

SEP 29 2005

**HAROLD S. MARENUS, CLERK
U.S. BKCY. APP. PANEL
OF THE NINTH CIRCUIT**

ORDERED PUBLISHED

**UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT**

6	In re:)	BAP No. ID-04-1566-BuBMo
7	KENNETH AND LAURA ROBERTS,)	Bk. No. 02-00252
8	Debtors.)	Adv. No. 02-06089
9	_____)	
10	KENNETH R. ROBERTS,)	
11	Appellant,)	
12	v.)	OPINION
13	JAMES F. ERHARD,)	
14	Appellee.)	
15	_____)	

Argued by Videoconference on July 29, 2005
Submitted on August 5, 2005

Filed - September 29, 2005

Appeal from the United States Bankruptcy Court
for the District of Idaho

Honorable Terry L. Myers, Chief Bankruptcy Judge, Presiding.

Before: BUFFORD,¹ BRANDT and MONTALI, Bankruptcy Judges.

¹Hon. Samuel L. Bufford, U.S. Bankruptcy Judge for the
Central District of California, sitting by designation.

1 BUFFORD, Bankruptcy Judge:
2

3 **I. Introduction**

4 Appellant Kenneth R. Roberts ("Roberts") raises two issues
5 on appeal. First, he argues that the bankruptcy court should have
6 dismissed the compliant filed by James F. Erhard ("Erhard")
7 objecting to his discharge for failure to serve it timely, even
8 though he never raised this issue in the trial court. Second,
9 Roberts asks us to find that the bankruptcy court erred in
10 holding that Roberts is not entitled to a chapter 7 discharge
11 under § 727(a)(4)(A).² We AFFIRM in part and REVERSE in part.
12

13 **II. Relevant Facts**

14 Roberts filed his chapter 7 petition on January 30, 2002,
15 and filed his Schedules and Statement of Financial Affairs ("the
16 Statement") on February 11, 2002. In the Statement, Roberts
17 stated that his 2001 income was "\$0.00". The Statement also
18 indicated that Roberts had not finished preparing his income
19 taxes for 2001 and that the "income figures [were] being done."
20

21 Roberts failed to make certain other financial disclosures
22 on his Statement. He failed to disclose \$9,964 in rent received
23 from a rental property and \$2,800 received from the sale of a
24 registered quarter horse within the year prior to the filing of
25 the petition. He also failed to disclose his ownership of a

26 ² Absent contrary indication, all chapter and section
27 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1330 and
28 all Rule references are to the Federal Rules of Bankruptcy
Procedure. "FRCP" references are to the Federal Rules of Civil
Procedure.

1 television set valued at \$400, an oak entertainment center valued
2 at \$500, and horse tack valued at \$40. On October 17, 2003,
3 nearly two years after he filed his Statement, Roberts amended
4 his Statement to disclose the missing information, including that
5 in 2001 he received income of \$19,798 from his business.

6 Erhard filed a complaint on April 30, 2002 objecting to
7 Roberts' discharge based on these errors and omissions, and
8 charged that the Statement contained false oaths that required
9 the denial of a discharge under § 727(a)(4)(A). However, Erhard
10 did not serve this complaint or a summons thereon.

11 The bankruptcy court issued a notice of conditional
12 dismissal on September 30, 2002, for lack of prosecution of the
13 complaint. In response, on October 10, 2002, Erhard filed a
14 "motion to retain," requesting that the court give him additional
15 time for service of the summons and complaint on Roberts. In
16 December 2002, the bankruptcy court granted the motion of Jerry
17 Korn, Erhard's counsel, to withdraw on the grounds that he had
18 been suspended from the practice of law.

19 On March 5, 2003, the bankruptcy court issued a second
20 notice of conditional dismissal because a return of summons had
21 still not been filed. However, the court served the notice only
22 on Mr. Korn, who was no longer representing Erhard. On July 5,
23 2003, the court served the motion on Erhard directly.
24 Thereafter, Erhard obtained new counsel and filed an amended
25 complaint on or about September 3, 2003 (more than sixteen months
26 after the filing of the original complaint), which asserted
27 claims for denial of discharge under § 727(a)(2), § 727(a)(3),
28 § 727(a)(4)(A), and § 727(a)(5). Roberts answered the complaint,

1 but failed to raise any timeliness issues. The adversary
2 proceeding then was litigated, and tried by the bankruptcy court
3 on July 15, 2004.

4 Following the trial on the merits, the bankruptcy court
5 found that Roberts did not cogently explain why his business
6 account showed total deposits of \$54,530.10 when the 2001 tax
7 returns showed gross business 2001 receipts of \$59,703.00. The
8 trial court also determined that Roberts received \$12,764 in
9 proceeds from the horse sale and rentals in the year prior to
10 bankruptcy that he failed to disclose in his Statement.

11 In its decision, the court specifically found that Roberts'
12 conduct indicated, "a careless and reckless approach to the
13 important duty of disclosure in sworn bankruptcy filings." The
14 bankruptcy court further stated, "case law places a serious duty
15 of care and candor" on debtors and "Defendant's conduct herein
16 was insufficient to meet that duty." The bankruptcy court denied
17 Roberts' discharge based solely on the § 727(a)(4)(A) cause of
18 action and dismissed the other causes of action.

19
20 **III. JURISDICTION**

21 The bankruptcy court had jurisdiction pursuant to 28 U.S.C.
22 §§ 1334 and 157(b)(1). The Panel has jurisdiction under 28
23 U.S.C. § 158(b)(1).
24

25 **IV. STANDARD OF REVIEW**

26 In reviewing decisions of the bankruptcy court, the Panel
27 reviews legal conclusions de novo, factual findings for clear
28 error, and mixed questions of law and fact de novo. Murray v.

1 Bammer (In re Bammer), 131 F.3d 788, 791-92 (9th Cir. 1997). The
2 Panel also reviews de novo a bankruptcy court's selection of the
3 applicable legal rules under § 727. Searles v. Riley (In re
4 Searles), 317 B.R. 368, 373 (9th Cir. BAP 2004).

6 **V. DISCUSSION**

7 Roberts challenges the denial of his discharge on two
8 grounds. First, he argues that the bankruptcy court had an
9 obligation to dismiss the adversary proceeding *sua sponte* because
10 of Erhard's delay in prosecuting it. Second, he challenges the
11 court's application of § 727(a)(4)(A) in this case. We reject
12 Roberts' challenge on the first ground, but sustain it on the
13 second.

15 **A. Dismissal for Untimely Service of Complaint**

16 Roberts argues for reversal on the grounds that the
17 bankruptcy court had an independent duty under FRCP 4(m),
18 incorporated by reference in Rule 7004(a), to dismiss the
19 adversary proceeding *sua sponte* for Erhard's failure to serve the
20 summons and complaint within 120 days of filing. We disagree for
21 two distinct reasons. First, Roberts raises this argument for
22 the first time on appeal, and did not raise it in the bankruptcy
23 court below. Second, the bankruptcy court was not obligated to
24 dismiss where Roberts subsequently appeared and litigated the
25 adversary proceeding to judgment on the merits.

27 **1. Failure to Raise Issue Below**

28 We need not reach the question of whether Erhard's complaint

1 should have been dismissed for untimeliness. Roberts did not
2 make this argument in the bankruptcy court, and he raises this
3 issue for the first time on appeal.

4 We normally decline to consider on appeal an argument that
5 is not raised in the bankruptcy court. See, e.g., S. Cal.
6 Permanente Med. Group v. Ehrenberg (In re Moses), 215 B.R. 27, 35
7 n.11 (9th Cir. BAP 1997); Consolidated Marketing Inc. v. Marvin
8 Props. Inc. (In re Marvin Props., Inc.), 76 B.R. 150, 153 (9th
9 Cir. BAP 1987); Credit Alliance v. Dunning-Ray Agency (In re
10 Blumer), 66 B.R. 109, 111 (9th Cir. BAP 1986). Although we have
11 discretion to consider issues not first raised at trial, we have
12 no obligation to do so. See Blumer, 66 B.R. at 111. Because
13 this argument was not presented to the bankruptcy court, we will
14 not review it here.

15 Our decision against consideration of this argument first
16 raised on appeal is supported by Kontrick v. Ryan, 540 U.S. 443,
17 446 (2004). Kontrick involved Rule 4004, which requires that a
18 § 727 complaint be filed no later than 60 days after the first
19 date set for the meeting of creditors. The debtor argued in that
20 case that a debtor may challenge the timeliness of a creditor's
21 filing of an objection to discharge under Rules 4004 and
22 9006(b)(3) at any point in the proceedings (even on appeal), just
23 as a litigant generally may raise a court's lack of subject
24 matter jurisdiction at any point in the same civil action. See
25 id. at 446-47. The Supreme Court rejected this analogy, and
26 found that Rules 4004 and 9006(b)(3) are not rules governing
27 subject-matter jurisdiction, but simply claims-processing rules
28 under which a claim may be forfeited if the party invoking the

1 rule waits too long to claim its benefit. Id. The Court stated
2 that a defense ordinarily is lost if it is not included in the
3 answer or amended answer. Id. at 459 (citing Rule 7012(b)).
4 "Only lack of subject-matter jurisdiction is preserved post-
5 trial." Id.

6
7 **2. FRCP 4 (m)**

8 Even if we were to reach Roberts' argument that FRCP 4(m)
9 required the bankruptcy court to dismiss the case because Erhard
10 failed to serve the summons and complaint before the 120-day
11 deadline, we would reject Roberts' argument.

12 Roberts argues on appeal that FRCP 4(m) required the
13 bankruptcy court to dismiss the complaint for lack of prosecution
14 sua sponte. FRCP 4(m) provides in relevant part:

15
16 If service of the summons and complaint is not made upon a
17 defendant within 120 days after the filing of the complaint,
18 the court, upon motion or its own initiative after notice to
19 the plaintiff, shall dismiss the action without prejudice as
20 to that defendant or direct that service be effected within
a specific time; provided that if the plaintiff shows good
cause for failure, the court shall extend the time for
service for an appropriate period.

21 Roberts relies on the language in this rule that provides, "the
22 court, upon . . . its own initiative . . . shall dismiss the
23 action" if service is not accomplished within 120 days of filing
24 and an extension is not sought on a showing of good cause. The
25 original complaint clearly was not served on Roberts within 120
26 days of its filing. Indeed, it appears that Erhard never served
27 any version of the complaint at all on Roberts. Roberts
28 eventually appeared voluntarily to answer and defend the

1 adversary proceeding. In addition, Erhard never sought an
2 extension of the 120-day period, and made no showing of good
3 cause for an extension.

4 Roberts' argument fails to take account of FRCP 12(h)(1)(B),
5 incorporated by reference in Rule 7012(b), which provides:

6
7 A defense of lack of jurisdiction over the person,
8 improper venue, insufficiency of process, or
9 insufficiency of service of process is waived . . .
(B) if it is neither made by motion under this rule nor
included in a responsive pleading

10
11 Under this provision, if a defendant files an answer that omits
12 insufficiency of service as a defense and also fails to make a
13 pre-answer motion to dismiss on that basis, the issue of
14 timeliness of service is waived.

15 Despite the mandatory-sounding language of FRCP 4(m), the
16 waiver provision of FRCP 12(h)(1)(B) takes priority over FRCP
17 4(m). See McCurdy v. American Bd. of Plastic Surgery, 157 F.3d
18 191, 195 (3d Cir. 1998) (defense of untimely service of process
19 under FRCP 4(m) is subject to FRCP 12's waiver provisions and may
20 be waived if not raised in compliance therewith); see also, 4B
21 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE: CIVIL
22 § 1137 (3d ed. 2002), at 376 (same). Thus, by failing to assert
23 the FRCP 12(h)(1)(B) defense in either the answer or in a pre-
24 answer motion to dismiss, Roberts has waived it.

25
26 **B. Application of § 727(a)(4)(A)**

27 Section 727(a)(4)(A) denies a discharge to a debtor who
28 "knowingly and fraudulently" made a false oath or account in the

1 course of the bankruptcy proceedings. In order to bring a
2 successful § 727(a)(4)(A) claim for false oath, the plaintiff
3 must show: (1) the debtor made a false oath in connection with
4 the case; (2) the oath related to a material fact; (3) the oath
5 was made knowingly; and (4) the oath was made fraudulently.
6 Fogal Legware of Switz., Inc. v. Wills (In re Wills), 243 B.R.
7 58, 62 (9th Cir. BAP 1999). A claim for denial of a discharge
8 under § 727 is construed liberally in favor of the discharge and
9 strictly against a person objecting to the discharge. First
10 Beverly Bank v. Adeeb (In re Adeeb), 787 F.2d 1339, 1342 (9th
11 Cir. 1986).

13 **1. False Oath**

14 We have held that a false oath may involve a false statement
15 or omission in the debtor's schedules. See Wills, 243 B.R. at
16 62; accord, Beaubouef v. Beaubouef (In re Beaubouef), 966 F.2d
17 174, 178 (5th Cir. 1992). In this case, the bankruptcy court
18 determined that the debtor omitted from his Statement the rent
19 received from the rental property and the proceeds from the sale
20 of the horse.³ We do not believe that the bankruptcy court was
21 clearly erroneous in finding that Roberts made a false oath as to
22 these nondisclosures.

24 ³ The bankruptcy court apparently also gave some weight to
25 "arguable errors in reported prebankruptcy business income" in
26 the amended Statement filed in 2003. The court found that the
27 business account records were not fully reconcilable to the
28 personal account statements. Standing alone, the court found,
these arguable errors were insufficient to support the cause of
action. However, the court found, "they do not stand alone." On
the other hand, the court found that the omission of the three
miscellaneous personal property items did not require a denial of
discharge.

1 **2. Materiality**

2 We also do not believe that the bankruptcy court was clearly
3 erroneous when it found that the false oath in this case was
4 material. Materiality is broadly defined: "A false statement is
5 material if it bears a relationship to the debtor's business
6 transactions or estate, or concerns the discovery of assets,
7 business dealings, or the existence and disposition of the
8 debtor's property." Wills, 243 B.R. at 62; accord, Weiner v.
9 Perry, Settles & Lawson (In re Weiner), 208 B.R. 69, 72 (9th Cir.
10 BAP 1997), rev'd on other grounds, 161 F.3d 1216 (9th Cir. 1998);
11 Chalik v. Moorefield (In re Chalik), 748 F.2d 616, 618 (11th Cir.
12 1984).

13 A false statement or omission may be material even in the
14 absence of direct financial prejudice to creditors. See Weiner,
15 208 B.R. at 72; Chalik, 748 F.2d at 618; see also Stanley v.
16 Hoblitzell (In re Hoblitzell), 223 B.R. 211, 215-16 (Bankr. E.D.
17 Cal. 1998) (omission of an asset may be material despite the lack
18 of prejudice to the estate or to creditors, "if it aids in
19 understanding the debtor's financial affairs and transactions");
20 Ford v. Ford (In re Ford), 159 B.R. 590, 593 (Bankr. D. Or. 1993)
21 (omission or false statement may be material if it concerns
22 discovery of assets, materiality does not depend on the financial
23 significance of the omitted assets, and detriment to creditors
24 need not be shown); Sergent v. Haverland (In re Haverland), 150
25 B.R. 768, 771 (Bankr. S.D. Cal. 1993) (materiality of false oath
26 does not depend on detriment to creditors). The bankruptcy court
27 in this case found that the omission of the rent and the horse
28 sale were "significant financial activities in the context of

1 Debtor's affairs."

2 In defense of the nondisclosure of the quarter horse
3 transaction, Roberts makes three arguments. First, he argues
4 that his wife signed the bill of sale, and Erhard made no showing
5 of the extent to which Roberts was involved in the transaction.
6 Second, Roberts argues that he did list other, larger
7 transactions, and that this mitigates against the materiality of
8 this nondisclosure. Finally, he argues that he made full
9 disclosure in his amended Statement when he became aware of the
10 complaint in this adversary proceeding and filed his answer.

11 As to the rental payment, Roberts contends that the
12 transaction started as a down payment on the purchase of the
13 house, and was converted into a rent payment when the purchaser
14 was unable to complete the transaction. He further contends that
15 his accountant apparently misunderstood the receipt for this
16 payment. However, he points to no trial testimony to support
17 these contentions.

18 The bankruptcy court evaluated each of these arguments. We
19 are not persuaded that the court was clearly erroneous in its
20 determination that the nondisclosure of the rents and the quarter
21 horse sale were material.

22

23 **3. Knowingly**

24 We have more difficulty with the bankruptcy court's findings
25 on the other two elements of the § 727(a)(4)(A) claim. A person
26 acts knowingly if he or she acts deliberately and consciously.
27 See BLACK'S LAW DICTIONARY 888 (8th ed. 2004). The bankruptcy court
28 did not make a finding that Roberts acted deliberately and

1 consciously in failing to make these disclosures until he amended
2 his Statement. Instead, the court found that Roberts exhibited,
3 "a careless and reckless approach to the important duty of
4 disclosure in sworn bankruptcy filings." "Careless and reckless"
5 is a lower standard than "knowing."

6 An action is careless if it is "engaged in without
7 reasonable care." Id. at 225. This is a negligence standard,
8 not a knowing misconduct standard. A false statement resulting
9 from ignorance or carelessness does not rise to the level of
10 "knowing and fraudulent." See, e.g., Mondore v. Mondore (In re
11 Mondore), 326 B.R. 214, 217 (Bankr. W.D. N.Y. 2005) ("a false
12 statement resulting from ignorance or carelessness is not one
13 that is knowing and fraudulent").

14 Similarly, recklessness does not measure up to the statutory
15 requirement of "knowing" misconduct. An action is reckless if
16 it creates, "a substantial and unjustifiable risk of harm to
17 others [through] a conscious (and sometimes deliberate) disregard
18 for or indifference to that risk" BLACK'S LAW DICTIONARY at
19 1298.⁴ Since the bankruptcy court did not find that Roberts made
20 his nondisclosures "knowingly" in the required sense, we cannot
21 sustain the denial of his discharge.

22 23 **4. Fraudulently**

24 Finally, to deny a discharge under § 727(a)(4)(A), the trial
25

26 ⁴ We need not and do not decide whether, as the Mondore
27 court suggested in dictum, "a reckless disregard of both the
28 serious nature of the information sought and the necessary
attention to detail and accuracy in answering may rise to the
level of fraudulent intent necessary to bar a discharge"
See 326 B.R. at 217.

1 court must also find that the false oath was made "fraudulently".
2 The fraud provision of § 727(a)(4) is similar to common law
3 fraud, which the Ninth Circuit has described as follows:

4 The creditor must show that (1) the debtor made the
5 representations; (2) that at the time he knew they were
6 false; (3) that he made them with the intention and
7 purpose of deceiving the creditors; (4) that the
8 creditors relied on such representations; (5) that the
9 creditors sustained loss and damage as the proximate
10 result of the representations having been made.

11 Anastas v. American Savs. Bank (In re Anastas), 94 F.3d 1280,
12 1284 (9th Cir. 1996), quoting Britton v. Price (In re Britton),
13 950 F.2d 602, 604 (construing fraud provision of § 523(a)(2)(A)).

14 The elements of common law fraud substantially overlap the
15 elements of a claim under § 727(a)(4)(A). The first two elements
16 of a fraud cause of action duplicate the first element described
17 above. For the purposes of § 727(a)(4), materiality replaces the
18 elements of reliance and proximately caused damage in a fraud
19 cause of action.

20 The intent required for finding that the debtor has acted
21 fraudulently under § 727(a)(4)(A) with respect to a false oath
22 must be actual intent: constructive fraudulent intent cannot be
23 the basis for the denial of a discharge. See Devers v. Bank of
24 Sheridan (In re Devers), 759 F.2d 751, 753 (9th Cir. 1985).

25 A debtor's fraudulent intent may be established by
26 circumstantial evidence or by inferences drawn from his or her
27 course of conduct. See e.g., id. at 753-54; Wills, 243 B.R. at
28 64; Hoblitzell, 223 B.R. at 215. The requisite intent may be
found from the surrounding circumstances. In examining the
circumstances, the court may find "badges of fraud" including,

1 (1) that there was a close relationship between the transferor
2 and the transferee; (2) that the transfer was in anticipation of
3 a pending suit; (3) that the transferor debtor was insolvent or
4 in poor financial condition at the time of the transfer; (4) that
5 all or substantially all of the debtor's property was
6 transferred; (5) that the transfer so completely depleted the
7 debtor's assets that the creditor has been hindered or delayed in
8 recovering any part of the judgment; and (6) that the debtor
9 received inadequate consideration for the transfer. See Emmett
10 Valley Assocs. v. Woodfield (In re Woodfield), 978 F.2d 516, 518
11 (9th Cir. 1992).⁵ These factors need not all be present in order
12 to find that a debtor acted with the requisite intent. Id.

13 While the bankruptcy court specifically found that the
14 errors and omissions in Roberts' Statement had a possible bearing
15 on his fraudulent intent, the court did not explicitly make a
16 finding that Roberts had acted with actual fraudulent intent.
17 Accordingly, we find that the bankruptcy court incorrectly
18 applied a lower legal standard than that mandated by
19 § 727(a)(4)(A) on the issue of whether Roberts' nondisclosure was
20 fraudulent.

22 VI. CONCLUSION

23 Insofar as Roberts' appeal is based on failure of the
24 bankruptcy court to dismiss the underlying complaint under FRCP
25

26 ⁵ Woodfield involved a denial of discharge under
27 § 727(a)(2). The analysis of what constitutes intent to defraud
28 with respect to § 727(a)(2) is applicable under § 727(a)(4). See
6 ALAN N. RESNICK & HENRY J. SOMMER, COLLIER ON BANKRUPTCY
¶ 727.04[1][a], p. 40 (15th ed. Rev. 2005). See also Garcia v.
Coombs (In re Coombs), 193 B.R. 557, 564 (Bankr. S.D. Cal. 1996)
(applying similar badges of fraud).

1 4(m), we AFFIRM the decision of the bankruptcy court. Because
2 Roberts did not raise this issue in the bankruptcy court, we find
3 that it is not properly before us. In addition, we find that,
4 because Roberts failed to invoke FRCP 4(m), either in his answer
5 to the complaint or in a pre-answer motion to dismiss, he has
6 waived any right to rely on this provision.

7 However, we conclude that the bankruptcy court made
8 insufficient findings in two respects to support its conclusion
9 denying Roberts his discharge under § 727(a)(4)(A). First, we
10 find that the bankruptcy court did not find that the material
11 nondisclosures in Roberts' Statement were knowing. Second, the
12 court did not find that Roberts intended to defraud.

13 For the foregoing reasons, we REVERSE the bankruptcy court
14 and remand for entry of an order granting Roberts his discharge.