

APR 18 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NOT FOR PUBLICATION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

6	In re:	)	BAP No.	WW-06-1089-SPaMo
7	ANTHONY J. SARP,	)	Bk. No.	03-24716
8	Debtor.	)	Adv. No.	05-01244
9	_____	)		
10	ANTHONY J. SARP; THE	)		
11	MARITAL COMMUNITY OF ANTHONY	)		
12	J. SARP & BARBARA SARP,	)		
13	Appellants,	)		
14	v.	)	<b>MEMORANDUM<sup>1</sup></b>	
15	DAVID S. MORRIS, Chapter 7	)		
16	Trustee,	)		
17	Appellee.	)		
18	_____	)		

Argued and Submitted on November 16, 2006  
at Seattle, Washington  
Filed - April 18, 2007

Appeal from the United States Bankruptcy Court  
for the Western District of Washington

Honorable Karen A. Overstreet, Chief Bankruptcy Judge, Presiding

Before: SMITH, PAPPAS and MONTALI, Bankruptcy Judges.

<sup>1</sup> 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 The trustee filed a complaint objecting to the appellants'  
2 discharge under § 727<sup>2</sup>. The court granted the trustee's motion  
3 for summary judgment in part, under § 727(a)(2)(B), and denied it  
4 in part. A timely notice of appeal was filed on February 28,  
5 2006. We AFFIRM in part, VACATE and REMAND in part, and REVERSE  
6 in part.

### 7 I. FACTS

8 Anthony Sarp ("Sarp") founded Katmai Lodge, Ltd. ("Katmai"),  
9 a fishing lodge located on 126 acres of land on the Alagnak River  
10 in Alaska, in 1981. Sarp and his spouse Barbara Sarp  
11 (collectively, "Appellants") acted as Katmai's president and  
12 officer, respectively.

13 On November 13, 2003, Sarp filed for chapter 11 relief, and  
14 thereafter, on December 12, 2003, Barbara Sarp filed her own  
15 chapter 11 petition. Pursuant to court order, Appellants'  
16 individual chapter 11 bankruptcies were substantively  
17 consolidated and David S. Mork was appointed as the chapter 11  
18 trustee ("Mork" or "trustee"). On December 5, 2003, Katmai filed  
19 its chapter 11 petition, which led to the bankruptcy court  
20 entering an order on December 17, 2004, substantively  
21 consolidating Appellants' and Katmai's bankruptcies. The order  
22 also appointed Mork as the chapter 11 trustee for the Katmai  
23 estate. Appellants' chapter 11 cases were converted to chapter 7  
24

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25 <sup>2</sup> Unless otherwise indicated, all chapter, section and rule  
26 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1330, and  
27 to the Federal Rules of Bankruptcy Procedure, Rules 1001-9036, as  
28 enacted and promulgated prior to the effective date (October 17,  
2005) of The Bankruptcy Abuse Prevention and Consumer Protection  
Act of 2005, Pub. L. 109-8, Apr. 20, 2005, 119 Stat. 23.

1 on April 7, 2005<sup>3</sup>, but remained substantively consolidated with  
2 Katmai's chapter 11 case.

3 On December 17, 2004, the same date Mork was appointed as  
4 chapter 11 trustee in the Katmai case, Appellants signed five  
5 Katmai checks made payable to themselves in the aggregate amount  
6 of \$18,057.80. Mork was able to stop payment on two of the  
7 checks, totaling \$5,450.30 made payable to Barbara Sarp.  
8 However, he was unable to prevent payment on the three checks  
9 payable to Sarp, which totaled \$12,607.50 (the "Withdrawals").  
10 On December 20, 2004, Mork sent Martin Snodgrass, Appellants'  
11 counsel, an e-mail demanding that his clients restore the  
12 Withdrawals to the estate. They failed to do so. As a  
13 consequence, Katmai was unable to make its December 2004 lease  
14 payment to Levelock Natives, Ltd. ("LNL").

15 In late December 2004 or early January 2005, the trustee  
16 notified Sarp of his intent to immediately terminate Katmai's  
17 business operations and to discharge all of its employees,  
18 including Sarp. He also advised Sarp of his intent to auction  
19 off the company sometime in March 2005.

20 Believing that a complete shutdown of Katmai's operations in  
21 January would cause it to be valueless by auction time<sup>4</sup>, Sarp  
22 took employment in January 2005 with World Wide Angling LLC  
23

24 \_\_\_\_\_  
25 <sup>3</sup> On April 25, 2005, the court entered an order approving  
26 the appointment of Mork as chapter 7 trustee of the Appellants'  
27 estates.

28 <sup>4</sup> A majority of Katmai's trips are booked during the  
winter, with the main bookings coming during the early part of  
the year between January and March.

1 ("WWA")<sup>5</sup>, the principal booking agent for Katmai, as a  
2 "consultant" and continued booking fishing trips for Katmai for  
3 the 2005 and 2006 seasons. From January 2005 through March 2005,  
4 Sarp ran the day-to-day operations of WWA and oversaw the  
5 solicitation and booking of Katmai vacations, as well as the  
6 collection of deposits and payments for those vacations (the  
7 "customer payments"). By June 2, 2005, WWA had collected  
8 \$543,351.73 in customer payments.<sup>6</sup>

9 By letter dated December 22, 2004, to WWA, the trustee's  
10 counsel demanded that WWA: (1) turnover all the customer  
11 payments, and (2) provide an accounting. WWA did not respond.<sup>7</sup>

12 <sup>5</sup> In 2000, Katmai entered into its first booking agency  
13 agreement with WWA. The contractual arrangement provided for WWA  
14 to buy vacations at wholesale from Katmai. WWA would then  
15 market and sell the vacations directly to potential guests and  
16 collect payments from the customers for the sold vacations.  
17 There is written evidence that Katmai and WWA entered into this  
18 type of booking agency agreement for the 2000, 2001, and 2003  
19 seasons.

20 <sup>6</sup> The collection of the \$543,351.73 occurred between  
21 September 1, 2004, and June 2, 2005; \$316,039.50 of this amount  
22 was collected after December 17, 2004. However, when WWA closed  
23 its checking account on June 2, 2005, the account ending balance  
24 was a -\$741.53.

25 <sup>7</sup> On March 29, 2005, after WWA failed to turnover all the  
26 customer payments, the trustee filed a complaint against WWA,  
27 Murray Armstrong, and Appellants for an accounting, turnover of  
28 property, violation of the automatic stay, breaches of fiduciary  
duties, breach of § 521 duties, fraud, and injunctive relief.  
Thereafter, on November 9, 2005, the bankruptcy court entered an  
order granting in part and denying in part the trustee's motion  
for summary judgment in that proceeding. In relevant part, the  
court granted summary judgment against Sarp and the community  
property of Barbara Sarp, in the amount of \$118,229.99, for  
turnover of estate property under § 542, violation of the  
automatic stay under § 362(a)(3), breach of Sarp's fiduciary

(continued...)

1 On June 30, 2005, trustee filed a complaint objecting to  
2 Appellants' discharge under § 727.<sup>8</sup> The complaint alleged that  
3 Appellants had intended to defraud the trustee by improperly  
4 transferring the Withdrawals and the customer payments, which  
5 represented property of Katmai's estate, to themselves or WWA.

6 On December 13, 2005, the trustee moved for summary  
7 judgment, asserting that Appellants were not entitled to a  
8 discharge because they had (1) misappropriated \$316,039.50 in  
9 estate funds, of which \$118,229.99 had not been refunded to the  
10 estate, from customer payments; and (2) withdrawn substantial  
11 funds from Katmai's checking account on the date of the trustee's  
12 appointment. Because there were no genuine issues of material  
13 fact, the trustee claimed entitlement to a judgment as a matter  
14 of law under § 727(a)(2)(B).<sup>9</sup>

15  
16 <sup>7</sup>(...continued)  
17 duties as an officer and shareholder of Katmai, and breaches of  
18 Sarp's duties as a debtor under § 521(3) and (4). It also  
19 entered a permanent injunction, in which the court found that  
20 Sarp, Armstrong, and WWA had "solicited, accepted, and spent  
Katmai Lodge customer deposits and payments, which were property  
of the substantively consolidated bankruptcy estate, without any  
legal right to do so."

21 Appellants appealed the order as to the court's findings  
22 regarding Sarp's breach of his § 521(3) and (4) duties and their  
23 liability as a result of such. We affirmed the bankruptcy  
court's order (BAP No. 05-1478).

24 <sup>8</sup> The specific subsections of § 727 under which the trustee  
25 objected to discharge were (a)(2)(A), (a)(2)(B), (a)(3), and  
(a)(4)(B).

26 <sup>9</sup> While we recognize the trustee also sought summary  
27 judgment on the other asserted § 727 causes of action, this  
28 appeal focuses solely on the denial of discharge pursuant to  
§ 727(a)(2)(B).

1 In response, Appellants denied that they had acted with the  
2 intent to defraud the estate. Rather, they argued that the  
3 Withdrawals represented reasonable compensation for unpaid salary  
4 and expenses, and that Sarp's continued efforts in booking  
5 vacations for Katmai and collecting customer payments were done  
6 for the benefit of the estate. Because their state of mind  
7 (i.e., intent) was at issue, they contended that summary judgment  
8 was inappropriate.

9 In disputing the existence of any triable material factual  
10 issues, the trustee maintained that the facts unequivocally  
11 established that 1) Sarp's continued efforts were not beneficial  
12 to the estate because Katmai was sold without including the  
13 additional profits from those vacations; and 2) Sarp had  
14 admittedly continued selling vacations and collecting customer  
15 payments despite knowledge of the trustee's intention to halt  
16 Katmai's operations. Further, Sarp's admission was in itself  
17 sufficient to demonstrate his intent to misappropriate the  
18 customer payments for § 727(a)(2)(B) purposes.

19 Finally, the trustee pointed out that Appellants had failed  
20 to show how they were entitled to the Withdrawals. No payroll  
21 records, expense reports, receipts, or any other type of  
22 independent evidence was provided to support their claim.  
23 Moreover, there was evidence that Steven Hartung, Katmai's former  
24 chief financial officer, had not even authorized the Withdrawals.  
25 The only logical conclusion for Appellants' actions, the trustee  
26 insisted, was that they intentionally raided Katmai's checking  
27 account before he could gain control. Accordingly, the  
28 Appellants' discharge should be denied under § 727(a)(2)(B).

1           The summary judgment motion came on for hearing on January  
2 6, 2006. The bankruptcy court found that Sarp's intent to  
3 defraud the trustee was evidenced by his acceptance of checks  
4 from the customer payment funds, and that Appellants both had  
5 exhibited the requisite intent when they cashed, or attempted to  
6 cash, checks related to the Withdrawals.

7           The court noted that if Sarp had booked the vacations and  
8 caused the customer payments to remain in WWA's account, then  
9 there would be evidence of his intent to sell the vacations for  
10 the benefit of the estate. Sarp, however, did not do this.  
11 Instead, the court found that he took "a check every single week  
12 after the trustee ha[d] demanded deposits to pay to himself and  
13 his wife." Sarp's actions were consistent with an intent to  
14 hinder the trustee's ability to exercise control over those  
15 estate funds.

16           The court further determined that Sarp's acceptance of the  
17 Withdrawals was done irrespective of Katmai's continued  
18 operations and the estate. The evidence showed that "[h]e knew  
19 his time was up, and he took the money" before he lost the  
20 ability to do so. The evidence also persuaded the court that  
21 Barbara Sarp was just as involved with the Withdrawals as Sarp.  
22 She was a beneficiary of the funds and had even signed at least  
23 one of the checks made payable to her. The fact that the trustee  
24 was able to stop payment on the checks did not change her intent.

25           Based on the above findings, the court granted partial  
26 summary judgment as to the § 727(a)(2)(B) claim for relief  
27 against Sarp both in his separate capacity and in his capacity as  
28 a member of the marital community of Appellants, and against

1 Barbara Sarp in her capacity as a member of the marital  
2 community.<sup>10</sup>

3 Appellants appeal.

## 4 **II. JURISDICTION**

5 The bankruptcy court had jurisdiction under 28 U.S.C. § 1334  
6 and §§ 157(b) (1), (b) (2) (A), and (2) (B). We have jurisdiction  
7 under 28 U.S.C. § 158.

## 8 **III. ISSUES<sup>11</sup>**

- 9 A. Whether there are genuine issues of material fact as to  
10 Sarp's intent to hinder, delay, or defraud the trustee for  
11 purposes of § 727(a) (2) (B); and  
12 B. Whether the Code allows for a partial denial of a debtor's  
13 discharge based upon the character of the debtor's property.

## 14 **IV. STANDARD OF REVIEW**

15 We review a grant of summary judgment de novo. Patterson v.  
16 Int'l Bhd. of Teamsters, Local 959, 121 F.3d 1345, 1349 (9th Cir.  
17 1997). In viewing the evidence in the light most favorable to  
18 the nonmoving party, we must determine whether there are any  
19 genuine issues of material fact and whether the applicable  
20 substantive law was correctly applied by the bankruptcy court.  
21 City of Vernon v. S. Cal. Edison Co., 955 F.2d 1361, 1365 (9th

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22 <sup>10</sup> The court denied summary judgment as to the  
23 § 727(a) (2) (A), (a) (3), and (a) (4) (B) causes of action. There  
24 has been no appeal filed as to the court's denial of such.

25 <sup>11</sup> Appellants state that one issue is whether the customer  
26 payments collected by WWA constitute property of the estate.  
27 This issue was asserted in Appellants' related appeal BAP No. 05-  
28 1478. In that appeal we found the customer payments did  
represent property of the estate. Because we have fully disposed  
of this issue in Appellants' related appeal, it is not necessary  
for the Panel to readdress the issue here.

1 Cir. 1992). If the record before the bankruptcy court, including  
2 all "pleadings, depositions, answers to interrogatories, and  
3 admissions on file, together with any affidavits" establish that  
4 there are no triable issues and that "the moving party is  
5 entitled to judgment as a matter of law, summary judgment will be  
6 upheld." In re Gertsch, 237 B.R. 160, 165 (9th Cir. BAP 1999).

7 Though summary judgment is rarely granted where intent is at  
8 issue, Provenz v. Miller, 102 F.3d 1478, 1489 (9th Cir. 1996),  
9 cert. denied, 522 U.S. 808 (1997), "summary judgment is  
10 appropriate if all reasonable inferences defeat the claims of one  
11 side, even when intent is at issue." Newman v. Checkrite Cal.,  
12 Inc., 912 F. Supp. 1354, 1380 (E.D. Cal. 1995) (citing White v.  
13 Roper, 901 F.2d 1501, 1505 (9th Cir. 1990)).

#### 14 **V. DISCUSSION**

15 Section 727(a)(2)(B) provides that a "court shall grant the  
16 debtor a discharge unless the debtor, with the intent to hinder,  
17 delay, or defraud . . . an officer of the estate charged with  
18 custody of property . . . has transferred, removed, destroyed,  
19 mutilated, or concealed, or has permitted" such to occur to  
20 "property of the estate, after the date of the filing of the  
21 petition." This section is to be construed liberally in favor of  
22 the debtor and strictly against those objecting to discharge. In  
23 re Devers, 759 F.2d 751, 754 (9th Cir. 1985). Accordingly, a  
24 discharge will be denied under § 727(a)(2)(B) only upon a showing  
25 of actual intent to hinder, delay, or defraud creditors. Id. at  
26 753; see In re Adeeb, 787 F.2d 1339, 1342 (9th Cir. 1986).  
27 Constructive fraudulent intent cannot be the basis for denial of  
28 discharge. Adeeb, 787 F.2d at 1343. However, "intent 'may be

1 established by circumstantial evidence, or by inferences drawn  
2 from a course of conduct.'" Id. (quoting Devers, 759 F.2d at  
3 753-54). Lack of injury to creditors is irrelevant for purposes  
4 of denying a discharge pursuant to § 727(a)(2). In re Bernard,  
5 96 F.3d 1279, 1281-82 (9th Cir. 1996).

6 Ordinarily, summary judgment is not appropriate in a § 727  
7 action where intent is at issue. Fogal Legware of Switz., Inc.  
8 v. Wills (In re Wills), 243 B.R. 58, 65 (9th Cir. BAP 1999); see  
9 also Consol. Elec. Co. v. United States, 355 F.2d 437, 438 (9th  
10 Cir. 1966). Nevertheless, "[e]ven in cases where . . . intent  
11 [is] at issue, summary judgment may be appropriate if the non-  
12 moving party rests merely upon conclusory allegations, improbable  
13 inferences, and unsupported speculation." Medina-Munoz v. R.J.  
14 Reynolds Tobacco Co., 896 F.2d 5, 8 (1st Cir. 1990).

15 A. Denial of Sarp's Discharge

16 Appellants challenge the bankruptcy court's order granting  
17 partial summary judgment under § 727(a)(2)(B) in favor of the  
18 trustee as erroneous in light of what Appellants believe are  
19 genuine issues of material fact as to the allegations regarding  
20 Sarp's intent to defraud or hinder the trustee. Specifically,  
21 Appellants contend that triable material issues exist with  
22 respect to the intent underlying Sarp's decision to continue  
23 booking Katmai vacations, his acceptance of checks related to  
24 those bookings, and his cashing of the Withdrawal checks. We  
25 disagree.

26 1. The Customer Payments

27 The bankruptcy court found that Sarp accepted over \$40,000  
28 in consulting fees and expenses from customer payments collected

1 by WWA for his efforts in booking Katmai vacations for the 2005  
2 and 2006 seasons with actual intent to hinder the trustee from  
3 getting those funds. Appellants argue that, because genuine  
4 issues of fact existed, the court erred in its findings regarding  
5 Sarp's intent.

6 As the bankruptcy court correctly recognized, the test under  
7 § 727(a)(2)(B) is not whether a debtor's actions benefit the  
8 estate, but whether he intends to hinder, delay, or defraud "an  
9 officer of the estate charged with custody of property." 11  
10 U.S.C. § 727(a)(2). Based on this test, Sarp could be found to  
11 have acted with the actual intent to hinder, delay or defraud the  
12 trustee even if his actions ultimately benefitted the estate,  
13 provided the evidence supported such a finding.

14 It is undisputed that after the trustee discharged Sarp as  
15 Katmai's president and informed him of his plan to shutdown its  
16 business operations, Sarp immediately took employment as a  
17 consultant with WWA and assumed complete managerial control over  
18 the day-to-day operations of WWA. With knowledge and in defiance  
19 of trustee's stated plans to cease the business operations of  
20 Katmai, Sarp, through WWA, effectively continued such operations  
21 by selling vacations for the 2005 and 2006 seasons and collecting  
22 customer payments without the authority of the trustee or the  
23 bankruptcy court. At his direction, WWA solicited and accepted  
24 \$316,039.50 in customer payments from the date of the trustee's  
25 appointment (December 17, 2004) through mid-March 2005. However,  
26 with the exception of \$110,300.40<sup>12</sup>, Sarp and WWA disbursed all

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27 <sup>12</sup> This amount was turned over to the trustee on the date  
28 that he filed a complaint for turnover of the customer payments,  
(continued...)

1 of the customer payments, and did so in the face of the trustee's  
2 demand for the turnover of them in December 2004. Included in  
3 the disbursements was over \$40,000.00 in fees and expenses paid  
4 to Sarp in January, February, and March 2005.

5 Even if, as asserted by Sarp, the prospective purchasers  
6 asked him to continue operating Katmai's business pending the  
7 sale, Sarp was well aware of the trustee's intent to terminate  
8 the operations. It is undisputed that he never sought authority  
9 from the trustee to continue the operations and to collect funds  
10 on behalf of the estate. See 11 U.S.C. § 363(b)(1) & (c)(1)  
11 (providing that only the trustee has the ability to sell or use  
12 property of the estate).

13 When stacked against the very substantial evidence presented  
14 by the trustee, Sarp's self-serving, unsubstantiated statements  
15 that he booked the vacations for the benefit of the estate, that  
16 he continued the operations at the request of prospective  
17 purchasers, and that he paid only wages and expenses from the  
18 funds collected, amount to a mere "scintilla" of evidence -  
19 insufficient to defeat a motion for summary judgment where, as  
20 here, the moving party has met his burden of proof. Anderson v.  
21 Liberty Lobby, Inc., 477 U.S. 242, 251-52 (1986); Rivera v.  
22 Phillip Morris, Inc., 395 F.3d 1142, 1146 (9th Cir. 2005) ("A mere  
23 scintilla of evidence supporting [a nonmovant's] position is  
24 insufficient to withstand summary judgment.").

25 Based on the foregoing, we agree with the bankruptcy court  
26 that the trustee is entitled to summary judgment denying Sarp's

27 <sup>12</sup>(...continued)  
28 among other things, against Appellants, WWA, and Murray Armstrong  
(WWA's owner).

1 discharge under § 727(a)(2)(B) based upon his collection and use  
2 of the customer payments.

3 2. The Withdrawals

4 Appellants deny that Sarp actually intended to hinder and  
5 delay the trustee's administration of the case when he tried to  
6 deposit the Withdrawals on the same date as the trustee's  
7 appointment. According to Sarp, the checks would have been  
8 deposited earlier, but he was waiting until Katmai had sufficient  
9 funds to cover them. In light of Sarp's asserted lack of  
10 awareness of the trustee's appointment, Appellants contend that  
11 there is a genuine issue of material fact as to his intent in  
12 cashing the Withdrawals.

13 The initial burden of showing that there is an absence of  
14 any genuine issue of material fact rests on the party seeking  
15 summary judgment. City of Vernon, 955 F.2d at 1365. If this  
16 burden is met, then the non-moving party must "set forth specific  
17 facts showing that there is a genuine issue for trial." Fed. R.  
18 Civ. P. 56(e). The non-moving party cannot defeat summary  
19 judgment by relying on self-serving statements alone as evidence  
20 that a disputed material fact is present. Far Out Prods., Inc.,  
21 247 F.3d 986, 997 (9th Cir. 2001).

22 Here, the trustee met his burden by presenting a number of  
23 undisputed facts. First, according to Katmai's payroll records,  
24 Sarp received one payroll check per month, consistently dated  
25 between the ninth and eleventh of the month. However, beginning  
26 in December 2004, the month of the trustee's appointment, Katmai  
27 paid Sarp three payroll checks: one on December 10, 2004, in the  
28 amount of \$5,879.25, another on December 15, 2004, for \$2,486.07,

1 and a third on December 16, 2004, in the amount of \$5,879.25.<sup>13</sup>  
2 These three payroll checks totaled \$14,244.57 - \$9,072 more than  
3 Sarp was ever paid in a single month. As of October 19, 2004,  
4 Sarp had notice of the trustee's motion to substantively  
5 consolidate Appellants' bankruptcies with Katmai's bankruptcy.  
6 In response to this motion, Sarp clearly articulated his concerns  
7 regarding Mork having control over Katmai's estate.<sup>14</sup> The  
8 substantive consolidation motion was ultimately heard on December  
9 17, 2004. Sarp's opposition and knowledge of this motion  
10 supports a finding that he was well aware of the possibility that  
11 a trustee could obtain control of Katmai's assets as early as  
12 December 17, 2004. Second, not only was Sarp paid significantly  
13 more in December 2004, but he admits that Hartung, the court-  
14 appointed president and chief financial officer of Katmai, did  
15 not authorize the Withdrawals. Third, Sarp conveniently  
16 deposited two of the paychecks and a check for reimbursed  
17 expenses totaling \$12,607.50 on the exact date of the trustee's  
18 appointment, i.e., December 17, 2004, the date he lost all  
19 control over Katmai's checking account.

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20  
21 <sup>13</sup> The Katmai payroll transaction sheets state that the  
22 checks were issued on December 10, 15, and 16, 2004. However,  
the actual checks have a date on them of December 17, 2004.

23 <sup>14</sup> The trustee's motion to substantively consolidate the  
24 bankruptcy cases and Sarp's opposition were not included as part  
25 of the record; nevertheless, we have obtained copies from the  
26 bankruptcy court's electronic case filing system, and we are able  
27 to take judicial notice of these pleadings. Harris v. U.S.  
28 Trustee (In re Harris), 279 B.R. 254, 261 n.4 (9th Cir. BAP  
2002) ("A judicially noticed fact must be one not subject to  
reasonable dispute in that it is . . . capable of accurate and  
ready determination by resort to sources whose accuracy cannot  
reasonably be questioned.").

1 To rebut the trustee's evidence, Appellants provide only  
2 Sarp's declaration averring that the timing of the Withdrawals  
3 was entirely coincidental. But this declaration is not  
4 sufficient to create a genuine issue of material fact. His  
5 statements therein do not explain why he was paid \$9,000 more in  
6 December than any other previous month, nor do they adequately  
7 address the status of Katmai's checking account at the relevant  
8 time. Appellants have not provided any time cards, expense  
9 reports, nor bank statements which would support any of Sarp's  
10 statements. In sum, the statements do nothing "more than simply  
11 show that there is some metaphysical doubt as to the material  
12 facts[,]” Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio  
13 Corp., 475 U.S. 574, 586 (1986), which, by itself, is  
14 insufficient to establish that a genuine dispute exists when  
15 viewed in light of the trustee's evidence.

16 The evidence in the record unequivocally demonstrates that  
17 1) in December, Sarp was paid \$9,000 more for his services than  
18 in any other month in 2004 without any explanation for the  
19 increase; 2) on the date of the appointment of the trustee, Sarp  
20 deposited over \$12,000 of Katmai funds for alleged salary and  
21 expenses; 3) no evidence has been provided to support Sarp's  
22 entitlement to the \$12,000 or that such amount was approved by  
23 Katmai's controlling officer; and 4) after the trustee's  
24 appointment Sarp lacked the authority to use Katmai funds without  
25 prior approval from the trustee or the court. Based on the  
26 inferences that can be drawn from Sarp's conduct and the facts in  
27 the record, we agree with the bankruptcy court that there is  
28 evidence that he acted with the actual intent to hinder, delay or

1 defraud the trustee when he made the Withdrawals. We therefore  
2 conclude that the court's granting of summary judgment under  
3 § 727(a)(2)(B) to be appropriate.

4 B. Denial of Barbara Sarp's Discharge

5 At the summary judgment hearing, the bankruptcy court found  
6 that Barbara Sarp had actively participated with Sarp in  
7 deceiving the trustee by cashing the Withdrawals made payable to  
8 her. Based on this finding, the court granted summary judgment  
9 against Barbara Sarp under § 727(a)(2)(B) "in her capacity as a  
10 member of the marital community".<sup>15</sup>

11 1. The Lack of Evidence Supporting Intent

12 Unlike the evidence supporting Sarp's denial of discharge,  
13 the trustee's case against Barbara Sarp is thin at best. In this  
14 regard, the only evidence presented by the trustee were the two  
15 Withdrawals made payable to Barbara Sarp, only one of which was  
16 actually endorsed by her.

17 By contrast, Barbara Sarp states in her declaration that she  
18 never participated in the management of Katmai's operations and  
19 that her involvement with the company was limited to "run[ning]  
20 errands and sign[ing] checks when told to do so." Further, she  
21 was never employed by WWA in any capacity. The trustee has not  
22 provided any evidence to rebut or even put into question the  
23 veracity of her declaration. When the evidence is viewed in a  
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25 <sup>15</sup> Prior to the conclusion of the hearing on the summary  
26 judgment motion, the court granted Appellants' request for the  
27 opportunity to file Barbara Sarp's supplemental declaration  
28 addressing her specific participation as to the Withdrawals and  
her separate property liability. The declaration persuaded the  
court to only grant summary judgment under § 727(a)(2)(B) as to  
her community property interest.

1 light most favorable to Barbara Sarp, there are clearly material  
2 factual issues regarding her intent. The execution of a single  
3 check simply does not provide sufficient evidence for us to  
4 reasonably infer an intent to deceive, delay, or defraud the  
5 trustee. Thus, the bankruptcy court's denial of her discharge on  
6 summary judgment as to her marital community liability is  
7 erroneous and we remand the matter for further findings as to  
8 Barbara Sarp's intent.

9 2. Partial Denial of Discharge

10 In a somewhat novel ruling, the bankruptcy court denied  
11 Barbara Sarp's discharge under § 727(a)(2), but only in her  
12 capacity as a member of the "marital community." Her discharge  
13 was left intact in her "separate capacity." Specifically, the  
14 order granting partial summary judgment provides in relevant  
15 part:

16 2. . . . Summary judgment is GRANTED against Barbara A.  
17 Sarp in her capacity as a member of the marital  
18 community of Anthony J. Sarp and Barbara A. Sarp.  
19 Summary judgment is DENIED against Barbara A. Sarp in  
20 her separate capacity;

21 3. Anthony J. Sarp is DENIED discharge of his debts  
22 under 11 U.S.C. § 727(a)(2)(B) both in his separate  
23 capacity and in his capacity as a member of the marital  
24 community of Anthony J. Sarp and Barbara A. Sarp; and

25 4. Barbara A. Sarp is DENIED discharge of her debts  
26 under 11 U.S.C. § 727(a)(2)(B) only in her capacity as  
27 a member of the marital community of Anthony J. Sarp  
28 and Barbara A. Sarp.

29 Order Granting In Part and Denying In Part the Trustee's Motion  
30 for Summary Judgment ("Summary Jmt. Order") at 2, Feb. 16, 2006.

31 A discharge under § 727(a), discharges a debtor of "all  
32 debts that arose before the date of the order for relief . . . ,  
33 and any liability on a claim that is determined under section 502

1 . . . as if such claim had arisen before the commencement of the  
2 case." 11 U.S.C. § 727(b). Section 727 allows the court to deny  
3 a debtor's discharge provided one of the ten enumerated grounds  
4 listed under subsection (a) is proven. Id. § 727(a). If the  
5 court denies discharge under § 727(a), creditors retain the right  
6 to pursue collection of their debt against the debtor and against  
7 non-bankruptcy estate property.

8 In contrast to certain subsections of § 523(a) which allow  
9 for a partial discharge of an otherwise nondishargeable debt, see  
10 Saxman v. Educ. Credit Mgmt. BJR Corp. (In re Saxman), 325 F.3d  
11 1168, 1173-74 (9th Cir. 2003) (discussing partial discharge under  
12 § 523(a) (8) and (a) (15)), § 727(a) embraces an all-or-nothing  
13 approach. This section "relieve[s] the honest debtor from the  
14 weight of oppressive indebtedness and permit[s] him to start  
15 afresh from the obligations and responsibilities consequent upon  
16 business misfortune." Adeeb, 787 F.2d at 1345 (citing Devers,  
17 759 F.2d at 754-55) (emphasis added). If a debtor is found to be  
18 dishonest under § 727(a), then discharge is denied as to all  
19 debts no matter the extent of the dishonest behavior. Nothing in  
20 § 727 allows for a partial denial of a debtor's discharge based  
21 upon the character of the debtor's property.

22 To the extent the bankruptcy court "denied discharge of  
23 [Barbara Sarp's] debts under 11 U.S.C. § 727(a) (2) (B) only in her  
24 capacity as a member of the [Appellants'] marital community"  
25 Summary Jmt. Order at 2, Feb. 16, 2006, it erred. We, therefore,  
26 reverse the bankruptcy court's order as to the granting of  
27 summary judgment against Barbara Sarp and the denial of discharge  
28 under § 727(a) (2) (B) in her capacity as a member of the marital

1 community of Appellants.

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**VI. CONCLUSION**

For the foregoing reasons, we AFFIRM the bankruptcy court's order as to the granting of summary judgment against Anthony Sarp and the denial of his discharge. However, we VACATE and REMAND the order in regards to the granting of summary judgment against Barbara Sarp and REVERSE the order as to the denial of her discharge.