

MAR 24 2009

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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NOT FOR PUBLICATION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.	CC-08-1098-MoPaD
		)		
7	KATAYONE ADELI,	)	Bk. No.	LA 05-30583-TD
		)		
8	Debtor.	)	Adv. No.	LA 05-02644-TD
		)		
9	_____	)		
		)		
10	RICHARD B. SACHS,	)		
		)		
11	Appellant,	)		
		)		
12	v.	)	<b>MEMORANDUM<sup>1</sup></b>	
		)		
13	KATAYONE ADELI,	)		
		)		
14	Appellee.	)		
		)		

Argued and Submitted on January 22, 2009  
at Pasadena, California

Filed - March 24, 2009

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

Honorable Thomas B. Donovan, Bankruptcy Judge, Presiding

\_\_\_\_\_  
Before: MONTALI, PAPPAS and DUNN, Bankruptcy Judges.

<sup>1</sup> 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.

1 Appellant-Creditor, Richard B. Sachs ("Sachs") appeals a  
2 judgment dismissing his denial of discharge claims under sections  
3 727(a)(2)(A)<sup>2</sup> and 727(a)(4)(A) against Appellee-Debtor, Katayone  
4 Adeli ("Adeli"). Because the bankruptcy court erred by  
5 misapplying applicable Ninth Circuit case law and relying on  
6 irrelevant factors to conclude that Adeli lacked the requisite  
7 intent to hinder, delay, or defraud Sachs under section  
8 727(a)(2)(A), we REVERSE and REMAND.

### 9 **FACTS**

10 Most facts are derived from the bankruptcy court's Findings  
11 of Fact and Conclusions of Law ("FFCL"), the admitted facts from  
12 the Joint Pretrial Order ("Joint PTO"), and the trial transcript.

#### 13 **A. Prepetition Facts.**

14 Adeli and Sachs are former business partners in Klothes,  
15 LLC, a clothing design business located in New York. Adeli is a  
16 clothing designer. She is also the 100% shareholder of a  
17 consulting business, Kader, Inc., a New York corporation.

18 On or about December 17, 2003, Sachs filed suit against  
19 Adeli and other defendants in the Supreme Court of New York  
20 ("Supreme Court"). One claim involved Sachs's attempt to recover  
21 approximately \$700,000 from Adeli for his purchase of a bank debt  
22 owed by Klothes, LLC, which Sachs and Adeli both guaranteed. On  
23 or about July 15, 2004, the Supreme Court denied Sachs's motion  
24

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25 <sup>2</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, as  
28 enacted and promulgated prior to the effective date of The  
Bankruptcy Abuse Prevention and Consumer Protection Act of 2005,  
Pub. L. 109-8, 119 Stat. 23.

1 for partial summary judgment. He appealed. On March 10, 2005,  
2 the New York Appellate Court ("Appellate Court") reversed the  
3 Supreme Court decision, instructing it to enter partial summary  
4 judgment in favor of Sachs. Just prior to this, on or about  
5 February 14, 2005, Adeli was approved for an equity credit line  
6 ("Equity Line") authorizing her to draw up to approximately  
7 \$193,000 against her Beverly Hills, CA condo ("Condo").

8 On or about April 7, 2005, the Supreme Court entered a  
9 partial judgment in favor of Sachs for \$727,358.52, exclusive of  
10 interest and attorneys fees (the "April 7 Judgment"), rendering  
11 Adeli insolvent. Adeli's New York counsel believed the decision  
12 to be in error, and on April 11, 2005, Adeli filed a motion  
13 seeking leave to appeal the March 10 decision and April 7  
14 Judgment. On April 11, 2005, the Appellate Court granted an  
15 interim stay of execution on the April 7 Judgment. Also on April  
16 11, 2005, Adeli began making the first of the transfers that are  
17 the subject of Sachs's denial of discharge action under section  
18 727(a)(2)(A). For sake of clarity, we adopt the bankruptcy  
19 court's characterization of the transfers as follows: those  
20 executed prior to Adeli's retention of California bankruptcy and  
21 other prepetition planning counsel in or around May 2005 (the  
22 "First 2005 Transfers"), and those executed thereafter (the  
23 "Second 2005 Transfers") (collectively the "Subject Transfers").

24 **1. First 2005 Transfers.**

25 Sometime around the entry of the April 7 Judgment, but prior  
26 to April 11, 2005, Adeli's New York counsel, consisting of four  
27 attorneys, advised Adeli to temporarily move her money and  
28 Kader's money in various New York accounts into the name of a

1 trusted friend or family member in California in order to protect  
2 Adeli's assets from any "improper" or "unreasonable and unlawful  
3 conduct" by Sachs in attempting to enforce his April 7 Judgment,  
4 including levying on her assets and the assets of Kader. By this  
5 time, Adeli had relocated to California. Apparently, Adeli's New  
6 York counsel considered Sachs's attorneys to be "very aggressive"  
7 and "very well connected," and their fear was that the interim  
8 stay would be ignored. All four attorneys deny that they advised  
9 Adeli to move such funds.

10 Prior to the April 7 Judgment, Adeli maintained a checking  
11 account in her name at Valley National Bank ("Adeli Valley  
12 Account"), and an investment account in her name at Bear Sterns  
13 ("Bear Sterns Account"), and as manager of Kader, Adeli  
14 controlled a checking account in the name of "Kader, Inc." at  
15 Valley National Bank ("Kader Valley Account").

16 Adeli followed the advice of her New York counsel and made  
17 the First 2005 Transfers:<sup>3</sup>

- 18 • On April 11, 2005, Adeli transferred \$33,000 from the Adeli  
19 Valley Account to the Kader Valley Account (the "\$33,000  
Valley Transfer");
- 20 • On April 11, 2005, Adeli drew \$150,000 in Equity Line funds  
21 ("Equity Line Funds");
- 22 • On April 12, 2005, Adeli and her friend, Roxanne Modjallal  
23 ("Modjallal"), opened a checking account in Modjallal's name  
at Bank of America, on which Adeli had check writing ability  
(the "Shared Modjallal Account");
- 24 • On April 12, 2005, Adeli deposited the Equity Line Funds  
25 into the Shared Modjallal Account (the "Equity Line  
Deposit");

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27  
28 <sup>3</sup> There were other transfers by Adeli but Sachs did not  
raise them at trial and they are not at issue on this appeal.

- 1 • On April 14, 2005, Adeli sold her securities in the Bear  
2 Sterns Account and on April 19, Adeli withdrew the sale  
3 proceeds of \$15,406.36 (the "Bear Sterns Withdrawal").  
4 These funds were deposited into the Kader Valley Account,  
5 and then transferred to an account of Modjallal (the  
6 "Personal Modjallal Account") (collectively with the Shared  
7 Modjallal Account, the "Modjallal Accounts");
- 8 • On April 19, 2005, Adeli wired \$58,000 (the "\$58,000 Wire  
9 Transfer") from the Kader Valley Account to the Personal  
10 Modjallal Account.

11 On May 12, 2005, the Appellate Court denied Adeli's motion  
12 for leave to appeal. On or about May 16, 2005, Sachs filed a  
13 motion in the Appellate Court seeking to vacate and/or modify the  
14 April 11, 2005 stay based upon the May 12 decision. On June 23,  
15 2005, the Appellate Court denied Sachs's stay motion as  
16 "unnecessary," referencing the May 12 decision which denied  
17 Adeli's motion. Therefore, the interim stay was in effect from  
18 April 11, 2005, until at least May 12, 2005, or maybe longer.<sup>4</sup>

19 Meanwhile, in or around May, 2005, Adeli retained California  
20 bankruptcy counsel Paul Brent ("Brent") to advise her regarding  
21 bankruptcy issues and to represent her in any bankruptcy case  
22 that she might file. At their first meeting, Adeli disclosed all  
23 of the First 2005 Transfers to Brent and further informed him  
24 that she made the transfers upon the advice of her New York  
25 counsel. She also told Brent that she was worried about the  
26 First 2005 Transfers and knew that Sachs and his counsel would  
27 scrutinize and attack them if there were any apparent or actual  
28 improprieties. The facts are somewhat in dispute as to the early

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<sup>4</sup> Although not at issue on appeal, there appears to be a  
dispute about service on Adeli and whether she knew exactly when  
the stay was lifted. See also Sachs Op. Br. at page 4 where he  
states that the stay was in effect until June 23, 2005.

1 discussions between Adeli and Brent, but there is no dispute that  
2 Brent advised Adeli not to undo the First 2005 Transfers.

3 Since Adeli's mother resided with her at the Condo, Adeli  
4 also told Brent that one of her goals was to protect her mother's  
5 residence in the Condo by selling her a fractional interest in  
6 it, and further informed Brent that she did not want any such  
7 sale to jeopardize her right to a bankruptcy discharge.

## 8 **2. Second 2005 Transfers.**

9 For the Condo sale, Adeli retained California attorney Paul  
10 Samuels ("Samuels") to represent her, and retained separate  
11 counsel to represent her mother. On or about June 1, 2005, Adeli  
12 and her mother entered into a Purchase Agreement, providing for  
13 Adeli to transfer a 25% interest in her Condo to her mother in  
14 exchange for \$30,000. Adeli and her counsel believed that the  
15 \$30,000 price fairly approximated the market value.

16 In further prepetition planning, Brent advised Adeli to  
17 consider setting up a pension plan through Kader, and referred  
18 her to California attorney Carl Waldman ("Waldman"). On or about  
19 May 28, 2005, Adeli retained Waldman. Since Kader's 2004 tax  
20 returns had not yet been filed, Waldman advised Adeli that she  
21 could make the pension plan effective as of 2004, and contribute  
22 \$80,000, the maximum allowed contribution for 2004 and 2005. On  
23 or about June 8, 2005, Adeli executed the "Kader, Inc. Defined  
24 Benefit Pension Plan and Trust" drafted by Waldman, which  
25 included a certification that it was adopted on December 31,  
26 2004. Waldman then advised Adeli to open two Kader checking  
27 accounts, one for general business and one for the pension fund.

28

1           During this time, Sachs domesticated his judgment in  
2 California and filed suit against Adeli and others on or about  
3 August 11, 2005. Adeli was served with a summons from that  
4 action on August 22, 2005.

5           The above actions lead to the following Second 2005  
6 Transfers:

- 7       • On June 27, 2005, Adeli opened a business checking account  
8 for general business in Kader's name at Gilmore Bank (the  
9 "First Gilmore Account");
- 10       • On June 27, 2005, Adeli opened a business checking account  
11 for the pension fund in Kader's name at Gilmore Bank (the  
12 "Second Gilmore Account");
- 13       • On June 27, 2005, Adeli wrote a \$100,000 check drawn on the  
14 Shared Modjallal Account, payable to Kader, Inc. and  
15 deposited it into the First Gilmore Account (the "\$100,000  
16 Kader Deposit");
- 17       • On June 27, 2005, Adeli wrote an \$80,000 check, drawn on the  
18 First Gilmore Account and deposited it into the Second  
19 Gilmore Account (the "Gilmore Deposit");
- 20       • On July 28, 2005, Adeli deposited \$4,589.21 into the Shared  
21 Modjallal Account (the "July 28 Deposit");
- 22       • On August 12, 2005, Adeli transferred \$40,000 from the  
23 Second Gilmore Account to the First Gilmore Account via two  
24 checks for \$20,000 each in order to pay "normal" expenses  
25 (the "\$40,000 Gilmore Transfer");
- 26       • On August 25, 2005, Adeli executed a grant deed transferring  
27 a 25% interest in her Condo to her mother (the "Condo  
28 Interest Transfer"). The \$30,000 payment came in the form  
of two checks, one for \$20,000 from Adeli's brother and one  
for \$10,000 from Adeli's sister (the "\$30,000 Payment");
- On August 25, 2005, Adeli transferred the \$30,000 Payment to  
Samuels for payment of legal services regarding Sachs's  
efforts to domesticate his judgment and for other related  
matters (the "\$30,000 Payment Transfer").

25 **B. Postpetition Facts**

26           Adeli filed a voluntary petition for relief under chapter 11  
27 on September 8, 2005 ("Petition Date"). Her case was converted  
28 to chapter 7 on May 9, 2006.

1 As of the Petition Date, the balance in the Shared Modjallal  
2 Account was \$356.19, the amount remaining from the Equity Line  
3 Funds. In order to recover some assets for the estate, on  
4 November 18, 2005, Brent sent a letter to Modjallal making an  
5 informal demand that she turn over all monies belonging to Adeli.  
6 On December 8, 2005, Modjallal wrote two checks, one on the  
7 Shared Modjallal Account for \$356.19, and one for \$37,000 on the  
8 Personal Modjallal Account. She sent them to Brent, who  
9 subsequently turned them over to Adeli's chapter 7 trustee.<sup>5</sup>

10 On December 22, 2005, Sachs filed an adversary proceeding  
11 seeking: (1) denial of Adeli's discharge pursuant to sections  
12  
13  
14

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15 <sup>5</sup> The FFCL and trial testimony indicates that Brent  
16 requested these funds orally prior to the written request on  
17 November 18, 2005, but that he lost the checks. Therefore, the  
18 written request was a second request. However, no date is  
19 provided as to when the oral request was made.

20 The Joint PTO and FFCL indicate that after Brent received  
21 the second set of checks he turned them over to Adeli's chapter 7  
22 trustee. Considering that Adeli's case was not converted to  
23 chapter 7 until May 9, 2006, it is unclear when these checks were  
24 actually turned over. We assume it was sometime after May 9,  
25 2006. This conflicts with Adeli's assertion that she recovered  
26 the funds within a month of the Petition Date, and would have  
27 recovered them sooner had Brent not lost the first set of checks.

28 The bankruptcy court stressed that even though Adeli did not  
recover some of the transfers until after the Petition Date,  
since she did recover what would have been available to creditors  
as of the Petition Date "promptly and in a business-like manner"  
she therefore complied with the "essence" of Consumers Oil Co. v.  
Adeeb (In re Adeeb), 787 F.2d 1339 (9th Cir. 1986). We do not  
consider eight months later "promptly," and furthermore the  
record reflects that the funds were only turned over as a result  
of the chapter 7 trustee's demands.



1 727(a)(2)(A) and 727(a)(4)(A)<sup>6</sup>, and (2) nondischargeability of  
2 Sachs's claims pursuant to section 523(a).<sup>7</sup> To support his claim  
3 under section 727(a)(2)(A), Sachs alleged, inter alia, that Adeli  
4 intentionally hindered or delayed Sachs by engaging in the  
5 Subject Transfers. As to the section 727(a)(4)(A) claim, Sachs  
6 alleged that Adeli knowingly and fraudulently made false oaths in  
7 connection with her bankruptcy case, viz. contradictory  
8 statements that she used the transferred funds for "ordinary"  
9 expenses, later characterizing the expenditures as "regular  
10 money" expenses, then referring to them as "personal" expenses,  
11 in addition to other false statements regarding the Equity Line  
12 Funds, the \$58,000 Wire Transfer, and Question 10 of Statement of  
13 Financial Affairs ("SOFA") (collectively the "Subject  
14 Statements").

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17 <sup>6</sup> Sachs also brought claims under section 727(a)(3) and  
18 (a)(5), but later waived these claims by way of the Joint PTO.

19 Section 727(a) provides in relevant part:

- 20 (a) The court shall grant the debtor a discharge, unless-  
21 (2) the debtor, with intent to hinder, delay, or  
22 defraud a creditor ... has transferred, removed, ... or  
23 concealed ... -  
24 (A) property of the debtor, within one year before  
25 the date of the filing of the petition.  
26 ....  
27 (4) the debtor knowingly and fraudulently, in or in  
28 connection with the case-  
(A) made a false oath or account.

26 <sup>7</sup> The bankruptcy court subsequently bifurcated Sachs's  
27 section 727 claims from his claims under section 523. The  
28 adversary proceeding is still pending on the section 523 claims.  
Only the section 727 claims are on appeal. See Jurisdiction  
section explaining our jurisdiction over this appeal.

1 On July 26, 2006, Sachs moved for summary judgment on the  
2 section 727(a)(2)(A) action. It was denied because a genuine  
3 issue of material fact existed as to Adeli's intent.

4 A trial on the section 727 claims was held on October 25,  
5 2007. On March 27, 2008, the bankruptcy court entered its  
6 judgment in favor of Adeli, thereby dismissing Sachs's 727  
7 claims. Regarding the section 727(a)(2)(A) claim, in its  
8 findings the court stated:

9 "There is no evidence that any Adeli act from April 2005  
10 until her bankruptcy filing in September 2005 was  
11 intended to, or did, deprive Sachs of any remedy that he  
12 was entitled to and properly sought through any legal  
13 process."

14 ....

15 "Sachs has failed to prove by a preponderance of the  
16 evidence that Adeli is guilty of any wrongdoing. Adeli  
17 never placed anything beyond Sachs' reach; she never  
18 hindered, delayed, or defrauded Sachs."

19 In its conclusions, the court stated:

20 Based upon my Findings of Fact, and after balancing all  
21 the possible inferences from the evidence, I conclude  
22 that Sachs did not meet his burden and that no basis  
23 exists to deny Adeli's discharge under § 727(a)(2)(A).  
24 None of the Subject Transfers was intended to hinder,  
25 delay, or defraud Sachs or any other Adeli creditor.  
26 Each was, or led directly to, an ordinary and proper  
27 expenditure by Adeli, was made with the knowledge and  
28 advice of counsel, or was properly accounted for, and  
recovered, to the extent necessary to exonerate Adeli.

As to the section 727(a)(4)(A) claim, the bankruptcy court  
found that Adeli's bankruptcy papers truthfully accounted for all  
of her assets, liabilities, and financial transactions, and at no  
time did she make a knowing or fraudulent false oath in  
connection with her case. Therefore, it concluded that Sachs had  
failed to meet his burden of proof under section 727(a)(4)(A)

1 that any of the Subject Statements were false, made knowingly and  
2 fraudulently, and related to a material fact. Sachs filed this  
3 timely appeal.

#### 4 **ISSUES**

5 1. Did the bankruptcy court err in determining that Adeli  
6 lacked the requisite intent to hinder, delay, or defraud her  
7 creditors under section 727(a)(2)(A)?

8 2. Did the bankruptcy court err in determining that Adeli  
9 did not knowingly and fraudulently make false oaths in connection  
10 with her bankruptcy case under section 727(a)(4)(A)?

#### 11 **JURISDICTION**

12 The bankruptcy court had jurisdiction under 28 U.S.C. § 1334  
13 and 28 U.S.C. § 157(b)(2)(J). It purported to "sever" the  
14 section 727 and 523 actions, which would render the judgment in  
15 the section 727 action final and appealable. See Fed. R. Civ. P.  
16 58. We determined, and treated as such, that what the court did  
17 was actually a "bifurcation" of the claims since no separate  
18 order severing the claims under Fed. R. Civ. P. 58, made  
19 applicable by rule 9021, was entered, which renders the section  
20 727 judgment interlocutory. Sachs then filed a motion for leave  
21 to appeal the interlocutory judgment, which Adeli opposed. We  
22 granted that motion, and thus have jurisdiction under 28 U.S.C.  
23 § 158(a)(3).

#### 24 **STANDARD OF REVIEW**

25 We review the bankruptcy court's findings of fact for clear  
26 error, and its conclusions of law de novo. United Student Aid  
27 Funds, Inc. v. Pena (In re Pena), 155 F.3d 1108, 1110 (9th Cir.  
28 1998). A court's finding that a debtor acted without intent to

1 hinder, delay or defraud her creditors is reviewed for clear  
2 error. Hughes v. Lawson (In re Lawson), 122 F.3d 1237, 1240 (9th  
3 Cir. 1997). A factual finding is clearly erroneous if the  
4 appellate court, after reviewing the record, has a definite  
5 conviction that a mistake has been made. Anderson v. Bessemer  
6 City, 470 U.S. 564, 573-75 (1985).

7 Where "the historical facts are established; the rule of law  
8 is undisputed, ...; and the issue is whether the facts satisfy  
9 the legal rule [,]" a mixed question of fact and law is presented  
10 which we review de novo. Murray v. Bammer (In re Bammer), 131  
11 F.3d 788, 792 (9th Cir. 1997).

#### 12 **DISCUSSION**

13 Sachs argues that the bankruptcy court: (1) erred by relying  
14 on irrelevant factors to determine that Adeli, who admittedly  
15 transferred funds into bank accounts in the name of a friend for  
16 the express purpose of shielding her assets from Sachs, did not  
17 act with the intent to hinder, delay, or defraud a creditor under  
18 section 727(a)(2); (2) erred in finding that the transfers were  
19 not made with intent to hinder, delay, or defraud a creditor  
20 under section 727(a)(2); (3) misapplied the "disclose and  
21 recover" exception set forth in Adeeb; (4) misapplied the "advice  
22 of counsel" defense available under section 727(a)(2); (5) erred  
23 in finding that Adeli did not knowingly and fraudulently make  
24 false oaths under section 727(a)(4); and (6) erred in holding  
25 that a denial of discharge under section 727(a)(4) requires  
26 reliance by, or damage to, a party.

27 As to the section 727(a)(2)(A) claim, Adeli admits that the  
28 First 2005 Transfers and Second 2005 Transfers were made within

1 one year before the Petition Date, and that at least most of them  
2 were of her property.<sup>8</sup> Therefore, the only alleged factual  
3 dispute before the bankruptcy court and on appeal as to that  
4 claim is the fourth element - whether Adeli had the requisite  
5 actual intent to hinder, delay or defraud Sachs. No dispute  
6 exists that Adeli, at all times, had unfettered access to all  
7 accounts and funds at issue.

8  
9 **I. The Bankruptcy Court Clearly Erred By Misapplying**  
10 **Controlling Ninth Circuit Case Law To Conclude That Adeli**  
11 **Lacked The Requisite Intent To Hinder, Delay, Or Defraud**  
12 **Sachs Under Section 727(a) (2) (A) .**

13 **A. Prima Facie Case Under Section 727(a) (2) (A) .**

14 The court must deny a discharge if "the debtor, with intent  
15 to hinder, delay, or defraud a creditor ... has transferred ...  
16 property of the debtor, within one year before the date of the  
17 filing of the petition...." 11 U.S.C. § 727(a) (2) (A). The burden  
18 of proof is on the creditor to show by a preponderance of the  
19 evidence that: (1) the debtor transferred or concealed property;  
20 (2) the property belonged to the debtor; (3) the transfer  
21 occurred within one year of the bankruptcy filing; and (4) the  
22 debtor executed the transfer with the intent to hinder, delay or  
23 defraud a creditor. Aubrey v. Thomas (In re Aubrey), 111 B.R.  
24 268, 273 (9th Cir. BAP 1990); Grogan v. Garner, 498 U.S. 279, 284  
25 (1991); see Rule 4005. As the intent requirement is stated in  
26 the disjunctive, it suffices to demonstrate any of the three

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27 <sup>8</sup> The parties dispute whether Kader's property (especially  
28 the \$100,000 Adeli transferred to Kader's First Gilmore Account)  
was Adeli's. If not, there could be no "transfer" under section  
727(a) (2) (A). However, they do agree that all other assets were  
property of Adeli.

1 alternatives, either intent to hinder or to delay or to defraud  
2 creditors, and proof of mere intent to hinder or delay may lead  
3 to denial of discharge. Beauchamp v. Hoose (In re Beauchamp),  
4 236 B.R. 727, 731-32 (9th Cir. BAP 1999), aff'd 5 Fed. Appx. 743  
5 (9th Cir. 2001) (adopting the Panel's opinion). See Adeeb, 787  
6 F.2d at 1343. A claim for denial of a discharge under section  
7 727 is construed liberally in favor of the discharge and strictly  
8 against the objector. Id. at 1342.

9 Both Adeli's direct admissions and the circumstantial  
10 evidence establish a prima facie case for denial of discharge  
11 under section 727(a)(2)(A). At trial, Adeli repeatedly admitted  
12 she intended to move nearly all of her available funds into  
13 Modjallal's name with the express purpose of keeping her assets  
14 out of Sachs's reach, fully understanding that by putting her  
15 money under someone else's name it would be protected.<sup>9</sup> There

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16  
17 <sup>9</sup> The dialogue at trial went as follows:

18 Q: So you put the Equity Line money in the Shared Modjallal  
19 Account to protect it from Mr. Sachs and the judgment?

20 ....  
21 Adeli: The answer was I put it - I pulled the money to pay  
22 my expenses, to possibly start a business, pay my attorney fees,  
23 and I put it under [Modjallal's] name to protect it from being  
24 wrongfully taken away.

25 Q: And you wanted to make sure that Mr. Sachs couldn't get  
26 hold of that money?

27 ....  
28 Adeli: Wrongfully, yes.

29 ....  
30 Q: I'll ask it again. Was it your understanding that, by  
31 putting the money in Ms. Modjallal's name, that Mr. Sachs could  
32 not take the money in the Shared Modjallal Account on account of  
33 his judgment?

34 Adeli: It was protected from wrongfully being taken.

(continued...)

1 was no other purpose for the transfers. Camacho v. Martin (In re  
2 Martin), 88 B.R. 319, 322-23 (D. Colo. 1988), a decision cited by  
3 and relied upon by the Panel in Aubrey, held that debtor's  
4 admission that the property was transferred to avoid further  
5 garnishment by a judgment creditor established a prima facie case  
6 under section 727(a)(2)(A). Aubrey, 111 B.R. at 273.

7 Even without Adeli's admissions, her fraudulent intent may  
8 be established by circumstantial evidence or by inferences drawn  
9 from her course of conduct. Roberts v. Erhard (In re Roberts),  
10 331 B.R. 876, 884-85 (9th Cir. BAP 2005) (citing Devers v. Bank of  
11 Sheridan (In re Devers), 759 F.2d 751, 753-54 (9th Cir.  
12 1985) (noting that a debtor is unlikely to testify directly that  
13 his intent was fraudulent), aff'd 241 Fed. Appx. 420 (9th Cir.  
14 2007). The requisite intent may be found from the surrounding  
15 circumstances. In examining the circumstances, the court may  
16 find "badges of fraud" including: (1) there was a close  
17 relationship between the transferor and the transferee; (2) the  
18 transfer was in anticipation of a pending suit; (3) the  
19 transferor debtor was insolvent or in poor financial condition at  
20 the time of the transfer; (4) all or substantially all of the  
21 debtor's property was transferred; (5) the transfer so completely  
22 depleted the debtor's assets that the creditor has been hindered  
23 or delayed in recovering any part of the judgment; and (6) the

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24  
25 <sup>9</sup>(...continued)

26 Q: Was your understanding that Mr. Sachs could not get hold  
27 of it because it was in Ms. Modjallal's name?

28 Adeli: His attorneys wrongfully taking the money, yes, that  
it would be protected if it was under someone else's name.

1 debtor received inadequate consideration for the transfer. Id.  
2 These factors need not all be present in order to find that a  
3 debtor acted with the requisite intent. Id.

4 Here: (1) Adeli transferred her funds to her close friend  
5 Modjallal; (2) the First 2005 Transfers were made within days of  
6 Sachs's April 7 Judgment, and some of the Second 2005 Transfers  
7 were made during a pending suit; (3) Adeli was rendered insolvent  
8 as a result of Sachs's April 7 Judgment; (4) she transferred  
9 approximately \$233,000 out of the \$242,000 she possessed in cash;  
10 (5) which so completely depleted her assets that Sachs was  
11 hindered or delayed in recovering any part of the judgment (in  
12 fact, he was able to levy on only \$4,000, which Adeli  
13 acknowledged in her SOFA, Question 4b); and (6) other than the  
14 Condo Interest Transfer, she received no consideration whatsoever  
15 for the other transfers. Consequently, all six factors of the  
16 "badges of fraud" test are met, establishing Adeli's actual  
17 intent. On this record, Sachs made out a prima facie case  
18 against Adeli under section 727(a)(2)(A).

19 **B. Adeli's Asserted Defenses.**

20 Adeli defends her wrongful conduct in three ways, any of  
21 which, she argues, negates her actual intent to hinder, delay, or  
22 defraud Sachs: (1) she needed to protect her assets from wrongful  
23 or unlawful and unreasonable conduct by Sachs and his attorneys;  
24 (2) she was relying in good faith on the advice of her New York  
25 counsel who told her to make the First 2005 Transfers; and (3)  
26 she disclosed most of the transfers and recovered some of the  
27 funds for her estate within a reasonable time postpetition, and  
28



1 manifested her intent to do so prepetition, therefore complying  
2 with the "disclose and recover" exception under Adeeb.

3 **1. Protecting Her Assets From Sachs's Wrongful**  
4 **Conduct.**

5 At trial, Adeli testified that she made the transfers, in  
6 particular, the First 2005 Transfers, in order to protect her  
7 assets from being wrongfully taken by Sachs. According to Adeli,  
8 her New York attorneys were "uncomfortable" with Sachs's "very  
9 aggressive" and "very well connected" attorneys, and Adeli  
10 believed that making the transfers would protect her assets from  
11 "wrongfully being taken away" and protect her from "attorneys who  
12 were not listening to the judge at the time."

13 This same defense was offered by the debtor and rejected by  
14 the Panel in Beauchamp, 236 B.R. at 730. There, the debtor  
15 admitted that he intended to conceal his assets from his former  
16 wife and her father, but argued that he only did so to thwart  
17 what he perceived to be a "pattern of improper harassment" by  
18 them, thus negating his intent to hinder or delay. Besides  
19 rejecting debtor's argument for failing to cite any authority for  
20 the premise that concealment of assets is justifiable where  
21 creditors engage in harassing behavior, the Panel stated:

22 The many aspersions Beauchamp directs at his former  
23 spouse and her father do not negate the bankruptcy  
24 court's finding of his actual intent. That he sought  
25 haven from untoward behavior, and that he intended to  
26 hinder or delay, are not mutually exclusive.

27 Id. at 731.

28 Although Adeli made numerous statements that she was only  
protecting her assets from what she perceived to be "improper" or  
"wrongful" behavior by Sachs or his attorneys, thus justifying  
her transfers, there is nothing in the record to support her

1 contention. She provides no evidence that Sachs did, or would,  
2 take any improper actions to obtain satisfaction of his April 7  
3 Judgment, or that he ever threatened to do so. She, like the  
4 debtor in Beauchamp, cites no authority for the premise that  
5 transferring assets is justifiable where creditors engage in  
6 harassing behavior, or, even more importantly as in this case,  
7 where they do not. Further, although Adeli testified at her  
8 deposition that she was "concerned" about Sachs illegally taking  
9 money from her, a moment later she stated that since there was a  
10 stay in place at the time, she "wasn't concerned," then  
11 subsequently stated she "was and [she] wasn't [concerned]."  
12 Nevertheless, the bankruptcy court found that Adeli reasonably  
13 and in good faith believed that at the time she made the First  
14 2005 Transfers and the Second 2005 Transfers she was protecting  
15 herself from Sachs's improper collection efforts, therefore  
16 justifying the transfers and negating her intent under section  
17 727(a)(2)(A). There is no safe harbor in that section that  
18 authorizes a debtor to hinder, delay, or defraud even a creditor  
19 the debtor believes to be acting improperly.

20 In light of Beauchamp, and the fact that Adeli offered no  
21 evidence in support of her contentions about Sachs's "improper"  
22 or "wrongful" behavior even if such evidence could be considered,  
23 the bankruptcy court clearly erred in finding that Adeli's  
24 unsupported fear of improper collection efforts by Sachs  
25 justified her intent to hinder or delay a creditor under section  
26 727(a)(2)(A).

1                   **2. Advice Of Counsel Defense.**

2           Adeli has asserted throughout this case and testified at  
3 trial that her New York counsel advised her to transfer her funds  
4 into either a trusted friend's or family member's name, and that  
5 she in good faith relied on their advice, thus negating her  
6 intent under section 727(a)(2)(A). Adeli does not recall which  
7 of her four New York attorneys gave her this advice.

8           "Generally, a debtor who acts in reliance on the advice of  
9 his attorney lacks the intent required to deny him a discharge of  
10 his debts." Adeeb, 787 F.2d at 1343 (citing Hultman v. Tevis, 82  
11 F.2d 940, 941 (9th Cir. 1936)). However, the debtor's reliance  
12 must be in good faith. Id. See Hultman, 82 F.2d at 941.

13           In Adeeb, the debtor claimed that he lacked actual intent to  
14 hinder or delay his creditors because he relied on the advice of  
15 his attorney, a non-bankruptcy lawyer, who advised him to  
16 transfer title to some of his real property to third parties who  
17 could be trusted. Id. at 1341. The Ninth Circuit rejected  
18 Adeeb's defense, stating that since both Adeeb's counsel and  
19 Adeeb knew that the purpose of the transfers was to hinder or  
20 delay Adeeb's creditors, such knowledge precludes the defense of  
21 good faith reliance on the advice of counsel, even if the client  
22 is otherwise innocent of any improper purpose. Id. at 1343  
23 (emphasis added). "A debtor who knowingly acts to hinder or  
24 delay his creditors acts with the very intent penalized by  
25 section 727(a)(2)(A)." Id.

26           In the instant case, all four of Adeli's New York attorneys  
27 denied under oath that they ever advised her to make any of the  
28 transfers. After considering all of the evidence and testimony

1 before it, the bankruptcy court stated:

2       There was a great deal of disagreement in the trial and  
3 deposition testimony and legal argument about Adeli's New  
4 York Lawyer's advice. In the end, I find Adeli's trial  
5 and deposition testimony highly credible and persuasive.  
6 Samuels' trial testimony corroborates Adeli's trial and  
7 deposition testimony regarding the advice Adeli received  
8 from her New York Lawyers shortly after the April 7, 2005  
9 New York Judgment. I find her New York Lawyers'  
10 deposition testimony self-serving and not persuasive; it  
11 is not consistent with my view of the totality of the  
12 evidence.

13 Consequently, since the bankruptcy court found Adeli's version of  
14 the facts to be more credible, and therefore that Adeli's New  
15 York counsel did advise her to make the First 2005 Transfers and  
16 the Second 2005 Transfers, it decided that Adeli in good faith  
17 acted in reliance on their advice, thus precluding a finding she  
18 intended to hinder, delay, or defraud Sachs. This was in error.

19 Findings of fact based on credibility are given particular  
20 deference by reviewing courts. Anderson, 470 U.S. at 573-575.  
21 However, the error committed here is not the bankruptcy court's  
22 credibility determination on this record, but rather the court's  
23 misapplication of the "good faith" test set forth in Adeeb.

24 Since the court found Adeli's version of the facts to be true,  
25 then, by her own admissions both she and her New York counsel  
26 knew that the purpose of the transfers was to hinder or delay  
27 Sachs's collection efforts. Under Adeeb, such knowledge  
28 precludes the defense of good faith reliance on the advice of  
29 counsel as to intent under section 727(a)(2)(A).

30 In further support of its finding of Adeli's good faith, the  
31 bankruptcy court focused on the fact that she is an artist, that  
32 she has no formal legal or business training, and that she is  
33 unsophisticated in legal matters. However, the good faith test

1 in Adeeb does not turn on the debtor's sophistication or whether  
2 she knows the law or the propriety of her conduct; as long as  
3 both the attorney and the debtor knew that the purpose of the  
4 transfers was to hinder or delay creditors, the debtor cannot  
5 assert the advice of counsel defense to negate intent.

6 Even if a court could properly consider a debtor's legal  
7 knowledge or sophistication as a factor for good faith, when  
8 asked at trial which New York attorney advised Adeli to put her  
9 money in a friend or family member's name, she stated:

10 "I don't know who told me. I spoke to at least four  
11 people in their office, but I do remember someone telling  
12 me that if something - you know, 'I don't want - I  
shouldn't be telling you this, but this is what you  
should do to protect yourself.'" (Emphasis added).

13 When an attorney regretfully prefaces advice to a client with the  
14 words, "I shouldn't be telling you this," such a statement is  
15 sufficient to put any reasonable person on notice that the advice  
16 about to follow could not be relied upon in good faith.<sup>10</sup>

17 Therefore, the bankruptcy court erred by incorrectly  
18 applying the good faith test set forth in Adeeb, and because  
19 Adeli admitted that both she and her New York counsel knew the  
20 purpose of the transfers was to protect her assets from Sachs and  
21 hinder or delay his collection efforts, she cannot assert the  
22 advice of counsel defense to negate her intent under section  
23 727(a) (2) (A) .

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24  
25  
26 <sup>10</sup> On the other hand, had the bankruptcy court found  
27 Adeli's New York counsel more credible, i.e., that they never  
28 advised Adeli to transfer her funds into the name of a trusted  
friend or family member, then the advice of counsel defense  
obviously would not be available to her.

1                   **3. "Disclose And Recover" Exception Defense.**

2           Adeli argues that she is entitled to the "disclose and  
3 recover" exception set forth in Adeeb because she always intended  
4 to make all assets available to creditors, and she manifested  
5 such intent by disclosing the First 2005 Transfers to Brent and  
6 asked what she should do about them. Not knowing about Adeeb,  
7 Brent advised her to leave the First 2005 Transfers undisturbed.  
8 Brent testified that had he known about Adeeb, he would have  
9 advised Adeli to put the funds in the Modjallal Accounts into her  
10 own name, and Adeli would have complied. In further support,  
11 Adeli notes that she disclosed the "gross amount of the  
12 transfers" in her SOFA at Question 10a, "and all such funds, less  
13 deductions for funds that were used for lawful purposes, were  
14 turned over to the estate about one month after the Petition  
15 Date." Thus, she asserts, that as long as she disclosed the  
16 First 2005 Transfers to Brent, who incorrectly advised her to not  
17 undo them, even if they were made with the intent to hide assets,  
18 and she recovered the funds promptly postpetition, there is no  
19 basis for Sachs's section 727(a)(2)(A) claim.

20           As noted above, Adeeb involved a debtor who, upon the advice  
21 of a non-bankruptcy attorney, transferred property to friends for  
22 no consideration in order to hinder collection efforts of one  
23 particular creditor. Later, Adeeb consulted bankruptcy counsel  
24 who advised him, prior to filing his petition, to reverse the  
25 transfers and disclose them to his creditors. Adeeb immediately  
26 began to reverse the transfers and called a meeting of his  
27 creditors, informing them of the reversals. Before he recovered  
28 all of the transferred property, an involuntary bankruptcy

1 petition was filed against him, therefore thwarting his efforts  
2 to complete the recovery. Adeeb, 787 F.2d at 1341-42. The  
3 bankruptcy court denied Adeeb's discharge, and the district court  
4 affirmed.

5 On appeal, Adeeb argued that a debtor who is able to recover  
6 improperly transferred property prior to filing bankruptcy should  
7 not be denied a discharge of his debts under 727(a)(2)(A). Id.  
8 at 1343-44. The Ninth Circuit held that:

9 ... [A] debtor who transfers property within one year of  
10 bankruptcy with the intent penalized by section  
11 727(a)(2)(A) may not be denied discharge of his debts if  
12 he reveals the transfers to his creditors, recovers  
substantially all of the property before he files his  
bankruptcy petition, and is otherwise qualified for a  
discharge.

13 Id. at 1345 (emphasis added). The Adeeb court reasoned that such  
14 a rule encourages, (1) honest debtors to recover transferred  
15 property, which facilitates the equitable distribution of assets  
16 among creditors by ensuring that the trustee has possession of  
17 all of debtor's assets, and (2) honest debtors to undo their  
18 mistakes and receive their discharge. Id. Although Adeeb  
19 involved an involuntary case and held that recovery must occur  
20 within a reasonable time after the petition is filed, in cases of  
21 voluntary petitions both disclosure and substantial recovery must  
22 occur prior to filing. Id. at 1346. But see Beauchamp, 236 B.R.  
23 at 733 (in cases of voluntary petitions, both "disclosure and  
24 recovery" must occur by the filing) (no mention of "substantial"  
25 recovery).

26 Adeli never recovered most of the Subject Transfers pre- or  
27 postpetition, and her counsel did not turn over to the trustee  
28 the property that was recovered until more than eight months

1 after her bankruptcy filing. Further, the "recovery" requirement  
2 means "recovery for the benefit of creditors, not recovery of  
3 cash which the debtor conceals from his creditors and spends, or  
4 purports to spend, prior to filing bankruptcy." Pac. W. Bank v.  
5 Johnson (In re Johnson), 68 B.R. 193, 199-200 (Bankr. D. Or.  
6 1986).

7 Despite the temporal limitations imposed by Adeeb and  
8 Beauchamp and the fact that, unlike Adeeb, Adeli neither  
9 recovered nor disclosed to Sachs any of the Subject Transfers  
10 prior to the Petition Date, the bankruptcy court concluded "the  
11 principles of Adeeb and § 727 should be interpreted broadly  
12 enough to include Adeli's exculpatory pre- and postpetition  
13 conduct," (citing Bank of Marin v. England, 385 U.S. 99, 103  
14 (1966)) and thus Adeli could properly invoke the disclose and  
15 recover exception. The court's decision to expand the express  
16 temporal limitation set forth in Adeeb was in error.

17 The disclose and recover exception is a narrow one, and  
18 Adeeb does not appear to hold that disclosing prepetition  
19 transfers to your bankruptcy counsel prior to filing bankruptcy,  
20 or revealing such information on your SOFA, satisfies the  
21 "disclose" requirement. The disclosure of prepetition transfers  
22 must be made to the creditors, and prior to filing. Moreover, in  
23 a voluntary case such as Adeli's, the recovery must be completed  
24 prior to the petition filing, not one or eight months later.

25 **II. The Bankruptcy Court Erred When It Relied On Irrelevant**  
26 **Factors To Conclude That Adeli Should Not Be Denied Her**  
27 **Discharge Under Section 727(a)(2)(A).**

28 Although we believe the errors discussed above support our  
decision to reverse, we briefly address Sachs's arguments that



1 the bankruptcy court considered irrelevant factors in its  
2 determination that Adeli should not be denied her discharge under  
3 section 727(a) (2) (A) .

4 First, Sachs argues that the bankruptcy court improperly  
5 relied upon an erroneous perception that since Adeli did not  
6 detrimentally affect his ability to obtain satisfaction of his  
7 April 7 Judgment, then his "lack of injury" somehow negates her  
8 acts under section 727(a) (2) (A) . In other words, the court took  
9 a "no harm, no foul" approach. Sachs is correct.

10 This same "lack of injury" defense was raised and rejected  
11 in Adeeb, in which the court noted that the Ninth Circuit has  
12 long held that a creditor's lack of injury is irrelevant for  
13 purposes of denying a discharge in bankruptcy. See Adeeb, 787  
14 F.2d at 1343, and Duggins v. Heffron, 128 F.2d 546, 549 (9th Cir.  
15 1942). Here, the bankruptcy court found the following to  
16 negate Adeli's acts:

17 "In managing her accounts, Adeli did not interfere with  
18 or deprive Sachs of any legal right he had;"

19 "Adeli did not act with fraudulent intent. She did not  
20 materially impede any proper Sachs collection effort;"

21 "None of the transfers between Adeli and Kader actually  
22 hindered, delayed, or defrauded Sachs or any other Adeli  
23 creditor. No Adeli or Kader transfer hindered, delayed,  
24 or defrauded Sachs, or in any way cheated him out of any  
25 lawful process that he properly asserted against Adeli  
26 prepetition."

27 In light of Adeeb and other controlling Ninth Circuit case  
28 law which holds that injury to creditors is irrelevant for  
purposes of denying a discharge, the bankruptcy court erred by  
utilizing an "injury" analysis to determine erroneously that

1 Adeli should not be denied her discharge under section  
2 727(a) (2) (A) .

3 Second, Sachs argues the bankruptcy court improperly imposed  
4 and erroneously applied a "materiality" standard. In its  
5 findings, the court stated:

6 "Any transfers between Adeli and Kader had no material  
7 effect on Sachs' efforts to collect on his judgment or on  
8 the value of Adeli's bankruptcy estate;"

8 "None of Adeli's transfers was material."

9 Again, Sachs is correct.

10 Although materiality is a factor to consider in false oath  
11 actions under section 727(a) (4) (A), section 727(a) (2) (A) does not  
12 contain a "materiality" element. Fogal Legware of Switz., Inc.  
13 v. Wills (In re Wills), 243 B.R. 58, 65 (9th Cir. BAP 1999).  
14 Therefore, the bankruptcy court erred in considering a  
15 materiality element in determining Adeli's intent.

16 Finally, Sachs argues that the bankruptcy court improperly  
17 relied on several other factors such as deceit, the court's  
18 approval of Adeli's settlement of the trustee's avoidance action,  
19 and the propriety of how Adeli spent her transferred funds, all  
20 of which are irrelevant to "intent" under section 727(a) (2) (A).  
21 Here too, Sachs is correct.

22 The critical facts in this case are that Adeli transferred  
23 her money with the intent to hinder or delay Sachs, she admitted  
24 this fact, and she offered no legitimate defenses for doing so.  
25 This is a clear case for denial of discharge under section  
26 727(a) (2) (A). It is irrelevant how Adeli spent the money, which  
27 actions were settled and with whom, or whether she intended to  
28 deceive Sachs. Although deceit can be implied in Adeli's actual

1 intent, and thus consideration of this fact by the court was  
2 harmless error, the other facts are irrelevant and do not negate  
3 nor can ever undo Adeli's wrongful acts.

4 **III. Did The Bankruptcy Court Err In Determining That Adeli**  
5 **Did Not knowingly And Fraudulently Make False Oaths In**  
6 **Connection With Her Bankruptcy Case Under Section**  
7 **727(a) (4) (A)?**

8 Because we have concluded that Adeli's discharge should have  
9 been denied by the bankruptcy court under section 727(a) (2) (A),  
10 we need not address Sachs's request to deny discharge under  
11 section 727(a) (4) (A).

12 **CONCLUSION**

13 Because the bankruptcy court clearly erred by misapplying  
14 Adeeb and other controlling Ninth Circuit case law and relied on  
15 irrelevant factors to conclude that Adeli lacked actual intent to  
16 hinder, delay, or defraud Sachs, it erred when it denied Sachs's  
17 section 727(a) (2) (A) claim and we REVERSE and REMAND with  
18 instructions to the bankruptcy court to enter a judgment denying  
19 Adeli's discharge.  
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