion of the court. *Gray*, 295 B.R. at 345; *see also In re Wheeler*, 38 B.R. 842, 846 (Bankr. Tenn. 1984) ("'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 [debtors] say with reference to the disappearance or the shortage . . . . He no longer wonders. He is contented [with the explanation],'" (quoting *In re Shapiro & Ornish*, 37 F.2d 403 (N.D. Tex. 1929), aff'd, *Shapiro & Ornish v. Holiday*, 37 F.2d 407 (5th Cir. 1930)).

BOKF generally alleges in its complaint that there is no satisfactory explanation for Simmons's diminution of assets from her ownership of an estimated $30,000,000 in real property at the inception of her loans with Bank of Arkansas in June 2006 to at least $12,000,000 in July 2009 to being insolvent at the time of her bankruptcy filing in July 2010. As proof of Simmons's assets in 2006 and 2009, BOKF references the properties listed in the financial statements that Simmons provided to various banks. In its post-trial brief, BOKF also contests specifically the nearly $3,000,000 transfer in assets from Simmons to Charles Simmons through their prenuptial agreement. BOKF argues that despite Simmons's claim that the purpose of the transfer was to compensate Charles Simmons for assets the couple had amassed through their joint efforts while married, these assets were, in fact, originally acquired predominately by Simmons's own efforts and that the purpose of the transfer to Charles Simmons was to frustrate creditors rather than to provide an equitable division of assets in the divorce. BOKF further argues that Simmons's inability to prove to what extent her efforts lead to the original acquisition of these assets means that she has failed to explain satisfactorily the loss of those assets when they were transferred to Charles Simmons according to the prenuptial agreement.

A comparison of the financial statements that Simmons submitted to banks between 2006 and 2009 with Simmons's petition and schedules that she filed on July 19, 2010, shows there are substantial, identifiable assets that Simmons formerly owned that are no longer

available to creditors. Therefore, the burden shifts to Simmons to explain satisfactorily the loss of these assets.

The Court finds that it is satisfied with Simmons's explanation regarding the diminution of her assets. As previously discussed in the § 727(a)(3) section, Simmons's transfer of the Ride Rite business and related real property to her son, Walter, was an event that had been contemplated for more than a decade prior to the filing of bankruptcy. Despite the discrepancies in ownership that appear in some paperwork (mostly in 2008), the Court is satisfied that Simmons intended to and, in fact, did transfer these properties to Walter in January 2008. In addition, as BOKF itself acknowledged, most of the financial statements dated between 2006 and 2008 were submitted in the name of Simmons *and* Charles Simmons (or a combination of Simmons, Charles Simmons, and Simmons LP) rather than in the name of Simmons only. Therefore, these financial statements do not provide an accurate portrait of Simmons's assets. Finally, BOKF's general argument of the diminution of Simmons's assets does not acknowledge the real estate market crisis that occurred during that period in which real property previously assessed at much higher amounts suddenly lost significant value. Almost all of Simmons's assets reflected in the financial statements was in the form of real property–much of it commercial real property. A comparison of financial statements submitted to the banks between 2005 and 2009 shows that in most cases, any given piece of real property was consistently listed at the same value (or with relatively minor adjustments) from 2005 until 2008 or 2009. However, the financial statements submitted in 2009 reflect those same properties valued at significantly lesser amounts, ostensibly to take into account market changes. Several times during the trial, Simmons alluded to market conditions significantly reducing the value of real property she owns or did own.

In relation to BOKF's argument regarding Simmons's transfer of property according to the prenuptial agreement between her and Charles Simmons, the Court is also satisfied with Simmons's explanation. The evidence shows that Simmons and Charles Simmons commingled their funds and collaborated on various business ventures despite their

often-changing marital status. Simmons testified that she and Charles Simmons had maintained a joint checking account at Simmons Bank since the early 1990s–even during the periods in which they were divorced–and that money made by either person, including proceeds from Simmons's various corporations, was commingled in that same "pot" with two exceptions: (1) his building business, and (2) her interest in a hotel, Simmons Suites. Cancelled checks and bank statements that were introduced show that while only Simmons's name appeared on the checks, both she and Charles Simmons were account holders. Simmons stated that Charles Simmons wrote checks on that account "occasionally." Simmons also testified that in respect to collaboration for building projects, she "did the banking, but he's the one that got the work done and he got all the buildings done . . . . And [. . .] the permitting and all the stuff through the city, he always took care of all of that." At the trial, counsel for BOKF questioned why Simmons and Charles Simmons had never had a prenuptial agreement previously. Simmons responded,

> Well, our assets have grown over the years from the previous divorce. And Charles just said he wasn't going to walk out again with nothing. . . . I'm a control freak, and everything had been in my name over the years, and he didn't care, and he just–because he, I think, trusted me that, you know, I would do what I said would do. So, but he just said that he wanted something in writing and he said I think we need to spell it out. And I said fine. So that's what we did.

Simmons also testified that "practically everything was in my name. It didn't matter whether he paid for it or I paid for it, it was still in my name." In addition, Charles Simmons testified that assets were in Simmons's name as a result of a prior divorce, and that the couple did not change this after re-marrying.

Given the fact that Simmons's and Charles Simmons's relationship spanned nearly 25 years, the Court finds it reasonable that the two parties together amassed assets that would be divided upon divorce. The Court also finds it reasonable that the couple chose to execute a prenuptial agreement in contemplation of their third marriage to each other because of their history together. Simmons has explained to the satisfaction of the Court

why substantial and identifiable assets she previously owned are no longer available to her creditors. Accordingly, the Court denies BOKF's objection to Simmons's discharge under § 727(a)(5).

Conclusion

For the foregoing reasons, the Court finds that BOKF has failed to prove by a preponderance of the evidence each element of § 727(a)(3), (a)(4), and (a)(5). For that reason, the Court denies BOKF's objections to Simmons's discharge under each of those provisions and the Debtor shall be granted her discharge. As stated previously, the Court also finds that BOKF abandoned its claim under § 727(a)(2).

IT IS SO ORDERED.

April 26, 2012
DATE

Ben Barry
BEN T. BARRY
UNITED STATES BANKRUPTCY JUDGE

cc: Samuel Scott Ory
Timothy L. Brooks
John D. Clayman
John C. Everett
Stanley V. Bond
U.S. Trustee
Jill R. Jacoway