NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL

OF THE NINTH CIRCUIT

In re:	
WINSTON PING-YAU KO; DOROTHY PUI-YUK KO,	BAP No. CC-05-1177-BKJ
	Bk. No. LA 03-30636-TD
Debtors.	Adv. No. LA 03-02695-TD
AESPACE AMERICA, INC.,	
Appellant,	
v.	**M E M O R A N D U M**[1]
WINSTON PING-YAU KO; DOROTHY PUI-YUK KO,	
Appellees.	

Argued and Submitted on January 18, 2006 at
Pasadena, California

Filed - March 3, 2006

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

Honorable Thomas B. Donovan, Bankruptcy Judge, Presiding

Before: BRANDT, KLEIN and JAROSLOVSKY,[2] Bankruptcy Judges.

[1] This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except when relevant under the doctrines of law of the case, res judicata or collateral estoppel. See 9th Cir. BAP Rule 8013-1.

[2] Hon. Alan Jaroslovsky, United States Bankruptcy Judge for the Northern District of California, sitting by designation.

Debtors/appellees Ko filed a chapter 7[3] petition, scheduling the state court judgment of Aespace America, Inc. ("Aespace"). Aespace filed a complaint objecting to discharge under § 727. After an evidentiary hearing, the bankruptcy court dismissed the complaint, and Aespace appealed. We AFFIRM.

I. FACTS

Dorothy and Winston Ko filed a joint chapter 7 petition on 6 August 2003. They scheduled a $1,200,000 judgment after a state court trial, awarded to Aespace only five days prepetition.[4]

Aespace was debtors' primary creditor. It filed a proof of claim and a complaint objecting to Kos' discharge under fraudulent transfer of assets/fraudulent concealment of assets/information under § 727(a)(2), failure to keep books or adequate records under § 727(a)(3), and false statements under oath in connection with the case under § 727(a)(4).

Aespace alleged that eight months prepetition, debtors transferred (gifted) a one-half interest in Beverly Hills property to their daughter and son-in-law; that debtors concealed, by omitting from schedules certain prepetition withdrawals from a Wells Fargo account, and had depleted their Charles Schwab account by withdrawing $130,878 prepetition. Aespace also alleged that debtors had a significant amount

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[3] Absent contrary indication, 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 the adversary proceeding and these appeals arise was filed before its effective date (generally 17 October 2005). All "Rule" references are to the Federal Rules of Bankruptcy Procedure.

[4] Superior Court of California, County of Los Angeles, Case No. BC 226948. The final judgment, entered 14 January 2004, was for negligent misrepresentation in connection with a $23.9M commercial real estate transaction in which debtors were sellers of a shopping mall. In October 2005, the Second District Court of Appeal affirmed, awarding Aespace its costs on appeal.

of undisclosed cash from employment earnings from K.M. Biotech, and that they had failed to document loans to K.M. Biotech and Kowin Investments.

The most serious of Aespace's allegations was that debtors undervalued their residence, the scheduled value of which was calculated to place the property outside creditors' reach. Kos also undervalued two other parcels of real property. The trustee ultimately sold all three for well above the scheduled values.

Having considered evidence introduced during a two-day trial in January and March 2005 (Kos' declarations, their prior deposition testimony both in bankruptcy and state courts, in their various individual and corporate capacities, and both Kos' rebuttal testimony at trial), the bankruptcy court issued its Memorandum of Decision ("Memo").

The Memo analyzed the claims at length by categorizing Aespace's factual allegations into 12 numbered paragraphs. Taking into account all the facts and surrounding circumstances, the court opined that there was not a sufficient basis to deny discharge under § 727, and entered judgment in favor of Kos. Aespace timely appealed.

II. JURISDICTION

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

III. ISSUES

Whether the bankruptcy court's dismissal of the complaint under § 727(a)(2)(A), (a)(3) or (a)(4) was proper.[5]

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[5] Aespace did not brief the Memo's ¶¶ 5, 6 or 12, and has thereby waived appeal of these claims. Ordinarily, we do not consider matters on appeal that are not specifically and distinctly argued in appellant's opening brief. In re Jodoin, 209 B.R. 132, 143 (9th Cir. (continued...)

IV. STANDARDS OF REVIEW

> Reviewing a judgment on an objection to discharge:
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> (1) the court's determinations of the historical facts are reviewed for clear error; (2) the selection of the applicable legal rules under § 727 is reviewed de novo; and (3) the application of the facts to those rules requiring the exercise of judgment about values animating the rules is reviewed de novo.

In re Searles, 317 B.R. 368, 373 (9th Cir. BAP 2004); In re Bammer, 131 F.3d 788, 792 (9th Cir. 1997). In de novo review, we look at the entire record before the bankruptcy court, and appellant bears the burden of providing the entire record on appeal. In re Kritt, 190 B.R. 382, 387 (9th Cir. BAP 1985).

We review findings of fact for clear error. Rule 8013. A factual finding is clearly erroneous if the appellate court, after reviewing the entire record, has a firm and definite conviction that a mistake has been committed. Anderson v. City of Bessemer City, N.C., 470 U.S. 564, 573 (1985). If two views of the evidence are possible, the trial judge's choice between them cannot be clearly erroneous. Id. at 574. We give findings of fact based upon credibility particular deference. Id. at 575. See also In re Lehtinen, 332 B.R. 404, 411 (9th Cir. BAP 2005).

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

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[5](...continued)
BAP 1997); see also In re Sedona Inst., 220 B.R. 74, 76 (9th Cir. BAP 1998), and Laboa v. Calderon, 224 F.3d 972, 985 (9th Cir. 2000) (issues not specifically and distinctly argued in the opening brief are deemed waived).

V. DISCUSSION

"Section 727 'is the heart of the fresh start provisions of the bankruptcy law.'" In re Lawson, 193 B.R. 520, 523 (9th Cir. BAP 1996), aff'd, 122 F.3d 1237 (9th Cir. 1997)(citation omitted). As a matter of statutory construction, objections to discharge are construed liberally in favor of the debtor and strictly against the objector. In re Adeeb, 787 F.2d 1339, 1342 (9th Cir. 1986) (citation omitted). The burden of proof in a § 727 adversary proceeding objecting to discharge is a preponderance of evidence. Grogan v. Garner, 498 U.S. 279, 289 (1991); In re Cox, 41 F.3d 1294, 1297 (9th Cir. 1994); Searles, 317 B.R. at 376.

A. Fraudulent Transfer or Concealment of Property

Section 727(a)(2)(A) provides:

> (a) [t]he court shall grant the debtor a discharge, unless . . .
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> (2) the debtor, with intent to hinder, delay, or defraud a creditor or an officer of the estate charged with the custody of property under this title, has transferred . . . or concealed . . .
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> (A) property of the debtor, within one year before the date of filing of the petition . . . .

"[T]wo elements comprise an objection to discharge under § 727(a)(2)(A): (1) a disposition of property, such as transfer or concealment, and (2) a subjective intent on the debtor's part to hinder, delay or defraud a creditor through the act of disposing of the property." Lawson, 122 F.3d at 1240; see also In re Wills, 243 B.R. 58, 65 (9th Cir. BAP 1999).

Whether a debtor harbors intent to hinder or delay is a factual question, and a finding of actual intent may be based on circumstantial

evidence. Searles, 317 B.R. at 380. In In re Woodfield, 978 F.2d 516 (9th Cir. 1992), the Ninth Circuit listed six examples of fraud:

> Certain 'badges of fraud' strongly suggest that a transaction's purpose is to defraud creditors unless some other convincing explanation appears. These factors, not all of which need be present, include 1) a close relationship between the transferor and the transferee; 2) that the transfer was in anticipation of a pending suit; 3) that the transferor Debtor was insolvent or in poor financial condition at the time; 4) that all or substantially all of the Debtor's property was transferred; 5) that the transfer so completely depleted the Debtor's assets that the creditor has been hindered or delayed in recovering any part of the judgment; and 6) that the Debtor received inadequate consideration for the transfer.

Id. at 518 (emphasis added) (citation omitted). The three factors which apply to the transfers here are 1, 2 and 6: the close relationship between debtors and the transferees (here, family members); anticipation of a pending suit (it was, in fact, already pending); and inadequate consideration. Factors 3 and 4 are not applicable on these facts: there was no evidence that debtors were insolvent at the time of the transfer. Adeeb, 787 F.2d at 1345. Kos were gainfully employed, owned other valuable property, and based on their schedules, apparently had no other creditors, other than their lawyer. Nor was factor 5 proven — the transfers did not involve substantially all of Kos' property, and the funds were used to pay ordinary expenses.

As for the bank withdrawals, debtors amended their schedules and disclosed the withdrawal at their § 341 meeting. To some extent, debtors redeemed themselves by making these subsequent disclosures.

In the case of the transfer to their daughter and son-in-law, the transferees cooperated, and, by stipulation, reconveyed property to the trustee, albeit 11 months post-petition. The court thus properly found that the transfer did not remain transferred, so could not qualify as a transfer under this section. See In re Beauchamp, 236 B.R. 727, 733

(9th Cir. BAP 1999), aff'd, 5 Fed. Appx. 743 (9th Cir. 2001) (applying Adeeb).

Mrs. Ko's trial testimony showed that, though delayed more than a year post-sale, Kos distributed two checks representing the proceeds of sale of townhouses to their children for a valid interest in the property. The remaining two checks were issued to debtors to pay legal fees and for living expenses. The long delay in writing checks on the account was noted but explainable, and not fraudulent.

The series of factual allegations are independent of each other; they do not sustain a continuing pattern of wrongful behavior, another indicator of fraudulent intent. In re Devers, 759 F.2d 751, 753-54 (9th Cir. 1985) ("fraudulent intent may be established by circumstantial evidence, or by course of conduct"). The bankruptcy court's finding that Aespace did not prove debtors had the specific intent to defraud was not clearly erroneous.

B. Inadequate records of assets and expenditures.

Section 727(a)(3) provides:

> (a) The court shall grant the debtor a discharge, unless--
>
> . . .
>
> (3) 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[.]

This provision 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 727-31 (Alan N. Resnick & Henry J. Sommer eds., 15th ed. rev. 2005) (citations omitted).

The Code places the initial burden on the creditor, but once it is determined that a debtor's records are inadequate, the burden shifts to the debtor to provide justification. Cox, 41 F.3d at 1296-97. See also § 521(4) ("[t]he debtor shall . . . if a trustee is serving in the case, surrender to the trustee all property of the estate and any recorded information, including books, documents, records, and papers, relating to the property of the estate[.]")

Aespace, for its initial burden, never explained where the gaps in the documentation are found, and specifically what missing evidence might show about Kos' deals and businesses. The loan from neighbors to repurchase the house was attacked but as it was post-petition, it was outside the time frame for scrutiny: the action complained of in § 727(a)(4)(A) must have occurred within one year before the petition date. § 727(a)(2)(A).

As to the allegation of undisclosed cash, Kos testified that they worked significant hours for K.M. Biotech even though it was not yet producing income, due to the nature of the scientific/medical drug patent process.

The bankruptcy court was satisfied that Kos had maintained sufficient records of two loans, one to K.M. Biotech for $188,151 and one to Kowin Investments, Inc. for $23,751 (although Kos' exact connection to Kowin is not explained in the record). Even if Kos did not use actual loan agreements, security agreements or notes to document the loans, they produced cancelled checks and checkbook registers. There was no improper concealment.

While Kos only barely met the minimum requirement of keeping and preserving records and documenting transactions, the record reflects more sloppy business practice than concealment. Notably, the trustee did not join in as party in this adversary proceeding. The bankruptcy court found that the claims were too speculative and that the allegations lacked supporting evidence. Aespace has not shown clear error in the bankruptcy court's finding that the records provided by debtors were sufficient to ascertain their financial condition and business transactions within the meaning of § 727(a)(3).

C. False Oath or Account - § 727(a)(4)(A)

Section 727(a)(4)(A) "excepts from discharge any debtor who knowingly or fraudulently, in or in connection with the case . . . made a false oath or account." See also Wills, 243 B.R. at 62-64; In re Roberts, 331 B.R. 876, 882-884 (9th Cir. BAP 2005). To be denied discharge under this section, three elements must be met: (1) a false statement under oath or penalty of perjury; (2) regarding a material fact; (3) made knowingly and (4) fraudulently. Id. at 882. A false oath requires that the creditor show that the debtor made the representations; that at the time debtor knew were false, made with the intention and purpose of deceiving creditors, that the creditor relied on the representations, and that the creditors sustained loss and damage as a proximate result. Id.

The alleged undervaluation of Kos' property, which on sale of the three properties netted more than $500,000 to the estate, was in contrast to the much bleaker situation depicted in Kos' original schedules. Mrs. Ko had experience selling and buying residential and commercial real estate, and Mr. Ko was a licensed architect.

Mrs. Ko's testimony was that the scheduled value for the house was based on a 2001 refinance lender's appraisal of $575,000 less renovation costs for "major defects." The house was plagued by defects and a need for repairs prepetition, which they were financially unable to make. Without relying on contractors' estimates (which they did obtain post-petition), Mrs. Ko considered the impact of those defects on the value, arriving at a scheduled value of $415,000. The trustee listed the house for $620,000, subject to overbids, and Kos bought it back for $703,000 (having obtained loans from "kindly" neighbors) netting the estate $245,170.

Debtors admitted they did little to determine the fair market value of either of the other two parcels, other than refer to property tax bills. They testified that the cost of an appraisal would have been excessive, considering the value of the property, and they did not verify its value because professional appraisals would require an outlay of cash. Mrs. Ko testified she believed the undeveloped Los Angeles lot had no value short of development and no plan had been approved, so she instead relied on property tax valuations, which she later conceded are not indicative of market value. There is no evidence of what transpired at the trustee's auction or what happened to residential real estate values in the neighborhood post-petition. While the purchase price at trustee's sale is evidence of value, it may have been artificially inflated by the fact that Kos clearly wanted to stay in their home, and had a willing lender.

Aespace cites In re Seruntine, 46 B.R. 286, 287-89 (Bankr. C.D. Cal. 1984) in which debtors' undervaluation of property was sufficient to deny discharge. Seruntine fundamentally stands for the principle that an undervaluation in the context of an objection to discharge must

be considered on a case-by-case basis. Id. at 287. The bankruptcy court believed Kos' testimony as to each, and debtors "provided a reasonable basis for their belief." They provided a somewhat cogent explanation, and the court properly concluded that they did not knowingly undervalue the residence on their schedules.

Kos did not schedule the companies owned by K.M. Biotech, which they did not own individually. The evidence was undisputed that debtors' 15,000 shares of K.M. Biotech had no current realizable value, as the drug patent had not been approved by FDA; that contention was not challenged. The court found debtors' testimony credible, and Aespace has not explained where there was error.

While Aespace's arguments are the strongest on this ground, they do not rise to the level required to deny discharge under § 727(a)(4). Kos' actions may have been careless, but:

> An action is careless if it is engaged in without reasonable care. This is a negligence standard, not a knowing misconduct standard. A false statement resulting from ignorance or carelessness does not rise to the level of 'knowing and fraudulent'.

Roberts, 331 B.R. at 884 (citation omitted).

VI. CONCLUSION

The trial transcript reflects that Kos were relatively unconcerned with the need to obtain accurate property values and unwilling to invest any time or money into a proper appraisal, reflective more of lack of effort than fraud. And Aespace showed that Kos made some questionable valuation decisions, were not careful to maintain good and timely documentation, and had sloppy paperwork practices.

But in all, Kos' credibility is central. In re Thiara, 285 B.R. 420, 427 (9th Cir. BAP 2002)(trial judge assesses witness' demeanor and

credibility in making determinations of intent). Aespace does not argue that the bankruptcy court failed to consider specific evidence, misinterpreted any particular facts or misapplied the law, or that any finding is unsupported by evidence. Considering that the trial judge is in the best position to evaluate credibility, and that, on appeal, we must give "due regard . . . to the opportunity of the bankruptcy court to judge the credibility of the witnesses," Rule 8013, there is no clear error.

As an appellate panel, we do not retry the case: the question for us is whether the bankruptcy court clearly erred in finding that the facts were insufficient to deny Kos their discharge. In short, Aespace has not shown clear error in any of the bankruptcy court's factual findings.

We emphasize that the counts under § 727(a)(2) and (a)(4) ultimately turned on the trial court's assessment of the intent and the state of knowledge within the minds of the debtors, which are inherently factual determinations that necessitate affording deference to the trier of fact. While we might not have reached the same conclusions had we been triers of fact, we cannot say that the trial judge's assessment was clearly erroneous.

The bankruptcy court did not clearly err in dismissing the complaint. We AFFIRM.