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OF THE NINTH CIRCUIT

NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT

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In re:)	BAP No.	CC-08-1264-MoMkH
)		
JOSEPH THOMPSON, JR.,)	Bk. No.	LA 07-13315-EC
)		
)	Adv. No.	LA 07-01567-EC
Debtor.)		
_____)		
JAMES WARD and GLORIA WARD,)		
)		
Appellants,)		
)		
v.)	MEMORANDUM¹	
)		
JOSEPH THOMPSON, JR.,)		
)		
Appellee.)		
_____)		

Argued and Submitted on March 18, 2009
at Pasadena, California

Filed - April 20, 2009

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

Hon. Ellen Carroll, Bankruptcy Judge, Presiding

Before: MONTALI, MARKELL and HOLLOWELL, 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 Appellant-Creditors, James Ward and Gloria Ward ("Wards"),
2 appeal a judgment in favor of Appellee-Debtor, Joseph Thompson,
3 Jr. ("Thompson") on their objection to discharge under section
4 727.² Because the bankruptcy court did not commit clear error on
5 this record, we AFFIRM.

6 I. FACTS

7 Prepetition Facts

8 Thompson and his wife (collectively "the Thompsens")
9 purchased a residence in Los Angeles on August 22, 2000, with a
10 loan from World Savings Bank ("World Savings") for \$144,000.00. A
11 grant deed was recorded on that same date. Thereafter, the
12 Thompsens refinanced the World Savings loan at least once, and
13 also took out a \$60,000.00 line of credit with World Savings
14 against the residence.

15 On March 2, 2006, in connection with an October 31, 2005,
16 arbitration award in favor of the Wards, the state court entered a
17 judgment in the Wards' favor for \$40,244.24, together with
18 interest at the legal rate of 10% per annum calculated from
19 October 31, 2005, and costs of \$355.00. The Wards recorded the
20 judgment with the Los Angeles County Recorder's Office on June 14,
21 2006.

22 The Wards conducted two judgment debtor examinations of
23 Thompson on February 15, 2007, and April 25, 2007. At the
24 February 15 examination, Thompson testified that the amount of

25
26 ² Unless otherwise indicated, all chapter, section and rule
27 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1330, and
28 to the Federal Rules of Bankruptcy Procedure, Rules 1001-9037, as
enacted and promulgated after the effective date of The Bankruptcy
Abuse Prevention and Consumer Protection Act of 2005, Pub. L. 109-
8, 119 Stat. 23.

1 debt secured by the residence was approximately \$260,000.00.

2 On or around March 7, 2007, the Thompsons refinanced again,
3 this time with Countrywide Home Loans, Inc. ("Countrywide"),
4 increasing the secured debt to \$410,000.00. The Countrywide
5 refinance effectively reduced the amount of the Thompsons' equity
6 in the residence from \$240,000.00 to \$90,000.00. After
7 Countrywide paid various judgment liens against the residence,
8 approximately \$105,000.00 to \$110,000.00 in cash proceeds went to
9 the Thompsons, \$52,500.00 to \$55,000.00 of which went to Thompson
10 as joint tenant. The Wards were not paid out of the proceeds
11 because apparently the recording of their judgment was defective
12 under California law. Countrywide recorded a deed of trust in
13 connection with the refinance on March 15, 2007.

14 At the April 25 debtor's examination, held 48 days after the
15 Countrywide refinance, Thompson testified that approximately in
16 2004 he took out a line of credit, or what Wards' counsel referred
17 to as the "second mortgage," with World Savings.

18 **Postpetition Facts**

19 Also on April 25, 2007, Thompson filed a voluntary petition
20 for relief under chapter 7. On that date, the value of the
21 residence was \$500,000.00 as noted in Thompson's Schedule A. In
22 his Schedule D, Thompson listed Countrywide with a secured claim
23 of \$410,000.00 and a lien incurred date of 2004, although the
24 actual date was 2007.

25 On June 20, 2007, Thompson filed Amended Schedules A and D.
26 The Amended Schedule D still reflected the same lien amount and
27 incorrect date for Countrywide, and also showed an additional
28 secured creditor, Shirley Redmon ("Redmon"), with a total claim of

1 \$150,000.00 incurred in 2006, with \$60,000.00 being unsecured and
2 \$90,000.00 secured. Redmon is Thompson's sister who lent him
3 money over the years to assist him financially in his business.

4 The Wards filed a complaint objecting to Thompson's discharge
5 on July 24, 2007, alleging causes of action under sections
6 727(a)(2)(A), (a)(3), (a)(4)³, and (a)(5).⁴ The initial Joint Pre-
7 trial Order was filed on March 7, 2008, with a final Joint Pre-
8 trial Order ("PTO") entered on September 29, 2008. In the PTO's
9 "Issues of Law" portion, the only matters remaining to be
10 litigated were the Wards' claims under sections 727(a)(2)(A) and
11 727(a)(5). However, the "Issues of Fact" portion appears to

12
13 ³ Although the Wards' Third Claim for Relief is titled as
14 "11 U.S.C. § 727(a)(4)," the statutory language quoted within
clearly refers only to subparagraph (a)(4)(B):

15 "Thompson knowingly and fraudulently presented or used a
16 false claim in connection with the pending Chapter 7
case."

17 ⁴ Section 727(a), in relevant part, provides: The court
18 shall grant the debtor a discharge, unless-

19 (2) the debtor, with intent to hinder, delay, or defraud a
creditor or officer of the estate . . . has . . . concealed

20 . . . (A) property of the debtor, within one year before the
21 date of the filing of the petition;

22 (3) the debtor has concealed, destroyed, mutilated,
23 falsified, or failed to keep or preserve any recorded
information, including books, documents, records, and papers,
24 from which the debtor's financial condition or business
transactions might be ascertained . . . ;

25 (4) the debtor knowingly and fraudulently, in or in
connection with the case-

26 . . . (B) presented or used a false claim;

27 (5) the debtor has failed to explain satisfactorily, before
28 determination of denial of discharge . . . any loss of
assets. . . .

1 include a claim under section 727(a) (4) (B). The PTO makes no
2 mention of, or implied reference to, a claim under section
3 727(a) (3).

4 Despite the PTO, in their trial brief submitted on September
5 19, 2008, the Wards once again asserted objection to discharge
6 claims under sections 727(a) (2) (A), (a) (3),⁵ (a) (4) (B),⁶ and
7 (a) (5). To support their claim under section 727(a) (2) (A), the
8 Wards argued that Thompson, with the intent to hinder, delay, or
9 defraud the chapter 7 trustee or his creditors, intentionally
10 misrepresented the Countrywide refinance date as 2004 instead of
11 the actual date of 2007, thereby effectively concealing the recent
12 \$150,000.00⁷ in proceeds and keeping such funds out of reach of the
13 trustee or Thompson's creditors. In other words, the Wards
14 alleged that had Thompson correctly stated the refinance date as
15 2007, the trustee would have been placed on notice of the recent
16 refinance and proceeds and had the opportunity to either recover
17 them for the benefit of creditors or add them to Thompson's estate
18 for distribution to creditors. Instead, Thompson's misstatement,

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21 ⁵ Although a claim under section 727(a) (3) reappeared in
22 their trial brief, it was not argued in the brief, not litigated,
and not determined at trial. In any event, this claim is not at
issue on appeal.

23 ⁶ Their trial brief expressly says section 727(a) (4) (B) and
24 quotes that section's language.

25 ⁷ The Wards have asserted Thompson's refinance proceeds in
26 several different amounts. In pretrial pleadings they alleged
that Thompson had \$150,000.00 or \$90,000.00. On appeal, they
27 assert the amounts of \$150,000.00 or \$110,000.00 or \$90,000.00.
Thompson testified at trial that he and his wife received
28 \$105,000.00 in refinance proceeds, with his share being
\$52,500.00. Therefore, we are not clear as to the amount the
Wards assert was unsatisfactorily explained.

1 they contended, led the trustee to erroneously conclude Thompson's
2 was a "no asset" case. As to the section 727(a)(4)(B) claim, the
3 Wards asserted that Redmon was not a secured creditor, she had no
4 such lien recorded against Thompson's residence for \$90,000.00,
5 and therefore Thompson made a false claim by listing her as such
6 on his Amended Schedule D. Finally, the Wards argued that
7 Thompson should be denied a discharge under section 727(a)(5)
8 because he failed to satisfactorily explain the disposition of the
9 \$90,000.00⁸ surplus that existed after the refinance but prior to
10 his chapter 7 filing, a time frame of 48 days.

11 A trial was held on September 29, 2008. Thompson appeared
12 pro se and was the only testifying witness. Apparently, the
13 chapter 7 trustee was not asked to and did not appear. Regarding
14 Countrywide's lien date, Thompson admitted that the refinance for
15 \$410,000.00 occurred on March 7, 2007, and asserted that listing
16 the date as 2004 in his Schedule D and Amended Schedule D was a
17 typographical error. As to Redmon's \$150,000.00 claim, Thompson
18 testified that at one point he gave her a "written claim to file"
19 for the \$90,000.00 portion, which appeared to be a deed of trust
20 given in exchange for monies she had lent him over a period of
21 eight years; there was no "written note." Finally, Thompson
22 testified that he spent his \$52,500.00 share of the Countrywide
23 refinance proceeds on three specific individuals who performed
24 work on the residence, and on the mortgage, and the remainder went
25 to pay other bills since he was unemployed for a period of time.

26 At the end of trial, the bankruptcy court issued an oral
27

28 ⁸ See footnote 7.

1 ruling finding that the Wards failed to meet their burden of proof
2 on all claims. It entered a judgment in favor of Thompson on
3 October 23, 2008. This timely appeal followed.^{9 10}

4 **II. ISSUES**

- 5 1. Did the bankruptcy court err in determining that Thompson
6 lacked the requisite intent to hinder, delay, or defraud the
7 trustee or his creditors under section 727(a)(2)(A)?
- 8 2. Did the bankruptcy court err in determining that Thompson
9 satisfactorily explained the disposition of the Countrywide
10 refinance proceeds under section 727(a)(5)?
- 11 3. Did the bankruptcy court err in determining that Thompson
12 did not knowingly and fraudulently present a false claim in
13 connection with his bankruptcy case under section 727(a)(4)(B)?

14 **III. JURISDICTION**

15 The bankruptcy court had jurisdiction under 28 U.S.C. § 1334
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17

18 ⁹ The Wards filed a premature Notice of Appeal on October 9,
19 2008, after the oral ruling on September 29, 2008. A final
20 judgment was entered on October 23, 2008, and the Wards filed a
21 timely Amended Notice of Appeal on October 28, 2008. Filing the
22 Amended Notice of Appeal was not necessary because the premature
23 Notice of Appeal was adequate under Rule 8002(a).

24 ¹⁰ On March 17, 2009, the day before oral argument, counsel
25 for the Wards submitted a letter to this Panel advising us of a
26 previously undiscovered letter from Thompson to the chapter 7
27 trustee, which stated that the Countywide refinance date was
28 actually 2007, not 2004, and the date of 2004 on his Schedule D
was a typo (the "Thompson Letter"). Counsel did not learn of the
Thompson Letter until after filing the Wards' opening brief, and
felt an ethical obligation to alert the Panel of this newly
discovered evidence. However, at oral argument, he requested that
we not consider it.

We commend counsel for his disclosure. Leaving aside whether
it would be proper to consider the Thompson Letter the day before
oral argument, we conclude that it has no effect on our decision.
Therefore, whether or not we consider it is a non-issue.

1 and 28 U.S.C. § 157(b) (2) (J). We have jurisdiction under 28
2 U.S.C. § 158.

3 IV. STANDARD OF REVIEW

4 We review the bankruptcy court's findings of fact for clear
5 error and its conclusions of law de novo. Hansen v. Moore (In re
6 Hansen), 368 B.R. 868, 874-75 (9th Cir. BAP 2007). A factual
7 finding is clearly erroneous if the appellate court, after
8 reviewing the record, has a definite conviction that a mistake has
9 been made. Anderson v. Bessemer City, 470 U.S. 564, 573-75
10 (1985). We give findings of fact based on credibility particular
11 deference. See Rule 8013 (on appeal, "due regard shall be given
12 to the opportunity of the bankruptcy court to judge the
13 credibility of the witnesses"). If two views of the evidence are
14 possible, the trial judge's choice between them cannot be clearly
15 erroneous. Anderson, 470 U.S. at 574.

16 V. DISCUSSION

17 A claim for denial of a discharge under section 727 is
18 construed liberally in favor of the discharge and strictly against
19 a person objecting to the discharge. First Beverly Bank v. Adeeb
20 (In re Adeeb), 787 F.2d 1339, 1342 (9th Cir. 1986). A creditor
21 who asks the court to deny a debtor a discharge bears the burden
22 of proving each of the elements of the applicable denial-of-
23 discharge provision. Watman v. Groman (In re Watman), 458 F.3d
24 26, 32 (1st Cir. 2006); Cadle Co. v. Pratt (In re Pratt), 411 F.3d
25 561, 565 (5th Cir. 2005); Rule 4005.

26 **A. The Bankruptcy Court Did Not Clearly Err When It Found That** 27 **Thompson Lacked The Requisite Intent Under Section** 28 **727(a) (2) (A) .**

The Wards argue that the bankruptcy court applied an

1 incorrect legal standard of materiality when it determined
2 Thompson's misstatement of the refinance date was not evidence of
3 an intent to "hinder, delay, or defraud either a creditor or an
4 officer of the estate" because had the trustee ordered a
5 preliminary title report he would have discovered that the
6 refinance occurred in 2007, not 2004. As a result, this incorrect
7 standard caused the bankruptcy court to erroneously conclude the
8 Wards did not meet their burden of proof with regard to Thompson's
9 actual intent.

10 The court must deny a discharge if "the debtor, with intent
11 to hinder, delay, or defraud a creditor . . . has . . . concealed
12 . . . property of the debtor, within one year before the date of
13 the filing of the petition" 11 U.S.C. § 727(a)(2)(A).
14 There is no dispute that the Thompsons refinanced with Countrywide
15 within one year before the date of petition, and that at least a
16 portion of the proceeds belonged to Thompson. Thus, the question
17 is whether Thompson concealed the proceeds when he listed the
18 Countrywide refinance date as 2004 instead of 2007 in his Schedule
19 D and Amended Schedule D, and if so, that he did so with the
20 intent to hinder, delay, or defraud the chapter 7 trustee or
21 Thompson's creditors.

22 We fail to see how misstating a date, or even concealing the
23 proper date as the Wards suggest, equates to a "concealment" of
24 property under section 727(a)(2)(A). Classic examples of
25 concealment include: concealing a beneficial interest in real
26 property equity (Hughes v. Lawson (In re Lawson), 122 F.3d 1237
27 (9th Cir. 1997)); transferring a deed of trust but concealing
28 retention of a right to place a superior encumbrance on the

1 property (Id.); and placing title to property in another's name
2 while retaining a beneficial interest (Village of San Jose v.
3 McWilliams, 284 F.3d 785 (7th Cir. 2002)).

4 Here, although Thompson misstated the date, he never
5 concealed the secured debt to Countrywide; it was on his Schedule
6 D and Amended Schedule D for the trustee and any creditors to see
7 and investigate. The bankruptcy court correctly recognized this
8 fact when it noted that an experienced trustee would have ordered
9 a title report and discovered the incorrect date. In other words,
10 misstating a date for something that is a matter of public record
11 does not equate to a concealment under section 727(a)(2)(A).
12 Further, the Wards focus on only part of the bankruptcy court's
13 findings. It also found:

14 "With regard to 727(a)(2), first of all, I don't think
15 there has been any evidence that there was an intent on
16 the part of the Debtor to hinder, delay or defraud either
a creditor or an officer of the estate. Sloppiness, yes.
Intent to defraud, no."

17 In addition to determining that misstating a refinance date does
18 not give rise to a claim under section 727(a)(2)(A), the
19 bankruptcy court independently found that Thompson was sloppy
20 about statements made in his Schedule D and Amended Schedule D,
21 but such statements did not rise to a level of actual intent to
22 defraud.

23 A court's finding on whether a debtor acted with intent to
24 hinder, delay or defraud his creditors is reviewed for clear
25 error. Lawson, 122 F.3d at 1240. We are not convinced on this
26 record that the bankruptcy court made a mistake in its findings,
27 and thus it did not clearly err when it found in favor of Thompson
28 under section 727(a)(2)(A).

1 **B. The Bankruptcy Court Did Not Clearly Err When It Found That**
2 **Thompson Satisfactorily Explained The Disposition Of The**
3 **Countrywide Proceeds Under Section 727(a) (5) .**

4 The Wards argue that the bankruptcy court applied an
5 incorrect legal standard of materiality under section 727(a) (5),
6 which led it to erroneously conclude that the Wards did not meet
7 their burden of proof. Overall, they argue that Thompson failed
8 to account for the Countrywide proceeds. In particular, they
9 question his testimony that some money went to pay the mortgage
10 even though the refinance had just occurred. Consequently, the
11 Wards argue that the deference given to the trial court on
12 credibility of witnesses should not apply.

13 "Section 727(a) (5) is broadly drawn and gives the bankruptcy
14 court broad power to decline to grant a discharge in bankruptcy
15 when the debtor does not adequately explain a shortage, loss, or
16 disappearance of assets." Aoki v. Atto Corp. (In re Aoki), 323
17 B.R. 803, 817 (1st Cir. BAP 2005). See In re D'Agnesse, 86 F.3d
18 732, 734 (7th Cir. 1996) (citing First Fed. Life Ins. Co. v. Martin
19 (In re Martin), 698 F.2d 883, 886 (7th Cir. 1983)).

20 The objecting party bears the initial burden of proof under
21 section 727(a) (5). Once the objecting party has met this initial
22 burden by producing evidence establishing the basis for the
23 objection, it then shifts to the debtor to provide a satisfactory
24 explanation for the disposition of the assets. Chalik v.
25 Moorefield (In re Chalik), 748 F.2d 616, 619 (11th Cir. 1984);
26 Aoki, 323 B.R. at 817.

27 Section 727(a) (5) does not require that the loss or other
28 disposition of the asset be proper; it requires only that the
29 explanation satisfactorily describe or account for the

1 disposition. See Rawlings v. Tapp (In re Tapp), 339 B.R. 420, 427
2 (Bankr. W.D. Ky. 2006), Peoples State Bank of Mazeppa, Mn. v.
3 Drenckhahn (In re Drenckhahn), 77 B.R. 697, 709 (Bankr. D. Minn.
4 1987) (both citing Great Am. Ins. Co. v. Nye (In re Nye), 64 B.R.
5 759, 762 (Bankr. E.D. N.C. 1986)). However, vague, indefinite,
6 and uncorroborated explanations are unsatisfactory. Bell v.
7 Stuerke (In re Stuerke), 61 B.R. 623, 626 (9th Cir. BAP 1986);
8 Aoki, 323 B.R. at 817.

9 Whether a debtor satisfactorily explains a loss of assets is
10 a question of fact. Stuerke, 61 B.R. at 626; Chalik, 748 F.2d at
11 619. The bankruptcy court has a great deal of discretion in
12 determining whether an explanation is satisfactory so as to defeat
13 the objection. Aoki, 323 B.R. at 817. See D'Agnese, 86 F.3d at
14 734 (citing Martin, 698 F.2d at 886) (same).

15 At trial, Thompson's testimony as to how he spent his share
16 of the Countrywide refinance proceeds went as follows:

17 Counsel: And what bills did you pay?

18 Thompson: I paid - well, I had a list of bills that my
19 attorney helped with me, but I don't have them with me
20 right now. I had work that was done on my house that was
ongoing at the time, my rear garage, materials, labor, et
cetera.

21 Counsel: And who was that to?

22 Thompson: Several people.

23 Counsel: Do you recall any of their names?

24 Thompson: Henry Smith, William Bryant, Fred Gain.

25 Counsel: Did all of the 52,500 go to them?

26 Thompson: Well, no, some of it I also utilized, because
27 I was out of work, to help pay my mortgage until I got
work.

28 As to the section 727(a)(5) claim, the bankruptcy court stated:

1 [T]here's been pretty clear testimony here this morning
2 what amount of money the Debtor received from the
3 Countrywide refinance and what he did with that money.
4 He paid bills. He was out of work. He made mortgage
5 payments. So, I don't think there has been a failure to
6 explain what happened to the proceeds of the refinance.

7 Again, the arguments asserted by the Wards are problematic.
8 First, no standard of materiality applies to section 727(a)(5).
9 We found no authority for this proposition, and the Wards cited
10 none. In fact, they cited no legal authority whatsoever to
11 support their argument under section 727(a)(5). Under section
12 727(a)(5), presuming the objecting party has met its initial
13 burden of proof, either the debtor explains the disposition of the
14 asset to the court's satisfaction, or the debtor does not; no
15 "materiality" is involved. Second, the debtor's disposition of
16 the asset need not be proper; the debtor need only describe or
17 account for the asset's disposition to the court's satisfaction.
18 Here, the bankruptcy court believed that Thompson adequately
19 explained, to its satisfaction, of how he spent the proceeds.
20 Whether the expenditures could be subject to a preference or some
21 other action is irrelevant on a claim under section 727(a)(5).

22 Although the Wards appear to rest this claim on Thompson's
23 "dishonest" testimony about making mortgage payments that could
24 not have existed, even if propriety of the expenditure could be
25 considered, it seems plausible that a mortgage payment came due in
26 the 48 days between the refinance and Thompson's filing of his
27 bankruptcy petition. Consequently, we reject the Wards' argument
28 that Thompson's allegedly dishonest testimony should defeat the
29 deference given to the trial court on credibility of witnesses.

30 We will not overturn a bankruptcy court's decision to grant

1 or deny a discharge under section 727(a) (5) unless it is clearly
2 erroneous. Aoki, 323 B.R. at 816; D'Agnesse, 86 F.3d at 734. We
3 see no clear error here. Thompson explained in sufficient detail
4 how he spent the proceeds, and, more importantly, he did so to the
5 bankruptcy court's satisfaction. We therefore conclude that it
6 did not err in finding that Thompson offered a satisfactory
7 explanation for the disposition of the Countrywide refinance
8 proceeds under section 727(a) (5).

9 **C. The Bankruptcy Court Did Not Clearly Err Under Sections
10 727(a) (4) (A), (a) (4) (B), and (a) (4) (D).**

11 In their "Issues on Appeal," the Wards argue that the
12 bankruptcy court applied an incorrect legal standard of
13 materiality under section 727(a) (4) (A),¹¹ which led it to
14 erroneously conclude that the Wards did not meet their burden of
15 proof with regard to Thompson's intent. Specifically, they assert
16 Thompson's testimony that a "writing" existed between Thompson and
17 Redmon as to her secured claim, and his later contradictory
18 testimony that there was no such writing, evidences that Thompson
19 presented a false claim. Consequently, they say, he should not
20 have been granted a discharge.

21 Before we address the merits of their argument, we must clear
22 up several procedural irregularities that occurred in this case.

23 ¹¹ The Wards' stated "Issues on Appeal" says section
24 727(a) (4) (A), but we assume they meant (a) (4) (B) since
25 subparagraph (a) (4) (A) was never pled or litigated at trial.
26 However, the bankruptcy court for whatever reason made findings
27 under subparagraphs (a) (4) (A) and (a) (4) (D), in addition to
28 (a) (4) (B). The Wards have cited and discussed section
727(a) (4) (A) within their brief, so we will assume they are
appealing the rejection of both the subparagraph (a) (4) (A) and
(a) (4) (B) claims.

1 **1. The Bankruptcy Court's Findings Under Section 727(a)(4)(A)**
2 **And Section 727(a)(4)(D), And Wards' Appeal On Section**
3 **727(a)(4)(A).**

4 First, the Wards never pled or litigated a claim under
5 section 727(a)(4)(A) - debtor knowingly and fraudulently made a
6 false oath or account. Their complaint, the PTO, and their trial
7 brief asserted a claim only under subparagraph (a)(4)(B) - false
8 claim. However, as noted above, their stated "Issues on Appeal"
9 refer to subparagraph (a)(4)(A). And, within their opening brief
10 they cite legal authority and assert arguments under both
11 subparagraphs (a)(4)(A) and (a)(4)(B).

12 In closing argument at trial, counsel for the Wards argued
13 that the evidence submitted supported a denial of discharge under
14 "(a)(4)," no subparagraph mentioned, in addition to their claims
15 under sections 727(a)(2)(A) and 727(a)(5). Upon this statement,
16 the bankruptcy court interrupted:

17 "The pretrial order that was submitted and has been
18 entered only makes a claim under (a)(2) and (a)(5)."

19 Nonetheless, counsel proceeded to discuss what the Wards had
20 proven under all three sections - 727(a)(2), 727(a)(4), and
21 727(a)(5). At the end of counsel's argument, the court again
22 stated:

23 All right, let me first note that the pretrial order that
24 has been entered in this adversary proceeding states
25 that, "The order shall supercede the pleadings and govern
26 the course of the trial of this cause." As I noted a
27 moment ago, the only issues of law that the pretrial
28 order states remain to be litigated are issues regarding
29 whether or not the Debtor's discharge should be denied
30 under Section 727(a)(2) and Section 727(a)(5).

31 Despite these statements, the bankruptcy court proceeded to make
32 findings under sections 727(a)(4)(A), 727(a)(4)(B), and
33 727(a)(4)(D).

1 Fed R. Civ. P. 16, as incorporated by Rule 7016, governs
2 pretrial orders (once the [pretrial] order is entered it controls
3 the scope and course of the trial). Generally, a claim or issue
4 omitted from the pretrial order is deemed abandoned or waived.
5 Valley Ranch Dev. Co., Ltd. v. F.D.I.C., 960 F.2d 550, 554 (5th
6 Cir. 1992). However, a pretrial order should be liberally
7 construed to permit any issues at trial that are embraced within
8 its language, even issues only implicitly included. DP Aviation
9 v. Smiths Ind. Aerospace and Defense Sys. Ltd., 268 F.3d 829, 841
10 (9th Cir. 2001). Further, an issue not raised in the pretrial
11 order but nonetheless litigated at trial deems the order amended
12 by the consent of the parties. Frank Music Corp. v. Metro-
13 Goldwyn-Mayer, Inc., 772 F.2d 505, 515 n.9 (9th Cir. 1985).

14 When the bankruptcy court recognized that according to the
15 PTO the only "Issues of Law" remaining to be litigated were those
16 under sections 727(a)(2) and 727(a)(5), technically this was
17 correct. However, in the PTO's remaining "Issues of Fact" to be
18 litigated it states:

19 "Whether, in his Chapter 7 Petition, Joseph Thompson, Jr.
20 falsely claimed that Shirley Redmon held a lien in the
amount \$150,000.00 against the subject property."

21 Therefore, the Wards' section 727(a)(4)(B) claim was implicitly
22 included in the PTO. Furthermore, questions regarding it were
23 asked at trial with no objection from Thompson. Thus, it was
24 proper for the bankruptcy court to consider it. However, it went
25 beyond this:

26 "And there was argument this morning that there should
27 also be a claim under Section 727(a)(4) which provides
28 that the Debtor's discharge should be denied if the
Debtor knowingly and fraudulently made a false oath or
account"

1 "And I don't also believe there's been any evidence that
2 the Debtor knowingly and fraudulently made a false oath
3 or account. The mortgage to Countrywide is listed in the
4 schedules. Yes, the date is wrong. Is that sloppy?
5 Yes. Is it fraudulent? I don't think so."

6 We are unclear why the bankruptcy court made findings under
7 section 727(a)(4)(A) when no such claim was ever pled by the Wards
8 or litigated at trial. When it decided to amend the PTO and make
9 findings under section 727(a)(4), to which questions were posed to
10 Thompson with no objection, it only needed to make findings under
11 subparagraph (a)(4)(B) since that was the only section 727(a)(4)
12 claim ever raised. However, to the extent it did make findings
13 under section 727(a)(4)(A), such error was harmless.

14 Now, turning to the merits of the Wards' claim under section
15 727(a)(4)(A), generally we will not consider issues raised for the
16 first time on appeal. Franchise Tax Bd. v. Roberts (In re
17 Roberts), 175 B.R. 339, 345 (9th Cir. BAP 1994). However, the
18 Wards are not appealing the fact that the bankruptcy court erred
19 by making a finding under subparagraph (a)(4)(A), but rather that
20 it did so incorrectly. In any event, even assuming the Wards can
21 raise this issue on appeal since the bankruptcy court addressed
22 it, we reject their argument. First, they provide no explanation
23 as to how the bankruptcy court applied an incorrect legal standard
24 of materiality. Further, whether a debtor knowingly and
25 fraudulently made a false oath is a finding of fact, and we see no
26 clear error on this record. Thompson disclosed the Countrywide
27 refinance with an incorrect date that he testified was a
28 typographical error. Thompson was found to be sloppy, but his
sloppiness did not rise to the level of fraud.

As noted above, the bankruptcy court also made a finding

1 under section 727(a)(4)(D):¹²

2 And there was argument this morning that there should
3 also be a claim under Section 727(a)(4) which provides
4 that the Debtor's discharge should be denied if the
5 Debtor knowingly and fraudulently . . . withheld from an
6 officer of the estate any recorded information, including
7 books, documents, records, et cetera. There's been no
8 evidence that the Debtor withheld any kind of books and
9 records from the Trustee.

10 Again, we are unclear why it made this finding when no such
11 claim was ever pled or litigated by the Wards. Further, the Wards
12 do not raise this issue on appeal. However, to the extent the
13 bankruptcy court made findings under section 727(a)(4)(D), such
14 error was harmless.

15 **2. The Bankruptcy Court Did Not Clearly Err When It Found That
16 Thompson Did Not Present Or Use A False Claim Under Section
17 727(a)(4)(B).**

18 Although section 727(a)(4)(B) was not stated explicitly in
19 their "Issues on Appeal," the Wards argue that Thompson's
20 contradictory testimony regarding Redmon's secured claim evidences
21 that he presented a false claim. Other than questioning his
22 credibility, and a cite to section 727(a)(4)(B), they state no
23 specific error committed by the bankruptcy court for this claim,
24 or provide any legal standards or authority that applies to claims
25 under section 727(a)(4)(B). For sake of argument, we will assume
26 that when the Wards referred to section 727(a)(4)(A) in their

27 ¹² Section 727(a)(4)(D), in relevant part, provides:

28 (4) the debtor knowingly and fraudulently, in or in
connection with the case -

. . . .

(D) withheld from an officer of the estate entitled to
possession . . . any recorded information, including
books, documents, records, and papers, relating to the
debtor's property or financial affairs.

1 "Issues on Appeal," such reference was a typographical error and
2 they meant to appeal the bankruptcy court's finding under section
3 727(a)(4)(B).

4 There is sparse case law applying section 727(a)(4)(B). The
5 term "claim" means the right to payment or a right to an equitable
6 remedy for breach of performance if the breach gives rise to a
7 right to payment. Garcia v. Garcia (In re Garcia), 168 B.R. 403,
8 407 (D. Ariz. 1994); Flanagan v. Howard (In re Howard), 361 B.R.
9 20, 25 (D. N.H. 2007); M & I Heat Transfer Prods., Ltd. v. Gorchev
10 (In re Gorchev), 275 B.R. 154, 164 (Bankr. D. Mass. 2002) (all
11 referencing section 101(5) to interpret "claim" under section
12 727(a)(4)(B)).

13 To deny a debtor's discharge under section 727(a)(4)(B), the
14 debtor must have presented or used inflated or fictitious claims
15 in his bankruptcy case, with intent to defraud. Hendon v. Oody
16 (In re Oody), 249 B.R. 482, 487 (Bankr. E.D. Tenn. 2000);
17 Perniciaro v. Natale (In re Natale), 136 B.R. 344, 349 (Bankr.
18 E.D. N.Y. 1992). Willful intent to defraud is a crucial element
19 of the cause of action. Natale, 136 B.R. at 349. Omissions,
20 misstatements or inaccuracies in bankruptcy petitions or schedules
21 do not necessarily establish fraudulent intent. Id.

22 A debtor's listing of a debt to another in his schedules,
23 when false, can constitute a proper cause of action as a
24 presentation or use of a false claim under section 727(a)(4)(B).
25 Keeling v. Ozey (In re Ozey), 172 B.R. 83, 91 (Bankr. N.D. Okla.
26 1994) (debtor's asserted existence of creditor's "secured claim"
27 that debtor knew was false but done only to discourage inquiry by
28 trustee was proper cause of action under section 727(a)(4)(B));

1 Oody, 249 B.R. at 487-89; Painewebber Inc. v. Gollomp (In re
2 Gollomp), 198 B.R. 433, 439 (Bankr. S.D. N.Y. 1996).

3 As to the section 727(a)(4)(B) claim, the bankruptcy court
4 found:

5 [Thompson] places on his schedules information regarding
6 a loan from his sister, Ms. Redman [sic]. Thinks he gave
7 her a deed of trust which he apparently did not record.
8 So that information was out there for the Trustee to
9 investigate. It would have been clear in a title search
10 that there was no deed of trust recorded in favor of Ms.
11 Redman [sic]. So I don't think there was anything
12 fraudulent or anything being hidden here. Maybe it
13 wasn't accurately described. Yes, it was sloppy, but I
14 don't think that rises to the level of fraud.

15 Whether a debtor filed a false claim with willful intent to
16 defraud is a question of fact. Here, the bankruptcy court found
17 that although Thompson did not accurately describe Redmon's claim,
18 the inaccuracy was sloppy, and it did not rise to the level of
19 fraud. We see no error here.

20 Additionally, we point out that the Wards presented no
21 evidence as to the truth or falsity of Redmon's claim against
22 Thompson, only that he was incorrect about its secured status. We
23 also question their contention that Thompson's testimony was
24 contradictory. Thompson testified that he gave Redmon a written
25 deed of trust, and then testified there was no written note. On
26 its face, this testimony is not inconsistent. A deed of trust and
27 a note are two separate documents. A party can give a deed a
28 trust without giving a written note. In fact, even an oral
promise to pay is not improper, which is what Thompson said
occurred in this case.

We are not convinced on this record that the bankruptcy court
made a mistake in its findings, and therefore conclude it did not

1 err when it found that Thompson did not present or use a false
2 claim under section 727(a)(4)(B).

3 **CONCLUSION**

4 For the foregoing reasons, we AFFIRM.

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