**NOT FOR PUBLICATION**

**UNITED STATES BANKRUPTCY APPELLATE PANEL**

**OF THE NINTH CIRCUIT**

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| In re: | BAP No. CC-06-1176-MaBPa |
| EZRA O. SFADIA, | Bk. No. SV 03-15050-GM |
| Debtor. | Adv. No. SV 03-01404-GM |
| EZRA O. SFADIA, | |
| Appellant, | |
| v. | **M E M O R A N D U M**[1] |
| DONGKUK INTERNATIONAL, INC.; UNITED STATES TRUSTEE; BRAD D. KRASNOFF, Chapter 7 Trustee, | |
| Appellees. | |

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

Filed - September 5, 2007

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

Honorable Geraldine Mund, Bankruptcy Judge, Presiding

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Before: MARLAR,[2] BRANDT and PAPPAS, Bankruptcy Judges.

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[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.

[2] Hon. James M. Marlar, United States Bankruptcy Judge for the District of Arizona, sitting by designation.

## INTRODUCTION

In a summary judgment proceeding, the chapter 7[3] debtor-defendant failed to provide sufficient admissible evidence to overcome the prima facie case presented by the moving creditor-plaintiff. The bankruptcy court granted the motion to deny the debtor his discharge under § 727.

In appealing the judgment, the debtor maintains that the bankruptcy court failed to consider movant's violation of the local rules in serving the motion. He also argues that the bankruptcy court erred or was biased because it did not continue the summary judgment hearing to enable him to provide additional evidence, which, he alleges, would have created a genuine factual issue. He further contends that the court erred in entering judgment on the merits.

We hold that the bankruptcy court did not abuse its discretion or err, on the § 727(a)(3) and (a)(4) counts, because the debtor failed to meet his burden to raise a genuine issue of material fact. While we reverse the judgment in regards to the (a)(5) count, that ruling was harmless error which does not change the substantive result. Therefore, the bankruptcy court's judgment granting the creditor's motion is AFFIRMED IN PART AND REVERSED IN PART.

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[3] Unless otherwise indicated, all "Code," chapter and section references are to the Bankruptcy Code, 11 U.S.C. § 101 - 1330, prior to its amendment by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. 109-8, 119 Stat. 23, as the case from which this appeal arises was filed before its effective date (generally October 17, 2005).

**FACTS**

In 1998, Edward Sfadia ("Debtor") had an ownership interest in a steel fabrication business known as Fontana Tube Manufacturing LLC ("FTM" or "Fontana Tube"). By 2001 he was the 100% owner and manager.

In January and February of 2001, FTM entered into written contracts for the purchase of cold rolled steel sheets from the appellee, Dongkuk International, Inc. ("Dongkuk"). When FTM failed to pay for the steel, Dongkuk sued and, in July 2003, obtained a California state court judgment in the amount of $1,057,057.03.

In October of 2001, Debtor sold his interest in FTM to an entity known as American Tube. As consideration for the sale, American Tube agreed to pay Debtor $300,000 and to assume FTM's debts of approximately $1,000,000. Rule 2004 Exam Tr. 59:9-12, August 19, 2003. No written documents were executed in connection with this sale, however. Id. at 69:9-11.

Debtor received a cashier's check from American Tube for $200,000, cashed the check, and testified that he used the money to pay "some loans that I had." Id. at 39:11. The $100,000 of liquidated debt owing to Debtor and the debts owing to Dongkuk and other creditors remained unpaid, however.[4] See Decl. of Sfadia, Resp. in Opp. 19, ¶ 24, March 31, 2006.

[4] The bankruptcy court docket reflects that an involuntary chapter 11 petition was filed against FTM and dismissed prior to an order for relief in 2002.

**Bankruptcy Schedules**

Debtor filed a voluntary chapter 7 petition on June 13, 2003. He indicated that he was currently unemployed. In Item No. 18 of the statement of financial affairs (nature, location and name of business within six years of bankruptcy petition), Debtor did not disclose his former ownership interest in FTM.[5]

Debtor neither listed the $200,000 payment he received from American Tube in 2001, nor did he indicate that there was a $100,000 debt still owed to him by American Tube.

On Item No. 4 (suits etc.), Debtor listed a "pending collection action" by Dongkuk, and also listed Dongkuk as an unsecured nonpriority creditor with an $800,000 contingent, unliquidated and disputed claim. On Schedule H, Debtor listed FTM as a codebtor on the Dongkuk debt.

Debtor's liabilities of more than $1.3 million exceeded his assets of $1,445. The Meeting of Creditors was held on July 18, 2003, and continued to August 15, 2003, for the production of additional information. Subsequently, on October 24, 2003, the chapter 7 trustee filed a Notice of Asset Case and Possible Dividend.[6]

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[5] Although Debtor also had indicated, in Item No. 2 (income other than from employment or operation of business) that he had received corporate draws from FTM in 2001 and 2002, he amended the statement of financial affairs, in 2003, to indicate that he had received no such income. He made no change to Item No. 18, however.

[6] We take judicial notice of the bankruptcy court docket, as this notice was not made part of the record.

**Rule 2004 Exam, Dongkuk's Claim and Complaint**

Dongkuk obtained an order for a Rule 2004 exam of Debtor and for production of documents, which was conducted on August 19, 2003.

At the examination, Debtor testified that he had started FTM in 1998 as a 50/50 "partnership" with two other individuals. About six months later, he bought them out and became the sole owner. As such, he was in charge of keeping all the books and records of the company. Rule 2004 Exam Tr. 68:14-18.

He stated that, in October 2001, he sold his interest in FTM to American Tube, based on an oral agreement only, for a cash payment of $300,000 and the buyer's agreement to pay 100% of the business debts. See id. at 59:9-12; 76:3-5. Debtor received and cashed a check from American Tube for $200,000, and used the money to pay "some loans" that he had. Id. at 39:3-17. At the time of the transfer, the FTM equipment inventory was worth approximately $600,000 to $700,000 and the steel inventory was worth another $300,000 to $400,000. Id. at 56:11; 79:17-19. Debtor testified that FTM was no longer operating. Id. at 68:2-4.

As for the production of documents, Debtor testified that all books and records had been left with FTM when he sold it, and that he had not seen such books and records for the three years since, nor had he had any continuing involvement in FTM. Id. at 78:12.

Following this examination, Dongkuk filed a nonpriority unsecured proof of claim for $1,057,057.03 based on "goods sold" and "fraud." On September 16, 2003, Dongkuk filed its "Complaint For Determination of Dischargeability of Debt [11 U.S.C. § 523(c),

523(a)(2)(A)] And Objecting to Discharge [11 U.S.C. § 727(a)(3), 727(a)(4), 727(a)(5)]."

This appeal only concerns the objection to discharge,[7] which contained the following counts:

Count Two - § 727(a)(3) (Failure to Keep or Preserve Any Recorded Information). Dongkuk alleged, inter alia, that Debtor failed to keep or preserve any recorded information concerning his ownership interest in Fontana Tube, the sale of that interest, and his right to receive payment of the liquidated debt of approximately $100,000 owed by American Tube on account of the unpaid portion of the sale price.

Count Three - § 727(a)(4) (False Oath). Dongkuk alleged that Debtor failed to disclose facts and assets, such as his interest in FTM and his right to receive additional payment from American Tube, in his schedules and statement of financial affairs.

Count Four - § 727(a)(5) (Failure to Explain Loss of Assets). Dongkuk alleged that Debtor failed to satisfactorily explain, inter alia, the disposition of the $300,000 proceeds of the sale of his interest in FTM.

Meanwhile, in October, 2003, Dongkuk requested, and the clerk of court entered a default on the complaint.

In the same month, Debtor converted his case to chapter 13. However, the case was reconverted to chapter 7, in January 2004, due to Debtor's ineligibility for chapter 13 relief.

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[7] The bankruptcy court subsequently dismissed the § 523 counts, enabling the panel to assert jurisdiction over the appeal. See Belli v. Temkin (In re Belli), 268 B.R. 851, 856-57 (9th Cir. BAP 2001) (a judgment that resolves an adversary proceeding as to all remaining counts and parties is final and appealable).

After several continued status hearings, Debtor answered the complaint and the bankruptcy court vacated the entry of default on December 15, 2005.

**Summary Judgment Proceedings**

On January 19, 2006, Dongkuk moved for summary judgment as to the § 727 counts only. Dongkuk presented the Debtor's schedules and statement of financial affairs, and a transcript of the Rule 2004 exam. See Notice of Lodging Transcript, January 19, 2006. A duplicate certified copy was filed on February 21, 2006.

The hearing on the motion was set for February 22, 2006. On February 17, 2006, Debtor filed a "Notice of Defective Service of Motion for Summary Judgment." He argued that the motion was served on his counsel but not on him and that less than the required 35 days' notice of the hearing was given. Debtor requested a continuance.

The court continued the hearing to March 1, 2006, and then the parties stipulated to continue it to March 29, 2006.

On March 13, 2006, Debtor filed a second notice of defective motion, this time asserting that neither he nor his attorney had been served with a copy of the Rule 2004 exam transcript. Debtor requested a 60-day continuance.

On March 29, 2006, the bankruptcy court entered a Tentative Ruling ("March 29, 2006 Tentative Ruling"), which considered the filing of these notices in lieu of a substantive opposition. The court stated:

> It appears that Mr. Brownstein is introducing his argument on the [Rule] 2004 transcript solely to delay

> this matter. The transcript was readily available to him and to his client. The court reporter shows that it was sent to Mr. Sfadia for review. Mr. Brownstein was present at the examination. All he had to do was order a copy from the transcriber. Further, he knew on 2/17 that there was no transcript, but waited until 3/13 to file his notice of defect.

March 29, 2006 Tentative Ruling, at 1 (alteration added).

The court issued an order to show cause ("OSC") as to why Debtor's attorney should not be sanctioned, and ordered the summary judgment and OSC hearing to go forward on April 12, 2006. (The sanction was ultimately denied. See Order, April 13, 2006.)

Debtor then filed his opposition to the motion and statement of facts. For the most part, Debtor did not dispute the material factual allegations made by Dongkuk, but rather gave various legal or procedural reasons for his actions and arguments as to why any such failures did not constitute cause to deny his discharge.

Specifically, in regards to his interest in FTM, Debtor stated that Item No. 18 on the statement of financial affairs asks only whether the debtor was an officer et cetera of a "corporation, partnership, sole proprietor, or was a self-employed professional." Debtor said he believed that the question did not apply to him because FTM was an "LLC" at all times and was none of the above. Decl. of Sfadia, Resp. in Opp. 17-18 ¶ 19-20 and 22, ¶ 40. Dongkuk subsequently objected to this statement on the grounds of lack of foundation.[8] Plaintiff's Objs. 17, ¶ 40, April 10, 2006.

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[8] Debtor testified at the Rule 2004 exam that FTM had been formed under a "partnership agreement," see Rule 2004 Exam Tr. 43:7-9, and was also an "LLC," see id. at 45:9-14. In his opposition papers, Debtor declared that "in reality," FTM had always been an LLC and the two "partners" were actually "members" of the LLC. Decl. of Sfadia, Resp. in Opp. 22, ¶ 44.

Dongkuk's evidentiary objection was well taken because Debtor never produced the agreement or any other documentation to prove the nature of the entity. See Rule 2004 Exam Tr. 43:10-12.

Debtor also declared that he had provided all disclosures to the chapter 7 trustee:

> I fully disclosed all facts and circumstances relating to Fontana Tube and all matters relating thereto to the Chapter 7 trustee in his case and provided copies [o]f all litigation files, which he believes fully disclosed anything that would be relevant regarding the existence of the entity and any possible actions against former members of that entity. I had no reason to withhold any information and I just did not want to put in extraneous and redundant information that was not asked for in the schedules and statements.

Decl. of Sfadia, Resp. in Opp. 18, ¶ 20 (alteration added).

Furthermore, Debtor declared that he inadvertently failed to disclose information concerning FTM because it was a "bankrupt[], worthless and liquidated entity." Id. at 17, ¶ 17.

In regards to his interest in the $100,000, Debtor maintained that the chapter 7 trustee's Notice of Asset Case was proof that he had disclosed to the trustee information concerning FTM and the money due from the buyer. Id. Debtor stated that he "forgot about the $100,000 verbal obligation of an insolvent and defunct debtor in preparing my schedules." Id. at 22, ¶ 48. Debtor referred to his testimony from the Rule 2004 exam that "after American Tube bought Fontana Tube it went out of business, that they were evicted and Fontana Tube was forced into bankruptcy and there was no way of recovering from American Tube." Resp. in Opp. 11, ¶ 19. (The pages of the transcript to which Debtor refers--pages 48 through 53--are missing from the excerpts of record.) Debtor asserted that American Tube either lost or destroyed the records. Decl. of Brownstein, Resp. in Opp. 27 ¶ 14, March 31, 2006; Resp. in Opp. 12, ¶ 20-21.

Debtor further declared that he has a high school education, his native language is Hebrew and he "speak[s] and understand[s] English with difficulty." He also mentioned that he had suffered from a "severe depression starting in 2001." Finally, he stated that "I may have left out certain things from my schedules and statement, however, such failures were due to my inadvertence and neglect and were not[] the result of any deliberate misconduct." Decl. of Sfadia, Resp. in Opp. 15, ¶ 2, ¶ 5, and 24, ¶ 52 (alterations added).

Dongkuk filed evidentiary objections to Debtor's declaration and memorandum, and also filed a Reply. Among other things, it objected to Debtor's hearsay statements regarding his disclosures to the trustee, the lack of foundation for, and irrelevance of, factual allegations concerning the financial state of FTM, and the irrelevance of Debtor's assertions of lack of fluency in English and of his inadvertence in failing to make disclosures.

The motion was heard on April 12, 2006. The bankruptcy court issued a Tentative Ruling ("April 12, 2006 Tentative Ruling"). Because there is no hearing transcript in the excerpts of record, we do not know the full extent of the court's evidentiary rulings, with the exception of the hearsay objection concerning Debtor's conversations with the chapter 7 trustee, which was sustained.

The April 12, 2006 Tentative Ruling, in pertinent part, was as follows:

> This adversary proceeding was filed 2 ½ years ago, so there has certainly been reasonable time for discovery. Much of the defense to lack of disclosure is based on the debtor's assertion . . . he told the chapter 7 trustee about the amount still owing for the sale of Fontana Tube Manufacturing (FTM) at the § 341(a) meeting. However all of these assertions in the debtor's declaration are hearsay as they are out of court statements being admitted

> for the truth therein. Although this has always been a critical issue to the defense, the debtor has not obtained or presented the tape of the § 341(a) meeting or a declaration of the trustee as to what was disclosed. Thus, I have no admissible evidence that the debtor ever disclosed this to the trustee. And he certainly never amended his schedules to disclose it. Whether he deemed it valueless or not, it is required that disclosure take place.
>
> Further, the debtor did not disclose the receipt of the $200,000 and has not provided any books or records as to how he used that money. At most he says that he paid his creditors. Even if I were to believe that he left all of his books and records at the business, these monies were received and paid AFTER he sold the business.
>
> Beyond that, it is not reasonable that a person would leave all business and personal books and records at a business (which had not yet been paid for). Or that he would not have a copy of the sales agreement and note (it is somewhat confusing where [whether] there were written documents at all or if so who signed what).
>
> I have read the transcript of the 2004 examination of the debtor and I do not find any reference by him or his attorney to a lack of fluency in English. In fact, he appears quite fluent. And if he was not, it was his responsibility to provide an interpreter. And although he and his attorney received a copy of the transcript, no changes were ever made and provide [sic] to the reporter or the other side.
>
> . . . .
>
> Therefore, I have little evidence to overcome this motion for summary judgment as to § 727(a)(3) and § 727(a)(4).
>
> I find that each of the facts in this Motion for Summary Judgment are in fact uncontroverted by any admissible evidence so that no triable issues of fact are raised except that the schedules do allude to a spouse from whom the debtor is separated (schedule I). Therefore summary judgment is warranted under 727(a)(3) and § 727(a)(4). However, I will not grant summary judgment under § 727(a)(5).

April 12, 2006 Tentative Ruling (alteration added).

On April 28, 2006, the bankruptcy court entered its Order granting the motion and incorporating its April 12, 2006 Tentative Ruling as its findings and conclusions. The only difference between the Order and the April 12 Tentative Ruling was that the Order also granted, without further elaboration, the motion under § 727(a)(5). Debtor filed a timely notice of appeal.

## ISSUES[9]

1. Whether the bankruptcy court committed reversible error in granting summary judgment when Dongkuk did not serve the Rule 2004 Exam transcript in support of the motion upon Debtor.

2. Whether the bankruptcy court was biased against Debtor.

3. Whether the bankruptcy court abused its discretion in failing to continue the hearing in order to allow Debtor to present the tape or transcript of the July 18, 2003, § 341(a) meeting.

4. Whether the bankruptcy court erred in granting summary judgment in favor of Dongkuk.

## STANDARDS OF REVIEW

We review the bankruptcy court's discovery rulings, case management, and its enforcement of the local rules for an abuse of discretion. Lewis v. Tel. Employees Credit Union, 87 F.3d 1537,

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[9] Debtor has also raised the issue of whether the bankruptcy court erred in deciding the motion without considering his "physical disability." Opening Brief 13, April 23, 2007. The term is not repeated or discussed, or even explained anywhere else in the opening or reply briefs. Debtor's declaration mentions only his alleged lack of fluency in English and his "severe depression." Debtor has not challenged the court's finding that he was fluent in English. See April 12, 2006 Tentative Ruling.

Since Debtor has neither addressed the physical disability argument in his appellate argument, nor cited to any portion of the record in its support, this issue has been abandoned. Green v. Kennedy (In re Green), 198 B.R. 564, 566 (9th Cir. BAP 1996).

1557 (9th Cir. 1996) (trial court has broad discretion to make discovery rulings); United States v. 2.61 Acres of Land, 791 F.2d 666, 671 (9th Cir. 1986) (as amended) (denial of a requested continuance is not necessarily abuse of discretion); Official Comm. of Unsecured Creditors v. Henry Mayo Newhall Mem. Hosp. (In re Henry Mayo Newhall Mem. Hosp.), 282 B.R. 444, 455 (9th Cir. BAP 2002) (trial court's inherent authority to manage its caseload); O'Donnell v. Vencor Inc., 466 F.3d 1104, 1109 (9th Cir. 2006) (district courts have "broad discretion in interpreting and applying their local rules") (citation omitted).

A trial court's failure to recuse itself is also reviewed for an abuse of discretion. Seidel v. Durkin (In re Goodwin), 194 B.R. 214, 220 (9th Cir. BAP 1996).

We review the summary judgment ruling de novo. Wood v. Stratos Prod. Dev., LLC (In re Ahaza Sys., Inc.), 482 F.3d 1118, 1123 (9th Cir. 2007). Viewing the evidence in the light most favorable to the nonmoving party, we must determine "whether there are any genuine issues of material fact and whether the trial court correctly applied relevant substantive law." Tobin v. Sans Souci Ltd. P'ship (In re Tobin), 258 B.R. 199, 202 (9th Cir. BAP 2001).

Evidentiary questions decided in the context of summary judgment are reviewed for an abuse of discretion. Younie v. Gonya (In re Younie), 211 B.R. 367, 372 (9th Cir. BAP 1997), aff'd mem., 163 F.3d 609 (9th Cir. 1998).

We may affirm summary judgment on any ground supported by the record. Cusano v. Klein, 264 F.3d 936, 950 (9th Cir. 2001).

**DISCUSSION**

The remedy of denial of discharge punishes a debtor for misconduct in the bankruptcy process. Latman v. Burdette, 366 F.3d 774, 782 (9th Cir. 2004). A claim for denial of discharge under § 727 is construed liberally in favor of the discharge and strictly against the person objecting to the discharge. Roberts v. Erhard (In re Roberts), 331 B.R. 876, 882 (9th Cir. BAP 2005), aff'd mem., 2007 WL 2089041 (9th Cir. July 19, 2007). The reasons for denying a discharge "must be real and substantial, not merely technical and conjectural." Commerce Bank & Trust Co. v. Burgess (In re Burgess), 955 F.2d 134, 136 (1st Cir. 1992) (quoting Dilworth v. Boothe, 69 F.2d 621, 624 (5th Cir. 1934)).

The party moving for summary judgment must show, by the "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits . . . that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c), (incorporated by Rule 7056).

"Once the moving party meets its initial burden, the nonmoving party must go beyond the pleadings and, by its own affidavits or by the depositions, answers to interrogatories, and admissions on file, come forth with specific facts to show that a genuine issue of material fact exists." Nat'l Motor Freight Traffic Ass'n, Inc. v. Superior Fast Freight, Inc. (In re Superior Fast Freight, Inc.), 202 B.R. 485, 487-88 (9th Cir. BAP 1996) (citation omitted).

This requires the nonmoving party to produce significant probative evidence, for a dispute with regard to a material fact is "genuine" only if the evidence is such that a reasonable jury could return a verdict for the nonmoving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 (1986). Summary judgment should be granted only if the evidence is so one-sided that one party must prevail as a matter of law. Id. at 248.

**A. Motion Defect**

Debtor contends that the bankruptcy court erred in granting summary judgment when Dongkuk's motion violated the local bankruptcy rules by failing to attach a copy of the Rule 2004 exam transcript upon which it relied as evidence. The rule cited is LBR 9013-1(a)(13) which provides:

> Evidence on Motions. Factual contentions involved in any motion or opposition to a motion shall be presented, heard, and determined upon declarations and other written evidence. Verifications of motions are not sufficient to constitute evidence on a motion unless otherwise ordered by the court.

In addition, LBR 9013-1(e) provides:

> A notice of motion and motion for summary judgment or partial summary adjudication pursuant to F.R.B.P. 7056 shall be served and filed no later than 35 calendar days prior to the date of the hearing on the motion. There shall be served and lodged with each motion for summary judgment or partial summary adjudication a proposed statement of uncontroverted facts and conclusions of law, and a separate proposed summary judgment. Such proposed statement shall state the material facts as to which the moving party contends there is no genuine issue and shall reference each fact to the evidence that supports it.

Although Dongkuk did not serve the transcript with the motion, it referenced in the statement of facts to the transcript

and filed a notice of lodging the transcript in bankruptcy court on January 19, 2006. Thereafter, it filed a certified copy of the transcript on February 21, 2006.

At that time the hearing was set for February 22, 2006. The record shows that Debtor objected to the short notice and requested a continuance. The court complied with the request, in part, and eventually the hearing was continued to April 12, 2006.

In its March 29, 2006 Tentative Ruling, the bankruptcy court ruled that Debtor clearly had access to the transcript. This evidence was within his knowledge and control, as it was his testimony. Furthermore, Debtor had notice that the transcript had been filed in bankruptcy court in January or February of 2006, but did not complain until March.

Since the court continued the hearing to April 12, 2006, any defect in service due to failure to attach a copy of the transcript was no longer a due process concern. Debtor had sufficient time to obtain and review a copy. See United States v. DeLuca, 692 F.2d 1277, 1281 (9th Cir. 1982) (local rules implement due process and other statutory rights and also promote efficiency).

Moreover, a bankruptcy court has discretion to set deadlines in the summary judgment proceeding. See, e.g., Marshall v. Gates, 44 F.3d 722, 725 (9th Cir. 1995) (stating that Fed. R. Civ. P. 56 "allows district courts to adopt procedures pursuant to which the non-moving party may oppose a motion prior to a hearing date").

We conclude that this notice issue neither prejudiced Debtor nor prevented the bankruptcy court from ruling favorably on the

motion. The bankruptcy court did not thereby abuse its discretion.

**B. Judicial Bias**

In another threshold issue on appeal, Debtor maintains that the bankruptcy court should have recused itself due to alleged bias against Debtor. This motion is untimely and was not made to the bankruptcy court. Davies v. Comm'r, 68 F.3d 1129, 1131 (9th Cir. 1995). However, for discussion purposes, we will address the issue.

Debtor points as evidence of bias to the court's reaction to the second notice of defective service, in which Debtor asserted that he had not been served with the Rule 2004 exam transcript and requested a 60-day continuance. He states that the court's "refusal to consider the request for continuance and instead to issue an order to show cause against Debtor's counsel for noting procedural defects in the service of the Motion for Summary Judgment show that the Court may have had an unintended, but nevertheless real bias against the Debtor." Op. Br. 9.

The operative recusal statute, 28 U.S.C. § 455(a) requires disqualification only when a judge's "impartiality might reasonably be questioned." The United States Supreme Court has explained that this is an "extrajudicial source" rule, and thus it would be "extraordinary to disqualify a judge for bias or appearance of partiality when his remarks arguably reflected what he learned, or what he thought he learned, during the proceedings." United States v. Microsoft Corp., 253 F.3d 34, 116

(D.C. Cir. 2001) (citing Liteky v. United States, 510 U.S. 540, 554-55 (1994)).

Appellant does not even allege, much less show, any extrajudicial source for any bias, nor any evidence of bias at all (we note his failure to provide a transcript of the hearing on which he bases his charge). The claim of bias is without merit.

**C. Continuance for Supplemental Evidence**

Debtor maintains that he was unfairly denied the opportunity to support his declarations with the transcript of the July 18, 2003, § 341 meeting.

Dongkuk alleged, under the § 727(a)(4) false-oath count, that Debtor had failed to disclose, in his schedules and statement of financial affairs, his ownership interest in FTM, his receipt and disposition of the $200,000 from American Tube, and the remaining $100,000 liquidated debt owing to him.

The Rule 2004 exam testimony reveals that Debtor admitted to these facts. In addition, his testimony was that he used the $200,000 to pay a loan.

In his declaration in opposition to summary judgment, Debtor stated that he had disclosed everything about this transaction to the chapter 7 trustee and that the trustee had investigated the matter. See Decl. of Sfadia, Resp. to Opp. 17, ¶ 17; 18, ¶ 20; and 20, ¶ 43. As evidence of such disclosure, he referred to the trustee's October 24, 2003 Notice of Asset Case. This evidence,

alone, does not create a genuine issue of material fact.[10] Debtor did not provide a trustee's declaration, however, nor did he present a transcript of the July 18, 2003, § 341 meeting to the bankruptcy court in the summary judgment proceedings.

Dongkuk therefore objected to this portion of the declaration as inadmissible hearsay. The bankruptcy court agreed. See April 12, 2006 Tentative Ruling, supra. Debtor has not challenged the evidentiary ruling against his declaration testimony, but instead he has filed with his opening brief to us a transcript of the July 18, 2003, § 341 meeting. We decline to review this evidence because it was not before the bankruptcy court. Drysdale v. Educ. Credit Mgmt. Corp. (In re Drysdale), 248 B.R. 386, 388 (9th Cir. BAP 2000), aff'd, 2 Fed. Appx 776 (9th Cir. 2001) ("In reviewing a motion for summary judgment, we must review the record that was before the bankruptcy court de novo."); Kabayan v. Yepremian (In re Yepremian), 116 F.3d 1295, 1297 (9th Cir. 1997).

Nonetheless, Debtor contends that the bankruptcy court erred in granting the motion when it could have continued the hearing to enable him to file the transcript, and thus to comply with Rule 56(e)'s requirement to present admissible evidence.

There is some judicial discretion involved in deciding a Rule 56 motion. An authoritative treatise states:

> Another factor that may motivate the court to refrain from granting summary judgment even though it theoretically could do so is if the noncompliance with the rule merely is technical and the opposing party appears to be proceeding in good faith. For example, when the

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[10] Further hampering our review is the fact that the October 24, 2004 Notice has not been made part of the excerpts on appeal. Debtor's request for judicial notice specified a November 17, 2004 "Report of Trustee in Chapter 7 No Asset Case."

> evidence offered in opposition to the motion is defective in form but is sufficient to apprise the court that there is important and relevant information that could be proffered to defeat the motion, summary judgment ought not to be entered. The judge should exercise discretion and grant the adversary a continuance to remedy the defect.

C. Miller, A. Miller & M.K. Kane, Fed. Prac. & Proc. Civ. 3d § 2728 (2007).

Here, Debtor failed to disclose material information in his schedules but purportedly disclosed the information at the § 341 meeting. Our circuit has held that § 341 meeting confessions may absolve a debtor who is "is not fraudulently concealing property from his creditors." See Beauchamp v. Hoose (In re Beauchamp), 236 B.R. 727, 732-33 (9th Cir. BAP 1999), aff'd, 5 Fed. Appx. 743 (9th Cir. 2001) (discussing First Beverly Bank v. Adeeb (In re Adeeb), 787 F.2d 1339 (9th Cir. 1986) and Baker v. Mereshian (In re Mereshian), 200 B.R. 342, 346 (9th Cir. BAP 1996)).

The bankruptcy court did not make a finding regarding Debtor's "good faith," yet it necessarily found fraudulent conduct on Debtor's part by granting summary judgment under § 727(a)(4) (denial of discharge for making a knowing and fraudulent false oath). The bankruptcy court also found that Debtor had not amended his schedules in order to cure such nondisclosure. See Searles v. Riley (In re Searles), 317 B.R. 368, 377 (9th Cir. BAP 2004), aff'd, 212 Fed. Appx. 589 (9th Cir. 2006) (stating that the "the method of correction [for giving false oath] is a formal amendment of the schedules.") We affirm that judgment.

Moreover, there is no indication in the record before us that Debtor asked for an additional continuance in order to proffer the § 341 meeting transcript or other evidence. Indeed, the

transcript of the April 12, 2006 summary judgment hearing has not been included in the excerpts of record. We can only presume that the debtor did not consider it helpful to his appeal. See McCarthy v. Prince (In re McCarthy), 230 B.R. 414, 417 (9th Cir. BAP 1999).[11]

We conclude that the § 341 meeting transcript would not have been relevant to the § 727(a)(4) action, nor to the § 727(a)(3) count based on a failure to keep written business records. (While it may have been relevant to a § 727(a)(5) claim of failure to satisfactorily explain loss or diminution of assets, we are reversing the order denying discharge under that count.)

Therefore, we hold that the bankruptcy court did not abuse its discretion by failing to sua sponte continue the hearing again to enable Debtor to file additional evidence, consisting of the July 18, 2003, § 341 meeting transcript, which should have been presented earlier.

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[11] Debtor also maintains that the testimony concerning his use of the $200,000 in the Rule 2004 exam was misleading because he testified that he used it to pay for "some loans," which could imply they were personal loans. He contends that the money was actually paid "for Fontana Tube's liabilities, for which liabilities the Debtor may have had some liability." Reply Brief 8, June 11, 2007. Thus Debtor believes that the § 341 meeting transcript would raise a genuine issue of material fact, i.e., whether he had an obligation to disclose a payment that was not his personal liability.

Nonetheless, Debtor stated, in his declaration, that the $200,000 was "used to cover losses that I had from stocks that I had traded." Decl. of Sfadia, Resp. to Opp. 22, ¶ 48. That statement is consistent with the inference from his Rule 2004 exam testimony that the money was spent on personal debts.

The problem with this new argument concerning the use of the $200,000 for business debts is that it was not raised until his Reply Brief in this appeal and was not clearly discussed. Therefore, we decline to address it. Cowen v. Kennedy (In re Kennedy), 108 F.3d 1015, 1019 (9th Cir. 1997); State v. Watkins, 914 F.2d 1545, 1560 (9th Cir. 1990).

**D. Judgment on the Merits**

**(1) § 727(a)(3)**

Section 727(a)(3) bars a discharge if

> the debtor has concealed, destroyed, mutilated, falsified, or failed to keep or preserve any recorded information, including books, documents, records, and papers, from which the debtor's financial condition or business transactions might be ascertained, unless such act or failure to act was justified under all of the circumstances of the case.

11 U.S.C. § 727(a)(3).

The objecting party must prove that: (1) the debtor failed to maintain and preserve adequate records, and (2) that failure made it impossible to ascertain debtor's financial condition and material business transactions. Lansdowne v. Cox (In re Cox), 41 F.3d 1294, 1296 (9th Cir. 1994).

This section is intended to "enable [a debtor's] creditors reasonably to ascertain his present financial condition and to follow his business transactions for a reasonable period in the past." 6 Collier on Bankruptcy ¶ 727.03[3][a], at 727-32 (Alan N. Resnick & Henry J. Sommer eds., 15th ed. rev. 2006) (citing In re Juzwiak, 89 F.3d 424, 428 (7th Cir. 1996)).

Dongkuk presented Debtor's own testimony that he did not have, nor could he obtain, any business records for FTM, including the documents, if any, relating to his sale of the business.

Debtor contends that the records were not material and that, in any event, the absence of records was justified because he had sold the business in 2001 (two years before the bankruptcy filing) to American Tube, pursuant to an oral agreement; he had left any

and all records at the business premises; he had not had a continuing relationship with either FTM or American Tube; and he did not have a duty to keep records of a business that was no longer his.

The bankruptcy court determined that it was "not reasonable that a person would leave all business and personal books and records at a business (which had not yet been paid for). Or that he would not have a copy of the sales agreement and note . . . ." April 12, 2006 Tentative Ruling.

Debtor did not dispute the fact that American Tube had paid him $200,000 and still owed him approximately $100,000 for completion of the sale of FTM that had occurred several years before. Moreover, he testified that the sale had included about $700,000 in inventory and the assumption of business debts. Debtor also testified that during his ownership of FTM, he was the sole person in charge of keeping financial records and bank accounts and, thus, such bookkeeping was in his zone of duties. Importantly, his current creditors included those with claims dating from his ownership and operation of FTM.

Debtors are required to keep records for a "reasonable" period of time for § 727(a)(3) purposes, and a court's determination of "reasonableness" depends on the particular facts and circumstances of each case. See, e.g., Union Planters Bank, N.A. v. Connors, 283 F.3d 896, 899 (7th Cir. 2002) (statute requires debtor to produce documents sufficient to track financial dealings with substantial completeness and accuracy for "a reasonable period past to present"). The approximately two-year look-back period for such records imposed by the court was not

unreasonable under the circumstances. It was irrelevant that FTM was no longer operating. See M.R. Toupin, Inc. v. Turpin (In re Turpin), 142 B.R. 491, 496 (Bankr. M.D. Fla. 1992) (denial of discharge warranted where debtor failed to keep records of six restaurants owned in six years preceding bankruptcy filing, even though businesses were failures).

Furthermore, although the bankruptcy court's ruling apparently focused on Debtor's failure to keep records of what became of the $200,000 payment to him following the sale of FTM, the circumstances would require the disclosure of more financial information than just that one item. For example, Debtor gave inconsistent testimony, with no evidentiary support, as to whether FTM was originally a partnership or an LLC, a distinction which might be important to a creditor. General business records are also relevant for the creditors with claims that date back to the operation of the business. The Code requires that creditors be able to reconstruct a debtor's business transactions and not have to speculate as to the debtor's financial history. Juzwiak, 89 F.3d at 427-28.

Consequently, Debtor's argument that he disclosed the disposition of the $200,000 to the trustee or during the Rule 2004 exam, or that all the records were left with FTM and then lost or destroyed, does not excuse his failure to keep and produce financial records from the time he owned and sold FTM. Debtor proffers no plausible argument for the propositions, necessary for him to prevail, that it is reasonable to sell a business having several hundred thousand dollars' worth of inventory for over a million dollars, with a hundred thousand dollars or more still

owing, on an oral agreement and without keeping any records whatsoever, or that it is justifiable to leave whatever records there were with the purchaser.

Any assertions by Debtor that his failure was not intentional or willful are to no avail, since intent to defraud is not an element of this objection to discharge. Cox, 41 F.3d at 1297; Phillips v. Bourget (In re Bourget), 176 B.R. 25, 28 (Bankr. C.D. Cal. 1994).

Debtor did not produce any material facts which would raise a genuine issue under § 727(a)(3), and summary judgment was properly entered against him on that count.

**(2) § 727(a)(4)**

Under § 727(a)(4), the court may deny a discharge if the debtor has "knowingly and fraudulently, in or in connection with the case . . . made a false oath or account." 11 U.S.C. § 727(a)(4)(A).

To deny a debtor a discharge under this section, "the plaintiff must show that (1) the debtor knowingly and fraudulently made a false oath; and (2) the false oath related to a material fact." Fogal Legware of Switzerland, Inc. v. Wills (In re Wills), 243 B.R. 58, 62 (9th Cir. BAP 1999).

The requisite false oath may consist of intentionally omitting material interests in property from the chapter 7 schedules, which are executed under penalty of perjury, combined with the failure to amend the schedules. See Searles, 317 B.R. at 377. A false oath is complete when made. Id.

In Searles, the BAP affirmed the bankruptcy court's denial of the debtor's discharge under § 727(a)(4) when it found a number of materially false statements or omissions in the schedules which were not amended. Id. (stating that "the method of correction is a formal amendment of the schedules"). In Olympic Coast Inv., Inc. v. Wright (In re Wright), 364 B.R. 51, 76 (Bankr. D. Mont. 2007), the bankruptcy court concluded that the plaintiff failed in its burden to prove that the debtors knowingly and fraudulently made a false oath because the omitted business assets were added to their schedules by amendment, without a showing of bad faith or prejudice to creditors.

Dongkuk moved for summary judgment under § 727(a)(4) based on Debtor's failure to disclose, in his schedules and statement of financial affairs, the following uncontroverted facts: that within the six years preceding the commencement of his chapter 7 case, Debtor had business interests with two others in FTM; that he was an owner and manager of FTM, owning 50% at its inception, ultimately becoming the 100% owner; that within approximately two years prior to the commencement of the case, Debtor sold his interest in FTM for $300,000 (plus assumption of liabilities) at a time when FTM had approximately $600,000 to $700,000 in assets; and that Debtor is the owner of, and therefore entitled to recover a liquidated debt of $100,000 owed by American Tube, on account of the unpaid portion of the purchase price.

It was uncontroverted that Debtor omitted these many material facts from his schedules and did not amend the schedules to disclose his interest in FTM, even after he disclosed this fact at the Rule 2004 exam.

Debtor attempts to dispute the allegations by declaring that his omissions did not meet the "knowing" standard because they were merely "sloppy," inadvertent or due to excusable neglect. See Decl. of Sfadia, Resp. in Opp. 15, ¶ 5 and 24, ¶ 52. See Roberts, 331 B.R. at 884 (a careless or negligent act does not rise to the level of "knowing and fraudulent").

First, Debtor contends that he did not believe that Item No. 18 of the statement of financial affairs applied to an LLC. This item asks whether the debtor "was an officer, director, partner, or managing executive of a corporation, partner in a partnership, sole proprietor, or was self-employed professional." An LLC is "an entity having one or more members that is organized under [title 2.5 – Limited Liability Companies] and is subject to the provisions of Section 17101." Cal. Corp. Code § 17001(t) (alteration added). Debtor testified at the Rule 2004 exam that FTM was started as a partnership, and then he averred that it was actually an LLC. Neither of these statements was corroborated by any documentary evidence, however.

The obvious purpose of Item No. 18 on the statement of financial affairs is to obtain information concerning any business enterprises of the debtor in the past six years. Debtor, who was a businessman, omitted this information. Given the properly supported motion for summary judgment on this count, and particularly the facts that Debtor was well aware of the business and its inventory, the sale of FTM, and of the outstanding $100,000 owed to him, Debtor's assertion that the disclosure was unnecessary is disingenuous.

Next, Debtor denies any fraudulent or wrongful intent. He contends that the omissions were either inadvertent or immaterial because they were worthless assets which would not be available to his creditors. We disagree. A fact 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. Weiner v. Perry, Settles & Lawson, Inc. (In re Weiner), 208 B.R. 69, 72 (9th Cir. BAP 1997), rev'd on other grounds, 161 F.3d 1216 (9th Cir. 1998). A false statement or omission may be material even if it does not cause direct financial prejudice to creditors. Id.

In addition, Debtor's bare denials of fraudulent intent are insufficient to meet his burden to produce admissible evidence that would raise a genuine factual issue concerning his fraudulent intent. See United States v. Wilson, 881 F.2d 596, 601 (9th Cir. 1989) (conclusory statements of fact and self-serving assertions do not create a genuine issue of material fact); Medina-Munoz v. R.J. Reynolds Tobacco Co., 896 F.2d 5, 8 (1st Cir. 1990) ("Even in cases where elusive concepts such as motive or intent are at issue, summary judgment may be appropriate if the nonmoving party rests merely upon conclusory allegations, improbable inferences, and unsupported speculation."); Gertsch v. Johnson & Johnson, Fin. Corp. (In re Gertsch), 237 B.R. 160, 165 (9th Cir. BAP 1999) (summary judgment may be appropriate even when intent is at issue). Therefore, we affirm summary judgment on the § 727(a)(4) count.

**(3) § 727(a)(5)**

Section 727(a)(5) provides that the court shall grant a discharge to the debtor unless:

> 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.

11 U.S.C. § 727(a)(5).

Dongkuk alleged in the motion for summary judgment that Debtor failed to satisfactorily explain the disposition of the $300,000, including the $200,000 cash payment.

We do not have confidence in the bankruptcy court's ruling granting judgment under this count, when (1) the court had already denied the motion under this count in its April 12, 2006 Tentative Ruling; and (2) the court incorporated the tentative ruling as part of the judgment. Therefore, we reverse the court's final order on the 727(a)(5) count, it appearing that entry of judgment on the § 727(a)(5) count was a mistake.

**CONCLUSION**

In this summary judgment proceeding, the bankruptcy court did not abuse its discretion in its application of the local rules, its management of the proceedings, or in entering judgment on the evidence as presented. Dongkuk met its burden under Fed. R. Civ. P. 56 by affirmatively demonstrating that Debtor's evidence was insufficient to establish defenses of probative force to the § 727 (a)(3) and (a)(4) claims. We AFFIRM judgment as to those counts

in favor of Dongkuk. However, we REVERSE the judgment as to the (a)(5) count. Rather than remanding, as it concerns the § 727(a)(5) count, we hold this portion of the judgment to be harmless error, considering that Debtor's discharge is denied under the first two counts in any event.

**AFFIRMED IN PART; REVERSED IN PART.**

BRANDT, Bankruptcy Judge, concurring in part and dissenting in part:

While I agree with the balance of the memorandum, I would affirm summary judgment on § 727(a)(5). Whether a loss has been satisfactorily explained is a question of fact. In re Mereshian, 200 B.R. 342, 346-347 (9th Cir. BAP 1996). Here, Debtor was asked about the assets at his Rule 2004 exam. Concerning the $200,000 which he received, Debtor stated that he used it to pay some unspecified loans. This was not a satisfactory explanation: he produced no books or records of these transactions, and the "explanation" is so general as to be meaningless. He has not even made an argument for the sufficiency of his explanation, but only asserts that he gave one. Although the bankruptcy court's tentative ruling was to deny summary judgment on the § 727(a)(5) count, it was not error to grant it.