

OCT 10 2006

NOT FOR PUBLICATION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**

In re:

6	SHAHRAM MESBAHI,)	BAP No.	CC-05-1517-BPaL
7)	Bk. No.	LA 03-39268-TD
8	Debtor.)	Adv. No.	LA 05-01139-TD

9	KHANBABA BANAYAN; PARIROKH)
10	BANAYAN,)
11	Appellants,)

v.

M E M O R A N D U M¹

12	SHAHRAM MESBAHI,)
13	Appellees.)

Argued and Submitted on September 22, 2006 at
Pasadena, California

Filed - October 10, 2006

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

Honorable Thomas B. Donovan, Bankruptcy Judge, Presiding

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

¹ This disposition is not appropriate for publication and may not be cited except when relevant under the doctrine of law of the case or the rules of res judicata, including issue and claim preclusion. See 9th Cir. BAP Rule 8013-1.

² Hon. W. Richard Lee, United States Bankruptcy Judge for the Eastern District of California, sitting by designation.

1 Approximately one year later, within days of the expiration of the
2 one year limitation of § 727(e), Banayans moved to reopen the case and
3 filed a § 727(d) complaint. Debtor filed an "Objection to Revoke
4 Discharge," signed under penalty of perjury, denying all allegations,
5 and specifically that he had any real property or business interests.

6 There are three orders on appeal:

7 1. Order Dismissing Katie Mesbahi. The complaint named Katie
8 Mesbahi, Debtor's then wife, seeking to "revoke" any marital "community
9 discharge" as to her (she had filed a petition for dissolution of the
10 marriage post-petition in December 2003). The bankruptcy court noted a
11 show cause hearing to dismiss Katie Mesbahi as a party because, although
12 she was not a debtor, the action sought revocation of discharge.
13 Banayans objected and moved for default.

14 After a contested hearing, the bankruptcy court entered an order on
15 24 June 2005 dismissing the complaint as to Katie Mesbahi.

16 2. Order Denying Motion to Compel and Continuance. The Trial
17 Setting Order established the discovery cutoff at 6 September 2005 and
18 barred requests for continuances of trial.

19 Banayans had served a request for production of documents on 12 May
20 2005, some of which Debtor provided on 12 June 2005. On 6 September
21 2005, Banayans moved for an order to compel production under FRCP 37 and
22 to extend the time for discovery by 90 days, arguing Mesbahi failed to
23 cooperate in discovery. They also sought to continue the trial to allow
24 additional time to prepare and supplement the response based on newly
25 discovered evidence. The motion also requested summary judgment,

26 _____
27 ⁴(...continued)
28 plaintiffs had not proven the alleged conduct at trial, the bankruptcy
court entered judgment for Mesbahi, and we affirmed. (No. 04-1628-
MaMoB). An appeal is pending before the Ninth Circuit (No. 05-56860).

1 apparently based on discovery issues, although the motion only hints at
2 the merits. Debtor responded, denying fraud, also arguing the merits of
3 property ownership issues, and denying an interest in any assets,
4 including in businesses, as was alleged. Summary judgment was denied.

5 The order, entered 14 October 2005, simply states:

6 Plaintiff's Motion for 1) Order Compelling Documents; 2)
7 Extending Discovery Cutoff/trial; and 3) Summary
8 Judgment/Adjudication came on for hearing at the above
captioned time and place. Appearances were noted on the
record.⁵

9 IT IS ORDERED that the Motion is denied.

10 Appellants' excerpts of record, required by Rules 8006 and 8009(b),
11 contain no transcript of the hearing on the motion, no findings or
12 conclusions, or anything to indicate what the court considered in
13 deciding the motion to compel. The court's Memorandum of Decision,
14 filed approximately two months later, states only: "Plaintiffs' failure
15 to properly follow Local Bankruptcy Rule 9013-1(c) led to an order
16 denying the discovery aspects of the motion entered on October 14, 2005.
17 (Plaintiffs' request for summary judgment and summary adjudication were
18 also denied.)"

19 3. Judgment. Trial was conducted by declaration. Banayans
20 submitted the declarations of Shai Oved and of Allan Herzlich, attaching
21 discovery papers and copies of documentation from various judicial
22 proceedings, to support their claim that Mesbahi had fraudulently failed
23 to disclose property, interests in businesses, and the existence of his
24 spouse. This evidence was unopposed, because the bankruptcy court
25 struck Debtor's declaration, which had been filed and served late.

26
27
28 ⁵ The adversary proceeding docket reflects no entry for a
hearing on that date.

1 The bankruptcy court issued its memorandum of decision, finding
2 that the evidence of Debtor's acts was insufficient to rise to the level
3 of fraud required to revoke discharge under § 727(d)(1) or (2). The
4 court entered judgment for Debtor and dismissing the complaint on
5 20 December 2005.

6 Banayans appealed.
7

8 II. JURISDICTION

9 The bankruptcy court had jurisdiction under 28 U.S.C. § 1334(b) and
10 § 157(b)(1) and (2)(J), and we do under 28 U.S.C. § 158(a)(1) and (c).
11

12 III. ISSUES

13 A. Whether we have jurisdiction over the appeal of the dismissal
14 of the complaint as to Katie Mesbahi;

15 B. Whether the bankruptcy court clearly erred by not compelling
16 production of documents and continuing the trial; and

17 C. Whether there are grounds to revoke Debtor's discharge under
18 § 727(d).
19

20 IV. STANDARDS OF REVIEW

21 A. We review case management decisions, including whether to
22 continue a hearing or trial, for abuse of discretion. Ungar v.
23 Sarafite, 376 U.S. 575, 589 (1964). Under the abuse of discretion
24 standard, we must have a definite and firm conviction that the
25 bankruptcy court committed a clear error of judgment in the conclusion
26 that it reached before reversal is proper. In re Black, 222 B.R. 896,
27 899 (9th Cir. BAP 1998).
28

1 B. Factual findings are reviewed for clear error. Rule 8013. A
2 factual finding is clearly erroneous if the appellate court, after
3 reviewing the record, has a firm and definite conviction that a mistake
4 has been made. Anderson v. Bessemer City, N.C., 470 U.S. 564, 573
5 (1985). If two views of the evidence are possible, the trial judge's
6 choice between them cannot be clearly erroneous. Id. at 574.

7 C. We review conclusions of law, including the bankruptcy court's
8 interpretation of the Bankruptcy Code, de novo. In re Pardee, 218 B.R.
9 916, 919 (9th Cir. BAP 1998), aff'd, 193 F.3d 1083 (9th Cir. 1999)
10 (citations omitted).

11 D. An appellate court may consider any issue supported by the
12 record and may affirm on any basis supported by the record, even where
13 the issue was not expressly considered by the bankruptcy court. In re
14 E.R. Fegert, Inc., 887 F.2d 955, 957 (9th Cir. 1989).

15 E. In reviewing a judgment denying an objection to discharge:

16 (1) the court's determinations of the historical facts are
17 reviewed for clear error; (2) the selection of the applicable
18 legal rules under § 727 is reviewed de novo; and (3) the
19 application of the facts to those rules requiring the exercise
20 of judgment about values animating the rules is reviewed de
21 novo.

22 In re Searles, 317 B.R. 368, 373 (9th Cir. BAP 2004) (citation omitted);
23 In re Bowman, 173 B.R. 922, 924 (9th Cir. BAP 1994). We see no reason
24 why review of an action to revoke discharge should differ.

25 V. DISCUSSION

26 A. Order Dismissing Katie Mesbahi

27 Banayans argue that Katie Mesbahi should not have been dismissed as
28 a party because she had an interest in the outcome of the proceeding via
her "community discharge," and was a material witness. Presumably Katie

1 Mesbahi did not receive a discharge, and from the argument at pages
2 14-16 of their opening brief, Appellants focus on the scope of the
3 discharge injunction under § 523(a) and (b). However, they did not seek
4 a declaratory judgment regarding the effect of those provisions as to
5 her possible liability or property.

6 But Appellants did not name Katie Mesbahi as an appellee in their
7 notice of appeal or in their amended notice of appeal, nor have they
8 identified her as a party directly affected by this appeal. She has not
9 appeared in this appeal.

10 It is beyond our jurisdiction to grant relief against someone not
11 a party to the appeal. In re Bankruptcy Petition Preparers, 307 B.R.
12 134, 144 (9th Cir. BAP 2004); In re Unioil, 948 F.2d 678, 681-82 (10th
13 Cir. 1991) (dismissal for lack of jurisdiction of parties not
14 specifically named in the notice of appeal).

15 We DISMISS the appeal of the order dismissing the complaint as to
16 Katie Mesbahi.

17
18 **B. Order Denying Motion to Compel Discovery**

19 A key factual issue concerned Debtor's alleged concealment of
20 business affairs and property interests. He did not produce the
21 following requested documents: tax returns for 2002 and 2004 (2001 and
22 2003 were produced), unlawful detainer documents, prepetition personal
23 or business banking statements (only one bank statement was produced) or
24 records and documents to support his income and monthly expenses,
25 including child and spousal support payments.

26 Despite many attempts from 8 July to 24 August 2005, Banayans were
27 unable to effect service of subpoenas on Debtor's parents-in-law and
28 other family members. But there is no explanation why Banayans could

1 not depose Mesbahi to develop the missing facts, or why Debtor is
2 responsible for their inability to effect service on other people.

3 The motion, which elaborated on the merits of the § 727(d) action,
4 states that "Plaintiff, counsel and Defendant met and conferred in
5 person on June 16, 2005 regarding the responses received[,] and
6 additional documents were to be produced but to date have never been
7 produced." Responding on the merits, Debtor responded that he had
8 produced all the documents in his possession, that due to his move (to
9 his parents' home) after he separated from his wife (and a subsequent
10 messy dissolution), other documents were lost. He also asserted that
11 when they were married, he and his wife lived in property which was
12 owned by his parents, purchased with his parents' funds and down payment
13 in 1997, and that he had no interest in that property.

14 Our review of this order is severely hampered by the lack of a
15 hearing transcript in the excerpts of record. It is appellants' job to
16 provide the complete record. In re Kritt, 190 B.R. 382, 387 (9th Cir.
17 BAP 1995). Where appellants have omitted something from the excerpts,
18 we are entitled to presume they do not regard the missing items as
19 helpful to their appeal. In re Gionis, 170 B.R. 675, 680-81 (9th Cir.
20 BAP 1994), aff'd, 92 F.3d 1192 (9th Cir. 1996) (table); In re McCarthy,
21 230 B.R. 414, 416-417 (9th Cir. BAP 1999).

22 Here, the record shows that bankruptcy court denied the motion
23 because of lack of compliance with LR 9013-1(c), which provides:

24 (c) DISCOVERY

25 For any dispute which may arise under F.R.B.P. 7026-7037 or
26 F.R.B.P. 2004, counsel shall comply with all portions of this
27 subsection of the Local Bankruptcy Rules unless excused from
doing so by order of the court for good cause shown.

28 (1) Meeting of Counsel. Prior to the filing of any motion
relating to discovery, counsel for the parties shall meet in

1 person or by telephone in a good faith effort to resolve the
2 discovery dispute. It shall be the responsibility of counsel
3 for the moving party to arrange for the conference. Unless
4 altered by agreement of the parties or by order of the court
5 upon good cause shown, counsel for the opposing party shall
6 meet with counsel for the moving party within 10 days of
7 service upon counsel of a letter requesting such meeting and
8 specifying the terms of the discovery order to be sought.

9 (2) Moving Papers. If counsel are unable to settle their
10 differences, the party seeking discovery shall file and serve
11 a notice of motion together with a written stipulation. This
12 written stipulation shall be formulated by the parties and
13 shall specify, separately and with particularity, each issue
14 that remains to be determined at the hearing and the
15 contentions and points and authorities of each party as to
16 each issue. The stipulation shall be set forth in 1 document
17 which shall contain all such issues in dispute and the
18 contentions and points and authorities of each party. The
19 stipulation shall not refer the court to other documents to
20 describe the dispute. For example, if the sufficiency of an
21 answer to an interrogatory is in issue, the stipulation shall
22 contain, verbatim, both the interrogatory and the allegedly
23 insufficient answer, followed by each party's contentions,
24 separately stated. **In the absence of such stipulation or a
25 declaration of counsel of noncooperation by the opposing
26 party, the court will not consider any discovery motion.**

27 (emphasis added).

28 Based upon our review of the excerpts of record, the motion, reply,
and given the lack of findings, we agree that the motion to compel
failed to comply with the strict requirements of LR 9013-1(c). The
parties did not file the "single document" incorporating a "written
stipulation" formulated by the parties specifying issues to be
determined. Nor did Banayans file a "declaration of noncooperation" by
Mesbahi. Based upon the last sentence of LR 9013-1(c) (2), we cannot say
that the bankruptcy court abused its discretion in denying the motion to
compel.

And, we also must consider that, in spite of the court's scheduling
order which barred trial continuances and allowed seven months to
complete discovery, Banayans waited until the deadline to move to compel
and to request a continuance.

1 **C. Revocation of Discharge Generally**

2 "Section 727 'is the heart of the fresh start provisions of the
3 bankruptcy law.'" In re Lawson, 193 B.R. 520, 523 (9th Cir. BAP 1996),
4 aff'd, 122 F.3d 1237 (9th Cir. 1997) (citations omitted). Revocation of
5 discharge is an extraordinary remedy. Bowman, 173 B.R. at 924. The
6 statutory provisions regarding objections to discharge are construed
7 liberally in favor of the debtor and strictly against the objector. In
8 re Adeeb, 787 F.2d 1339, 1342 (9th Cir. 1986).

9 Averments of fraud or mistake must be stated with particularity,
10 FRCP 9(b), and the "burden of proof for objections to discharge is the
11 ordinary preponderance of the evidence standard." Bowman, 173 B.R. at
12 925 (citations omitted).

13 We proceed by considering each allegation, as charged in paragraphs
14 7 and 10 of the Complaint:

15
16 **1. Discharge Obtained through Debtor's Fraud - § 727(d)(1)**

17 A discharge may be revoked if it was "obtained through the fraud of
18 the debtor, and the requesting party did not know of such fraud until
19 after the granting of such discharge." § 727(d)(1). "Obtained through"
20 means that the creditor must show that "but for the fraud, the discharge
21 would not have been granted." In re Nielsen, 383 F.3d 922, 926 (9th
22 Cir. 2004).

23 To effectuate a revocation under § 727(d)(1), the fraud must be
24 discovered post-discharge. In re Dietz, 914 F.2d 161, 163 (9th Cir.
25 1990). Plaintiff must diligently investigate any possible fraudulent
26 conduct before discharge, and "prove that it was unaware of the fraud at
27 the time the discharge was granted." Bowman, 173 B.R. at 925.

1 Appellants' entire first cause of action is framed in terms of
 2 § 727(a)(1), and does not allege the elements of actual fraud, necessary
 3 to establish a § 727(d)(1) claim. Bowman, 173 B.R. at 925 (Plaintiff
 4 must prove fraud in fact). Nevertheless, we will consider Banayans'
 5 factual assertions, shown below with the corresponding § 727(d)(1)
 6 analysis:

Facts alleged to support § 727(d)(1) claim	Analysis
<p>7 Mesbahi failed to disclose an 8 interest in real property at 3541 9 Caribeth Drive, Encino, CA and 10 1934 Idaho Ave., Santa Monica, 11 CA.</p>	<p>Prepetition, Debtor lived at the Caribeth property from 1999 to June 2003. No evidence Mesbahi owned rental properties. Evidence does not show community property interest in Caribeth Drive property; documents showing Mesbahi's address at Caribeth Drive does not support finding of ownership.</p>
<p>12 Mesbahi failed to disclose rental 13 income in Caribeth Drive and 14 Idaho Avenue properties.</p>	<p>No evidence Mesbahi earned any rental income.</p>
<p>15 Mesbahi failed to preserve 16 documents as to his business 17 transactions or financial 18 condition.</p>	<p>No evidence.</p>
<p>19 Mesbahi failed to disclose 20 offices or business interests in 21 Sam Rox Industries, Inc., stock 22 in L'Orient Industry, Venom Jean 23 TS Investment, or American Dream 24 Homes. Signing power on behalf 25 of Sam Rox creates the 26 "possibility" that a debtor could write out checks to himself, not disclosed in schedules.</p>	<p>Per pleadings from state court cases, Mesbahi had signing authority for Sam Rox, which does not evidence an ownership interest.⁶ No evidence his signing authority was ever abused. Unclear whether Debtor held stock ownership as of petition date. Secretary of State internet reports do not reflect stock ownership. Excerpt of § 523 trial transcript does not establish nature or timing of Mesbahi's stock in TS Investment or American Dream Homes.</p>

27 ⁶ Banayans did not argue before the BAP that the state court
 28 default judgment must be given issue and claim preclusive effect.
 See Appellants' Opening Brief at 7.

Facts alleged to support § 727(d)(1) claim	Analysis
<p>False oath: Mesbahi was married within the last six years and his failure to identify his spouse in his schedules is a material omission.</p>	<p>Schedules were somewhat conflicting: he listed his marital status as "separated" but on his statement of financial affairs indicated he had no spouse. Statement of financial affairs was technically incorrect but plaintiffs did not prove intent to deceive. Tax returns show Mesbahi filed jointly with his wife for 2001 and 2003. Also, it is unclear how such an omission rises to the level of fraud. Not a basis to revoke discharge as plaintiffs were aware of Mesbahi's marital situation from prior state court litigation.</p>

Appellants proffered no evidence showing their "diligent investigation," or any investigation, nor evidence to convince us that the bankruptcy court made a mistake in not finding fraud sufficient to revoke discharge under § 727(d)(1). The bankruptcy court did not clearly err.

2. Fraudulent Transfer or Concealment of Property

Section 727(d)(2) provides that a discharge may be revoked if the debtor acquired property that is property of the estate, or became entitled to acquire property that would be property of the estate, and knowingly and fraudulently failed to report the acquisition of or entitlement to such property, or to deliver or surrender such property to the trustee[.]

Under § 727(d)(2), Appellants must show two elements: that Mesbahi, with knowing intent to defraud, "acquired or became entitled to acquire property of the estate and knowingly and fraudulently failed to report

1 or deliver the property to the trustee. . . ." Bowman, 173 B.R. at
2 925.

Facts alleged to support § 727(d) (2) claim	Analysis
Mesbahi failed to disclose 2001 income; income not itemized in Statement of Financial Affairs	No showing of intent to defraud, or materiality of omission.
Mesbahi failed to disclose rental income in Caribeth Drive and Idaho Avenue properties.	No evidence Mesbahi owned any rental properties or earned any rental income.
Mesbahi failed to disclose other property.	No evidence to support.

10
11 None of the allegations were proven by a preponderance of the
12 evidence, nor does that evidence show that Debtor committed fraud for
13 the purpose of obtaining a discharge. As well, Banayans did not prove
14 that they did not know of any fraud prior to the discharge. Dietz, 914
15 F.2d at 163. Certainly Katie Mesbahi's existence was not "concealed."
16 Although Debtor only produced a bare minimum of documentation, and may
17 have not adequately adhered to the requirement of keeping and preserving
18 records and documenting transactions, the record reflects more sloppy
19 business and record keeping practice than true concealment. Some income
20 tax returns for prior years were produced, and some county property
21 ownership documents. Most of the business transactions and
22 relationships involved here could have been discoverable in the course
23 of the chapter 7, or in the seven years between Appellant's obtaining a
24 seven-figure judgment against Debtor and his bankruptcy filing.

25 Banayans could have investigated before discharge, but were
26 dilatory, not diligent, see Dietz, 914 F.3d at 163 (one with knowledge
27 of probable wrongdoing does not have the privilege to wait), and
28 Appellants have not shown clear error.

1 **D. Appellants' Motion to Supplement Designation of Record**

2 We have reviewed Appellants' motion to supplement their excerpts of
3 record, filed 28 February 2006, the response and the reply.

4 We grant the motion to supplement with respect to the 14 October
5 2005 order denying Appellants' motion to compel discovery and continue
6 the trial, discussed above,⁷ but deny the balance of the motion, which
7 proposes to include in the record material not before the bankruptcy
8 court in deciding this adversary proceeding.

9
10 **VI. CONCLUSION**

11 As we have no jurisdiction to afford relief against someone not a
12 party to this appeal, we DISMISS the appeal as to the dismissal of Katie
13 Mesbahi.

14 The order denying the motion to compel was not an abuse of
15 discretion, based on the lack of compliance with LR 9013. Nor have
16 Appellants carried their appellate burden to show that the bankruptcy
17 court made an error of law or predicated its judgment for debtor on a
18 clearly erroneous finding of fact. We AFFIRM both.

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⁷ We could and would take judicial notice of this order absent
this motion. In re Atwood, 293 B.R. 227, 233 n.9 (9th Cir. BAP 2003).