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

NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT

6	In re:)	BAP No.	WW-05-1372-KDMc
7	LORI ANN MORGAN,)	Bk. No.	03-50831
8	Debtor.)	Adv. No.	04-04017
9)		
10	LORI ANN MORGAN,)		
11	Appellant,)		
12	v.)	MEMORANDUM*	
13	KATHRYN A. ELLIS, Trustee,)		
14	Appellee.)		

Submitted without oral argument by agreement of the parties
on September 11, 2006

Filed - September 13, 2006

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

Honorable Philip H. Brandt, Bankruptcy Judge, Presiding

Before: KLEIN, DUNN, and McMANUS,** Bankruptcy Judges.

*This disposition is not appropriate for publication and may
not be cited except when pertinent 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.

**Hon. Michael S. McManus, Chief United States Bankruptcy
Judge for the Eastern District of California, sitting by
designation.

1 The appellant appeals the denial of her discharge pursuant
2 to 11 U.S.C. § 727(a) (3) on the basis that the bankruptcy court's
3 factual findings rendered orally on the record following trial
4 are clearly erroneous. We AFFIRM.

5
6 FACTS

7 Lori Ann Morgan, the debtor and appellant, owned and
8 operated a business known as Truck Rental Company ("TRC") as a
9 sole proprietorship from 1996 through November 2002. At the same
10 time, Morgan worked full-time managing the front office of a
11 dental practice. Morgan's duties at the dental practice included
12 billing, tracking accounts receivables, and preparing statements.
13 Her education included two years of college.

14 In November 2002, Morgan transferred ownership of TRC to
15 James Walls for no consideration. James Walls is the father of
16 Christopher Walls, who is Morgan's boyfriend. Christopher Walls
17 has a lengthy criminal record with convictions that include bank
18 fraud.

19 Christopher Walls "secretly" operated TRC from 2000 through
20 approximately July 2003. Because of Christopher Walls' criminal
21 record for bank fraud, Morgan and then James Walls were record
22 owners of TRC, but Christopher Walls essentially ran the business
23 behind the scenes.¹

24 In July 2003, eight months after Morgan transferred
25 ownership of TRC, the Superior Court of Washington for the County
26 of Pierce issued a Temporary Restraining Order ("TRO") preventing
27

28 ¹At some point, James Walls transferred ownership of TRC to
Christopher Walls.

1 Morgan, James Walls, and Christopher Walls from operating TRC or
2 coming within 1000 feet of TRC's business office.²

3 On October 18, 2003, Morgan filed a voluntary chapter 7
4 bankruptcy case. Appellee, Kathryn Ellis, was appointed as the
5 chapter 7 trustee.

6 Prior to the first meeting of creditors, Ellis wrote Morgan
7 and requested that Morgan bring certain information and
8 documentation, including business-related records, with her to
9 the meeting to be held on November 25, 2003.

10 At the meeting of creditors, Ellis asked Morgan about
11 records relating to her operation and transfer of TRC. Because
12 Morgan did not bring the requested documents with her to the
13 meeting, the meeting was continued. Morgan was instructed to
14 obtain and bring to the continued meeting certain business-
15 related records.³

16 Morgan appeared at the continued meeting on December 9,
17 2003, without the requested business records. Morgan told Ellis
18 that she could not get the requested business-related records
19 because of the TRO that was issued in July 2003. Morgan also
20 could not provide Ellis with her personal bank statements because
21 she said that she did not keep them after reconciling them with
22 her check register.

24
25 ²Around the same time, Christopher Walls was being
26 investigated for a probation violation and certain business
27 documents of TRC were turned over to the United States Probation
28 Office.

³Such requested business records included bank statements,
cancelled checks and check registers, all documents pertaining to
her transfer of TRC to James Walls, and tax documents for TRC.

1 On January 26, 2004, the trustee filed an adversary
2 complaint objecting to Morgan's discharge under 11 U.S.C.
3 §§ 727(a) (3), (a) (4) (A), (B) and/or (D), and (a) (5).

4 A trial was held on August 24, 2005.

5 At trial, Morgan again argued that all the requested
6 business records were located at the TRC business office and that
7 she could not produce them because the TRO prevented her from
8 accessing such records.

9 During her testimony, Morgan admitted that she did not
10 maintain records and that she had no knowledge of what the assets
11 of TRC were at the time that she transferred the business in
12 November 2002.

13 On August 29, 2005, the bankruptcy court entered its
14 findings of fact and conclusions of law. Reasoning that there
15 was not adequate justification under the circumstances of the
16 case, the court denied Morgan's discharge under § 727(a) (3) for
17 failure to "keep records adequate to ascertain her financial
18 condition and her business transactions" and that such failure
19 "rendered it impossible to determine her financial condition and
20 those business transactions."⁴

21 This timely appeal ensued.

22 JURISDICTION

23 The bankruptcy court had jurisdiction via 28 U.S.C. § 1334.
24 We have jurisdiction under 28 U.S.C. § 158(a) (1).
25
26

27
28 ⁴The court dismissed the trustee's causes of action under
§§ 727 (a) (4) and (a) (5).

1 ISSUE

2 Whether the bankruptcy court clearly erred when it
3 determined, as a matter of fact, that the failure of the debtor
4 to keep or preserve records from which her financial condition or
5 business transactions might be ascertained, was not justified
6 under all the circumstances of the case.

7
8 STANDARD OF REVIEW

9 We review findings of fact for clear error. Massoud v.
10 Ernie Goldberger & Co. (In re Massoud), 248 B.R. 160, 162 (9th
11 Cir. BAP 2000). A factual finding is clearly erroneous if, after
12 reviewing all the evidence, the reviewing court "is left with a
13 definite and firm conviction that a mistake has been committed."
14 Id. at 163, quoting United States v. United States Gypsum Co.,
15 333 U.S. 364, 395 (1948).

16
17 DISCUSSION

18 The debtor assigns error to the court's finding that she
19 lacked justification for her failure or delay in producing
20 certain documents requested by the trustee. She argues that some
21 of her personal records and all of her business records were not
22 accessible to her in light of the TRO barring her from the
23 business premises. The debtor contends that she eventually
24 provided all requested documents to the trustee, but that
25 obtaining copies of the requested documents was costly and time
26 consuming. In effect, the debtor argues that the findings of
27 fact underlying the court's decision to deny her discharge were
28 clearly erroneous.

I

1
2 We begin by noting that our review is impeded because the
3 debtor did not provide a complete transcript of the trial and did
4 not include a copy of all exhibits admitted into evidence.
5 Morgan, as appellant, has the burden to demonstrate that the
6 bankruptcy court's findings of fact are clearly erroneous.
7 Gionis v. Wayne (In re Gionis), 170 B.R. 675, 681 (9th Cir. BAP
8 1994).

9 The statute at issue focuses on "all the circumstances of
10 the case," which ordinarily would necessitate a complete
11 transcript. In light of the standard of review, debtor, as
12 appellant, is responsible for providing us with the entire
13 transcript and all other relevant evidence considered by the
14 bankruptcy court. Price v. Lehtinen (In re Lehtinen), 332 B.R.
15 404, 416 (9th Cir. BAP 2005).

16 Because the debtor chose to provide an incomplete transcript
17 and an incomplete set of trial exhibits, we are entitled to
18 presume that the missing portions are not helpful to her
19 position. Gionis, 170 B.R. at 680-81. Although the limited
20 record before us handicaps our review, it does not preclude us
21 from deciding this appeal. Id. at 681. We will proceed to
22 review the matter from the record before us.

23
24 II

25 The bankruptcy court denied the debtor a chapter 7 discharge
26 by virtue of § 727(a)(3):

27 (a) The court shall grant the debtor a discharge,
28 unless -

(3) the debtor has . . . failed to keep or

1 preserve any recorded information, including books,
2 documents, records, and papers, from which the debtor's
3 financial condition or business transactions might be
ascertained, unless such act or failure to act was
justified under all the circumstances of the case[.]

4 11 U.S.C. § 727(a) (3).

5 The trustee had the initial burden of proof to show that the
6 debtor "failed to maintain and preserve adequate records" and
7 that such failure made it "impossible to ascertain" the debtor's
8 financial condition and material business transactions.

9 Lansdowne v. Cox (In re Cox), 41 F.3d 1294, 1296 (9th Cir. 1994).

10 Once the trustee made such a showing, the burden shifted to the
11 debtor to "justify the inadequacy or non-existence of the
12 records." Id.

13 The trustee was not required to prove fraudulent intent.
14 Id. at 1297 (intent to conceal one's financial condition is not
15 an element under § 727(a) (3)).

16 Although denial of discharge issues are usually construed
17 generously in favor of the debtor, a bankruptcy discharge is a
18 privilege that is dependent upon a true presentation of a
19 debtor's financial affairs. Cox v. Lansdowne (In re Cox), 904
20 F.2d 1399, 1401 (9th Cir. 1990). "' Creditors are not required
21 to risk the withholding or concealment of assets by the bankrupt
22 under cover of a chaotic or incomplete set of books or records.'" Id.,
23 quoting Burchett v. Myers, 202 F.2d 920, 926 (9th Cir.
24 1953).

25 Debtors have an affirmative duty to produce financial
26 records and/or business documents that accurately reflect the
27 debtor's business affairs so that the trustee may carry out its
28 duties under the Bankruptcy Code. 11 U.S.C. § 521(a).

1 The debtor's contention both at trial and on appeal is that
2 she could not timely provide the trustee with the requested
3 records because she did not have access to the requested records.
4 However, the debtor repeatedly admitted at trial that she
5 retained no records regarding TRC after she transferred ownership
6 in November 2002. As for the records pertinent to the period
7 prior to the transfer, the debtor testified that she relied on
8 the availability of such records from her boyfriend Christopher
9 Walls, a convicted felon.

10 The bankruptcy court found that the debtor's reliance on
11 James Walls and Christopher Walls was not objectively reasonable
12 under all the circumstances of this case.

13 The debtor transferred TRC in November 2002. The TRO was
14 not issued until July 2003. The debtor did not file her
15 bankruptcy until October 2003 and offered no explanation why she
16 did not keep or access any records prior to July 2003.

17 As part of its "all-of-the-circumstances-of-the-case"
18 analysis, the bankruptcy court paid particularized attention to
19 the debtor's background, training, and experience. It found that
20 the debtor had "two years of college, a decade's worth of
21 experience running the front office of a dental practice,
22 including billing, tracking accounts receivable, and preparing
23 statements." Based on the debtor's business background and
24 experience, the bankruptcy court reasoned that the debtor was not
25 absolved from the duty to keep or maintain records herself. It
26 necessarily concluded that the TRO was an inadequate
27 justification. Thus, it concluded that the debtor did not meet
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1 her burden to justify the inadequacy and/or non-existence of the
2 requested records. We agree.

3 Because the debtor admitted at trial that she did not keep
4 (among other records) records relating to her transfer of her
5 personal ownership interest in TRC, as would be appropriate for
6 the owner of an active business that is transferred, and because
7 the court rejected as objectively unreasonable the debtor's
8 reliance on James Walls and Christopher Walls or access to
9 records, the trustee was unable to ascertain the debtor's
10 business transactions for a reasonable period in the past. Under
11 these circumstances, the bankruptcy court did not err when it
12 denied the debtor's discharge.

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CONCLUSION

The bankruptcy court's findings of fact were not clearly
erroneous and support its conclusion that the debtor did not
preserve recorded information and was not, under all the
circumstances of the case, excused from such requirement. Thus,
it was not error to deny the debtor's discharge on the basis of
§ 727(a)(3). AFFIRMED.