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U.S. BKCY. APP. PANEL
OF THE NINTH CIRCUIT

NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT

5	In re:)	BAP No. CC-12-1257-HKiD
6	FERDINAND GERTES and)	Bk. No. 11-24572-BR
7	EMMA R. DUTRO,)	Adv. No. 11-02484-BR
8	Debtors.)	
9	MIGUEL A. GARCIA,)	
10	Appellant,)	
11	v.)	M E M O R A N D U M¹
12	FERDINAND GERTES; EMMA R.)	
13	DUTRO;)	
14	Appellees.)	

Argued and Submitted on November 15, 2012
at Pasadena, California

Filed - December 5, 2012

Appeal from the United States Bankruptcy Court
for the Central District of California

Honorable Barry Russell, Bankruptcy Judge, Presiding

Appearances: Appellant Miguel A. Garcia argued pro se; David
Scott Hagen, Esq. argued for Appellees Ferdinand
Gertes and Emma R. Dutro.

Before: HOLLOWELL, KIRSCHER, and DUNN, Bankruptcy Judges.

¹ This disposition is not appropriate for publication.
Although it may be cited for whatever persuasive value it may
have (see Fed. R. App. P. 32.1), it has no precedential value.
See 9th Cir. BAP Rule 8013-1.

1 Miguel Garcia (Garcia) appeals the bankruptcy court's
2 judgment in favor of the debtors on his complaint to deny the
3 debtors a discharge under § 727.² We AFFIRM.

4 **I. FACTS**

5 Ferdinand Gertes and Emma Dutro (Dutro) (the Debtors) filed
6 a chapter 7 bankruptcy petition and schedules on April 4, 2011.
7 On bankruptcy Schedule A - Real Property, the Debtors listed two
8 properties in Carson, California. One was their residence,
9 purchased in 1986. The other (the Property) was described as:

10 1/3 interest in [single family residence in Carson,
11 California]. Debtors own a 1/3 interest in a single
12 family residence . . . with Steve Saiz and the Bayside
13 Apostolic Center, each of whom own a 1/3 interest. The
14 property was acquired by the owners in 7/07 for
15 \$899,000 with \$200,000 down payment put up by the other
16 two owners. The intent was to develop the property by
17 building condos but the real estate market changed
18 while those plans were being developed. The existing
19 house has 5 bedrooms, 3 baths in approximately 2000
20 square feet and is occupied by 3 renters who pay a
21 total of \$2000 per month. Current fair market value of
22 property, per zillow.com search on 3/23/11 is \$427,000.
23 Property is subject to first trust deed in favor of
24 Chase with balance of \$743,000 and a municipal
25 development loan of \$200,000 which does not bear
26 interest and would be due upon sale of the property.

19 Also in their schedules, the Debtors listed Garcia as an
20 unsecured creditor with a claim of \$78,000. Garcia is an
21 architect and contractor. After Garcia and Dutro met in 2003,
22 they worked together on several construction projects. In 2007,
23 Dutro contemplated developing the Property into a condominium
24 complex (the Project), but she needed financing. Garcia agreed

26 ² Unless otherwise indicated, all chapter and section
27 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532.
28 "Rule" references are to the Federal Rules of Bankruptcy
Procedure, Rules 1001-9037.

1 to lend Dutro money with the understanding that, in exchange, he
2 would be given general contractor and architectural work on the
3 Project.

4 With the help of Dutro's son, Garcia refinanced his own
5 property and obtained a loan of \$75,000, which he, in turn, lent
6 to Dutro. On October 17, 2007, Dutro signed a note (Note) in
7 favor of Garcia in the amount of \$81,512.00, which represented
8 the \$75,000 loan plus transactional closing costs. Payment on
9 the Note was due by October 17, 2010. The Note referenced that a
10 deed of trust was to secure the Note. However, it appears that
11 no deed of trust was ever executed or recorded.

12 Dutro made monthly interest payments on the Note from
13 October 2007 through October 2008. She stopped making payments
14 beginning in November 2008, and failed to repay the Note.

15 On July 13, 2011, Garcia filed a complaint against the
16 Debtors objecting to their discharge pursuant to § 727(a)(4),
17 (a)(7), and (a)(2). After the Debtors filed a motion to dismiss,
18 Garcia filed an amended complaint on September 19, 2011 (the
19 Complaint). In the Complaint, and in his pre-trial and trial
20 briefs, Garcia's allegations focused on his contention that Dutro
21 enticed him to refinance his property by promising him all
22 contractor work on the Project and by promising him that a high
23 return would be gained from the refinancing. He alleged that
24 Dutro made the false and misleading promise that she would invest
25 Garcia's money in the Project, when no such investment was ever
26 made; he alleged that instead the Debtors used his money for
27 their own personal use. Garcia also asserted that the Note
28 should have been secured by a deed of trust that Dutro promised,

1 but failed, to record.

2 The Debtors denied the allegations. Dutro submitted a
3 declaration stating that no collateral for the loan was ever
4 contemplated by her or Garcia. She stated that Garcia's money
5 was used to pay for architectural drawings and engineering for
6 the Project and to service the debt on the Property. Dutro also
7 stated that she had intended to complete the Project but the
8 subsequent downturn in the real estate market made it too
9 difficult. Therefore, she contended that she returned a portion
10 of the Property to the former seller, and rented out the
11 residence on the Property, retaining her one-third interest. The
12 Debtors maintained that they fully disclosed their interest in
13 the Property, the rental income, and monthly obligations on the
14 Property.

15 On April 3, 2012, Garcia filed a reply brief with
16 "additional facts." The additional facts were that although
17 Dutro contended she purchased the Property with partners, Steve
18 Saiz and the Bayside Apostolic Center, the Los Angeles County
19 Recorder's Office as well as the Tax Assessor's Records showed
20 that Dutro alone held title to the Property. Thus, Garcia
21 shifted the focus of his allegations under § 727 to contend that
22 the Debtors (1) concealed Dutro's full interest in the Property
23 with an intent to hinder, delay, or defraud the bankruptcy
24 trustee and creditors (§ 727(a)(2)); (2) failed to record the
25 deed of trust that secured the Note and instead transferred the
26 Property to insiders (§ 727(a)(2)); and, (3) failed to fully
27 disclose their ownership of the Property on her bankruptcy
28 schedules (§ 727(a)(4)).

1 A trial was held on May 9, 2012. Garcia and Dutro submitted
2 testimony by declaration. Dutro also testified at the trial.
3 Garcia submitted into evidence the Note and the records of the
4 Los Angeles County Recorder's Office and Tax Assessor. At the
5 trial, Garcia's counsel argued only the § 727(a)(4) claim that
6 the Debtors should be denied a discharge because Dutro "failed to
7 disclose the truth of the matter that she's a 100 percent owner
8 of the property." Trial Tr. (May 9, 2012) at 8:5-15.

9 Dutro was asked about the nature of her interest in the
10 Property. She testified that Steve Saiz and the Bayside
11 Apostolic Center put money down for the purchase of the Property
12 and she took the title in her name. She testified that she took
13 the title with the understanding among them that they would each
14 have a one-third interest in the Property and any profit from the
15 Project.

16 The bankruptcy court made an oral ruling at the close of
17 trial. It found that although the official records listed Dutro
18 as the title holder of the Property, Dutro "disclosed everything,
19 and there's no reason not to accept what she said." Trial Tr.
20 (May 9, 2012) at 15:1-2. The bankruptcy court found that the
21 Debtors provided sufficient information on their bankruptcy
22 schedules so that anyone could easily investigate the basis of
23 the other partners' interest in the Property. The bankruptcy
24 court noted that the Note was a form that was simply filled out
25 by the parties. It found that while there was a dispute about
26 whether the Note was secured by a deed of trust, it "would [not]
27 base a nondischargeability of this nature [] on just that." Id.
28 at 15:5-10. Finally, the bankruptcy court found there was no

1 fraud or misrepresentation by the Debtors: "I'm not convinced
2 from the facts before me that it wasn't anything other than
3 described by the Debtor that things went bad for a lot of people,
4 and the Debtor simply couldn't make the payments." Id. at
5 15:14-18.

6 On May 17, 2012, the bankruptcy court entered judgment in
7 favor of the Debtors.³ Garcia timely appealed.

8 **II. JURISDICTION**

9 The bankruptcy court had jurisdiction pursuant to 28 U.S.C.
10 §§ 1334 and 157(b)(2)(J). We have jurisdiction under 28 U.S.C.
11 § 158.

12 **III. ISSUE**

13 Did the bankruptcy court err in entering judgment in favor
14 of the Debtors on the Complaint?

15 **IV. STANDARDS OF REVIEW**

16 We apply the following standards of review to a judgment on
17 an objection to discharge: (1) the bankruptcy court's
18 determinations of the historical facts are reviewed for clear
19 error; (2) the selection of the applicable legal rules under
20 § 727 is reviewed de novo; and (3) the application of the facts
21 to those rules requiring the exercise of judgments about values
22 animating the rules is reviewed de novo. Retz v. Samson
23 (In re Retz), 606 F.3d 1189, 1196 (9th Cir. 2010) (citing Searles
24

25
26 ³ At the trial and in its judgment on Garcia's Complaint,
27 the bankruptcy court referenced § 727 and § 523. However,
28 according to the bankruptcy court docket, Garcia did not file a
separate complaint alleging § 523 claims for relief. Garcia also
did not reference § 523 in his Complaint.

1 v. Riley (In re Searles), 317 B.R. 368, 373 (9th Cir. BAP 2004),
2 aff'd, 212 Fed. Appx. 589 (9th Cir. 2006)).

3 A factual finding is clearly erroneous if it is "illogical,
4 implausible, or without support in the record." Id. at 1196
5 (citing United States v. Hinkson, 585 F.3d 1247, 1261-62 & n.21
6 (9th Cir. 2009)(en banc)).

7 **V. DISCUSSION**

8 A denial of a discharge is an act that must not be taken
9 lightly. Consequently, § 727 must be construed liberally in
10 favor of the debtor and against the objector. Roberts v. Erhard
11 (In re Roberts), 331 B.R. 876, 882 (9th Cir. BAP 2005) (citing
12 First Beverly Bank v. Adeeb (In re Adeeb), 787 F.2d 1339, 1342
13 (9th Cir. 1986)). However, the opportunity for a fresh start is
14 available only to the "honest but unfortunate debtor." Merena v.
15 Merena (In re Merena), 413 B.R. 792, 807 (Bankr. D. Mont. 2009)
16 (citing Grogan v. Garner, 498 U.S. 279, 286-87 (1990)).

17 Therefore, a party objecting to a debtor's discharge must prove
18 by a preponderance of the evidence that the debtor's actions or
19 conduct fall within one of the exceptions to discharge set forth
20 in § 727. Khalil v. Developers Sur. & Indem. Co. (In re Khalil),
21 379 B.R. 163, 172 (9th Cir. BAP 2007), aff'd, 578 F.3d 1167, 1168
22 (9th Cir. 2009).

23 Garcia's sole contention at the trial and on appeal is that
24 the Debtors made a false oath on their bankruptcy schedules
25 because they disclosed only a one-third interest in the Property,
26 when the title records showed Dutro was the only title holder of
27 the Property. On appeal, Garcia contends that there was "no
28 documentary evidence whatsoever [] presented by Debtors or on

1 their behalf which would rebut the 'prima Facie evidence'
2 presumption that their ownership was anything other than what is
3 shown by the official title records." Therefore, Garcia argues
4 that the bankruptcy court erred in finding that the Debtors did
5 not make a material omission on their bankruptcy schedules
6 requiring a denial of their discharge.

7 The Bankruptcy Code provides that a chapter 7 debtor shall
8 be granted a discharge, unless "the debtor knowingly and
9 fraudulently, in or in connection with the case - (A) made a
10 false oath or account." 11 U.S.C. § 727(a)(4)(A). The
11 "fundamental purpose of § 727(a)(4)(A) is to insure that the
12 trustee and creditors have accurate information without having to
13 conduct costly investigations." In re Retz, 606 F.3d at 1196
14 (citing Fogal Legware of Switz., Inc. v. Wills (In re Wills),
15 243 B.R. 58, 63 (9th Cir. BAP 1999)). To succeed on a
16 § 727(a)(4)(A) claim, the objecting party must demonstrate that:
17 (1) a false oath or statement was made by the debtor;
18 (2) knowingly and fraudulently; (3) which was material to the
19 course of the bankruptcy proceedings. Id.; In re Roberts,
20 331 B.R. at 882.

21 A false oath or statement is made when it occurs in the
22 debtor's schedules or at an examination during the course of the
23 proceedings. In re Roberts, 331 B.R. at 882. A debtor's
24 bankruptcy schedules must be verified or contain an unsworn
25 declaration under penalty of perjury. 28 U.S.C. § 1746;
26 Rule 1008. Accordingly, a false statement or omission in a
27 debtor's schedules is a false oath under § 727(a)(4)(A).
28

1 The bankruptcy court found that the Debtors did not fail to
2 disclose their interest in the Property. The bankruptcy court
3 found that although the official documents revealed that Dutro
4 was the title holder, the Debtors disclosed in their schedules
5 that Dutro held a one-third interest in the Property as it was
6 purchased with Steve Saiz and the Bayside Apostolic Center. It
7 found that the Debtors' disclosure regarding the Property in
8 their schedules provided the Trustee and creditors with
9 sufficient information to further investigate the ownership
10 interests if there were any questions. Moreover, it found that
11 "there's no reason not to accept what she said" about co-owning
12 it with her partners, and intending to repay Garcia and complete
13 the Project. Trial Tr. (May 9, 2012) at 15:1-2.

14 Findings of fact based on credibility are given particular
15 deference on appeal. Anderson v. City of Bessemer City, N.C.,
16 470 U.S. 564, 575 (1985); Arab Monetary Fund v. Hashim (In re
17 Hashim), 379 B.R. 912, 924-25 (9th Cir. BAP 2007). Nevertheless,
18 the record supports both contentions: that Dutro wholly owned the
19 Property or that Dutro owned only a one-third interest. Where
20 there are two permissible views of the evidence, the fact
21 finder's choice between them cannot be clearly erroneous."
22 Anderson, 470 U.S. at 574. Consequently, we cannot conclude that
23 the bankruptcy court's finding that the Debtors had a one-third
24 ownership interest in the Property was clearly erroneous. As a
25 result, the bankruptcy court did not err in finding that the
26 Debtors did not make a material omission on their schedules.

27 Because Garcia did not establish the elements necessary to
28 prevail on his § 727(a)(4) claim, we agree with the bankruptcy

1 court's conclusion that the Debtors were entitled to judgment on
2 the Complaint.

3 **VI. CONCLUSION**

4 For the foregoing reasons, we AFFIRM.
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