

JUN 21 2010

SUSAN M SPRAY, CLERK
U.S. BKCY. APP. PANEL
OF THE NINTH CIRCUIT

NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT

5	In re:)	BAP No. SC-09-1406-RuJuH
)	
6	STEVEN SALOMON and)	Bk. No. 05-14843-JM7
	VICTORIA SALOMON,)	
7)	Adv. No. 07-90015-JM
	Debtors.)	
8	_____)	
)	
9	STEVEN SALOMON;)	
	VICTORIA SALOMON,)	
10)	
	Appellants,)	
11)	
	v.)	M E M O R A N D U M¹
12)	
	GERALD H. DAVIS,)	
13	Chapter 7 Trustee,)	
)	
14	Appellee.)	
15	_____)	

Argued and Submitted on May 21, 2010
at Pasadena, California

Filed - June 21, 2010

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

Honorable James W. Meyers, Bankruptcy Judge, Presiding

Before: RUSSELL,² JURY and HOLLOWELL, Bankruptcy Judges.

The debtors in this case appeal the bankruptcy court's
judgment revoking their discharge pursuant to 11 U.S.C.

¹ 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.

² Hon. David E. Russell, Bankruptcy Judge for the Eastern District of California, sitting by designation.

1 § 727(d)(2)³ entered after trial at which evidence, including
2 live testimony, was presented.

3 We **AFFIRM** the bankruptcy court's judgment revoking the
4 debtors' discharge.

5
6 **FACTS**

7 This is the second appeal arising from an adversary
8 proceeding filed by Chapter 7 trustee Gerald Davis seeking to
9 revoke Debtors' discharge.

10 Appellants Steven H. Salomon and Victoria Y. Salomon (the
11 Debtors) filed a joint voluntary Chapter 7 petition on
12 October 15, 2005. Although their attorney rushed to file the
13 petition before October 17, 2005, the effective date of BAPCPA,
14 both Debtors admit they were given at least one opportunity to
15 look over their petition prior to signing it. They received
16 their discharge on January 17, 2006.

17 Evidence that Debtors' conduct might qualify them for a
18 revocation of their discharge was discovered in a related
19 adversary proceeding Greenfield v. Salomon (No. 06-90083) and was
20 reported to the Chapter 7 trustee. On January 16, 2007, one day
21 prior to the expiration of the one-year statute of limitations of
22 11 U.S.C. § 727(e), trustee filed an adversary proceeding seeking
23 to revoke Debtors' discharge pursuant to § 727(d)(1) and (2) on
24 the premise that property was omitted from the schedules and
25
26

27 ³ Unless otherwise indicated, all chapter, section, and rule
28 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532, and
to the Federal Rules of Bankruptcy Procedure, Rules 1001-9037.

1 liquidated postpetition without turnover of proceeds to the
2 estate.

3 The first appeal to the BAP (BAP No. SC-07-1290) stemmed
4 from a default judgment revoking Debtors' discharge, which was
5 entered over Debtors' objections and requests to vacate their
6 default so they could defend themselves. The prior panel vacated
7 the default judgment because it was based on insufficient
8 findings and conclusions and remanded for further proceedings.

9 On remand, the bankruptcy court determined that it would
10 vacate the default and conduct a trial. On April 7, 2009, the
11 court approved a stipulated joint pre-trial order pursuant to
12 Federal Rule of Civil Procedure 16 (incorporated by Federal Rule
13 of Bankruptcy Procedure 7016).

14 The parties stipulated in the pre-trial order that the
15 following facts, among others, were not in dispute: 1) Debtors
16 did not disclose their interest in the membership at the Farms
17 Country Club; 2) Steven Salomon sold the membership after the
18 bankruptcy petition was filed; 3) the country club remitted
19 payment of \$17,738.75 to Mr. Salomon; 4) Debtors did not turn
20 those funds over to the trustee; 5) Debtors did not notify the
21 trustee of the sale or the receipt of the proceeds from the sale;
22 6) Debtors represented to Canyon National Bank, through a
23 personal financial statement filled out about one year prior to
24 bankruptcy, that the country club membership was their personal
25 property; 7) Debtors did not disclose their submission of the
26 financial statement to Canyon National Bank in their Statement of
27 Financial Affairs.

1 Trial was conducted on October 1, 2009. At the trial,
2 Debtors were represented by counsel; there was live testimony of
3 witnesses, including testimony by Mr. Salomon. Mrs. Salomon
4 attended telephonically and did not testify.

5 Mrs. Salomon's brother, Jeffrey Welty, testified that the
6 country club membership was an asset of CBIS, Mr. Welty's
7 company, as it paid 50 per cent of the original membership fee.
8 Mr. Salomon testified that he contributed the remaining 50 per
9 cent of the country club membership fee. Mr. Salomon also
10 testified that he included the country club membership as an
11 asset in his financial statement filed with Canyon National Bank
12 because it was in his name.

13 At the trial, the trustee was represented by Mr. Alan
14 Nahmias of Plotkin, Rapoport & Nahmias. Mr. Nahmias was first
15 employed by a former business partner and creditor of the
16 Salomons, Steve Greenfield, to prosecute a related adversary
17 proceeding Greenfield v. Salomon. Trustee's application to
18 expand the scope of employment of Mr. Nahmias to prosecute the
19 revocation of discharge action at the expense of Mr. Greenfield
20 was approved by the court over Debtors' objections.

21 At the conclusion of the trial, the court announced its
22 decision to revoke discharge orally on the record. The notice of
23 appeal was filed after the court announced its decision, but
24 before the judgment revoking discharge pursuant to § 727(d)(2)
25 was entered on the docket on January 7, 2010.

1 [T]he admitted findings would make a prima facie case on its
2 own. What we were really here for today was the opportunity
3 to listen to Mr. Salomon indicate that it was not his
4 intention to defraud anyone, in effect. And I listened to
5 him and most of the things, they're either immaterial --
6 they wouldn't cause me to decide this way except on that one
7 item. On that one item, I had to wrestle with, I had to
8 deal with, and I finally made a decision based on that. I
9 think he did explain a lot of the things away. I don't know
10 what to make of that previous financial statement, but
11 obviously that was some evidence that he knew this had value
12 to him personally.... So I reluctantly rule that there was
13 an intention to deceive, an intention to omit. It was
14 certainly a material item.

15 The court's findings indicate that the bankruptcy court
16 considered both the evidence as stipulated to by the parties and
17 the evidence (including testimony) provided by the Debtors.
18 There is no indication of clear error in the court's findings,
19 because the finding that the Salomons had an interest in the
20 country club membership and the finding that it was omitted from
21 the schedules were based on stipulated facts.

22 The court considered the evidence, including testimony,
23 presented by Debtors that the country club membership was an
24 asset of a company owned by Mr. Welty because it had paid 50 per
25 cent of the cost and considered Mr. Salomon's testimony about his
26 intent. The court also considered the evidence that Mr. Salomon
27 represented that the membership had value to him personally when
28 he prepared the Canyon National Bank financial statement sometime
prior to filing bankruptcy.

Weighing the evidence established both by stipulation and by
testimony and making determinations of fact rest squarely within
the trial court's province and should not be disturbed on appeal
absent clear error. Fed. R. Civ. P. 52(a)(6), incorporated by
Fed. R. Bankr. P. 7052. The court did not find Mr. Salomon's
testimony, which was designed to negate fraudulent intent,

1 credible. The court's conclusion that the omission from the
2 schedules was intentional and deliberate, which equates with
3 knowing and fraudulent, was supported by the evidence and was not
4 clearly erroneous.

5
6 **2**

7 Appellants contend that the showing of fraudulent intent was
8 based only on documentary evidence. We do not agree that the
9 evidence probative of that question was so limited.

10 The question of intent necessarily requires the trier of
11 fact to "delve into the mind of the debtor." Searles 317 B.R. at
12 380. Such intent ordinarily is established by inference from
13 surrounding circumstances. Emmett Valley Assocs. v. Woodfield
14 (In re Woodfield), 978 F.2d 516, 518 (9th Cir. 1992).

15 Here, the surrounding circumstances, namely the omission of
16 the country club membership from the schedules, the listing of it
17 as an asset on the Canyon National Bank financial statement, the
18 subsequent sale of the membership, and the retention of the
19 proceeds, all support a finding of fraudulent intent.

20 Moreover, the court listened to the testimony, including
21 that of Mr. Salomon, considered the evidence, and made findings
22 of fact that were within its discretion based on that evidence.
23 It is apparent that the court did not find Mr. Salomon's
24 testimony credible in that respect.

25
26 **3**

27 Appellant's argument that the amount of money involved does
28 not warrant revocation of discharge is not supported by the law.

1 The Ninth Circuit has consistently held that lack of injury to
2 creditors is irrelevant for purposes of denying a discharge in
3 bankruptcy. First Beverly Bank v. Adeeb (In re Adeeb), 787 F.2d.
4 1339, 1343 (9th Cir. 1986) (citing Duggins v. Heffron, 128 F.2d
5 546, 549 (9th Cir. 1942), and Harris v. Baker, 86 F.2d 936,
6 937-38 (9th Cir. 1936)). Thus, the amount of money is not a
7 relevant consideration when pondering the question of denying or
8 revoking a bankruptcy discharge. In any event, \$17,738.75 cannot
9 be described as an immaterial sum in the context of this case.

10
11 4

12 Appellant contends that the BAP's earlier remand of the case
13 for further proceedings requires that new evidence must be
14 presented to establish wrongdoing by Appellants. The BAP vacated
15 and remanded in the prior appeal because there were "essentially
16 no actual findings or supported conclusions on the record" making
17 it impossible to make "any rational determination on whether [the
18 court's] findings and conclusions are clearly erroneous." The
19 findings and conclusions referenced by the BAP are those required
20 by Federal Rule of Civil Procedure 52(a)(1), as incorporated by
21 Federal Rule of Bankruptcy Procedure 7052. The BAP instructed
22 the trial court to make requisite findings of fact and
23 conclusions of law, and left to the trial court the question of
24 what proceeding would be appropriate. On remand, the bankruptcy
25 court elected to reopen the evidentiary record by holding a trial
26 and stated its findings on the record after the parties presented
27 their respective cases. The fact that in rendering its decision
28 the bankruptcy court relied on facts established in original

1 pleadings did not offend the instructions contained in the BAP's
2 order remanding the case for further proceedings.

3
4 **B**

5 The revocation of Debtors' discharge is also affirmed on
6 adequate independent grounds pursuant to § 727(d)(1) as having
7 been obtained by fraud. This theory was asserted in the
8 complaint and was tried, but was not mentioned in the form of the
9 judgment. The stipulated facts establish that Mr. Salomon did
10 not disclose the country club membership on the schedules, sold
11 the country club membership, received payment of \$17,738.75, and
12 did not turn over those funds to the trustee. The conclusion
13 that Debtors' actions were fraudulent follows from the court's
14 conclusion about Debtors' intent that was based on the court's
15 finding that Mr. Salomon's testimony lacked credibility. The
16 stipulated facts together with the court's conclusions about
17 Debtors' intent are sufficient to support a finding of fraud and
18 thus to support revocation of the discharge under § 727(d)(1).

19
20 **II**

21 Appellants raise the issue of prejudice, bias, and conflict
22 of interest by Mr. Nahmias, special counsel to trustee, because
23 Mr. Nahmias also represented Mr. Greenfield, Debtors' former
24 business partner and plaintiff in a related adversary proceeding,
25 No. 06-90083.

26 Appellee contends that whether Mr. Nahmias had a conflict of
27 interest in prosecuting the case against Debtors was not raised
28 at trial and should not be considered in this appeal, citing

1 Enewally v. Wash. Mut. Bank (In re Enewally), 368 F.3d. 1165
2 (9th Cir. 2004).

3 However, Debtors did oppose trustee's application to expand
4 the scope of employment of Mr. Nahmias to litigate the revocation
5 of discharge. Thus, the issue was raised below and can be
6 considered on appeal.

7 Section 327(c) states that in a case under Chapter 7, "a
8 person is not disqualified for employment under this section
9 solely because of such person's employment by or representation
10 of a creditor, unless there is objection by another creditor or
11 the United States trustee, in which case the court shall
12 disapprove such employment if there is an actual conflict of
13 interest" [emphasis added].

14 The trustee's application to expand the scope of employment
15 of Mr. Nahmias conforms with the requirements of § 327 and of
16 Federal Rule of Bankruptcy Procedure 2014. The application
17 details the background of the relationship between Mr. Nahmias
18 and Mr. Greenfield, explains that Mr. Greenfield will pay the
19 fees and costs incurred by Mr. Nahmias' firm, and is accompanied
20 by an appropriate declaration from Mr. Nahmias.

21 While Debtors opposed trustee's application to expand the
22 scope of employment of Mr. Nahmias to prosecute the revocation of
23 discharge action, the record does not show that either another
24 creditor or the United States trustee objected to such
25 employment. Given the adequate disclosure provided in the
26 application and declaration, and apparent lack of opposition by
27 parties entitled to oppose, the fact that Mr. Nahmias represented
28

1 a creditor of the estate does not disqualify him from employment
2 by the trustee.

3 Moreover, there is no actual conflict of interest. The
4 interest of creditors and of the trustee are aligned in the
5 matters involving denial of discharge.

6 Debtors' contention that trustee's retention of Mr. Nahmias
7 shows bias and prejudice is misplaced. If Mr. Nahmias had an
8 interest adverse to the estate by virtue of his representation of
9 a creditor, § 327(c) provides for a procedure by which affected
10 parties may object and § 328(c) provides a remedy. However, the
11 fact that Mr. Nahmias first represented a creditor and then the
12 trustee does not establish a disqualifying conflict of interest
13 and does not show bias and prejudice against the Debtors, except
14 those inherent in the adversarial process.

15
16 **CONCLUSION**

17 For the foregoing reasons, we AFFIRM the bankruptcy court's
18 judgment revoking the Debtors' discharge.