NOT FOR PUBLICATION

**UNITED STATES BANKRUPTCY APPELLATE PANEL**

**OF THE NINTH CIRCUIT**

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| In re: | ) BAP No. CC-10-1207-PaKiL |
| REZA KUCHECKI, | ) Bk. No. 08-13809-TA |
| Debtor. | ) Adv. No. 08-01389-TA |
| MAHMOOD K. RAFSANJANI, | ) |
| Appellant, | ) |
| v. | ) **M E M O R A N D U M**[1] |
| REZA KUCHECKI, | ) |
| Appellee. | ) |

Argued and submitted on November 17, 2010
at Pasadena, CA

Filed - November 29,2010

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

Hon. Theodor C. Albert, U.S. Bankruptcy Judge, Presiding

Appearances: John L. Palmer of Bucher & Palmer, LLP, argued for Appellant Mahmood Rafsanjani
Thomas J. Polis of Polis & Associates argued for Appellee Reza Kuchecki

Before: PAPPAS, KIRSCHER and LYNCH,[2] Bankruptcy Judges.

[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] The Honorable Brian D. Lynch, United States Bankruptcy Judge for the Western District of Washington, sitting by designation.

Creditor Mahmood K. Rafsanjani ("Rafsanjani") appeals the bankruptcy court's judgment dismissing his objections to the discharge of chapter 7[3] debtor Reza Kuchecki ("Kuchecki") under §§ 727 (a)(3), (a)(4)(A), and (a)(5). We AFFIRM.

**FACTS**

Kuchecki and Rafsanjani are cousins and Russian immigrants. In approximately August 1999, Kuchecki borrowed money from Rafsanjani in connection with their joint venture to acquire and operate a gasoline station in Torrance, California. At some point not clear in the record, Kuchecki signed a promissory note payable to Rafsanjani for $80,000 representing his debt for the loans relating to the gasoline station venture. Kuchecki repaid $18,000 of that debt, but defaulted on the balance.

The gasoline station business failed. Thereafter, Kuchecki worked first as an employee, and then owner, of an auto repair business known as Capo Valley Auto. He incorporated the business as Capo, Inc. in 2005.

Sometime in 2007, Rafsanjani sued Kuchecki in state court to collect the balance due on the promissory note in the Orange County Superior Court. After a bench trial on June 19, 2008, the state court entered judgment in favor of Rafsanjani and against Kuchecki for the $62,000 balance due on the note, plus interest of

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

$38,420, for a total judgment of $100,420.[4]

Two weeks later on July 2, 2008, Kuchecki filed a pro se chapter 7 petition. Kuchecki states that he prepared his bankruptcy petition and initial version of schedules and statements with the help of a paralegal-bookkeeper, Sohrab Rowshan. The parties agree that Kuchecki "relied in good faith on the paralegal efforts of Shorab Rowshan . . . to guide him through the bankruptcy process." PTO at 3. Nevertheless, there were numerous errors and deficiencies in the petition and schedules. As the bankruptcy court would later summarize them, these documents:

> Fail[ed] to reveal that the debtor was, in fact, married; debtor listed no vehicles on Schedule B although at the time he leased a 2004 Mercedes Benz, owned a second, older, high-mileage Mercedes and owned a third car that was inoperable; the value given in debtor's schedules for debtor's wholly owned corporation, Capo, Inc., dba Capo Valley Auto, was only $300, although plaintiff suspects this number is low; average monthly income and expenses were each reported as $3700, and no schedules D, E or F of creditors were filed although at the time debtor did owe some debt and certainly owed the judgment to [Rafsanjani].

Statement of Decision at 2.

The § 341(a) meeting in Kuchecki's case was conducted by chapter 7 trustee Thomas Casey on August 11, 2008. The parties agree that Kuchecki "provided the chapter 7 trustee any and all documents and explanations to any and all questions he had during the Debtor's Section 341(a) meeting." PTO at 3.

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[4] In the Joint Pre-trial Order ("PTO") the parties filed in the bankruptcy court, Rafsanjani and Kuchecki agreed that the state court "judgment was only for breach of contract and money loaned, no other claims for relief." PTO at 2.

At the meeting, Kuchecki was examined under oath and asserted that his schedules and petition were complete and accurate. He testified that he was married in January 2008 to Ella Marksenuke, who did not file for bankruptcy, a fact not revealed in the petition and schedules. Kuchecki also described his current business and assets related to that business. The trustee ended the examination with the comment, "We are going to complete this. It's a service based business and I don't see any other evidence of any potential assets, other assets." Hr'g Tr. 15:23-25.

On August 20, 2008, the trustee submitted a Report of No Assets. The trustee has not changed his position in this case.

Rafsanjani commenced the adversary proceeding giving rise to this appeal on October 6, 2008. In his complaint, Rafsanjani set forth thirty examples of alleged false statements given under oath in Kuchecki's petition, schedules and at his § 341(a) meeting, and as a result, Rafsanjani objected to Kuchecki's discharge under § 727(a)(4)(A). Rafsanjani also sought denial of discharge under § 727(a)(3), asserting that Kuchecki failed to provide any business records to substantiate his schedules I and J, and failed to identify bookkeepers or holders of financial records in his Statement of Financial Affairs. Finally, Rafsanjani asserted that a loss or deficiency of assets occurred before the petition date, and Kuchecki had not provided a satisfactory explanation of that loss, requiring denial of discharge under § 727(a)(5).

On December 4, 2008, Kuchecki engaged an attorney to represent him in the bankruptcy case and adversary proceeding. Acting through his attorney, he filed amended schedules and an

amended statement of financial affairs. The bankruptcy court would later observe that the amended schedules corrected most of the obvious deficiencies in the earlier filings, but Kuchecki still failed to correct his marital status. The list of creditors was amended on December 18, 2008, and April 4, 2009.

Kuchecki's answer to the complaint was filed on January 25, 2009. He generally denied its allegations arguing that he had filed his original petition and schedules in good faith, and had retained qualified bankruptcy counsel who assisted him in amending the documents to cure inaccuracies.

The bankruptcy court approved the PTO on December 15, 2009, setting trial for April 4, 2010. Both Rafsanjani and Kuchecki submitted trial declarations and briefs.

The trial took place on April 12, 2010, and a transcript is included in the record. The bankruptcy court accepted the parties' declarations as their direct testimony. Rafsanjani was then called to testify and cross-examined. He admitted that, as to most of the statements in his declaration regarding omissions and inaccuracies in Kuchecki's schedules, Rafsanjani did not have personal knowledge about them, but had instead based his declaration on information provided by his attorney and a private investigator.

Rafsanjani's attorney then called and examined Kuchecki as a witness. Following the close of Rafsanjani's case in chief, Kuchecki's lawyer moved for a dismissal in favor of Kuchecki. At that point, the bankruptcy court expressed considerable skepticism about whether Rafsanjani had carried his burden of proof:

THE COURT: I'm not trying to say that the court is happy

> about people who file under penalty of perjury saying [my petition and schedules are] everything and it's not correct. The system depends upon trust. The question is, however, does the Court think this was a deliberate, intentional attempt to deceive the creditors and [] I'm way far away from being convinced that that's the case here. Mostly because the assets omitted are just not that substantial.
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> It's the kind of thing I would not be totally surprised to find out somebody would omit, particularly if English is their second language, particularly if they're relying on their bookkeeper which I think is ridiculous . . . Did [Kuchecki] tell lies in the first meeting of creditors? Well, I'm not seeing that so far. Did he tell lies in the amended schedule? I'm not seeing that. . . . If the case is not totally without merit, it's damn close. . . . I'm not going to grant the motion. I'm going to let you make a case this afternoon but that's where I think we are.

Hr'g Tr. 73:1-74:17.

In the afternoon session, Kuchecki was cross-examined about his declaration. When asked about his failure to indicate his correct marital status, Kuchecki stated that his bookkeeper told him that if his wife was not filing for bankruptcy, he should not reference her in the petition; she had no assets and no assets were transferred to, or from, her. Kuchecki was also questioned on other incorrect statements in his schedules. Following closing arguments, the bankruptcy court took the issues under submission.

The court entered its Statement of Decision on April 14, 2010, in which it ruled in favor of Kuchecki on all counts of the complaint, explaining that:

- The original petition and schedules, although inaccurate, were not, standing alone, fatal to Kuchecki's discharge under § 727(a)(4)(A). The incorrect statements by Kuchecki were not knowing and fraudulent, because "almost all the inaccuracies were corrected within a reasonable time and, considering debtor's

relatively forthright answers given at the § 341(a) meeting, no inference of fraudulent intent can be taken."

- The inaccuracies were also not material, because none of the omissions amounted to very much.

- Rafsanjani had offered little or no evidence to substantiate his objections to discharge under §§ 727(a)(3) and (a)(5). Kuchecki's alleged failure to preserve or keep adequate records was not shown, or explained satisfactorily, at trial; there was no evidence that any records were destroyed. If there were any unexplained loss or deficiency of assets, that was likewise never explained or substantiated.

The bankruptcy court entered a judgment in favor of Kuchecki on May 28, 2010, denying Rafsanjani's objections to discharge under §§ 727(a)(3), (a)(4)(A), and (a)(5). Rafsanjani filed a timely notice of appeal on June 8, 2010.

## JURISDICTION

The bankruptcy court had jurisdiction under 28 U.S.C. §§ 1334 and 157(a)(2)(J). We have jurisdiction under 28 U.S.C. § 158.

## ISSUE

Whether the bankruptcy court erred in denying Rafsanjani's objections to Kuchecki's discharge under §§ 727(a)(3), (a)(4)(A), and (a)(5).

## STANDARD OF REVIEW

In reviewing a bankruptcy court's decision concerning an objection to discharge: (1) the bankruptcy 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 judgments about values animating the rules is reviewed de novo. Searles v. Riley (In re Searles), 317 B.R. 368, 373 (9th Cir. BAP 2004), aff'd, 212 Fed. App'x 589 (9th Cir. 2006). De novo means review is independent, with no deference given to the bankruptcy court's legal conclusions. Rule 8013.

"When there are two permissible views of the evidence, the trial judge's choice between them cannot be clearly erroneous." Village Nurseries v. Gould (In re Baldwin Builders), 232 B.R. 406, 410 (9th Cir. BAP 1999). When a question of fact is determined based on findings regarding witness credibility, great deference is to be given to the bankruptcy court's determinations due to its opportunity to observe the witness. Retz v. Samson (In re Retz), 606 F.3d 1189, 1196 (9th Cir. 2010)(quoting Anderson v. City of Bessemer City, N.C., 470 U.S. 564, 575 (1985)).

**DISCUSSION**

Unless an objection to discharge is sustained, a chapter 7 debtor is entitled to a discharge. § 727(a). The discharge is critical to a chapter 7 debtor's opportunity for a "fresh start," and § 727 should be construed liberally in favor of debtors and strictly against creditors objecting to discharge. See In re Retz, 606 F.3d at 1196 (quoting Bernard v. Sheaffer (In re Bernard), 96 F.3d 1279, 1281 (9th Cir. 1996)). A creditor objecting to a debtor's discharge bears the burden of proving by a

preponderance of the evidence that the discharge should be denied. Khalil v. Developers Sur. & Indem. Co. (In re Khalil), 379 B.R. 163, 172 (9th Cir. BAP 2007), aff'd 578 F.3d 1167 (9th Cir. 2008)(expressly adopting the BAP's statement of applicable law).

Here, the bankruptcy court rejected Rafsanjani's objections to Kuchecki's discharge under §§ 727(a)(3), (a)(4)(A), and (a)(5). We conclude that the bankruptcy court did not err in rejecting Rafsanjani's objections. While we examine all of those objections, Rafsanjani focused primarily on § 727(a)(4)(A), the provision dealing with a false oath or account, and so we turn to that issue first.

**I.**

**The bankruptcy court did not err in denying Rafsanjani's objection to discharge under § 727(a)(4)(A).**

Under § 727(a)(4)(A), a discharge may be denied if, "the debtor knowingly and fraudulently, in or in connection with the case — (A) made a false oath or account[.]" A creditor objecting to discharge under § 727(a)(4)(A) must show that: (1) the debtor made a false statement or omission; (2) the statement or omission was regarding a material fact; (3) the debtor made the false statement or omission knowingly; and (4) the debtor made the false statement fraudulently. In re Roberts, 331 B.R. at 882.

The first element requires proof of the existence of a false oath or account made by the debtor in connection with a bankruptcy case. Such a false oath may include a false statement or omission in the debtor's bankruptcy schedules or statement of financial affairs. In re Roberts, 331 B.R. at 882; Fogal Legware of Switzerland, Inc. v. Wills (In re Wills), 243 B.R. 58, 62 (9th Cir. BAP 1999).

Without doubt, Kuchecki's initial petition and schedules contained numerous inaccurate statements. Both parties and the bankruptcy court agreed to this fact. Additionally, the bankruptcy court found in its decision that "most of the obvious deficiencies" in the initial papers were corrected, necessarily implying that there were at least some inaccurate statements that survived into the amended petition and schedules. Specifically, the court noted that Kuchecki failed to correct the incorrect statement regarding his marital status in response to Question No. 16 of his amended Statement of Financial Affairs.

But did the false statements involve material facts? A false statement or omission is immaterial if it does not impact a bankruptcy case, such as might occur where the omission or misstatement concerns assets having little or no value, or that would not be property of the estate. See In re Khalil, 379 B.R. at 172; In re Wills, 143 B.R. at 63. An omission is also not material if the bankruptcy estate would have no interest in the omitted item. Robertson v. Swanson (In re Swanson), 36 B.R. 99, 103 (9th Cir. BAP 1984).

In its decision and at trial, the bankruptcy court commented at length on the lack of materiality of Kuchecki's inaccurate statements. The court found that none of the targeted omissions or false statements amounted to very much. Instead, the court focused its attention on three statements.

The first statement concerned the value of Kuchecki's corporation, Capo, Inc. In his original schedules, he valued this interest at $500. That value was increased to $5,000 in his amended schedules. The bankruptcy court reasoned correctly that,

even if these statements could be challenged, they were not material, because any value in the corporation was attributable to a leased auto repair shop, which owned no tangible assets, the value of which was entirely based on the continuing personal services of Kuchecki. In the court's view, no value could be extracted from the corporation without the full cooperation of Kuchecki and, thus, his ownership interest in the company had no value to the bankruptcy estate.

Second, Rafsanjani pointed out that there was a $79,000 discrepancy between the reported annual income from this business on the original and amended schedules, and as reflected in bank statements. Kuchecki testified that he received the bulk of these funds as loans or gifts from family members. But the bankruptcy court reasoned that even if Rafsanjani's numbers were accurate and the $79,000 represented sales proceeds, Rafsanjani simply did not take into consideration the cost of sales. Indeed, Rafsanjani's counsel conceded this at trial:

> THE COURT: You can't say that revenue equates to value. You have $79,000 in revenue . . .you have to take against that his profit margin. There's a cost of sale of some kind involved. It's certainly not [$79,000]. Certainly less than that. I get the feeling that this was a very marginal business such that . . . $79,000 in revenue might be [offset by] $60,000, $70,000 the cost of sale. That's a false comparison. Am I right?
>
> COUNSEL FOR RAFSANJANI: I stand corrected, your Honor. There's not a direct correlation one for one you're right. . . . Maybe I've overstated it but I think there's an under-reporting of the value. Exactly what it is reasonable minds could differ but I believe it is under reported to an extent that is material.

That counsel acknowledges that the materiality of the alleged under-reporting is a matter about which "reasonable minds could differ" is significant, since when a finder of fact is presented

with two permissible views of the evidence, the choice between them cannot be clearly erroneous. In re Baldwin Builders, 232 B.R. at 410.

A third inaccurate statement highlighted by Rafsanjani concerned Kuchecki's marital status. In both the original and amended schedules, Kuchecki identified himself as a single man; at his § 341(a) hearing, however, he acknowledged that he was married. Testimony and evidence adduced at trial established that he was married, but that Kuchecki's wife was not a codebtor in the bankruptcy case, had no assets of her own, and there had been no transfer of assets between Kuchecki and his spouse. The bankruptcy court found, without clear error in our view, that Kuchecki's misstatement could therefore have no effect on the bankruptcy case, and was thus immaterial.

The bankruptcy court found that none of the other misstatements or omissions made by Kuchecki "amounted to much" and, after reviewing the record, we conclude that the court's finding that none of these false statements were material was not clearly erroneous. And because the bankruptcy court did not clearly err in its findings regarding the materiality of Kuchecki's inaccurate statements, an essential element for an objection to discharge under § 727(a)(4)(A), Rafsanjani's claim must be rejected.

Moreover, to succeed, Rafsanjani was also required to demonstrate that Kuchecki knowingly and fraudulently made the false statements or omissions. To show the statement was knowing, Rafsanjani must show that Kuchecki acted deliberately and consciously in doing so. See In re Khalil, 379 B.R. at 173

(quoting In re Roberts, 331 B.R. at 883). To demonstrate that Kuchecki's statements were fraudulent, Rafsanjani must show: (1) that the debtor made the false statement or omission; (2) that the debtor knew the statements or omissions were false when he made them; and (3) that the debtor intended to deceive his creditors by making the false statements or omissions. Id. (quoting In re Roberts, 331 B.R. at 883). To prove a debtor's intent, a creditor may rely upon circumstantial evidence, or inferences drawn from a debtor's course of conduct. In re Khalil, 379 B.R. at 174 (citing In re Searles, 317 B.R. at 377). Even so, there must be something in those circumstances and inferences that suggest that a debtor intended to defraud creditors. In re Khalil. 379 B.R. at 175 (quoting Garcia v. Coombs (In re Coombs), 193 B.R. 557, 565–66 (Bankr. S.D. Cal. 1996)). An example of circumstantial evidence suggesting an intent to defraud may be seen where the debtor fails to clear up all inconsistencies and omissions, even having had an opportunity to do so, such as when filing amended schedules.

The bankruptcy court declined to find in this case that any false statements made by Kuchecki were knowing and fraudulent. Based upon our review of the record, Rafsanjani never established that Kuchecki knew the statements or omissions were false when he made them, nor that he intended to deceive his creditors by making the false statements or omissions. On the contrary, the bankruptcy court heard live testimony from both Kuchecki and Rafsanjani, with Kuchecki testifying that he did not intend to make false statements or deceive his creditors, and Rafsanjani arguing to the contrary. The bankruptcy court credited Kuchecki's

testimony over Rafsanjani's, and we defer to such credibility determinations at trial. Rule 8013; In re Retz, 606 F.3d at 1196 (citing Anderson, 470 U.S. at 575.

There were other reasons the bankruptcy court need not have found that Kuchecki's incorrect statements were made knowingly and fraudulently. For example, the court found that the omissions and inaccuracies were at least partly traceable to the challenges faced by Kuchecki in speaking and writing in a second language: "It's the kind of thing I would not be totally surprised to find out somebody would omit, particularly if English is their second language[.]" Hr'g Tr. 73:21-22.

In addition, the court acknowledged that Kuchecki was relying on the advice of a paralegal in completing the original petition and schedules, and in making the false statements and omissions. While we agree with the bankruptcy court that relying on such advice is "ridiculous," nevertheless, assuming Kuchecki was justified in considering the paralegal to be knowledgeable, the situation is analogous to a debtor who relies upon advice of his attorney, and it is well-established in the case law that a debtor who acts in reliance on the advice of his attorney may lack the intent required to deny him a discharge of his debts. In re Retz, 606 F.3d at 1199 (quoting First Beverly Bank v. Addeb (In re Adeeb), 787 F.2d 1339, 1343 (9th Cir. 1986)). Although we are reluctant to compare the impact of advice of an attorney with that received from a paralegal, the parties themselves agreed in the PTO that "[Kuchecki] relied in good faith on the paralegal efforts of Shorab Rowshan . . . to guide him through the bankruptcy process." (Emphasis added.). PTO at 3.

Moreover, Ninth Circuit case law supports the proposition that amendment of a schedule and a "prompt correction of an inaccuracy or omission may be evidence probative of lack of fraudulent intent." Beauchamp v. Hoose (In re Beauchamp), 236 B.R. 727, 733 (9th Cir. BAP 1999), aff'd., 5 Fed. Appx. 743 (9th Cir. 2001); In re Searles, 317 B.R. at 377; Merena v. Merena (In re Merena), 413 B.R. 792, 817 (Bankr. D. Mont. 2009). When Kuchecki obtained qualified bankruptcy counsel, who explained to him that his filings contained inaccuracies, he promptly amended the petition and schedules to cure most of the inaccuracies.

All things considered, we decide that the bankruptcy court did not err in concluding that "none of the omissions or misstatements [by Kuchecki] were material, almost all were corrected within a reasonable time, and considering debtor's forthright answers given at the § 341(a) meeting, no inference of fraudulent intent can be taken." Statement of Decision at 6.

**II.**

**The bankruptcy court did not err in denying Rafsanjani's objections to discharge under §§ 727(a)(3) and (5).**

Pursuant to § 727(a)(3), a bankruptcy court may not grant the debtor a discharge if, "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 statute ensures that discharge is dependent on a debtor's true presentation of his financial affairs. Caneva v. Sun Cmtys. Operating Ltd. P'ship (In re Caneva), 550 F.3d 755, 761 (9th Cir.

2008). By requiring a complete and organized set of books and records, the exception removes some risk to creditors that assets may be withheld or concealed within chaotic or incomplete recorded information. Id. At the same time, absolute completeness in a debtor's records is not required; a debtor must simply provide sufficient written evidence to allow his creditors to reasonably determine his present financial condition and to follow his business transactions for a reasonable past period. Id. (quoting Rhoades v. Wikle, 453 F.2d 51, 53 (9th Cir. 1971)).

The initial burden of proving that a debtor has inadequately kept, or has failed to keep, records rests with the creditor objecting to discharge. See id. To prevent a discharge under § 727(a)(3), a creditor must prove: (1) that the debtor failed to maintain and preserve adequate records; and (2) that the debtor's failure makes it impossible for debtor's creditors to determine the debtor's financial condition and material business transactions. See id. (citing Lansdowne v. Cox (In re Cox), 41 F.3d 1294, 1296 (9th Cir. 1994)). If, and only if, a creditor is able to establish a prima facie case, does the burden shift to the debtor, who must then justify the inadequacy or nonexistence of the records in order to maintain his discharge. See id.

Section 727(a)(5) sets forth another exception to a debtor's right to a discharge. It provides that a discharge shall not be granted if "the debtor has failed to explain satisfactorily, before determination of denial of discharge under this paragraph, any loss of assets or deficiency of assets to meet the debtor's liabilities."

Similar to § 727(a)(3), § 727(a)(5) employs a shifting burden

of proof, with the initial burden placed upon the creditor objecting to a debtor's discharge. See In re Retz, 606 F.3d at 1205; Devers v. Bank of Sheridan, Montana (In re Devers), 759 F.2d 751, 754 (9th Cir. 1985). To demonstrate that a debtor should be denied discharge, a creditor must show that, "(1)[the] debtor at one time, not too remote from the bankruptcy petition date, owned identifiable assets; (2) on the date the bankruptcy petition was filed or order of relief granted, the debtor no longer owned the assets; and (3) the bankruptcy pleadings or statement of affairs do not reflect an adequate explanation for the disposition of the assets." In re Retz, 606 F.3d at 1205 (quoting Olympic Coast Invest., Inc. v. Wright (In re Wright), 364 B.R. 51, 79 (Bankr. D. Mont. 2007)). If a creditor is able to establish a prima facie case that a debtor has inadequately explained a loss or deficiency of assets, the burden shifts to the debtor to provide credible evidence regarding the missing assets' disposition. Id. The determination of whether a debtor has "satisfactorily" explained a loss or deficiency of assets is a question of fact, and the bankruptcy court's determination should be overturned only for clear error. Id.

In this appeal, Rafsanjani failed to establish a prima facie case for an objection under either § 727(a)(3) or (5). The bankruptcy court summarized the deficiencies in Rafsanjani's proof as follows:

> Plaintiff offered little or no evidence to substantiate claims under section 727(a)(3) or (a)(5) either. If failure to preserve or keep records was material, that was never shown or explained satisfactorily by plaintiff. There was no evidence offered that any such records were ever destroyed. Similarly, if there were any unexplained loss or deficiency of assets, that was likewise never explained or substantiated. If debtor

> ever had any assets of any size or value, or ever said that he did, this was never shown at trial.

Statement of Decision at 7.

Rafsanjani asserted at trial, and again in this appeal, that the records produced by Kuchecki "are not sufficient to ascertain his true financial condition because, although the partial bank statements show that the tax return and income statement under-report the amount of revenue flowing into the business, it is impossible to determine by how much because there are only eight months of bank statements. As a result, it is impossible to ascertain the true value of [Kuchecki's] business." Rafsanjani Op. Br. at 28.

As the bankruptcy court noted, this sort of argument is not evidence; it is merely speculation. Rafsanjani also fails to explain why, if more complete bank statements were needed to ascertain the value of Kuchecki's business, Rafsanjani did not seek to obtain them through discovery.[5] Even if Kuchecki did not have them, they were likely available through Kuchecki's bank.

In short, Rafsanjani failed to present a prima facie case for denial of discharge under § 727(a)(3) because he presented insufficient evidence to meet the second requirement of In re Cox, that the debtor's failure to keep adequate records makes it impossible for debtor's creditors to determine the debtor's financial condition and material business transactions. The bankruptcy court did not err in denying Rafsanjani's objection to discharge under § 727(a)(3).

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[5] Neither party conducted discovery in this adversary proceeding.

Rafsanjani speculates even further in his argument for denial of discharge under § 727(a)(5). Without presenting any evidence, he claims that the $79,000 discrepancy between the reported annual income on the original and amended schedules, and that appearing in Kuchecki's bank statements, was a "lost asset" for which there was no explanation by Kuchecki. As discussed above, though, the bankruptcy court noted, and as Kuchecki explained in his testimony, this sum was likely made up of loans to Kuchecki from family members, and should be reduced by the cost of services. Therefore, in addition to failing to provide evidence, Rafsanjani's argument fails to establish the third In re Retz requirement for denial of discharge under § 727(a)(5), that is, that the bankruptcy pleadings or statement of affairs do not reflect an adequate explanation for the disposition of the assets. The bankruptcy court did not err in denying Rafsanjani's objection to discharge under § 727(a)(5).

**CONCLUSION**

The bankruptcy court did not err in denying Rafsanjani's objections to discharge under §§ 727(a)(3), (a)(4)(A), and (a)(5). We therefore AFFIRM the judgment of the bankruptcy court.