

**AUG 31 2005**

**NOT FOR PUBLICATION**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**

6	In re:	)	BAP No.	WW-05-1026-SJuMa
7	SHERRY L. WYMAN,	)	Bk. No.	04-15567
8	Debtor.	)	Adv. No.	04-01374
9	_____	)		
10	LUC J. R. MARTINI,	)		
11	Appellant,	)		
12	v.	)		
13	SHERRY L. WYMAN,	)		
14	Appellee.	)		
	_____	)		

**M E M O R A N D U M<sup>1</sup>**

Submitted Without Oral Argument  
on August 29, 2005

Filed - August 31, 2005

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

Honorable Thomas T. Glover, Bankruptcy Judge, Presiding.

Before: SMITH, JURY<sup>2</sup> AND MARLAR, Bankruptcy Judges.

<sup>1</sup> This disposition is not appropriate for publication and may not be cited except when relevant under the doctrines of law of the case, res judicata, or collateral estoppel. See 9th Cir. BAP Rule 8013-1.

<sup>2</sup> Hon. Meredith A. Jury, United States Bankruptcy Judge for the Central District of California, sitting by designation.

1 The court dismissed Luc Martini's adversary action against  
2 Sherry Wyman ("Debtor") following the presentation of his case-  
3 in-chief at trial on the grounds that he failed to establish a  
4 nondischargeable claim or a basis for the denial of discharge.  
5 We AFFIRM.

6 FACTS

7 Debtor rented a mobile home from Martini from 1998 to 2003.  
8 At some point Debtor stopped paying rent and, in October 2001,  
9 Martini served on her a Notice to Pay Rent or Quit Premises. The  
10 following month, the parties met to work out a payment plan  
11 regarding Debtor's delinquent rent. At the meeting, Martini  
12 drafted a promissory note which indicated both the amount Debtor  
13 owed in back rent and the personal property that Debtor was to  
14 provide as collateral for the unpaid rent, to wit, a camper, a  
15 boat, and a truck. Debtor never signed the promissory note.  
16 Instead, she countered with her own document entitled "An  
17 Agreement of Contract," which stated

18 I SHERRY WYMAN OWE IN THE AMOUNT OF \$3900.00 TO LUC  
19 MARTINI IN BACK RENT AT THE SAID ADDRESS. THIS AMOUNT  
20 IS BEING REDUCED UPON DELIVERY OF AGREED COLLATERAL TO  
21 \$2700.00.  
22 REPAYMENT OF SAID AMOUNT WILL START ON 01-01-02 IN THE  
23 AMOUNT OF \$112.50 PER MONTH, FOR 24 MONTHS WITH NO  
24 INTEREST OR PENALTY EXCEPTING DEFAULT.

25 The document was signed by Debtor and included a handwritten  
26 notation:

27 P.S. Luc, due to financial "hardship" I am unable to  
28 furnish Oct/Nov 2001 rent until I find work. Things  
are "very" tough out there right now and am working  
very hard to land a desent [sic] job to cover said  
expenses.

According to Martini, days later, Debtor gave him a list of

1 collateral securing the back rent she owed. The document was  
2 dated October 23, 2001 and signed by Debtor. It stated

3 To: Luke Martini

4 This is a record of personal property I, Sherry Wyman  
5 am using for collateral for repayment of back rent owed  
6 for 2001 In agreement with paperwork received on 10-10-  
7 01.

8 1: Snof. 1965 Camper model 11 CBR plate # 38022F

9 2: 1995 Starcraft 12' aluminum boat & Caulkins trailer  
10 plate #6227MJ.

11 Notably, the collateral offered by Debtor did not include  
12 the truck, the item of property Martini considered the most  
13 valuable of Debtor's possessions.

14 According to Martini's own testimony, the parties never  
15 reached an agreement with respect to repayment of his debt. He  
16 testified that he met with Debtor to hash out an agreement for  
17 payment of rent and arrears but that Debtor "almost immediately  
18 altered [the agreement] - you, know, she never signed the  
19 agreement." When Debtor later presented him with "something else  
20 which was more-or-less an agreement on terms she had invented,"  
21 Martini did not accept it. Martini testified that he allowed  
22 Debtor to continue living in the rental property because he felt  
23 secure once Debtor gave him some collateral.

24 In August 2002, the Washington State Department of  
25 Transportation (the "State") notified Debtor that the property  
26 would be subject to a condemnation action in the spring of 2003.  
27 In early March 2003, the State, Martini, and Debtor executed a  
28 stipulated order providing for the payment of \$66,000 by the  
State for the immediate possession and use of the property.  
Under applicable federal and state law, Debtor was entitled to  
receive approximately \$23,000 in relocation benefits. In this

1 regard, she received \$11,207 in March 2003 (most of which was  
2 paid to her new landlord), and \$12,145 in October, 2003 (which  
3 was paid directly to her).

4 Martini claims that at the time she moved out in March 2003,  
5 Debtor owed him \$5,037 in rent arrearages. He also charges that,  
6 in the course of her tenancy, Debtor's failure to maintain the  
7 property caused its value to diminish by \$5,000. Finally,  
8 Martini accuses Debtor of having damaged the property in the  
9 amount of \$30,000 by driving her truck across an area covering a  
10 septic tank.

11 In April 2004, Debtor filed a chapter 7<sup>3</sup> voluntary petition  
12 and in August, Martini filed this adversary proceeding, claiming  
13 that his debt was nondischargeable under §§ 523(a)(2) and  
14 523(a)(6), and that Debtor should be denied a discharge pursuant  
15 to §§ 727(a)(2) and 727(a)(4).

16 Trial was held in January 2005. At the conclusion of  
17 Martini's case, the court dismissed the action in its entirety,  
18 sua sponte, finding that Martini had not met his burden of proof  
19 on any of the requirements for a determination of  
20 nondischargeability or denial of discharge.<sup>4</sup> Martini appealed.

#### 21 JURISDICTION

22 The bankruptcy court had jurisdiction under 28 U.S.C. § 1334  
23 and § 157(b)(1) and (b)(2)(I). This Panel has jurisdiction  
24 under 28 U.S.C. § 158(c).

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25 <sup>3</sup> Unless otherwise indicated, all chapter, section and rule  
26 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1330, and  
27 to the Federal Rules of Bankruptcy Procedure, Rules 1001-9036.

28 <sup>4</sup> At trial, Martini was represented by counsel; on appeal,  
Debtor appeared pro se.

1 ISSUE

2 Whether the court erred in determining that Martini had  
3 failed to establish a basis for excepting his debt from discharge  
4 under §§ 523(a)(2) and 523(a)(6) or for denying Debtor's  
5 discharge under §§ 727(a)(2) and 727(a)(4).

6 STANDARDS OF REVIEW

7 We review de novo whether a particular type of debt is  
8 nondischargeable under § 523(a). In re Tsurukawa, 258 B.R. 192,  
9 195 (9th Cir. BAP 2001). Whether a debtor transferred property  
10 with intent to defraud a creditor is a finding of fact which we  
11 review under the clearly erroneous standard. Losner v. Union  
12 Bank, 374 F.2d 111, 112 (9th Cir. 1967) (per curiam); Citibank  
13 (S.D.), N.A. v. Eashai (In re Eashai), 87 F.3d 1082 (9th Cir.  
14 1996). Review under the clearly erroneous standard is  
15 significantly deferential and requires that an appellate court  
16 accept the court's findings of fact unless it is left with the  
17 definite and firm conviction that a mistake has been committed.  
18 Comm. for Idaho's High Desert, Inc. v. Yost, 92 F.3d 814, 819  
19 (9th Cir. 1996). "If the district court's account of the  
20 evidence is plausible in light of the record viewed in its  
21 entirety, the court of appeals may not reverse it even though  
22 convinced that had it been sitting as the trier of fact, it would  
23 have weighed the evidence differently." Phoenix Eng'g and  
24 Supply, Inc. v. Universal Electric Co., 104 F.3d 1137, 1141 (9th  
25 Cir. 1997), quoting Anderson v. Bessemer City, 470 U.S. 564, 573-  
26 74 (1985). Where there are two permissible views of the  
27 evidence, the fact finder's choice between them cannot be clearly  
28 erroneous. Duckett v. Godinez, 109 F.3d 533, 535 (9th Cir.

1 1997).

2 Denial of discharge under § 727 is reviewed de novo. In re  
3 Searles, 137 B.R. 368, 373 (9th Cir. BAP 2004) (citing In re  
4 Bammer, 131 F.3d 788, 792 (9th Cir. 1997)).

5 DISCUSSION

6 Martini's complaint alleges exceptions to discharge under  
7 §§ 523(a) (2) and 523(a) (6) and objects to Debtor's discharge  
8 under §§ 727(a) (2) and 727(a) (4).

9 Under § 523(a) (2) (A), a debt is nondischargeable if it was  
10 for money or property obtained by "false pretenses, a false  
11 representation, or actual fraud, other than a statement  
12 respecting the debtor's . . . financial condition." McCrary v.  
13 Barrack (In re Barrack), 217 B.R. 598, 605 (9th Cir. BAP 1998).<sup>5</sup>  
14 Section 523(a) (2) (B) excludes from discharge a debt for money or  
15 property obtained through the use of a false written statement  
16 regarding the debtor's financial condition. Where a debtor's  
17 statement does not purport to set forth the debtor's net worth or  
18 overall financial condition, the analysis must revolve around  
19 § 523(a) (2) (A) rather than § 523(a) (2) (B)<sup>6</sup>. Kirsh, 973 F.2d at  
20 1457.

21 Section 523(a) (6) excepts from discharge any debt resulting  
22 from "willful and malicious injury" by a debtor to another entity  
23

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24 <sup>5</sup> The creditor must show that (1) the debtor made the  
25 misrepresentation; (2) the debtor knew the representation was  
26 false at the time made; (3) the debtor made the representation  
27 with the intention and purpose of deceiving the creditor; (4) the  
28 creditor relied on the representation; and, (5) the creditor  
sustained damages as a proximate result. In re Kirsh, 973 F.2d  
1454, 1457 (9th Cir. 1992).

<sup>6</sup> As Martini does not allege that Debtor obtained a  
financial benefit from him on the basis of a false written  
statement concerning her financial condition, § 523(a) (2) (B) is  
not implicated.

1 or the property belonging to another entity. Carillo v. Su (In  
2 Re Su), 290 F.3d 1140, 1142 (9th Cir. 2002). The willful injury  
3 requirement is met only when the debtor has a subjective motive  
4 to inflict injury or when the debtor believes that injury is  
5 substantially certain to result from her own conduct. Id.  
6 “[D]ebts arising from recklessly or negligently inflicted  
7 injuries do not fall within the compass of § 523 (a) (6).”  
8 Kawaauhau v. Geiger, 523 U.S. 57, 64 (1998).

9 A. Martini’s debt is not excepted from discharge under  
10 § 523(a) (2) or § 523(a) (6).

11 At trial, the court denied Martini’s attempt to except his  
12 debt from discharge under §§ 523(a) (2) and 523(a) (6), holding  
13 that Martini had not identified any actionable misrepresentations  
14 by Debtor and that Debtor’s failure to maintain the rental  
15 property did not rise to the level of the willful and malicious  
16 conduct required under § 523(a) (6).

17 1. Section 523(a) (2) (A)

18 The precise misrepresentation Martini believes Debtor  
19 made to him is not entirely clear from record presented. In his  
20 brief, Martini states that “a contract between the parties  
21 existed, evidenced by Quid-Pro-Quo” but the existence of a  
22 contract is not supported by the record. It is unclear what  
23 contract he is referencing.

24 Though Martini raises a number of arguments regarding  
25 Debtor’s alleged misconduct, his primary complaint seems to  
26 revolve around representations concerning the “collateral.”<sup>7</sup>

27 <sup>7</sup> In his appeal, Martini makes a number of other charges  
28 against Debtor which are not supported by argument or legal  
authority. These charges include, that Debtor’s removal of the  
collateral constituted grand larceny, that her failure to list  
these assets on her schedules constitutes a fraud upon the court,  
(continued...)

1 The court did not find Martini's testimony credible, in part,  
2 because the purported "collateral" had little to no value. In  
3 this regard, the court stated

4 As far as the collateral is concerned, by the  
5 plaintiff's own admission, there was never a deal  
6 because she refused to sign the agreement and submitted  
7 her own, which wasn't satisfactory. There is no deal  
8 with respect to the providing of collateral. And  
9 again, the collateral is insignificant.

10 There might be a little value in that - it looks like a  
11 river fishing boat, but the camper is what? A 1965?  
12 At least that's what she puts on the data. Or am I  
13 misreading it? I mean that's an old junker. Any kind  
14 of camper that has been left out in the weather out  
15 there isn't worth anything. It's not worth anything  
16 with a truck to put it on anyway. And she specifically  
17 wasn't going to give the truck. Well, how can that be  
18 a false representation if there was never a deal made?

19 Transcript of Proceeding, January 3, 2005, pp. 60-61.

20 We find no error with the court's findings. Martini has not  
21 shown that his debt should be excepted from discharge under § 523  
22 (a) (2) (A) because he has not met even the first element required,  
23 i.e., that Debtor made a misrepresentation. Though he seems to  
24 argue that she misrepresented the value of the collateral she was  
25 offering, and that he relied on her representation that "the  
26 surety she offered was worth the debt owed," Martini offered no  
27 evidence of his own to refute her valuation. Instead, Martini  
28 argues that "[t]he issue of their actual value is moot under the  
29 principle that 'But For' the removal and transfer, the greater  
30 portion of this debt . . . would not exist; and 'But For' her  
31 Unlawful Detainer' no claim would exist." We disagree. If

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32 <sup>7</sup>(...continued)

33 that she committed perjury by testifying that she was homeless  
34 because she gave an address in her schedules, and that she  
35 tampered with evidence. We do not address these charges because  
36 issues raised in a brief but not supported by argument are deemed  
37 abandoned absent manifest injustice. Humble v. Boeing Co., 305  
38 F.3d 1004, 1112 (9th Cir. 2002).



1 Martini's claim is that Debtor misrepresented the value of the  
2 collateral to him, the issue is not "moot" and he cannot prevail  
3 on the claim without demonstrating the falsity of Debtor's  
4 alleged statement.

5 Next, Martini appears to argue that Debtor misrepresented  
6 that she delivered the collateral to him by virtue of the fact  
7 that she took the property with her when she moved out in March  
8 2003. This argument is difficult to follow, but ultimately fails  
9 under the weight of one clear truth: there was no underlying  
10 agreement to which a security interest could attach. Stated  
11 otherwise, Debtor could not, as the court correctly noted, make a  
12 representation about something (the "collateral") intended to  
13 support a debt that never existed.

14 In sum, Martini has not shown that Debtor made a  
15 misrepresentation that she knew to be false, with the intention  
16 and purpose of deceiving him, upon which he relied and that he  
17 sustained damages as a proximate result thereof. Kirsh, 973 F.2d  
18 at 1457. In short, Martini has not satisfied any of the elements  
19 of a § 523(a)(2)(A) claim.

20 2. Section 523(a)(6)

21 The thrust of Martini's § 523(a)(6) claim is that  
22 Debtor willfully and maliciously damaged his property by driving  
23 or parking her vehicle over a buried septic tank, for the purpose  
24 of stealing an appurtenance of the property (an aviary). Debtor  
25 claims that Martini's septic tank allegations are without merit  
26 because his proof (photos of tire tracks which he alleges were  
27 made by Debtor's truck) is inadequate and unauthenticated, and  
28 also because he no longer owned the property on the date he

1 claims Debtor did the damage. Debtor also argues that what she  
2 removed was fencing that was her own personal property, and that  
3 all of these charges constitute proof that Martini has  
4 persistently violated the relief from stay order by harassing her  
5 in an attempt to enforce a non-existent contract he believes he  
6 has with her.

7 Section 523(a) (6) essentially precludes a debtor from  
8 obtaining a discharge of a debt based on "tortious conduct that  
9 gives rise to willful and malicious injury." In re Jercich, 238  
10 F.3d 1202, 1206 (9th Cir. 2001). Here, the bankruptcy court  
11 found that while Debtor may not have been diligent in maintaining  
12 the rental property, Martini did not demonstrate that any of her  
13 actions were done willfully and maliciously, as required under  
14 the statute. We agree.

15 Though Martini's legal argument is difficult to follow, to  
16 the extent he is claiming that Debtor committed trespass or  
17 theft, or any other tortious conduct, he has failed to present  
18 evidence sufficient to support such claims.<sup>8</sup> We find no error  
19 with the court's ruling in this regard.

20 B. Martini's objection to discharge under § 727(a) was  
21 properly dismissed.

22 Martini objects to Debtor's discharge under  
23 § 727(a) (2), which denies a discharge to one who, with intent to

24 <sup>8</sup> We are likewise not convinced by any of Martini's  
25 arguments that the court erred in not admitting certain exhibits  
26 which, Martini claims, would tend to support his claim of Wyman's  
27 willful and malicious conduct. None of the evidence Martini  
28 sought to introduce appears to be relevant to or probative of  
Wyman's intent. At best, the exhibits referenced, so far as we  
can discern, would have indicated what degree of damage, if any,  
Wyman inflicted on Martini's property, not whether the alleged  
damage was done willfully and maliciously.

1 hinder, delay or defraud a creditor transfers property of the  
2 estate, and, under § 727(a)(4), which denies a discharge to one  
3 who knowingly or fraudulently made a false oath or account.  
4 Baker v. Mereshian (In re Mereshian), 200 B.R. 342, 345-56 (9th  
5 Cir. BAP 1996).

6 Section 727 is construed liberally in favor of debtors and  
7 strictly against a creditor. In re Adeeb, 787 F.2d 1339, 1342  
8 (9th Cir. 1986). "Two elements comprise an objection to  
9 discharge under § 727(a)(2)(A): 1) a disposition of property,  
10 such as transfer or concealment, and 2) a subjective intent on  
11 the debtor's part to hinder, delay or defraud a creditor. . ." In  
12 re Beauchamp, 236 B.R. 727, 732 (9th Cir. BAP 1999), quoting In  
13 re Lawson, 122 F.3d 1237, 1240 (9th Cir. 1997).

14 To deny Debtor a discharge under § 727(a)(4)(A), Martini  
15 must show that (1) Debtor knowingly and fraudulently made a false  
16 oath; and (2) the false oath related to a material fact. In re  
17 Aubrey, 111 B.R. 268, 274 (9th Cir. BAP 1990); In re Ford, 159  
18 B.R. 590 (Bankr. D. Or. 1993). A false oath may involve a false  
19 statement or omission in Debtor's schedules. In re Beaubouef,  
20 966 F.2d 174, 178 (5th Cir. 1992). The purpose of § 727(a)(4)(A)  
21 is to insure that a debtor provides accurate information so that  
22 trustees and creditors do not have to conduct costly  
23 investigations. Wills, 243 B.R. at 65, citing Aubrey, 111 B.R.  
24 at 274. "The entire thrust of an objection to discharge because  
25 of a false oath or account is to prevent knowing fraud or perjury  
26 in the bankruptcy case. As a result, the objection should not  
27 apply to minor errors or deviations in testimony under oath."  
28 243 B.R. at 65, quoting William L. Norton, Jr., Norton Bankruptcy

1 Law and Practice 2d § 74.11 (1997). Before Debtor can be denied  
2 a general discharge under either of these sections, Martini must  
3 show Debtor's actual intent to defraud. In re Mereshian, 200  
4 B.R. at 345.

5 Martini claims that Debtor's intent is evidenced by her  
6 failure to produce documents and other information as required  
7 under § 727(a)(2) and (4). Specifically, Martini claims that  
8 Debtor misrepresented her income on her schedules, falsely stated  
9 that she was "homeless" when she was, in fact, staying with a  
10 relative, failed to explain what became of the assets she had  
11 allegedly pledged to him as collateral, and did not adequately  
12 account for what became of the relocation funds she received from  
13 the Washington State DOT. Debtor, on the other hand, testified  
14 that she gave the boat and camper away to family members and that  
15 the relocation funds were used for living expenses. Debtor also  
16 testified that the relocation benefits were spent more than 90  
17 days before she filed her petition so, in her opinion, the issue  
18 of the funds was irrelevant. Debtor further stated that she was  
19 staying temporarily with relatives at the time she filed her  
20 petition.

21 The court determined that Debtor had not acted with the  
22 requisite intent and that any false statements and omissions  
23 contained in her petition were immaterial, stating

24 As far as her bankruptcy is concerned, at least in this  
25 case, the complaints are - well, concerning her  
26 address. Well, she doesn't have a place to live.  
27 She's living around with various people. You know,  
that is - that's the truth. Maybe she isn't supposed  
to live with her sister; but, you know, you've got to  
live someplace. . . .

28 Transcript of Proceedings, January 3, 2005, p. 61-62.

1 With respect to the relocation funds Debtor received, one  
2 half was paid directly to her new landlord, and the court found  
3 that it was not unreasonable for Debtor to spend the remainder,  
4 roughly \$1,000 a month, for living expenses over the course of a  
5 year. The court also found that it would have been unreasonable  
6 to deny Debtor a discharge because she did not keep records or  
7 receipts accounting for funds spent on living expenses.

8 We agree with the court's conclusion that Martini has not  
9 shown that Debtor acted with the fraudulent intent required for  
10 denial of her discharge. In addition, in determining that Debtor  
11 had no fraudulent intent, the court appropriately looked at the  
12 low value of the assets Debtor transferred to her family members  
13 - the boat and camper - as one factor to be considered.

14 Mereshian, 200 B.R. at 346, citing 4 Collier on Bankruptcy  
15 ¶ 727.02[3] at 727-16-17 (15th ed. 1986) ("The fact that valuable  
16 property has been gratuitously transferred raises a presumption  
17 that such transfer was accompanied by the actual fraudulent  
18 intent necessary to bar a discharge under section 727(a)(2). The  
19 fact that the property transferred or concealed is of small  
20 value, however, tends to negate fraudulent intent.")

21 CONCLUSION

22 Based on the foregoing, we AFFIRM.  
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