NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL

OF THE NINTH CIRCUIT

In re:	BAP No. MT-07-1443-DJuPa
BRENDON KEITH RETZ,	Bk. No. 04-60302
Debtor.	Adv. No. 05-00018
BRENDON KEITH RETZ,	
Appellant,	
v.	**M E M O R A N D U M**[1]
DONALD G. ABBEY,	
Appellee.	

Argued and Submitted on March 18, 2008
at Helena, Montana

Filed - March 31, 2008

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

Honorable Ralph B. Kirscher, Chief Bankruptcy Judge, Presiding

Before: DUNN, JURY and PAPPAS, 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.

Chapter 7 debtor appeals denial of his discharge pursuant to §§ 727(a)(2)(A), 727(a)(2)(B), 727(a)(4)(A), and 727(a)(5) of the Bankruptcy Code.[2] We AFFIRM.

I. FACTS

This appeal involves an extensive, complicated set of facts involving numerous transactions and alleged non-disclosures, which the bankruptcy court analyzed in an extensive (135 pages) Memorandum of Decision ("MOD") issued September 6, 2007, following a five-day trial. Our factual discussion will focus on the salient transactions and events which have a dispositive impact on the appeal before us.

A. Background

The debtor, Brendon Retz ("Retz"), holds a bachelor of arts degree in Business Management. [MOD 4:4-5]. In 1994, Retz formed a construction company, Timberland Construction, Inc. ("TCI"). [MOD 5:3]. Retz was the sole shareholder of TCI, and he operated TCI successfully until at least June of 2001.[3]

Retz performed all accounting for TCI the first few years it

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[2]Unless otherwise indicated, all chapter and section references are to the Bankruptcy Code, §§ 101-1330, as enacted and promulgated prior to October 17, 2005, the effective date of most of the provisions of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. 109-8, 119 Stat. 23.

[3]Retz testified that the annual revenue of TCI increased from less than $500,000 in 1994 to between $4 million and $5 million in 2001. [MOD 5:16-17]. Retz remained the sole shareholder of TCI at the time he filed his bankruptcy petition. [MOD 5:4-5].

was operating. [MOD 5:5-6]. He later hired a bookkeeper, and he purchased accounting software known as "Master Builder" to aid him in record keeping at TCI. [MOD 5:6-8]. Retz testified both that the more familiar one is with Master Builder, the easier it is to find information, and that he considers himself proficient at using the Master Builder program. [MOD 5:8-12].

Donald G. Abbey ("Abbey") has been a successful real estate investor for more than 30 years. [MOD 5:22]. At the time of trial he had interests in more than 60 companies. [MOD 6:1-2]. Abbey wanted to build a multi-million dollar residence for himself in Montana ("Shelter Island Project"). Rather than simply hire a contractor, Abbey wanted to form a partnership with his contractor in order to have more control and to be able to look inside the contractor's books. [MOD 7:1-2].

In early 2001, Retz and TCI entered into an oral agreement with Abbey to form Timberland Construction, LLC ("TCLLC"). TCLLC operated informally, until an operating agreement dated July 1, 2001 ("Operating Agreement"), was executed in March 2002. [MOD 6:5-6; 13:5-6].

As relevant to the dispute, the Operating Agreement provided by its terms (1) that Retz was to manage the day-to-day operations of TCLLC [MOD 14:8-9], (2) that Retz's annual salary was to be $40,000 plus a share of the profits of TCLLC [MOD 15:8-14], (3) that Retz was to "devote full time exclusively to [TCLLC]" [Operating Agreement, paragraph 5.8], and (4) that major decisions falling outside the scope of TCLLC's day-to-day operations required Abbey's written consent. [MOD 14:9-10]. Under the Operating Agreement, major decisions included:

distributions; incurring or guaranteeing indebtedness; selecting officers of TCLLC and any of its affiliated LLCs; determining the compensation of significant employees; disposal, sale, exchange or liquidation of assets of TCLLC or its affiliated LLCs; and any transaction between TCLLC or its affiliated LLCs and any governing member of TCLLC, including a representative or affiliate of a governing member. [MOD 14:8-16].

Despite the fact that it took months to draft the Operating Agreement and that Retz and TCI's interests in the drafting were represented by an attorney and two accountants, and notwithstanding a provision of the Operating Agreement which stated that the Operating Agreement was intended to replace and supersede all prior written and oral agreements by and among Retz, TCI and Abbey, Retz did not believe that he needed to comply with its terms. Everything up to the time the Operating Agreement was executed had been done verbally, and Abbey allegedly had assured Retz that the Operating Agreement was just "for the file." [MOD 15:15-17; 16:3-10].

In mid-2003, Abbey began to have concerns about Retz's conduct in connection with Retz's operation of TCLLC. The concerns arose after Retz and Abbey had a chance meeting in Las Vegas in May 2003. In particular, Abbey was concerned with how Retz, whose annual salary was $40,000 according to the Operating Agreement, had the resources to be on the "comp" casino floor of the Bellagio resort in Las Vegas. [MOD 24:9-12].

To address his concerns, Abbey traveled to Montana in July 2003. At that time Abbey discovered that Retz's brother, Ryan ("Ryan"), had been hired as controller for TCLLC, and was living

in a house ("650 Woodside") which Abbey believed belonged to TCLLC. [MOD 25:1-3]. Abbey went to TCLLC's banks and discovered TCLLC had loans and partnerships which he was not aware existed. [MOD 25:6-7]. Abbey also learned that Retz, without Abbey's consent, had appointed Thomas Tornow ("Tornow") to be TCLLC's authorized agent in Montana. [MOD 25:8-9]. Tornow was the attorney who had represented Retz and TCI in the drafting of the Operating Agreement. Abbey testified that Tornow had created several partnerships involving TCLLC without obtaining Abbey's consent or signature. [MOD 25:9-11]. In addition, Retz had deeded a parcel of TCLLC property to Tornow. [MOD 25:11-12].

Abbey then went to Ryan to inquire about the loans and partnerships that he had discovered. Ryan showed Abbey an account that reflected $50,000 transferred back and forth between Retz and TCLLC. Ryan explained to Abbey that Retz was using those funds to try to shore up a financial statement for a bond application. [MOD 25:13-16]. Ryan thereafter refused to answer Abbey's questions; Ryan testified that Abbey had accused Retz of stealing money. [MOD 25:16-19].

During the first week of August 2003, William Matteson ("Matteson"), a CPA with whom Abbey previously had worked in California, arrived in Montana as Abbey's agent for the purpose of assessing TCLLC's financial condition and operations, including compliance with the Operating Agreement, verifying that all contributions Retz and TCI were to have made to TCLLC under the Operating Agreement had in fact been made, and investigating a draft audit report by Deloitte & Touche which identified overcharges on the Shelter Island Project. [MOD 25:20-26:7].

Matteson had difficulty getting access to the books and records of TCLLC to determine what assets of Retz and TCI had been contributed to TCLLC. [MOD 26:15-17].

Abbey began withdrawing financial support from TCLLC and shutting down the Shelter Island Project in order to protect his $10 million investment. [MOD 27:7-8].

There is conflict in the testimony regarding when the relationship between Abbey and Retz ultimately failed. Abbey admitted on cross-examination that Retz continued to bring him various projects in 2003, and that in late July or early August 2003, Abbey, in a meeting with the president of Glacier Bank, had stated that he had a lot of confidence in Retz. However, Abbey further testified that he withdrew his statement of confidence shortly thereafter. [MOD 27:10-14]. Abbey testified that construction on the Shelter Island Project ceased in August 2003; Retz testified that construction continued until the middle of September 2003. [MOD 27:18-20].

Retz learned that Abbey was preparing to file litigation against him in state court ("State Court Litigation") and determined that it would be better for Retz to file litigation preemptively. Retz directed the removal of TCLLC equipment and business records from the Shelter Island Project site a few days before Retz filed suit. [MOD 28:4-16].

James Cossitt was appointed as receiver ("Receiver") in the State Court Litigation, effective September 3, 2003. [MOD 28:18-19]. As a result of a hearing held October 16, 2003, on the Receiver's motion to hold Retz in contempt, the State Court entered an order precluding Retz from transferring property he

owned or controlled for a period of 90 days. [MOD 31:17-20; 32:22-33:1]. A further hearing was set for February 13, 2004, but the State Court Litigation was stayed when Retz filed a voluntary chapter 7 petition on February 12, 2004.

Abbey commenced an adversary proceeding in the bankruptcy court seeking denial of Retz's discharge pursuant to §§ 727(a)(2)(A), 727(a)(2)(B), 727(a)(4)(A), and 727(a)(5). Following a five-day trial, the bankruptcy court denied Retz's discharge.

B. 650 Woodside and Related Non-Disclosures

Pursuant to the agreement of the parties in the formation of TCLLC, Abbey was to contribute $300,000 in cash as his capital contribution. Abbey contributed $100,000 of this amount in early 2001, i.e., before the July 1, 2001 effective date of the Operating Agreement, at Retz's request in order to resolve a cash flow problem. [MOD 13:2-4]. The balance of Abbey's capital contribution, $200,000, was made in March 2002, in conjunction with the execution of the Operating Agreement. [MOD 13:19-14:3].

Retz and TCI were to contribute to TCLLC assets they owned which had an approximate aggregate value of $300,000. [MOD 7:5-6]; [Tr. of July 8, 2004 § 341a Meeting of Creditors, 73:3-74:3]. As relevant to the present dispute, among the assets Retz and TCI were to contribute to TCLLC were several lots in the Woodside subdivision ("Woodside Lots") under development in Whitefish, Montana, including a property known as Lot 6, or 650 Woodside. ("650 Woodside"). [MOD 7:9-12; 7:17-19].

Prior to the execution of the Operating Agreement, 650

Woodside was an asset of TCI. As of July 1, 2001, construction on 650 Woodside was not complete, and TCI's construction loan was secured by 650 Woodside in the amount of $99,000. Additionally, 650 Woodside was subject to an encumbrance of $22,000, representing the purchase price of the lot. Once the Operating Agreement was executed in March 2002, Retz and Abbey intended 650 Woodside to be an asset of TCLLC. Retz admitted at trial that 650 Woodside constituted an asset of TCLLC pursuant to the Operating Agreement, and he contends that he put 650 Woodside on TCLLC's books on or about July 1, 2001:

> Q: Okay. Now, it's true that under the terms of the operating agreement for Timberland Construction, LLC, that 650 Woodside was to be contributed to the company by Timberland Construction, Inc.; isn't that true?
>
> A: Yes.
>
> Q: Okay. And you believe, in fact, that the operating agreement effectuated that transfer, do you not?[4]

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[4]At the continuation of his § 341a Meeting of Creditors held July 8, 2004, Retz testified generally about the loose arrangements he had followed with respect to transfer of the Woodside Lots into TCLLC.

> There were some of the lots that initially had – that were owned by Timberland Construction, Inc. and had financing that was obtained by Timberland Construction, Inc. So when we – you know, when we made the theoretical contribution of all of the assets to the new LLC, a lot of times we didn't – you know, I'm not sure whether a deed was actually recorded transferring from Inc. to LLC, but in practice, it was put on the books as an LLC asset, and if when we went back and had to transfer something, if it was in Inc.'s name, I would just transfer it as if it were an LLC asset.

(continued...)

A: Yes.

[Tr. of April 11, 2007 Trial, 470:12-19].

Although Retz testified that after July 1, 2001, he believed 650 Woodside to be an asset of TCLLC and that he treated it as such, his actions regarding 650 Woodside after the effective date of the Operating Agreement suggest otherwise.

First, Retz and his wife, Misty Retz ("Misty"), moved into

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[4](...continued)

[Tr. of July 8, 2004 § 341a Meeting of Creditors, 42:23-43:10].

Also:

> Q: To the best of your knowledge, did you see to it that yourself or Timberland Construction, Inc. transferred all of the property or the equipment or the vehicles that was required under the agreement? Are you sure that that was all transferred then?
>
> A: As I stated, titles and deeds were in various states of encumbrances and debts and things like that. [O]n the day that we started operating as Timberland Construction, LLC, all of the assets and liabilities were contributed based on the accounting system of Timberland Construction, LLC. Some of the assets, you know, for example, a lot of our vehicles that were titled I couldn't just transfer the title unless the loan was paid off and the new company just assumed the loan and started making the payments, so maybe sometime down the road when we refinanced or if the loan was paid off, then I would sign it over to Timberland Construction, LLC. But, in essence, I operated as if everything was owned by Timberland Construction, LLC.

[Tr. of July 8, 2004 § 341a Meeting of Creditors, 74:4-25].

650 Woodside after it was completed in the fall of 2001,[5] but they paid no rent to TCLLC. There is conflict in the testimony whether Abbey required Retz to pay rent for his use of 650 Woodside, and if so, whether that rent had been paid. Abbey testified that when confronted about the use of the TCLLC asset, Retz stated that he was paying rent. Abbey later learned Retz was not paying rent. Retz admitted he never paid rent for use of 650 Woodside, but asserted that Abbey had rejected Retz's offer to pay rent by stating: "Don't be ridiculous. Just put a cup at the back door and stick a quarter in it for your uncle Don now and then." [MOD 8:11-18]. The bankruptcy court found Retz's testimony regarding Abbey's nonchalance about his business affairs "fantastic," and "wholly inconsistent with the evidence of Abbey's business practices in dozens of companies." [MOD 124:20-22].

Second, TCI deeded 650 Woodside to Retz and Misty at the beginning of July 2002; the deed was recorded on July 5, 2002. [MOD 9:15-18]. In conjunction with this transfer, Retz and Misty borrowed $121,000 to pay off the construction loan and the lot loan secured by 650 Woodside. [MOD 9:15-20]. Again, there is a conflict in the testimony with respect to any agreement of Abbey to this transaction. Retz testified that Abbey agreed verbally to the transfer of 650 Woodside out of TCLLC. Abbey denies that he gave such consent. Both parties agree that Abbey gave no consent for the transfer in writing. [MOD 9:6-14].

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[5]TCLLC paid the costs to complete construction over and above the construction loan. The capitalized cost of 650 Woodside was $136,000. [MOD 8:3-5].

Third, Retz and Misty executed an "EquityLine Account Agreement" ("Equity Line of Credit") with Wells Fargo Financial National Bank ("Wells Fargo") on September 6, 2002. [MOD 9:22-10:2]. The Equity Line of Credit authorized Retz to access up to $50,000 in credit, secured by a deed of trust on 650 Woodside granted to Wells Fargo by Retz and Misty on September 6, 2002.

Fourth, in or about November 2002, Retz invited Ryan to come to Montana to work for TCLLC. As an inducement for Ryan to accept the position with TCLLC, Retz promised to sell 650 Woodside to Ryan at a good price. [MOD 21:18-22:2].

Fifth, Retz included 650 Woodside as an asset on his Personal Financial Statement as of May 20, 2003 at a valuation of $180,000, with a notation that there was a "buyer in place" and that he had owned the property since 2002.

In July 2003, Retz and Misty, upon completion of the construction of their new house at 665 Woodside, moved out of 650 Woodside, and Ryan moved in. Retz subsequently ordered an appraisal of 650 Woodside in order to facilitate Ryan getting a loan to purchase 650 Woodside. [MOD 42:7]. The appraised value of 650 Woodside as of July 25, 2003, was $220,000. [MOD 42:10-11].

Sometime later, Retz entered into a contract ("Real Estate Purchase Contract") with Ryan, which the parties dated July 20, 2003, and which reflected a purchase price of $160,000 for 650 Woodside. Ryan testified that the July 20, 2003 date was the date he moved into 650 Woodside, but that the Real Estate Purchase Contract actually was executed at a later date. Ryan testified that it was executed prior to the September 3, 2003,

hearing in the State Court Litigation. [Tr. of April 11, 2007 Trial, 415:19-416:7].

On September 3, 2003, Retz testified in the State Court Litigation at the hearing regarding appointment of the Receiver. When asked whether Retz would have a "quarrel" with the judge entering an order requiring that he transfer to TCLLC all property that was to have been transferred under the Operating Agreement, Retz testified he would not, except for 650 Woodside, based both on his asserted ownership of 650 Woodside and on the existence of what he called a "buy-sell agreement" on 650 Woodside. Despite a lengthy colloquy with the judge, wherein the judge was seeking clarification of Retz's position with respect to the transfer of 650 Woodside and the pending sale, Retz disclosed neither that the intended purchaser was his brother, nor that the agreed sale price was less than fair market value. Based on Retz's discussion of the "buy-sell agreement," the judge in the State Court Litigation expressly excluded 650 Woodside as a property which Retz must transfer to TCLLC. [Tr. of September 3, 2003 Hearing, 103:9-108:15].

The sale of 650 Woodside to Ryan took place on November 21, 2003; the sales price was $160,000. [MOD 43:3-4].

At the time the deed to Ryan was recorded, the principal balance on the Equity Line of Credit secured by 650 Woodside was $50,484.10. A payment in the amount of $51,194.38 was made November 25, 2003, which covered accrued interest in the amount of $165.41, and $50,983.96 of the principal amount owing, leaving a credit balance of $499.88. Thereafter, Retz made the following transactions with respect to the Equity Line of Credit,

notwithstanding that he had sold 650 Woodside to Ryan:

12/2/03	Advance in the amount of $600
12/3/03	Advance in the amount of $600
12/4/03	Advance in the amount of $300
12/12/03	Payment in the amount of $1,000.14, leaving a balance due of $0
12/18/03	Advance in the amount of $900
12/24/03	Payment in the amount of $900, leaving a balance due of $0.

There was no further activity on the Equity Line of Credit until Retz took an advance in the amount of $50,000, the full amount of the Equity Line of Credit, on February 13, 2004, the day after he filed his bankruptcy petition.

C. The Helicopter and Related Disclosures

In January 2000, Retz and Chance Chacon ("Chacon") purchased a Robinson R22 helicopter from Paul Bloomquist ("Bloomquist") for purposes of earning their helicopter licenses. The helicopter had 300 hours left on the engine before a mandatory rebuild. The purchase price was $44,600. Bloomquist agreed to buy back the helicopter after the 300 engine hours were used because he intended to rebuild the engine and sell the helicopter.

Although Retz and Chacon shared ownership of the helicopter "50:50," the loan for the purchase was in Chacon's name at Glacier Bank. Retz authorized automatic payments from his account at Glacier Bank to be applied to Chacon's loan. Over time, Retz began making the entire payment on Chacon's loan.

Retz testified that he talked with his bankruptcy attorney, Harold Dye ("Dye"), about selling the helicopter and a hangar before filing his bankruptcy petition, and that Dye thought it would make things simpler since the helicopter was in Chacon's

name. [MOD 50:5-7]. Retz also discussed with Dye making advance mortgage payments on his residence from the liquidation of the helicopter and the hangar since Retz was concerned that the amount of his time that would be required by the bankruptcy process would prevent him from working. [MOD 54:3-7].

On January 28, 2004, Retz and Chacon executed an agreement stating that Retz had purchased Chacon's interest in the helicopter in May 2003. [MOD 40:9-14]. Retz did not include the helicopter in his personal financial statement dated December 12, 2003 ("December Financial Statement"), which he provided to the Receiver. [MOD 33:10-11].[6]

Retz sold both the helicopter and the hangar to Plexis Management, Inc., which appears to be an entity controlled by Bloomquist, shortly before filing for bankruptcy protection. Regarding the circumstances surrounding the sale of the hangar, Retz testified that he had very little time to make the sale because he had to wait for the order in the State Court Litigation enjoining him from transferring any assets for a period of 90 days to expire.

> Q: You had an airport hangar, and I think you told me you had acquired it at some point in time a couple years ago. But you sold it, I'm going to say a week or ten days or you closed on a sale a week or ten days before you filed. So why don't you go back and let's just talk generally about what happened.
>
> A: Okay. When everything started to fall apart,

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[6]Retz contends he either left the helicopter off the December Financial Statement inadvertently, or he included it among the "vehicles" valued in an aggregate amount of $135,000. He did include the hangar in the December Financial Statement, at a value of $55,000. [MOD 33:12-13].

> Glacier Bank, who had the loan on that hangar, the guy that, the lender, Randy Cogdill, was a -- had this other client, Paul Bloomquist, who was looking for a hangar. And so Paul approached me and wanted to buy it and I told him that I couldn't sell it without the consent of [the Receiver], which I knew I wouldn't get, so we agreed on a price and waited for my restriction from the state court to expire that prohibited me from transferring property.[7] Once it expired, I sold it to him.

[Tr. of July 8, 2004 § 341a Meeting of Creditors, 50:24-51:17].

The sale of the helicopter provided Retz with $8,009.29 in net proceeds after payment of the underlying loan to Glacier Bank. [MOD 50:8-16]. The sale of the hangar provided Retz with an additional $8,000 in net proceeds after payment of the underlying loan to Glacier Bank. [MOD 50:8-16]. From the combined net proceeds, Retz (1) paid Dye, by check dated February 11, 2004, $7,367.80 for attorneys fees, and (2) paid Whitefish Credit Union, by check dated February 11, 2004, $9,665.88 for six payments on his home mortgage. [MOD 56:12-20].

Retz did not list the sale of the helicopter or the hangar in response to Question 10[8] of the Statement of Financial Affairs ("SOFA"), nor did he list the resulting payment to Dye or

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[7]An order had been entered in the State Court Litigation prohibiting Retz from transferring any assets belonging to him or TCI. The order was the result of the October 16, 2003 hearing on the Receiver's motion to hold Retz in contempt for having sold stock held by TCI without the Receiver's approval and contrary to a prior order of the court.

[8]Question 10 of the SOFA instructs the debtor to "List all other property, other than property transferred in the ordinary course of the business or financial affairs of the debtor, transferred either absolutely or as security within **one year** immediately preceding the commencement of this case."

Whitefish Credit Union in response to Question 3a[9] of the SOFA. Retz did include the payment to Dye among the list of payments set forth in response to Question 9[10] of the SOFA.

At his first § 341a Meeting of Creditors, Retz disclosed in his testimony that he owned 50% of a helicopter with Chacon, which he had sold prepetition and that from the proceeds, he had paid Glacier Bank, Dye, and Whitefish Credit Union. [MOD 73:18-74:7]. In fact, Retz owned 100% of the helicopter at the time it was sold.

At the § 341a Meeting of Creditors, Retz testified that he had purchased the hangar approximately one year before filing bankruptcy. He transferred the hangar to Bloomquist days before he filed his bankruptcy petition, but the transfer was not listed on the SOFA.[11] [MOD 75:2-11].

D. The North Forty Resort and Related Disclosures

After graduating from college, Retz developed a business

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[9]Question 3a of the SOFA instructs the debtor to "List all payments on loans, installment purchases of goods or services, and other debts, aggregating more than $600 to any creditor, made within **90 days** immediately preceding the commencement of this case."

[10]Question 9 of the SOFA instructs the debtor to "List all payments made or property transferred by or on behalf of the debtor to any persons, including attorneys, for consultation concerning debt consolidation, relief under the bankruptcy law or preparation of a petition in bankruptcy within **one year** immediately preceding the commencement of this case."

[11]The trustee later filed a complaint against Bloomquist to set aside the sale as a fraudulent conveyance; that litigation settled for $2,500.

plan for a bed and breakfast resort ("North Forty Resort"). The North Forty Resort was owned by the North Forty Resort Corp. ("NFRC"). Retz's parents, Robert and JoEllen Retz, owned 82% of NFRC; Retz, Ryan, and a third brother, Eric Retz, each owned 6% of NFRC. [MOD 4:6-8; 4:15-17].

Retz was a director and vice president of NFRC from its inception in 1993. Retz never received a dividend from NFRC, and he never sold or received an offer to buy, any of his shares. [MOD 4:18-5:2]. Retz performed the bookkeeping, maintained the ledger, wrote checks, paid bills, and compiled financial statements and balance sheets for operation of the North Forty Resort. [MOD 4:8-10].

After the commencement of the State Court Litigation, and beginning on September 13, 2003, Retz made four separate charges at the North Forty Resort on his American Express card, each in the amount of $40,000. Retz then took the money credited to the North Forty Resort's account based on these charges without the knowledge or consent of other family members. [MOD 48:7-14]. Retz testified that the purpose of the transactions was to try to gather cash to make a settlement offer to Abbey. [MOD 52:7-9].

When Retz first met with Dye to discuss the possibility of filing bankruptcy, Retz's father, Robert, was present, and expressed his concern about the $160,000 Retz charged through the North Forty Resort. [MOD 52:2-3]. Dye expressed his concern that the transactions were in violation of the North Forty Resort's merchant agreement and advised Retz to pay the American Express charges. Retz no longer had enough money to do so.[12] As

[12]Retz was unable to explain where the missing amounts had been spent. With respect to the proceeds of at least one of the (continued...)

a result, Robert loaned $80,000 to Misty, who then gave it to Retz; Robert took a security interest secured by a mortgage on Retz's and Misty's property.[13] [MOD 52:3-7].

On July 6, 2004, the trustee requested by letter that Retz provide him with information regarding the NFRC. [MOD 81:22-82:1]. Retz did not respond to the trustee's request for information about NFRC until October 27, 2004, at which time he merely requested that the trustee be more specific about what he needed. [MOD 82:4, 82:13-14; 90:10-14]. In the interim, all of NFRC's assets had been sold to North Forty Resort, LLC, on or about September 17, 2004, without the trustee's consent or knowledge. Retz's mother, JoEllen, is the sole shareholder of

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[12](...continued)
North Forty Resort charges which appears to have been transferred into Retz's Glacier Bank account, Retz testified he may have written a $30,000 check to himself, and that he "might have cashed it or something." [MOD 49:3-15]. Retz also speculated that some of the American Express advances went into TCI for payroll and business expenses, and some were spent on Misty and his monthly expenses, which he characterized as high. [MOD 49:10-13].

[13]In his Schedule A, Retz listed an undivided half interest in Iron Horse Lot 186, which included a golf membership. In his Schedule D, Retz listed the $80,000 mortgage held by his father, Robert, which was secured by the Iron Horse Lot. Schedule D characterizes this debt to Robert as a joint obligation with Misty.

When asked by the trustee at his first § 341a Meeting of Creditors what the $80,000 had been used for, Retz testified:

> Boy, that would be hard to tell, there were so many things going on at that point in time. I was trying to keep my company alive and pay the employees and pay the bills, so it probably went to a number of different sources.

[Tr. of March 8, 2004 § 341a Meeting of Creditors, 10:21-11:1].

North Forty Resort, LLC.

As a result of the transfer, NFRC now holds as its only asset a promissory note in the amount of $850,000, payable in 30 years with interest at 6%. The trustee did not learn of the transfer until September 20, 2004, after it had taken place, and did not receive the sale documents until December 7, 2004.

Retz testified that he did not consider NFRC an insider because he owned a minority interest. However, he did concede that he exercised control over NFRC bank accounts and made withdrawals therefrom, which he transferred to his own personal bank accounts. [MOD 84:13-15]. The testimony of Dave Schultz, the accountant with respect to the NFRC transfer, is enlightening as to Retz's involvement in the transaction.

The transfer of the NFRC assets was motivated primarily by the imminent death of Retz's father, Robert, the majority shareholder of NFRC, and an effort to benefit from $1.5 million in tax loss carryovers which would be lost upon Robert's death. [MOD 84:22-85:3]. Retz brought in attorney Tornow and accountant Schultz to handle the transaction. [MOD 85:3-5]. Schultz testified he did not recall any discussion regarding the transfer at which Retz was not present. [MOD 85:14-16]. Schultz prepared a memorandum outlining the goals to be accomplished by the transfer, the last of which was to protect the assets from any of Retz's creditors who might survive bankruptcy. [MOD:13-17].

E. Retz's Schedules and Statement of Financial Affairs

Numerous concerns were raised regarding Retz's Schedules and SOFA filed on March 1, 2004. Retz was aware that the Schedules

and SOFA were incomplete when they were signed and filed, as was Dye. In fact, Retz contends he signed the Schedules and SOFA without having reviewed them. He testified he first looked at his schedules by the time of the second § 341a Meeting of Creditors held July 8, 2004. At the close of trial, nearly three years later, Retz still had not filed amended Schedules or an amended SOFA. Nevertheless, Retz asserts he should not be denied a discharge based on information missing from his schedules and SOFA because (1) he made full disclosure to Dye, as evidenced by a completed worksheet he provided to Dye as the Schedules and SOFA were being prepared, (2) he relied on Dye in not filing amendments to his Schedules and SOFA prior to trial, and (3) Retz had provided the trustee with sufficient documents, more than 28,000 pages, from which the trustee could piece together Retz's financial affairs.

With that background, we chronicle some of the deficiencies with Retz's Schedules and SOFA.

In response to item 2 on Schedule B, Retz disclosed a single bank account with a balance of $68.42. In fact, Retz had more than one bank account, and the account he did disclose had a balance of $17,372.26 on the petition date. [MOD 63:1-3]. Retz asserts he deducted from the balance, on advice from Dye, checks that he had written prepetition, but which had not cleared as of the petition date, including the $7,367.80 check to Dye, which cleared, postpetition, on February 17, 2004, and the $9,665.88 check to Whitefish Credit Union for the mortgage prepayments, which cleared, postpetition, on February 13, 2004. [MOD 63:7-10].

In response to item 7 on Schedule B, Retz disclosed that he owned jewelry with a market value of $200.00, and listed only an Omega watch and a wedding ring. [MOD 63:13-15]. Riley McGiboney ("McGiboney"), Retz's insurance agent, who had known Retz for approximately 30 years, testified that since March 13, 2002, and through at least April 10, 2007, the first day of trial in the adversary proceeding, Retz had maintained in force a "personal articles" insurance policy for certain items of jewelry, including a man's Tag Heuer watch, valued for coverage purposes at $1,027, and a man's Omega watch, valued for coverage purposes at $2,026. [Tr. of April 10, 2007 Trial, 239:1-16; 244:13-245:1]. On December 15, 2003, slightly less than two months before filing his bankruptcy petition, Retz made a claim under the policy for reimbursement of expenses for repairs to the Omega watch. That claim was paid. McGiboney testified that the claim would have been paid only after the repairs had been made. Retz testified at trial that the Omega watch had no value on the petition date. Nevertheless, on February 15, 2005, Retz was reimbursed under his insurance policy for a second time for repairs made to the Omega watch. [Tr. of April 10, 2007 Trial, 247:25-249:3].

In response to item 23 on Schedule B, Retz disclosed his interests in two Harley Davidson motorcycles, a 2003 Corvette, a 2004 Chevrolet truck, and an undivided one-half interest in a 1988 BMW. The trustee independently learned that Retz owned a 1984 Cadillac. [MOD 64:17-20]. The trustee's inquiry at the March 8, 2004 § 341a Meeting of Creditors regarding the location of the 1984 Cadillac led to Retz's disclosure of the sale of the

hangar to Bloomquist in the days immediately prior to the filing of the petition. [Tr. of March 8, 2004 § 341a Meeting of Creditors, 24:10-25:12; 79:17-83:17].

In response to Question 1 on his SOFA, Retz disclosed income from employment or the operation of a business for 2001 in the amount of $104,572 and for 2002 in the amount of $164,631. In response to Question 2 on his SOFA, Retz disclosed other income in the amount of $13,581 for 2001 and $4,585 for 2002. He made no disclosures of any income with respect to 2003 or the portion of 2004 that preceded the filing of his bankruptcy petition. [MOD 66:10-67:10].

Retz conceded at trial that he still had not made a complete response to the trustee with respect to Question 3a (payments to creditors), Question 3b (payments to insiders), and Question 10 (other transfers), but that he was working on them. Among the information that should have been included in response to Question 3a are the disclosures relating to the payments Retz made from the proceeds of the sale of the helicopter and the hangar. Among the information that should have been included in response to Question 3b are two transactions involving Retz's father, Robert: a check to Robert dated March 17, 2003, in the amount of $38,287.30; and a check to Robert dated September 29, 2003, in the amount of $12,181.00. The trustee testified at trial that to the extent these transfers might have been preferential, the statute of limitations had run on the trustee's right to bring those actions. [Tr. of April 10, 2007 Trial, 104:9-105:2]. Among the information that should have been included in response to Question 10 were the numerous

contributions Retz made to, and the numerous distributions Retz received from, TCI [MOD 69:5-11], as well as the $80,000 encumbrance, reflected on Schedule D, on real property owned by Retz and Misty [Tr. of June 4, 2007 Trial, 955:8-11].

II. JURISDICTION

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

III. ISSUES

Whether the bankruptcy court erred in denying Retz his chapter 7 discharge.

IV. STANDARDS OF REVIEW

> [T]he Ninth Circuit standard of review of a judgment on an objection to discharge is that: (1) the court's determinations of the historical facts are reviewed for clear error; (2) the selection of the applicable legal rules under § 727 is reviewed de novo; and (3) the application of the facts to those rules requiring the exercise of judgments about values animating the rules is reviewed de novo.

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

Whether a debtor has satisfactorily explained a loss of assets is a question of fact for the bankruptcy court, overturned only for clear error. In re Hawley, 51 F.3d 246, 248 (11th Cir. 1995)(per curiam); Farouki v. Emirates Bank Int'l, Ltd., 14 F.3d 244, 251 (4th Cir. 1994). "This standard is adhered to because the trial judge is best able to assess the credibility and

evidentiary content of the testimony of the witnesses before him." In re Hawley, 51 F.3d at 248 (citing In re Chalik, 748 F.2d 616, 619 (11th Cir. 1984)).

"We give findings of fact based on credibility particular deference. Anderson v. City of Bessemer City, 470 U.S. 564, 573-75 (1985). See also Rule 8013 (on appeal, 'due regard shall be given to the opportunity of the bankruptcy court to judge the credibility of the witnesses.')." Hansen v. Moore (In re Hansen), 368 B.R. 868, 874-75 (9th Cir. BAP 2007).

V. DISCUSSION

A. General Considerations

When unable to meet their financial obligations, many debtors seek a fresh financial start, which is available to them by virtue of the discharge provisions of the Bankruptcy Code. In this appeal, we are asked to determine whether the bankruptcy court erred when it denied Retz a discharge. Beyond our review of the bankruptcy court's findings of fact and conclusions of law, we are governed by certain general principles in our review of the denial of a discharge.

We are mindful that

> A denial of a discharge is an act of mammoth proportions, and must not be taken lightly. In light of this gravity . . . Section 727 must be construed liberally in favor of the debtor and against the objector.

In re Goldstein, 66 B.R. 909, 917 (Bankr. W.D. Pa. 1986). See First Beverly Bank v. Adeeb (In re Adeeb), 787 F.2d 1339, 1342 (9th Cir. 1986); Devers v. Bank of Sheridan (In re Devers), 759 F.2d 751, 754 (9th Cir. 1985). However, the bankruptcy discharge

and its opportunity for a financial fresh start are available only to the "honest but unfortunate debtor." See Cohen v. De La Cruz, 523 U.S. 213, 217 (1998), citing Grogan v. Garner, 498 U.S. 279, 286-87 (1990). Further, the party objecting to the debtor's discharge has the burden of proving, by a preponderance of the evidence, that the debtor's actions or conduct fall within one of the exceptions to discharge set forth in § 727. Grogan v. Garner, 498 U.S. at 289.

Significantly, the bankruptcy court explicitly found as a threshold matter that Retz was not a credible witness based on the bankruptcy court's observance of Retz's demeanor while testifying under oath and cross examination, based on the bankruptcy court's review of the transcripts from the State Court Litigation, and based on evidence supporting its findings as stated in the Memorandum of Decision. [MOD 100:20-101:3].

Rule 8013 provides in relevant part:

> Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the bankruptcy court to judge the credibility of the witnesses.

When findings are based, as in this case, on determinations regarding the credibility of witnesses, we give even greater deference to the bankruptcy court's findings, because the bankruptcy court, as the trier of fact, had the opportunity to note "variations in demeanor and tone of voice that bear so heavily on the listener's understanding of and belief in what is said." See Anderson, 470 U.S. at 575.

With these guidelines in mind, we turn to our review of the specific causes of action at issue in the appeal.

B. Section 727(a)(4)(A) - False Oath

Section 521 requires all debtors to "file a list of creditors, and unless the court orders otherwise, a schedule of assets and liabilities, a schedule of current income and current expenses, and a statement of the debtor's financial affairs." Rule 1008 requires that "[a]ll petitions, lists, schedules, statements and amendments thereto shall be verified or contain an unsworn declaration as provided in 28 U.S.C. § 1746."[14] Therefore, if there is a false statement or omission in a debtor's schedules or statement of financial affairs, it qualifies as a false oath for purposes of § 727(a)(4)(A).

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[14] 28 U.S.C. § 1746 provides:

> Wherever, under any law of the United States or under any rule, regulation, order, or requirement made pursuant to law, any matter is required or permitted to be supported, evidenced, established, or proved by the sworn declaration, verification, certificate, statement, oath, or affidavit, in writing of the person making the same (other than a deposition, or an oath of office, or an oath required to be taken before a specified official other than a notary public), such matter may, with like force and effect, be supported, evidenced, established, or proved by the unsworn declaration, certificate, verification, or statement, in writing of such person which is subscribed by him, as true under penalty of perjury, and dated, in substantially the following form:
> . . .
> (2) If executed within the United States, its territories, possessions, or commonwealths: "I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct. Executed on (date).
>
> (Signature)".

Kavanagh v. Leija (In re Leija), 270 B.R. 497, 502-03 (Bankr. E.D. Cal. 2001).

To prevail on a § 727(a)(4)(A) claim based on a false oath, the plaintiff must show: "(1) the debtor made a false oath in connection with the case; (2) the oath related to a material fact; (3) the oath was made knowingly; and (4) the oath was made fraudulently." Roberts v. Erhard (In re Roberts), 331 B.R. 876, 882 (9th Cir. BAP 2005), aff'd, 241 Fed. Appx. 420 (9th Cir.); see also Fogal Legware of Switz., Inc. v. Wills (In re Wills), 243 B.R. 58, 62 (9th Cir. BAP 1999).

1. False Oath

There is no dispute in this case that at the time Retz signed his Schedules and SOFA declaring, under penalty of perjury, that they were true and correct, he knew they were not true and correct. In fact, Retz did not even read the Schedules and SOFA to determine the extent of their inaccuracy until after they were filed.

We point out, as did the bankruptcy court, that Retz's declaration that he had read the Schedules and SOFA, when in fact he had not, is sufficient in itself to constitute a false oath, knowingly made, to support a denial of his discharge under § 727(a)(4)(A) provided that the elements of materiality and fraudulent intent can be established. Likewise, his declaration that the Schedules and SOFA were true and correct at the time he signed them is sufficient to deny discharge for a false oath under § 727(a)(4)(A). In fact, in an appropriate case, the signing of schedules and a statement of financial affairs in

blank can establish fraudulent intent. See In re Leija, 270 B.R. at 503 (holding that the execution of schedules and a statement of financial affairs before they were completed was intended to perpetrate a fraud on the court - to give the appearance that the documents were "truthful and accurate when in fact they were not").

Aside from the false oaths contained in the declarations themselves, the record is replete with evidence of omissions from the Schedules and SOFA. Retz failed to list accurately his bank accounts, the amounts in his bank accounts, the vehicles he owned, jewelry in his possession, and innumerable transfers and payments. Retz admitted at trial, more than three years after the Schedules and SOFA were first filed, that he still had not provided the trustee with responses to Questions 3a, 3b, and 10 of the SOFA.

2. Materiality

> Materiality is broadly defined: "A false statement is material if it bears a relationship to the debtor's business transactions or estate, or concerns the discovery of assets, business dealings, or the existence and disposition of the debtor's property."

Roberts, 331 B.R. at 883 (citing Wills, 243 B.R. at 62).

The testimony of the trustee at trial provides ample support for a finding that Retz's false oaths were numerous and material.

3. Knowingly Made

For purposes of § 727(a)(4)(A), a debtor "acts knowingly if he or she acts deliberately and consciously." Roberts, 331 B.R. at 883. The errors and omissions in the Schedules and SOFA are

not the result of a mistake. Retz made the deliberate and conscious choice to sign the declarations, attesting that he had read the Schedules and SOFA and that they were true and correct, and filed the Schedules and SOFA despite their deficiencies.

4. Evidence of Intent

"A false oath is complete when made . . . The fact of prompt correction of an inaccuracy or omission may be evidence probative of lack of fraudulent intent." In re Searles, 317 B.R. at 377 (citations omitted).

Retz asserts that "[t]he critical failure of the bankruptcy court was in finding facts and reaching conclusions without consideration of the principal relevant inquiry: the intention of the debtor." [Appellant's Opening Brief, 16:17-19.] However, the bankruptcy court clearly found that Retz's fraudulent intent "was shown by a pattern of falsity, his reckless indifference to and disregard of the truth, and demonstrated by his course of conduct." [MOD 119:18-20].

The bankruptcy court made no error in its determination of Retz's intent.

> [T]he existence of more than one falsehood, together with a debtor's failure to take advantage of the opportunity to clear up all inconsistencies and omissions, such as when filing amended schedules, can be found to constitute reckless indifference to the truth satisfying the requisite finding of intent to deceive.

Martin Marietta Materials, Inc. v. Lee (In re Lee), 309 B.R. 468, 477 (Bankr. W.D. Tex. 2004)(emphasis added). We recently clarified that for purposes of § 727(a)4)(A), "reckless indifference to accuracy may be probative of intent even though

reckless indifference alone does not suffice to establish requisite intent." Khalil v. Developers Surety & Indemn. Co. (In re Khalil), 379 B.R. 163, 166 (9th Cir. BAP 2007).

Our review of the record persuades us that the bankruptcy court did not clearly err in finding that Retz made false oaths in his schedules and SOFA with the requisite fraudulent intent to warrant a denial of his discharge under § 727(a)(4)(A).

5. Reliance on Counsel

> [I]f items were omitted by mistake or upon honest advice of counsel, to whom the debtor had disclosed all the relevant facts, the declaration will not be deemed willfully false, and the discharge should not be denied because of it.

6 COLLIER ON BANKRUPTCY ¶ 727.04[2], at p. 727-43 (15th rev. ed. 2007).

Retz asserts on appeal that the bankruptcy court erred in concluding that Retz could not justifiably rely on the advice of counsel after full disclosure. We reject this assertion for two reasons.

First, Retz never made full disclosure to Dye. Dye gave Retz a worksheet to complete as an aid in preparing the Schedules and SOFA. There is no question that the worksheet filled out by Retz was not used by Dye and in fact had inadvertently been returned to Retz. Nevertheless, the bankruptcy court found that, Retz had "admitted that if everything on his 'lost' worksheet had been on the Schedules, they still would not have been complete." [MOD 94:8-9]. The record supports this finding.

Second, try as he might, Retz cannot hide behind the advice of his counsel in these circumstances. "Generally, a debtor who

acts in reliance on the advice of his attorney lacks the intent required to deny him a discharge. . . . However, the debtor's reliance must be in good faith." Adeeb, 787 F.2d at 1343.

The bankruptcy court expressly found that Retz did not rely on Dye's advice in good faith.

> While the foregoing 'generally' rebuts an inference of fraud, it cannot in the instant case because of the magnitude and number of errors and omissions, which the Trustee Samson testified interfered with his ability to administer the case. Adeeb noted that a debtor's reliance on attorney advice must be in good faith. [Retz's] admitted perjury in his declarations . . . and false § 341(a) testimony under oath regarding his ownership of the helicopter, persuade the Court that [Retz] did not rely on his attorney's advice in good faith.

[MOD 116:15-21].

The finding of the bankruptcy court in this regard was not clearly erroneous.

> The very purpose of certain sections of the law, like 11 U.S.C. § 727(a)(4)(A), is to make certain that those who seek the shelter of the bankruptcy code do not play fast and loose with their assets or with the reality of their affairs. The statutes are designed to insure that complete, truthful, and reliable information is put forward at the outset of the proceedings, so that decisions can be made by the parties in interest based on fact rather than fiction.

Boroff v. Tully, 818 F.2d 106, 110 (1st Cir. 1987) (emphasis added).

Notwithstanding Retz's awareness from the beginning of the case that information was missing that impeded the trustee's ability to function, Retz has done little more than provide lip service to his "intent" to complete his Schedules and SOFA accurately. What Retz should have done was amend his Schedules and SOFA promptly.

> Where the offending oath is contained in the schedules or required statements, the debtor's continuing duty to assure accuracy of such schedules and statements means that the proper method of correction is a formal amendment to the schedules.

Searles, 317 B.R at 377.

In our review of the record, it appears that Retz has unabashedly taken the view that his Schedules and SOFA were not inaccurate, but were merely incomplete and needed supplementing. At the time he signed the Schedules and SOFA, he apparently had convinced himself it was sufficient that his attorney knew the Schedules and SOFA were incomplete, that the trustee was being advised that the Schedules and SOFA were incomplete, and that he needed only to verbalize, not act upon, his intent to complete the Schedules and SOFA. He maintained that stance through trial, and continues to do so on appeal, despite the many voices that have tried to tell him otherwise.

The bankruptcy court did not err in denying Retz a discharge pursuant to § 727(a)(4)(A).

C. Section 727(a)(2)(A)

Section 727(a)(2) provides:

> The court shall grant the debtor a discharge, unless–
>
> (2) the debtor, with intent to hinder, delay, or defraud a creditor or an officer of the estate charged with custody of property under this title, has transferred, removed, destroyed, mutilated, or concealed, or has permitted to be transferred, removed, destroyed, mutilated, or concealed–
>
> (A) property of the debtor, within one year before the date of the filing of the petition; or
>
> (B) property of the estate, after the date of the filing of the petition[.]

The bankruptcy court must find that a debtor harbors actual intent to hinder, delay or defraud a creditor or officer of the estate before the debtor's discharge can be denied under § 727(a)(2). Whether the requisite intent exists is a finding of fact which we review for clear error.

We may infer the intent from the circumstances surrounding the transaction. Adeeb, 787 F.2d at 1342-43. The Ninth Circuit has identified several factors, or "badges of fraud," which, if present in sufficient combination, strongly suggest that a transaction's purpose is to defraud creditors. These factors include:

> 1) a close relationship between the transferor and the transferee; 2) that the transfer was in anticipation of a pending suit; 3) that the transferor Debtor was insolvent or in poor financial condition at the time; 4) that all or substantially all of the Debtor's property was transferred; 5) that the transfer so completely depleted the Debtor's assets that the creditor has been hindered or delayed in recovering any part of the judgment; and 6) that the Debtor received inadequate consideration for the transfer.

Emmett Valley Assoc. v. Woodfield (In re Woodfield), 978 F.2d 516, 518 (9th Cir. 1992).

1. The transfer of 650 Woodside - § 727(a)(2)(A)

The bankruptcy court found that Retz's conduct with respect to 650 Woodside supported denial of Retz's discharge pursuant to § 727(a)(2)(A).

The bankruptcy court found that Retz made a disposition of property by transfer of 650 Woodside with intent to hinder or delay Abbey. In doing so, it determined that there were sufficient "badges" of fraud present to establish Retz's

fraudulent intent, including: (1) a close relationship to the transferee, his brother, Ryan; (2) the transfer was made during a pending suit; (3) Retz was in poor financial condition at the time of the transfer; and (4) Retz received inadequate consideration by selling to Ryan for $60,000 less than the then-appraised value.

In addition, the bankruptcy court found that the transfer to Ryan took place within one year before the bankruptcy petition was filed. The transfer occurred when the deed was recorded in November 2003, not when Ryan was first promised the right to purchase 650 Woodside.

On appeal, Retz asserts that the bankruptcy court erred in finding a transfer of the debtor's assets when no transfer occurred. Retz is not specific whether he is assigning this error to the transfer involving 650 Woodside. A transfer clearly took place. For Retz to contend otherwise would be specious. We find no error in the bankruptcy court's finding that Retz transferred 650 Woodside to Ryan.

Retz further asserts that the bankruptcy court erred in finding that a loss resulted from a corporate asset sale. As noted by the bankruptcy court, no loss to the creditor is required under the statute. Nevertheless, it is clear that an economic loss did occur, represented by the "good deal" Retz gave Ryan on the purchase price of 650 Woodside in comparison to its appraised value. If 650 Woodside belonged to TCLLC,[15] Abbey and

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[15]This is a reasonable inference based on the bankruptcy court's finding that Retz's testimony regarding Abbey's consent

(continued...)

TCLLC were injured by at least $60,000 in lost value as a result of the transfer. If the asset belonged to Retz, the injury was to his bankruptcy estate.

Finally, Retz asserts that the bankruptcy court failed to apply established legal principles to determine the debtor's intent. We disagree that the bankruptcy court applied the incorrect legal standard in arriving at its decision to deny Retz's discharge pursuant to § 727(a)(2)(A). The bankruptcy court found actual intent to hinder, delay or defraud by circumstantial evidence as permitted by controlling case authority. Further, in addition to the "badges of fraud" identified by the bankruptcy court, Retz's lack of candor in his testimony in connection with 650 Woodside in the State Court Litigation supports an inference of fraudulent intent.

We observe that "[although] the three disjunctive intent elements of § 727(a)(2)(A) are distinct, there is inevitably some overlap: fraud is the most severe, but hindrance or delay is sufficient." Beauchamp v. Hoose (In re Beauchamp), 236 B.R. 727, 731-32 (9th Cir. BAP 1999), aff'd, 5 Fed. Appx. 743 (9th Cir. 2001). While the bankruptcy court found that Retz acted with fraudulent intent, we can affirm on any basis supported by the record. Retz's repeated promises to correct the Schedules and SOFA, followed by inaction, reflects an intent to both hinder and delay, and supports a denial of Retz's discharge under § 727(a)(2)(A).

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[15](...continued)
to a transfer of 650 Woodside was not credible [MOD 124:17-20].

2. North Forty Resort Transfer - § 727(a)(2)(B)

As acknowledged by the bankruptcy court, the sale of the NFRC assets included a legitimate purpose: the preservation of Robert's tax loss benefits. That does not change the fact that the trustee, on behalf of Retz's bankruptcy estate, held a 6% interest in NFRC, and that the sale constituted an effective disposition of property of the estate.

The bankruptcy court found that Retz had the requisite subjective intent to hinder, delay or defraud his creditors, based upon his participation in and influence over planning of the sale, while at the same time evading the trustee's inquiries regarding his interest in NFRC. Further, it is impossible to ignore that one of the stated goals for the transaction was to "minimize exposure to possible creditors of [Retz] that survive bankruptcy." The bankruptcy court also found sufficient "badges of fraud" were present in the sale of the assets of NFRC, including (1) Retz's close relationship to the transferee, an entity owed and controlled by JoEllen, his mother, (2) that the transfer was made while Retz's bankruptcy case was pending, and (3) that Retz was insolvent at the time of the transfer.

On appeal, Retz asserts that the bankruptcy court erred in finding a transfer of the debtor's assets when no transfer occurred, and that the bankruptcy court erred in finding that a loss resulted from a corporate asset sale. While it is true that NFRC remained in existence and Retz's bankruptcy estate retained its 6% interest in NFRC stock, NFRC's assets were removed from NFRC and replaced by an unsecured obligation on which no payment was due for a period of thirty years. The sale transferred

NFRC's assets to an entity solely owned by Retz's mother, while diminishing and, in effect, minimizing the value of the estate's interest in NFRC stock.

We disagree with Retz's assertion on appeal that the bankruptcy court applied an incorrect legal standard in arriving at its decision to deny Retz's discharge pursuant to § 727(a)(2)(B) based upon the postpetition sale of NFRC assets.

D. Section 727(a)(5) - Failure to Explain

Section 727(a)(5) provides:

> The court shall grant the debtor a discharge, unless–
>
> (5) 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[.]

(emphasis added).

The issue as to whether Retz satisfactorily explained any loss of assets or deficiency of assets to meet his liabilities involves a factual and credibility question. In re Hawley, 51 F.3d at 248 (citing In re Chalik, 748 F.2d at 619).

The bankruptcy court found that Retz took unauthorized withdrawals of money and property from TCLLC, as well as from its lending facilities, and received extensions on his own credit, and then went on a spending spree for himself and his supposedly inactive business, TCI. He purchased computers, office furniture, servers, luxury cars, a Harley Davidson motorcycle, jewelry, a helicopter and hangar, and took gambling trips where

he lost thousands of dollars which may have belonged to TCLLC.[16] The bankruptcy court determined that Retz's explanations regarding the TCLLC transactions and his own credit use were not credible.

The bankruptcy court's determinations are well-supported by the record. Retz asserts that the trustee had sufficient information based on 28,000 pages of documents Retz had produced from which the trustee could piece together Retz's financial affairs. However, Retz, having had access to the same 28,000 pages he produced to the trustee, himself was unclear in many circumstances as to what happened with significant sums of money.[17] The mere fact that at the time the trial concluded and the record was closed, nearly three and one-half years after Retz filed his bankruptcy petition, the Schedules and SOFA still were not amended and the information required by questions 3a, 3b and 10 of the SOFA still had not been provided to the trustee[18]

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[16]At the time of trial, Retz testified that he had in storage at the North Forty Resort the computers and other office equipment he had purchased for TCI just before he filed his bankruptcy petition. These items were neither listed in the Schedules (on advice of counsel), nor surrendered to Abbey when Abbey purchased TCI and its assets from Retz's bankruptcy estate.

[17]Retz is not excused from providing the trustee with documents or records on the basis they were not in his possession because he previously had provided those documents or records to the Receiver or to Abbey in other proceedings. Retz had the right under Rule 2004(c) to compel the production of documents, but he did not.

[18]Retz filed amended Schedules and SOFA on August 7, 2007, after the record in the adversary proceeding had been closed, and did not attempt to reopen the record to include them. The

(continued...)

speaks volumes regarding Retz's lack of diligence and good faith efforts to comply with requirements under § 521.

Retz admitted that the Schedules and SOFA were not complete. Because intent is not a factor in denial of a discharge pursuant to § 727(a)(5), that is enough, particularly where the bankruptcy court deemed "significant" the trustee's testimony that Retz's lack of disclosure in connection with his financial transactions hindered administration of the estate, and that the trustee had not, as of the time of trial, received complete and accurate information. In the end, there simply is no basis in the voluminous but nevertheless woefully incomplete record before the bankruptcy court from which anyone could explain satisfactorily Retz's deficiency of assets to meet his liabilities. Retz certainly has not done so.

VI. CONCLUSION

On the factual record before us, a trier of fact reasonably could infer that Retz acted with fraudulent intent for purposes of denial of his discharge pursuant to §§ 727(a)(2)(A), 727(a)(2)(B), and 727(a)(4)(A). Retz failed satisfactorily to explain the deficiency of his assets to meet his liabilities, which supports denial of his discharge under § 727(a)(5). We find no error in the bankruptcy court's determination that Retz is not entitled to a discharge in bankruptcy. We AFFIRM.

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[18](...continued)
bankruptcy court did not consider the amended Schedules and SOFA in its decision.