

SEP 05 2007

NOT FOR PUBLICATION

HAROLD S. MARENUS, CLERK
U.S. BKCY. APP. PANEL
OF THE NINTH CIRCUIT

UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT

1 In re:)
 2)
 3 EZRA O. SFADIA,)
 4)
 5 Debtor.)
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BAP No. CC-06-1176-MaBPa
Bk. No. SV 03-15050-GM
Adv. No. SV 03-01404-GM

MEMORANDUM¹

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

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

¹ This disposition is not appropriate for publication. Although it may be cited for whatever persuasive value it may have (see Fed. R. App. P. 32.1), it has no precedential value. See 9th Cir. BAP Rule 8013-1.

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

1 **INTRODUCTION**

2
3 In a summary judgment proceeding, the chapter 7³ debtor-
4 defendant failed to provide sufficient admissible evidence to
5 overcome the prima facie case presented by the moving creditor-
6 plaintiff. The bankruptcy court granted the motion to deny the
7 debtor his discharge under § 727.

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

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

24
25 _____
26 ³ Unless otherwise indicated, all "Code," chapter and
27 section references are to the Bankruptcy Code, 11 U.S.C. § 101 -
28 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).

1 **FACTS**

2
3 In 1998, Edward Sfadia ("Debtor") had an ownership interest
4 in a steel fabrication business known as Fontana Tube
5 Manufacturing LLC ("FTM" or "Fontana Tube"). By 2001 he was the
6 100% owner and manager.

7 In January and February of 2001, FTM entered into
8 written contracts for the purchase of cold rolled steel sheets
9 from the appellee, Dongkuk International, Inc. ("Dongkuk").
10 When FTM failed to pay for the steel, Dongkuk sued and, in July
11 2003, obtained a California state court judgment in the amount of
12 \$1,057,057.03.

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

19 Debtor received a cashier's check from American Tube for
20 \$200,000, cashed the check, and testified that he used the money
21 to pay "some loans that I had." Id. at 39:11. The \$100,000 of
22 liquidated debt owing to Debtor and the debts owing to Dongkuk and
23 other creditors remained unpaid, however.⁴ See Decl. of Sfadia,
24 Resp. in Opp. 19, ¶ 24, March 31, 2006.

25
26
27 ⁴ The bankruptcy court docket reflects that an involuntary
28 chapter 11 petition was filed against FTM and dismissed prior to
an order for relief in 2002.

1 Bankruptcy Schedules

2
3 Debtor filed a voluntary chapter 7 petition on June 13, 2003.
4 He indicated that he was currently unemployed. In Item No. 18 of
5 the statement of financial affairs (nature, location and name of
6 business within six years of bankruptcy petition), Debtor did not
7 disclose his former ownership interest in FTM.⁵

8 Debtor neither listed the \$200,000 payment he received from
9 American Tube in 2001, nor did he indicate that there was a
10 \$100,000 debt still owed to him by American Tube.

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

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

22
23
24 ⁵ Although Debtor also had indicated, in Item No. 2 (income
25 other than from employment or operation of business) that he had
26 received corporate draws from FTM in 2001 and 2002, he amended the
27 statement of financial affairs, in 2003, to indicate that he had
28 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.

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

2
3 Dongkuk obtained an order for a Rule 2004 exam of Debtor and
4 for production of documents, which was conducted on August 19,
5 2003.

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

11 He stated that, in October 2001, he sold his interest in FTM
12 to American Tube, based on an oral agreement only, for a cash
13 payment of \$300,000 and the buyer's agreement to pay 100% of the
14 business debts. See id. at 59:9-12; 76:3-5. Debtor received and
15 cashed a check from American Tube for \$200,000, and used the money
16 to pay "some loans" that he had. Id. at 39:3-17. At the time of
17 the transfer, the FTM equipment inventory was worth approximately
18 \$600,000 to \$700,000 and the steel inventory was worth another
19 \$300,000 to \$400,000. Id. at 56:11; 79:17-19. Debtor testified
20 that FTM was no longer operating. Id. at 68:2-4.

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

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

1 523(a)(2)(A)] And Objecting to Discharge [11 U.S.C. § 727(a)(3),
2 727(a)(4), 727(a)(5)].”

3 This appeal only concerns the objection to discharge,⁷ which
4 contained the following counts:

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

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

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

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

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

25 _____
26 ⁷ The bankruptcy court subsequently dismissed the § 523
27 counts, enabling the panel to assert jurisdiction over the appeal.
28 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).

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

4
5 **Summary Judgment Proceedings**
6

7 On January 19, 2006, Dongkuk moved for summary judgment as to
8 the § 727 counts only. Dongkuk presented the Debtor's schedules
9 and statement of financial affairs, and a transcript of the Rule
10 2004 exam. See Notice of Lodging Transcript, January 19, 2006.
11 A duplicate certified copy was filed on February 21, 2006.

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

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

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

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

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

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

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

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

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

18 Specifically, in regards to his interest in FTM, Debtor
19 stated that Item No. 18 on the statement of financial affairs asks
20 only whether the debtor was an officer et cetera of a
21 "corporation, partnership, sole proprietor, or was a self-employed
22 professional." Debtor said he believed that the question did not
23 apply to him because FTM was an "LLC" at all times and was none of
24 the above. Decl. of Sfadia, Resp. in Opp. 17-18 ¶ 19-20 and 22, ¶
25 40. Dongkuk subsequently objected to this statement on the
26 grounds of lack of foundation.⁸ Plaintiff's Objs. 17, ¶ 40, April
27 10, 2006.

28 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.

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

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

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

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

17 In regards to his interest in the \$100,000, Debtor maintained
18 that the chapter 7 trustee's Notice of Asset Case was proof that
19 he had disclosed to the trustee information concerning FTM and the
20 money due from the buyer. Id. Debtor stated that he "forgot
21 about the \$100,000 verbal obligation of an insolvent and defunct
22 debtor in preparing my schedules." Id. at 22, ¶ 48. Debtor
23 referred to his testimony from the Rule 2004 exam that "after
24 American Tube bought Fontana Tube it went out of business, that
25 they were evicted and Fontana Tube was forced into bankruptcy and
26 there was no way of recovering from American Tube." Resp. in Opp.
27 11, ¶ 19. (The pages of the transcript to which Debtor refers--
28 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.

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

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

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

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

25 This adversary proceeding was filed 2 ½ years ago, so
26 there has certainly been reasonable time for discovery.
27 Much of the defense to lack of disclosure is based on the
28 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

1 for the truth therein. Although this has always been a
2 critical issue to the defense, the debtor has not obtained
3 or presented the tape of the § 341(a) meeting or a
4 declaration of the trustee as to what was disclosed.
5 Thus, I have no admissible evidence that the debtor ever
6 disclosed this to the trustee. And he certainly never
7 amended his schedules to disclose it. Whether he deemed
8 it valueless or not, it is required that disclosure take
9 place.

10 Further, the debtor did not disclose the receipt of
11 the \$200,000 and has not provided any books or records as
12 to how he used that money. At most he says that he paid
13 his creditors. Even if I were to believe that he left all
14 of his books and records at the business, these monies
15 were received and paid AFTER he sold the business.

16 Beyond that, it is not reasonable that a person would
17 leave all business and personal books and records at a
18 business (which had not yet been paid for). Or that he
19 would not have a copy of the sales agreement and note (it
20 is somewhat confusing where [whether] there were written
21 documents at all or if so who signed what).

22 I have read the transcript of the 2004 examination of
23 the debtor and I do not find any reference by him or his
24 attorney to a lack of fluency in English. In fact, he
25 appears quite fluent. And if he was not, it was his
26 responsibility to provide an interpreter. And although he
27 and his attorney received a copy of the transcript, no
28 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.

1 **ISSUES**⁹

- 2
- 3 1. Whether the bankruptcy court committed reversible error in
4 granting summary judgment when Dongkuk did not serve the Rule
5 2004 Exam transcript in support of the motion upon Debtor.
6
- 7 2. Whether the bankruptcy court was biased against Debtor.
8
- 9 3. Whether the bankruptcy court abused its discretion in failing
10 to continue the hearing in order to allow Debtor to present
11 the tape or transcript of the July 18, 2003, § 341(a)
12 meeting.
13
- 14 4. Whether the bankruptcy court erred in granting summary
15 judgment in favor of Dongkuk.
16

17 **STANDARDS OF REVIEW**

18

19 We review the bankruptcy court's discovery rulings, case
20 management, and its enforcement of the local rules for an abuse of
21 discretion. Lewis v. Tel. Employees Credit Union, 87 F.3d 1537,
22

23

24 ⁹ Debtor has also raised the issue of whether the bankruptcy
25 court erred in deciding the motion without considering his
26 "physical disability." Opening Brief 13, April 23, 2007. The
27 term is not repeated or discussed, or even explained anywhere else
28 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).

1 1557 (9th Cir. 1996) (trial court has broad discretion to make
2 discovery rulings); United States v. 2.61 Acres of Land, 791 F.2d
3 666, 671 (9th Cir. 1986) (as amended) (denial of a requested
4 continuance is not necessarily abuse of discretion); Official
5 Comm. of Unsecured Creditors v. Henry Mayo Newhall Mem. Hosp. (In
6 re Henry Mayo Newhall Mem. Hosp.), 282 B.R. 444, 455 (9th Cir. BAP
7 2002) (trial court's inherent authority to manage its caseload);
8 O'Donnell v. Vencor Inc., 466 F.3d 1104, 1109 (9th Cir. 2006)
9 (district courts have "broad discretion in interpreting and
10 applying their local rules") (citation omitted).

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

14 We review the summary judgment ruling de novo. Wood v.
15 Stratos Prod. Dev., LLC (In re Ahaza Sys., Inc.), 482 F.3d 1118,
16 1123 (9th Cir. 2007). Viewing the evidence in the light
17 most favorable to the nonmoving party, we must determine "whether
18 there are any genuine issues of material fact and whether the
19 trial court correctly applied relevant substantive law." Tobin v.
20 Sans Souci Ltd. P'ship (In re Tobin), 258 B.R. 199, 202 (9th Cir.
21 BAP 2001).

22 Evidentiary questions decided in the context of summary
23 judgment are reviewed for an abuse of discretion. Younie v. Gonya
24 (In re Younie), 211 B.R. 367, 372 (9th Cir. BAP 1997), aff'd mem.,
25 163 F.3d 609 (9th Cir. 1998).

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

28

1 **DISCUSSION**

2

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

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

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

28

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

8
9 **A. Motion Defect**

10
11 Debtor contends that the bankruptcy court erred in granting
12 summary judgment when Dongkuk's motion violated the local
13 bankruptcy rules by failing to attach a copy of the Rule 2004 exam
14 transcript upon which it relied as evidence. The rule cited is
15 LBR 9013-1(a) (13) which provides:

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

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

23 A notice of motion and motion for summary judgment or
24 partial summary adjudication pursuant to F.R.B.P. 7056
25 shall be served and filed no later than 35 calendar days
26 prior to the date of the hearing on the motion. There
27 shall be served and lodged with each motion for summary
28 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.

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

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

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

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

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

21 Moreover, a bankruptcy court has discretion to set deadlines
22 in the summary judgment proceeding. See, e.g., Marshall v. Gates,
23 44 F.3d 722, 725 (9th Cir. 1995) (stating that Fed. R. Civ. P. 56
24 "allows district courts to adopt procedures pursuant to which the
25 non-moving party may oppose a motion prior to a hearing date").

26 We conclude that this notice issue neither prejudiced Debtor
27 nor prevented the bankruptcy court from ruling favorably on the
28

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

3
4 **B. Judicial Bias**

5
6 In another threshold issue on appeal, Debtor maintains that
7 the bankruptcy court should have recused itself due to alleged
8 bias against Debtor. This motion is untimely and was not made to
9 the bankruptcy court. Davies v. Comm'r, 68 F.3d 1129, 1131 (9th
10 Cir. 1995). However, for discussion purposes, we will address the
11 issue.

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

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

1 (D.C. Cir. 2001) (citing Liteky v. United States, 510 U.S. 540,
2 554-55 (1994)).

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

7

8

C. Continuance for Supplemental Evidence

9

10 Debtor maintains that he was unfairly denied the opportunity
11 to support his declarations with the transcript of the July 18,
12 2003, § 341 meeting.

13 Dongkuk alleged, under the § 727(a)(4) false-oath count, that
14 Debtor had failed to disclose, in his schedules and statement of
15 financial affairs, his ownership interest in FTM, his receipt and
16 disposition of the \$200,000 from American Tube, and the remaining
17 \$100,000 liquidated debt owing to him.

18 The Rule 2004 exam testimony reveals that Debtor admitted to
19 these facts. In addition, his testimony was that he used the
20 \$200,000 to pay a loan.

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

27

28

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

5 Dongkuk therefore objected to this portion of the declaration
6 as inadmissible hearsay. The bankruptcy court agreed. See April
7 12, 2006 Tentative Ruling, supra. Debtor has not challenged the
8 evidentiary ruling against his declaration testimony, but instead
9 he has filed with his opening brief to us a transcript of the July
10 18, 2003, § 341 meeting. We decline to review this evidence
11 because it was not before the bankruptcy court. Drysdale v. Educ.
12 Credit Mgmt. Corp. (In re Drysdale), 248 B.R. 386, 388 (9th Cir.
13 BAP 2000), aff'd, 2 Fed. Appx 776 (9th Cir. 2001) ("In reviewing a
14 motion for summary judgment, we must review the record that was
15 before the bankruptcy court de novo."); Kabayan v. Yepremian (In
16 re Yepremian), 116 F.3d 1295, 1297 (9th Cir. 1997).

17 Nonetheless, Debtor contends that the bankruptcy court erred
18 in granting the motion when it could have continued the hearing to
19 enable him to file the transcript, and thus to comply with Rule
20 56(e)'s requirement to present admissible evidence.

21 There is some judicial discretion involved in deciding a Rule
22 56 motion. An authoritative treatise states:

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

27 ¹⁰ Further hampering our review is the fact that the October
28 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."

1 evidence offered in opposition to the motion is defective
2 in form but is sufficient to apprise the court that there
3 is important and relevant information that could be
4 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.

5 C. Miller, A. Miller & M.K. Kane, Fed. Prac. & Proc. Civ. 3d
6 § 2728 (2007).

7 Here, Debtor failed to disclose material information in his
8 schedules but purportedly disclosed the information at the § 341
9 meeting. Our circuit has held that § 341 meeting confessions may
10 absolve a debtor who is "is not fraudulently concealing property
11 from his creditors." See Beauchamp v. Hoose (In re Beauchamp),
12 236 B.R. 727, 732-33 (9th Cir. BAP 1999), aff'd, 5 Fed. Appx. 743
13 (9th Cir. 2001) (discussing First Beverly Bank v. Adeeb (In re
14 Adeeb), 787 F.2d 1339 (9th Cir. 1986) and Baker v. Mereshian (In
15 re Mereshian), 200 B.R. 342, 346 (9th Cir. BAP 1996)).

16 The bankruptcy court did not make a finding regarding
17 Debtor's "good faith," yet it necessarily found fraudulent conduct
18 on Debtor's part by granting summary judgment under § 727(a)(4)
19 (denial of discharge for making a knowing and fraudulent false
20 oath). The bankruptcy court also found that Debtor had not
21 amended his schedules in order to cure such nondisclosure. See
22 Searles v. Riley (In re Searles), 317 B.R. 368, 377 (9th Cir. BAP
23 2004), aff'd, 212 Fed. Appx. 589 (9th Cir. 2006) (stating that the
24 "the method of correction [for giving false oath] is a formal
25 amendment of the schedules.") We affirm that judgment.

26 Moreover, there is no indication in the record before us that
27 Debtor asked for an additional continuance in order to proffer the
28 § 341 meeting transcript or other evidence. Indeed, the

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

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

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

17
18 ¹¹ Debtor also maintains that the testimony concerning his
19 use of the \$200,000 in the Rule 2004 exam was misleading because
20 he testified that he used it to pay for "some loans," which could
21 imply they were personal loans. He contends that the money was
22 actually paid "for Fontana Tube's liabilities, for which
23 liabilities the Debtor may have had some liability." Reply Brief
24 8, June 11, 2007. Thus Debtor believes that the § 341 meeting
25 transcript would raise a genuine issue of material fact, i.e.,
26 whether he had an obligation to disclose a payment that was not
27 his personal liability.

28 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).

1 D. Judgment on the Merits

2
3 (1) § 727(a)(3)

4
5 Section 727(a)(3) bars a discharge if

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

13 11 U.S.C. § 727(a)(3).

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

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

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

28 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

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

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

10 Debtor did not dispute the fact that American Tube had paid
11 him \$200,000 and still owed him approximately \$100,000 for
12 completion of the sale of FTM that had occurred several years
13 before. Moreover, he testified that the sale had included about
14 \$700,000 in inventory and the assumption of business debts.
15 Debtor also testified that during his ownership of FTM, he
16 was the sole person in charge of keeping financial records and
17 bank accounts and, thus, such bookkeeping was in his zone of
18 duties. Importantly, his current creditors included those with
19 claims dating from his ownership and operation of FTM.

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

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

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

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

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

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

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

12
13 **(2) § 727(a)(4)**
14

15 Under § 727(a)(4), the court may deny a discharge if the
16 debtor has "knowingly and fraudulently, in or in connection with
17 the case . . . made a false oath or account." 11 U.S.C.
18 § 727(a)(4)(A).

19 To deny a debtor a discharge under this section, "the
20 plaintiff must show that (1) the debtor knowingly and fraudulently
21 made a false oath; and (2) the false oath related to a material
22 fact." Fogal Legware of Switzerland, Inc. v. Wills (In re Wills),
23 243 B.R. 58, 62 (9th Cir. BAP 1999).

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

1 In Searles, the BAP affirmed the bankruptcy court's denial of
2 the debtor's discharge under § 727(a)(4) when it found a number of
3 materially false statements or omissions in the schedules which
4 were not amended. Id. (stating that "the method of correction is
5 a formal amendment of the schedules"). In Olympic Coast Inv.,
6 Inc. v. Wright (In re Wright), 364 B.R. 51, 76 (Bankr. D. Mont.
7 2007), the bankruptcy court concluded that the plaintiff failed in
8 its burden to prove that the debtors knowingly and fraudulently
9 made a false oath because the omitted business assets were added
10 to their schedules by amendment, without a showing of bad faith or
11 prejudice to creditors.

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

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

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

7 First, Debtor contends that he did not believe that Item No.
8 18 of the statement of financial affairs applied to an LLC. This
9 item asks whether the debtor "was an officer, director, partner,
10 or managing executive of a corporation, partner in a partnership,
11 sole proprietor, or was self-employed professional." An LLC is
12 "an entity having one or more members that is organized under
13 [title 2.5 - Limited Liability Companies] and is subject to the
14 provisions of Section 17101." Cal. Corp. Code § 17001(t)
15 (alteration added). Debtor testified at the Rule 2004 exam that
16 FTM was started as a partnership, and then he averred that it was
17 actually an LLC. Neither of these statements was corroborated by
18 any documentary evidence, however.

19 The obvious purpose of Item No. 18 on the statement of
20 financial affairs is to obtain information concerning any business
21 enterprises of the debtor in the past six years. Debtor, who was
22 a businessman, omitted this information. Given the properly
23 supported motion for summary judgment on this count, and
24 particularly the facts that Debtor was well aware of the business
25 and its inventory, the sale of FTM, and of the outstanding
26 \$100,000 owed to him, Debtor's assertion that the disclosure was
27 unnecessary is disingenuous.

28

1 Next, Debtor denies any fraudulent or wrongful intent. He
2 contends that the omissions were either inadvertent or immaterial
3 because they were worthless assets which would not be available to
4 his creditors. We disagree. A fact is "material" if it bears a
5 relationship to the debtor's business transactions or estate, or
6 concerns the discovery of assets, business dealings, or the
7 existence and disposition of the debtor's property. Weiner v.
8 Perry, Settles & Lawson, Inc. (In re Weiner), 208 B.R. 69, 72 (9th
9 Cir. BAP 1997), rev'd on other grounds, 161 F.3d 1216 (9th Cir.
10 1998). A false statement or omission may be material even if it
11 does not cause direct financial prejudice to creditors. Id.

12 In addition, Debtor's bare denials of fraudulent intent are
13 insufficient to meet his burden to produce admissible evidence
14 that would raise a genuine factual issue concerning his fraudulent
15 intent. See United States v. Wilson, 881 F.2d 596, 601 (9th Cir.
16 1989) (conclusory statements of fact and self-serving assertions
17 do not create a genuine issue of material fact); Medina-Munoz v.
18 R.J. Reynolds Tobacco Co., 896 F.2d 5, 8 (1st Cir. 1990) ("Even in
19 cases where elusive concepts such as motive or intent are at
20 issue, summary judgment may be appropriate if the nonmoving party
21 rests merely upon conclusory allegations, improbable inferences,
22 and unsupported speculation."); Gertsch v. Johnson & Johnson, Fin.
23 Corp. (In re Gertsch), 237 B.R. 160, 165 (9th Cir. BAP 1999)
24 (summary judgment may be appropriate even when intent is at
25 issue). Therefore, we affirm summary judgment on the § 727(a)(4)
26 count.

27
28

1 (3) § 727(a)(5)

2
3 Section 727(a)(5) provides that the court shall grant a
4 discharge to the debtor unless:

5 the debtor has failed to explain satisfactorily, before
6 determination of denial of discharge under this paragraph,
7 any loss of assets or deficiency of assets to meet the
debtor's liabilities.

8 11 U.S.C. § 727(a)(5).

9 Dongkuk alleged in the motion for summary judgment that
10 Debtor failed to satisfactorily explain the disposition of the
11 \$300,000, including the \$200,000 cash payment.

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

19
20 CONCLUSION

21
22 In this summary judgment proceeding, the bankruptcy court did
23 not abuse its discretion in its application of the local rules,
24 its management of the proceedings, or in entering judgment on the
25 evidence as presented. Dongkuk met its burden under Fed. R. Civ.
26 P. 56 by affirmatively demonstrating that Debtor's evidence was
27 insufficient to establish defenses of probative force to the § 727
28 (a)(3) and (a)(4) claims. We AFFIRM judgment as to those counts

1 in favor of Dongkuk. However, we REVERSE the judgment as to the
2 (a) (5) count. Rather than remanding, as it concerns the
3 § 727(a) (5) count, we hold this portion of the judgment to be
4 harmless error, considering that Debtor's discharge is denied
5 under the first two counts in any event.

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

7
8 BRANDT, Bankruptcy Judge, concurring in part and dissenting in
9 part:

10 While I agree with the balance of the memorandum, I would
11 affirm summary judgment on § 727(a) (5). Whether a loss has been
12 satisfactorily explained is a question of fact. In re Mereshian,
13 200 B.R. 342, 346-347 (9th Cir. BAP 1996). Here, Debtor was asked
14 about the assets at his Rule 2004 exam. Concerning the \$200,000
15 which he received, Debtor stated that he used it to pay some
16 unspecified loans. This was not a satisfactory explanation: he
17 produced no books or records of these transactions, and the
18 "explanation" is so general as to be meaningless. He has not even
19 made an argument for the sufficiency of his explanation, but only
20 asserts that he gave one. Although the bankruptcy court's
21 tentative ruling was to deny summary judgment on the § 727(a) (5)
22 count, it was not error to grant it.

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