

AUG 15 2007

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

NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL  
OF THE NINTH CIRCUIT

In re:	)	BAP No.	NC-06-1459-KSP
	)		
JOHN PERPINAN,	)	Bk. No.	05-14638
	)		
Debtor.	)	Adv. No.	06-01057
	)		
_____	)		
	)		
JOHN PERPINAN,	)		
	)		
Appellant,	)		
	)		
v.	)	<b>MEMORANDUM*</b>	
	)		
JEFFRY G. LOCKE, Trustee,	)		
	)		
Appellee.	)		
_____	)		

Argued and Submitted on July 27, 2007  
at Pasadena, California

Filed - August 15, 2007

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

Honorable Alan Jaroslovsky, Bankruptcy Judge, Presiding

Before: KLEIN, SMITH and PERRIS,\*\* Bankruptcy Judges.

\_\_\_\_\_  
\*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.

\*\*Hon. Elizabeth L. Perris, Chief Bankruptcy Judge for the District of Oregon, sitting by designation.



1 debtor several cashier's checks and money orders in small  
2 denominations. The debtor did not deposit any of these items  
3 into a bank account.

4 All the while, Low continued to prosecute her state court  
5 case against the debtor. Due to a lack of cooperation with Low,  
6 and a lack of compliance with court orders compelling the debtor  
7 to attend a deposition, Low filed a Motion for Terminating  
8 Sanctions. Low's motion was set for hearing on October 20, 2005.

9 On October 16, 2005, the debtor filed a chapter 7 case and  
10 scheduled Low as a disputed creditor. On the debtor's Schedule  
11 B, he scheduled as "Cash on Hand" \$48,000 in sale proceeds from  
12 the sale of his residence. On the debtor's Schedule C, he  
13 claimed the \$48,000 in sale proceeds as exempt pursuant to  
14 California Code of Civil Procedure §§ 704.710 - 704.880.

15 At the debtor's first 11 U.S.C. § 341 meeting of creditors,  
16 the chapter 7 trustee (appellee) questioned the debtor at length  
17 about the disposition of the proceeds from the sale of his  
18 residence:

19 Trustee: So you got \$122,000 from the title  
20 company you said you cashed that you  
21 didn't deposit that in a bank account.  
Is that correct?

22 Debtor: That is correct

23 Trustee: You did not deposit any of those funds  
into a bank account?

24 Debtor: No I did not

25 Trustee: And why not?

26 Debtor: Why not? I was worried this man might  
27 come steal my money

28 Trustee: O.K. and by this man you are talking  
about?

1 Debtor: Glenn Smith

2 Trustee: O.K.

3 Because the debtor received approximately \$122,000 in sale  
4 proceeds but only scheduled \$48,000 on his bankruptcy petition,  
5 the trustee informed the debtor that it was the debtor's  
6 responsibility to explain and account for approximately \$74,000  
7 in sale proceeds that he did not schedule.

8 When the trustee questioned the debtor about the amount of  
9 sale proceeds that the debtor had spent since escrow had closed  
10 in July 2005, the debtor told the trustee that it had been spent  
11 on legal fees, living expenses, child care, vehicles, home  
12 furnishings, and the like.

13 On January 17, 2006, which was just over six months after  
14 the July 12, 2005, close of escrow on the sale of the debtor's  
15 residence, the trustee filed an Objection to Claim of Exemption,  
16 followed by a Motion to Compel Turnover and Accounting of  
17 Property of the Estate. The trustee argued that the debtor's  
18 homestead exemption lapsed on January 12, 2006, unless the funds  
19 had been reinvested in a new homestead.

20 The debtor filed an opposition on February 14, 2006, and  
21 filed a declaration stating that on January 11, 2006, he tendered  
22 a \$48,000 cashier's check to his mother, Joan Scoggins, for a  
23 4.5% interest in her home. His mother, in return, had executed  
24 and recorded a grant deed in favor of the debtor on January 12,  
25 2006.

26 Based on the information provided by the debtor in his  
27 declaration, the trustee dropped his Objection to Claim of  
28 Exemption.

1           On March 9, 2006, trustee filed an adversary proceeding  
2 against the debtor objecting to his discharge pursuant to 11  
3 U.S.C. § 727(a)(2)(A), (a)(3), (a)(4)(A), and (a)(5). The  
4 trustee alleged that the debtor's pre-petition disposition of the  
5 sale proceeds into cashier's checks and money orders was a  
6 transfer or concealment of the debtor's property done with the  
7 intent to "hinder, delay, or defraud" his creditors.

8           Several months later, the trustee discovered that on January  
9 13, 2006, the debtor had signed and notarized a quitclaim deed in  
10 favor of his mother that reversed the transaction the debtor and  
11 his mother had entered into the previous day (January 12). The  
12 trustee also discovered that the debtor's mother never deposited  
13 the \$48,000 cashier's check given to her by the debtor in  
14 exchange for an interest in her property. Instead, the debtor's  
15 mother returned the original cashier's check to the debtor.

16           The debtor did not disclose the latter series of events  
17 between himself and his mother in his February 14, 2006  
18 declaration alleging the re-establishment of his homestead.

19           On March 15, 2006, the debtor redeemed the \$48,000 cashier's  
20 check at the bank and used the cash for living expenses. Several  
21 days later, the deed reversing the transaction was recorded with  
22 the county land records.

23           Armed with this newly discovered information, the trustee  
24 filed a first amended adversary complaint on November 21, 2006,  
25 seeking to deny the debtor's discharge on the additional ground  
26 that the transaction between the debtor and his mother was a  
27 "sham" and a fraudulent concealment of property of the estate.  
28 The trustee also sought to compel turnover of the \$48,000.

1 Trial was held on November 29, 2006. On December 4, 2006,  
2 the bankruptcy court entered its memorandum decision denying the  
3 debtor's discharge pursuant to § 727(a)(2)(A) and ordering the  
4 debtor to turnover the \$48,000 in sale proceeds to the trustee.  
5 Final judgment was entered on December 5, 2006.

6 This appeal ensued.

#### 7 8 JURISDICTION

9 The bankruptcy court had jurisdiction via 28 U.S.C. § 1334.  
10 We have jurisdiction under 28 U.S.C. § 158(a)(1).

#### 11 12 ISSUES

13 1) Whether the bankruptcy court erred when it denied the  
14 debtor's discharge pursuant to § 727(a)(2)(A).

15 2) Whether the bankruptcy court erred when it ordered the  
16 debtor to turn over to the trustee the \$48,000 in sale proceeds.

#### 17 18 STANDARD OF REVIEW

19 In bankruptcy discharge appeals, we review findings of fact  
20 for clear error, conclusions of law de novo, and also apply de  
21 novo review to "mixed questions" of law and fact that require  
22 consideration of legal concepts and the exercise of judgment  
23 about the values that animate the legal principles. Murray v.  
24 Bammer (In re Bammer), 131 F.3d 788, 791-92 (9th Cir. 1997) (en  
25 banc), overruling, e.g., Finalco v. Roosevelt (In re Roosevelt),  
26 87 F.3d 311, 314, as amended, 98 F.3d 1169 (9th Cir. 1996) (§ 727  
27 reviewed for abuse of discretion), and Friedkin v. Sternberg (In  
28 re Sternberg), 85 F.3d 1400, 1404-05 (9th Cir. 1996) (same);

1 First Beverly Bank v. Adeb (In re Adeb), 787 F.2d 1339, 1342  
2 (9th Cir. 1986) (§ 727 finding of transfer of property with  
3 intent to defraud is finding of fact).

4 Whether a debtor harbors actual intent to hinder, or delay,  
5 or defraud a creditor is a question of fact reviewed for clear  
6 error. Emmett Valley Assoc. v. Woodfield (In re Woodfield), 978  
7 F.2d 516, 518 (9th Cir. 1992); Searles v. Riley (In re Searles),  
8 317 B.R. 368, 379 (9th Cir. BAP 2004), aff'd, 212 F. App'x 589  
9 (9th Cir. 2006). Intent may be inferred from circumstances  
10 surrounding the transaction. Woodfield, 978 F.2d at 518.

11 Under the "clear error" standard, we accept findings of fact  
12 unless the findings leave the "definite and firm conviction that  
13 a mistake has been committed" by the trial judge. Latman v.  
14 Burdette, 366 F.3d 774, 781 (9th Cir. 2004).

## 16 DISCUSSION

### 17 I

18 The trustee sought denial of the debtor's discharge pursuant  
19 to § 727(a)(2)(A), (a)(2)(B), (a)(3), (a)(4)(A), and (a)(5). The  
20 burden of proof on an objection to discharge under § 727(a)(2) is  
21 preponderance of evidence. Grogan v. Garner, 498 U.S. 279, 289  
22 (1991); Landsdowne v. Cox (In re Cox), 41 F.3d 1294, 1297 (9th  
23 Cir. 1994); Wolkowitz v. Beverly (In re Beverly), slip op. at 36  
24 (9th Cir. BAP July 24, 2007); Searles, 317 B.R. at 376; 6 COLLIER  
25 ON BANKRUPTCY ¶ 522.08[4] (Henry J. Sommer & Alan N. Resnick eds.  
26 15th ed. rev. 2006) ("COLLIER 15th ed."). The bankruptcy court  
27 found that the debtor kept assets in cash (cashier's checks and  
28 money orders) in order to hinder his creditors and denied the

1 debtor's discharge pursuant to § 727(a)(2)(A).

2 Section 727(a)(2)(A) provides,

3 (a) The court shall grant the debtor a discharge,  
4 unless -

5 (2) the debtor, with intent to hinder, delay, or  
6 defraud a creditor . . . has transferred, removed,  
destroyed, mutilated, or concealed . . .

7 (A) property of the debtor, within one year  
8 before the date of the filing of the  
9 petition[.]

10 11 U.S.C. § 727(a)(2)(A).

11 Discharge may be denied under § 727(a)(2)(A) only upon a  
12 finding of actual intent to hinder, delay, or defraud creditors.  
13 Adeeb, 787 F.2d at 1342-43; Devers v. Bank of Sheridan (In re  
14 Devers), 759 F.2d 751, 753 (9th Cir. 1985). Constructive  
15 fraudulent intent can not be the basis for the denial of  
16 discharge. Adeeb, 787 F.2d at 1343.

17 It is sufficient under the plain language of § 727(a)(2)(A)  
18 to deny discharge upon a showing of intent to hinder or delay or  
19 defraud creditors. Searles, 317 B.R. at 379. In other words,  
20 intent to defraud need not be shown because intent to hinder or  
21 to delay is sufficient.

22 Here, it is undisputed that the subject transaction involved  
23 property of the debtor and that it occurred within one year of  
24 the debtor filing bankruptcy. The debtor argues that he did not  
25 harbor the requisite intent and did not transfer or conceal his  
26 property.

27 The bankruptcy court found that the debtor acted with actual  
28 intent to hinder his creditors when he kept the proceeds from the

1 sale of his residence in the form of cashier's checks and money  
2 orders.

3 The court based its decision on the debtor's admission at  
4 his meeting of creditors that he did not deposit the sale  
5 proceeds into a bank account because he believed that Low's  
6 attorney (Glenn Smith) was going to "steal" his money.

7 At trial, the debtor was questioned about the statement he  
8 made at his meeting of creditors:

9 [Trustee's attorney]: [Y]ou didn't really think  
10 Glenn Smith was going to point a gun at you  
and hold you up in a robbery; did you?

11 [Debtor]: No. What I thought he was going to do  
12 was lie to the courts -

13 [Trustee's attorney]: Okay. Thank you. And you  
14 didn't think -

15 [Debtor]: And that's what he did. He filed a  
16 bunch of lies. He lied to a lot of people.

17 This evidence supports the trial court's inference (which  
18 was based on a credibility determination) regarding the debtor's  
19 intent. We perceive no clear error. Moreover, we agree with the  
20 bankruptcy court that the debtor acted with actual intent to  
21 hinder the collection efforts of his creditors, specifically the  
22 efforts of Low.

23 We also agree that the debtor's admitted actions in using  
24 the sale proceeds to acquire money orders and cashier's checks in  
25 order to prevent the proceeds from being "stolen" by Low's

26 //

27 //

28 //

1 attorney was an act of concealment.<sup>1</sup>

2 The bankruptcy court did not err when it denied the debtor's  
3 discharge pursuant to § 727(a)(2)(A).

4  
5 II

6 On the debtor's schedule B, he stated that he had \$48,000  
7 "cash on hand" as proceeds from the sale of his residence.  
8 Because the sale of the debtor's residence occurred approximately  
9 four months before he filed bankruptcy, the debtor sought to  
10 exempt those sale proceeds.

11 Under California law, the proceeds of a homestead sale  
12 remain exempt for a period of six months after the sale. Cal.  
13 Civ. Proc. Code §§ 704.720(b), 704.960(a). When the six month  
14 period expires, the exempt status of the sale proceeds  
15 automatically dissolves, even if the six month period expires  
16 after the filing of the bankruptcy petition. England v. Golden  
17 (In re Golden), 789 F.2d 698, 699 (9th Cir. 1986); Konnoff, 356  
18 B.R. at 208; Gaughan v. Smith (In re Smith), 342 B.R. 801, 808-09  
19 (9th Cir. BAP 2006).

20 Thus, to keep their exempt status, the proceeds must be  
21 reinvested into another homestead within six months of the sale.  
22 If not timely reinvested, the sale proceeds become property of  
23 the bankruptcy state.

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24 <sup>1</sup>Black's Law Dictionary defines "concealment" as follows:

25 **concealment**, *n.* **1.** The act of refraining from  
26 disclosure; esp., an act by which one prevents or  
27 hinders the discovery of something. **2.** The act of  
28 removing from sight or notice; hiding. . . .

Black's Law Dictionary 282 (7th ed. 1999).

1 In this case, because escrow closed on the sale of the  
2 debtor's residence on July 12, 2005, under California law, the  
3 debtor had until January 12, 2006, to reinvest the proceeds in a  
4 new homestead. On January 17, 2006, the trustee filed an  
5 objection to debtor's claim of exemption, and, pursuant to  
6 Golden, sought turnover of the \$48,000 in sale proceeds the  
7 debtor claimed were exempt.

8 In response to trustee's motions, the debtor filed a  
9 declaration stating that he had tendered to his mother a \$48,000  
10 cashier's check in exchange for a 4.5% interest in her residence.  
11 The debtor attached to his declaration a copy of the recorded  
12 grant deed that had been executed by his mother in favor of the  
13 debtor. The deed had been recorded with the county recorder's  
14 office on January 12, 2006.

15 Based on the debtor's declaration, the trustee believed that  
16 the debtor had timely reinvested the sale proceeds and he  
17 withdrew his objection to claim of exemption.

18 However, unbeknownst to the trustee, on January 13, 2006  
19 (one day after the recording of the first deed), the debtor  
20 signed and notarized a quitclaim deed back to his mother  
21 reversing the transaction. The debtor's mother then returned the  
22 original cashier's check to the debtor. None of this information  
23 was provided to the court or to the trustee by the debtor in his  
24 declaration that was filed one month after these later events  
25 took place.

26 At trial, the debtor testified that on March 15, 2006, he  
27 and his mother went to the bank and he "redeemed" the cashier's  
28 check and "lived off" the proceeds. The deed reversing the

1 transaction was recorded with the Sonoma County Recorder's Office  
2 on March 23, 2006.

3 When the trustee discovered that the transaction between the  
4 debtor and his mother had been reversed the next day, he filed a  
5 first amended complaint in the pending adversary proceeding to  
6 add a claim for denial of discharge pursuant to § 727(a)(2)(B)  
7 and for turnover of the \$48,000 pursuant to 11 U.S.C. § 542.

8 After trial, the bankruptcy court concluded that the  
9 debtor's purchase of a new homestead was a "sham" and therefore,  
10 under Golden, the sale proceeds were property of the estate and  
11 should be turned over to the trustee. We agree.

12 As it is a factual finding, the bankruptcy court's  
13 determination that the transaction the debtor entered into with  
14 his mother was a "sham transaction" done with the intent to  
15 conceal property of the estate is reviewed for clear error.  
16 Atkins v. Fiberglass Representatives, Inc. (In re Atkins), 134  
17 B.R. 936, 940 (9th Cir. BAP 1992) ("sham transaction").

18 Even though the debtor purported to reinvest the \$48,000 on  
19 the eve of the expiration of the statutory six month limitations  
20 period, what he in fact did was retain a secret beneficial  
21 interest in those legally transferred proceeds in an effort to  
22 conceal those proceeds from the trustee and his creditors. See  
23 Hughes v. Lawson (In re Lawson), 122 F.3d 1237, 1241 (9th Cir.  
24 1997) (denial of discharge based on continuing concealment  
25 doctrine.)

26 The debtor and his mother reversed the transaction one day  
27 after its making, but did not make it known publicly until two  
28 months later when the second deed was recorded.

