

DEC 02 2011

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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NOT FOR PUBLICATION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

5	In re:	)	BAP No. EC-10-1316-JuKiD
6	MARTY WAYNE DONOHUE,	)	Bk. No. 09-20986
7	Debtor.	)	Adv. No. 09-2241
8	<hr/> MARTY WAYNE DONOHUE,	)	
9	Appellant,	)	
10	v.	)	M E M O R A N D U M*
11	PETER C. BRONSON and CAROLYN	)	
12	P. BRONSON,	)	
13	Appellees.	)	

Argued and Submitted on November 16, 2011  
at Sacramento, California

Filed - December 2, 2011

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

Honorable Christopher M. Klein, Bankruptcy Judge, Presiding

Appearances: 

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 Philippa Lauben, Esq. argued for Appellant Marty  
Wayne Donohue; Peter C. Bronson, Esq. argued for  
Appellee Carolyn Bronson and himself pro se.

Before: JURY, KIRSCHER, and DUNN, Bankruptcy Judges.

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 \* 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, chapter 7<sup>1</sup> debtor Marty Wayne Donohue, appeals  
2 from the bankruptcy court's judgment entered in favor of  
3 appellees, Peter and Carolyn Bronson (the "Bronsons"). The  
4 judgment denied debtor his discharge under § 727(a)(3) based on  
5 his failure to keep and preserve records for his businesses and  
6 personal affairs. We AFFIRM.

7 **I. FACTS**

8 Michael Donohue, debtor's father, owned and operated a  
9 construction business under the name of River City Construction  
10 ("River City") with California Contractor License Number 330020.  
11 The Bronsons hired River City to perform construction and other  
12 work on their property in Penn Valley, California, which they  
13 planned to develop as an equestrian facility. The record shows  
14 that when the Bronsons hired River City, debtor was managing the  
15 business and in the process of acquiring it from his father who  
16 was semi-retired.<sup>2</sup>

17 Mrs. Bronson first contacted debtor in 2006 to install  
18 fencing on the Bronsons' property after she saw an ad for River  
19 City in an equestrian publication called Equestrian Connection.  
20 After the fencing was installed, the Bronsons hired River City  
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22 <sup>1</sup> Unless otherwise indicated, all chapter, section and rule  
23 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532.  
24 "Rule" references are to the Federal Rules of Bankruptcy  
25 Procedure and "Civil Rule" references are to the Federal Rules of  
Civil Procedure.

26 <sup>2</sup> Debtor testified that he had a dba as River City  
27 Construction so that he could manage the bank account. Debtor  
28 also testified that he claimed all the income from the business  
as his own and paid his father a salary. Hr'g Tr. at 61  
(July 21, 2010).

1 to do additional work on the property on a project-by-project  
2 basis. The projects included, among other things, the  
3 correction of an improperly assembled barn which the Bronsons  
4 had ordered as a kit, an irrigation system, a septic system,  
5 building arenas, installation of entry gates, grading, and  
6 substantial plantings for erosion control. These projects  
7 spanned two years.

8 For each project, River City submitted a bid proposal to  
9 the Bronsons. Change orders were also handled through the bid  
10 proposal process. With few exceptions, the proposals were not  
11 signed by the Bronsons, and none were signed by River City. The  
12 bids typically required payment in full or a substantial portion  
13 prior to delivery. Mrs. Bronson wrote the checks for those  
14 payments which eventually added up to \$400,000. The bid  
15 proposals are part of the Bronsons' record on appeal.

16 As time went by, the Bronsons became dissatisfied with the  
17 quality of River City's work and its failure to complete work  
18 for which the Bronsons had paid in advance. The Bronsons  
19 documented the numerous deficiencies in a November 19, 2007  
20 letter sent to debtor and his father (collectively, the  
21 "Donohues").

22 On February 22, 2008, River City recorded two mechanic's  
23 liens against the Bronsons' property in the sum of \$59,450.  
24 This amount allegedly reflected unpaid invoices. The record  
25 reflects that neither of the Donohues could ever point to an  
26 invoice which the Bronsons had not paid.

27 On May 2, 2008, the Bronsons wrote to the Donohues,  
28 asserting that River City's liens were improper because they had

1 paid for all the work. They further maintained that the work  
2 done by River City was substandard and documented more than a  
3 hundred deficiencies in the letter. Finally, the Bronsons  
4 informed the Donohues that they would be taking legal action to  
5 expunge the liens and recover damages.

6 The Donohues later caused River City to unconditionally  
7 release the mechanic's liens against the Bronsons' property.

### 8 **Bankruptcy Events**

9 On January 21, 2009, debtor filed his chapter 7 petition.  
10 Debtor's Schedule D showed creditors holding secured claims in  
11 the amount of over \$2.3 million, of which \$1 million was  
12 unsecured. Schedule E showed approximately \$15,000 owed to the  
13 Internal Revenue Service<sup>3</sup> and Amended Schedule F showed  
14 unsecured claims in the amount of \$426,000. Some of the secured  
15 and unsecured debts listed on debtor's schedules belonged to  
16 River City.

17 In his Statement of Financial Affairs, debtor listed 2007  
18 and 2008 income from River City as \$68,499 and \$25,000,  
19 respectively. Debtor stated that he had no other income from  
20 employment or operation of a business during the two years  
21 immediately preceding the commencement of his case.

22 On April 21, 2009, the Bronsons filed an adversary  
23 proceeding against debtor, seeking damages in excess of  
24 \$350,000, which included \$130,000 paid to River City that debtor  
25 allegedly diverted for his own use, and \$220,000 representing  
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27 <sup>3</sup> The IRS filed two proofs of claim in debtor's case for the  
28 sum of \$515,000.

1 the cost of remediating River City's improper or illegal work on  
2 the Bronsons' property. The Bronsons also sought punitive  
3 damages.

4 The Bronsons alleged that these yet to be determined  
5 damages were nondischargeable debts under § 523(a)(2) and (6).  
6 The § 523(a)(2) claim was based on debtor's alleged  
7 misrepresentations made to the Bronsons in connection with River  
8 City's work on their property and the § 523(a)(6) claim was  
9 based on River City's alleged improper filing of the mechanic's  
10 liens against their property.

11 The complaint also sought denial of debtor's discharge  
12 under § 727(a)(2) and (3). The § 727(a)(2) claim alleged that  
13 debtor had transferred or concealed property such as motor  
14 vehicles, gold, securities, cash, jewelry and other valuable  
15 personal property with the intent to defraud his creditors. The  
16 § 727(a)(3) claim alleged that debtor had failed to keep or  
17 preserve recorded information from which his financial condition  
18 or business transactions might be ascertained.

19 Debtor answered the complaint by denying all allegations  
20 and asserting twelve affirmative defenses.

21 The bankruptcy court held a two-day trial on the matter.<sup>4</sup>

22 \_\_\_\_\_  
23 <sup>4</sup> On January 27, 2009, Michael Donohue filed a chapter 7  
24 petition (Bankruptcy Case No. 09-21354). On May 4, 2009, the  
25 Bronsons filed an adversary proceeding against him (Adv. No. 09-  
26 02265), alleging claims for relief under § 523(a)(2) and (6).  
27 Although the Bronsons filed separate complaints against debtor  
28 and his father, the bankruptcy court consolidated the adversary  
proceedings for trial. On August 3, 2010, the bankruptcy court  
entered judgment for Michael Donohue and against the Bronsons.  
We take judicial notice of the relevant pleadings docketed and  
(continued...)

1 On July 15, 2010, Mrs. Bronson and debtor testified. At the  
2 completion of the Bronsons' case in chief, debtor's attorney  
3 moved under Civil Rule 52(c)<sup>5</sup> for judgment on partial findings  
4 based on her assertion that the Bronsons had failed to meet  
5 their burden of proof on their § 727(a)(2) and (3) claims. The  
6 bankruptcy court granted the motion on the § 727(a)(2) claim,  
7 but found sufficient evidence to proceed on the § 727(a)(3)  
8 claim. On July 21, 2010, the court heard further testimony from  
9 Mrs. Bronson, debtor and other witnesses.

10 On August 2, 2010, the bankruptcy court placed its findings  
11 of fact and conclusions of law and order for judgment on the  
12 record. The court found that the Bronsons had not proven their  
13 claims under § 523(a)(2) or (6). On the § 727(a)(3) claim, the  
14 court found that based on the totality of exhibits in the record  
15 and debtor's testimony, it was persuaded that adequate records  
16 were not kept or preserved, particularly with respect to River  
17 City, which was debtor's responsibility. The court stated that  
18 in more than twenty years on the bench, it had never come into  
19 contact with such a weak collection of records. Based on the  
20 evidence presented, the court found debtor had no justification  
21 for his failure to keep or preserve records under the  
22 circumstances of the case.

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23  
24 <sup>4</sup>(...continued)  
25 imaged in Michael Donohue's underlying bankruptcy case and the  
26 adversary proceeding which were not included in the record.  
Atwood v. Chase Manhattan Mortg. Co. (In re Atwood), 293 B.R.  
27 227, 233 n.9 (9th Cir. BAP 2003).

28 <sup>5</sup> Civil Rule 52(c) is made applicable to bankruptcy cases by  
Rule 7052.

1 On August 3, 2010, the bankruptcy court entered judgment  
2 for the Bronsons on their § 727(a)(3) claim. Debtor filed a  
3 timely appeal.

## 4 II. JURISDICTION

5 The bankruptcy court had jurisdiction over this proceeding  
6 under 28 U.S.C. §§ 1334 and 157(b)(2)(J). We have jurisdiction  
7 under 28 U.S.C. § 158.

## 8 III. ISSUE

9 Whether the bankruptcy court erred in denying debtor his  
10 discharge under § 727(a)(3).

## 11 IV. STANDARDS OF REVIEW

12 On appeal of a denial of discharge under § 727(a), we  
13 review the bankruptcy court's findings of fact for clear error  
14 and conclusions of law de novo, and we apply de novo review to  
15 "mixed questions" of law and fact that require consideration of  
16 legal concepts and the exercise of judgment about the values  
17 that animate the legal principles. Oney v. Weinberg (In re  
18 Weinberg), 410 B.R. 19, 28 (9th Cir. BAP 2009).

19 A bankruptcy court's factual finding is clearly erroneous  
20 if it is illogical, implausible, or without support in the  
21 record. Retz v. Samson ((n re Retz), 606 F.3d 1189, 1196 (9th  
22 Cir. 2010) (citing United States v. Hinkson, 585 F.3d 1247,  
23 1261-62 & n.21 (9th Cir. 2009) (en banc)).

24 We may affirm on any ground supported by the record.  
25 Shanks v. Dressel, 540 F.3d 1082, 1086 (9th Cir. 2008).

## 26 V. DISCUSSION

27 Section § 727(a)(3) states that a bankruptcy court shall  
28 grant the debtor a discharge, unless –

1 [T]he debtor has concealed, destroyed, mutilated,  
2 falsified, or failed to keep or preserve any recorded  
3 information, including books, documents, records, and  
4 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.

5 Section 727(a)(3) is a broadly worded statute prohibiting  
6 numerous acts in relation to "any recorded information." The  
7 only qualification is that the recorded information concealed,  
8 falsified, or not kept or preserved by a debtor, must be such  
9 from which one "might" be able to ascertain the debtor's  
10 financial condition or business transactions.

11 The statute's purpose is to protect creditors by requiring  
12 debtors to make accurate disclosures regarding their financial  
13 affairs. Caneva v. Sun Cmtys. Operating Ltd. P'ship (In re  
14 Caneva), 550 F.3d 755, 761 (9th Cir. 2008). As a policy matter,  
15 and consistent with the statutory construction of other  
16 exceptions to discharge, § 727(a)(3) is strictly construed  
17 against the moving party and liberally in favor of the debtor.  
18 Id.

19 As the parties objecting to debtor's discharge under  
20 § 727(a)(3), the Bronsons had the initial burden of proving, by  
21 a preponderance of the evidence,<sup>6</sup> "(1) that the debtor failed  
22

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23 <sup>6</sup> See Grogan v. Garner, 498 U.S. 279, 287 (1991)  
24 (preponderance of the evidence applies to discharge exceptions).  
25 "The burden of showing something by a 'preponderance of the  
26 evidence,' . . . 'simply requires the trier of fact to believe  
27 that the existence of a fact is more probable than its  
28 nonexistence before [he] may find in favor of the party who has  
the burden to persuade the [judge] of the fact's existence.'" Concrete Pipe & Prods. of Cal., Inc. v. Constr. Laborers Pension Trust for So. Cal., 508 U.S. 602, 622 (1993).



1 to maintain and preserve adequate records, and (2) that such  
2 failure makes it impossible to ascertain the debtor's financial  
3 condition and material business transactions.'" Id. Once the  
4 Bronsons met their initial burden on these elements, "the  
5 burden of proof then shifts to the debtor to justify the  
6 inadequacy or nonexistence of the records.'" Id.

7 Debtor argues on appeal that the evidence submitted during  
8 the trial does not support the bankruptcy court's decision to  
9 deny him a discharge under § 727(a)(3). In that regard, debtor  
10 has taken a two-pronged approach: First, debtor contends that  
11 the bankruptcy court erred in denying his motion under Civil  
12 Rule 52(c) at the close of the Bronsons' case in chief on  
13 July 15, 2010.<sup>7</sup> Second, debtor contends that the court erred in  
14 denying his discharge after hearing all the evidence. We  
15 address each argument below.

16 **A. Debtor's Civil Rule 52(c) Motion**

17 According to debtor, the Bronsons failed to present a prima  
18 facie case for denial of his discharge under § 727(a)(3) by the  
19 close of their case in chief on July 15, 2010.

20 Civil Rule 52(c) provides:

21 If a party has been fully heard on an issue during a  
22 \_\_\_\_\_

23 <sup>7</sup> Debtor refers to the motion as one for a directed verdict.  
24 Motions for directed verdicts are now called motions for judgment  
25 as a matter of law and are governed by Civil Rule 50. This rule  
26 applies in bankruptcy cases only if the matter is tried before a  
27 jury. See Rule 9015(c). Because the trial was a bench trial,  
28 debtor's motion for a directed verdict was a motion for a  
judgment on partial findings under Civil Rule 52(c). The  
bankruptcy court apparently treated the motion as one for  
judgment under Civil Rule 52(c), and we shall do the same for  
purposes of appeal.

1 nonjury trial and the court finds against the party on  
2 that issue, the court may enter judgment against that  
3 party on a claim or defense that, under the  
4 controlling law, can be maintained or defeated only  
5 with a favorable finding on that issue. The court  
6 may, however, decline to render any judgment until the  
7 close of the evidence . . . .

8 Given the rule's use of the permissive "may," the bankruptcy  
9 court had full discretion to defer entering judgment until it  
10 had heard all the evidence. We cannot conclude in this case  
11 that the bankruptcy court abused its discretion, especially in  
12 light of our affirmance of the court's factual findings.

13 Moreover, it is undisputed that after the denial of  
14 debtor's motion, he proceeded to offer evidence on his own  
15 behalf at the July 21, 2010 hearing. Where a party introduces  
16 evidence on his own behalf after he has moved for relief under  
17 Rule 52(c), he waives his right to relief under Rule 52(c). See  
18 Fed. Ins. Co. v. HPSC, Inc., 480 F.3d 26, 32 (1st Cir. 2007).  
19 Therefore, we test the sufficiency of the evidence on appeal by  
20 reviewing the entire record. Id.; Gaffney v. Riverboat Servs.,  
21 451 F.3d 424, 451 n.29 (7th Cir. 2006).

22 **B. The Bronsons' Proof Of Missing Information**

23 Debtor contends the bankruptcy court clearly erred by  
24 finding that he failed to keep and preserve records from which  
25 his financial condition or business transactions might be  
26 ascertained.

27 Under Civil Rule 52(a)(6), "[f]indings of fact, whether  
28 based on oral or other evidence, must not be set aside unless  
clearly erroneous, and the reviewing court must give due regard  
to the trial court's opportunity to judge the witnesses'  
credibility." Where there are two plausible views of the

1 evidence, "the factfinder's choice between them cannot be  
2 clearly erroneous." Anderson v. City of Bessemer City, N.C.,  
3 470 U.S. 564, 574 (1985). Moreover, findings based on  
4 determinations regarding the credibility of witnesses "demand[]  
5 even greater deference to the trial court's findings; for only  
6 the trial judge can be aware of the variations in demeanor and  
7 tone of voice that bear so heavily on the listener's  
8 understanding of and belief in what is said." Id. at 575.

9       After reviewing the testimony and exhibits in the record  
10 provided to us, we find no reversible error in the bankruptcy  
11 court's fact determination. The bankruptcy court made a  
12 credibility determination regarding debtor's testimony about his  
13 records (or lack thereof) and was otherwise unconvinced by  
14 debtor's testimony that he had kept records – especially as they  
15 pertained to River City's business.

16       The evidence in the record shows that debtor treated River  
17 City's business and assets as his own; that debtor engaged in  
18 automotive-related businesses and commingled funds from those  
19 businesses with the funds of River City; and that debtor was  
20 unable to account for the more than \$400,000 he received from  
21 the Bronsons. Most significantly, the record reveals that  
22 debtor was missing substantial categories of documents: (1) any  
23 organized documents which related to receipts or other  
24 information regarding car sales; (2) cancelled checks or other  
25 records which supported River City's income and payment of  
26 expenses; and (3) records relating to debtor's personal affairs,  
27 household expenditures or budgets.

28       We need not recite all the evidence (or lack thereof) which

1 supports the bankruptcy court's finding, but highlight the  
2 missing information with the following excerpts of debtor's  
3 unsubstantiated testimony:

4 • Debtor explained through his testimony that he listed and  
5 brokered a couple dozen cars and that he sometimes made a  
6 commission. Debtor could not estimate how much he received in  
7 any given year from his "hobby." Hr'g Tr. at 33-35 (July 21,  
8 2010).

9 • When Mr. Bronson questioned debtor about his interests in  
10 a BMW, debtor testified that at one point a customer of River  
11 City wanted work done, but did not have the money to pay for it.  
12 The customer had a BMW for sale which debtor agreed to take in  
13 exchange for the work. Debtor testified that he never owned the  
14 vehicle, but he sold the vehicle to pay his material costs and  
15 the men that worked on the job, so he didn't get the car. Hr'g  
16 Tr. at 26-27 (July 21, 2010). When asked if he received \$9,500  
17 for the BMW, debtor answered: "I believe so, yeah." Id. at 28.  
18 When asked how much he netted from the sale, debtor answered:  
19 "A few thousand dollars probably." Id. at 33.

20 • Debtor testified that although he believed the Bronsons  
21 owed River City money, he could not point to an invoice showing  
22 an unpaid amount. Debtor testified that he did not have all the  
23 bid proposals or parts of them.<sup>8</sup> Debtor further testified that  
24 it was "kind of hard to tell exactly where we're at and actually  
25 really what was paid, because I don't have check numbers on all

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26 \_\_\_\_\_  
27 <sup>8</sup> Debtor contended that some of these documents were "lost"  
28 on his computer, but he never substantiated which records he  
thought were lost or gave any detail as to how they were lost.

1 of these. So I never could really determine what was paid and  
2 what was not paid." Hr'g Tr. at 192-93 (July 15, 2010).  
3 Finally, debtor testified that there had never been an  
4 accounting of the various invoices during the project and  
5 conceded that there may have been bid proposals that were not  
6 reflected in the documents that he maintained. Id. at 193.

7 • Debtor was unable to explain how the Bronsons' advance  
8 payments for the construction of their gate were spent. In this  
9 regard, the bankruptcy court made a factual finding that debtor  
10 had never ordered the gate that the Bronsons had paid for in  
11 advance. Hr'g Tr. at 8 (August 2, 2010). During the trial,  
12 Mr. Bronson asked debtor what he did with the \$9,000 they paid  
13 him for their gate. Debtor testified that he purchased part of  
14 the materials, and part of the money sat in the account. Debtor  
15 further testified that the money was no longer in the account,  
16 simply stating that it got used over the years and that, as the  
17 times got tough, the money got spent. Hr'g Tr. at 57 (July 21,  
18 2010). "I mean I don't know exactly when your money got spent."  
19 Id.

20 • Mr. Bronson questioned debtor about his personal  
21 financial status and living expenses; specifically, how did  
22 debtor pay \$4100 in monthly rent payments when his Statement of  
23 Financial Affairs showed that his income for the year preceeding  
24 the bankruptcy filing was \$25,000. Debtor testified that the  
25 "source" of payment was "the stuff dealing with autos or River  
26 City construction money that comes in . . . . It's all run  
27 through my bank account." Hr'g Tr. at 162-63 (July 15, 2010).

28 On appeal, debtor is adamant that he had client files, bank

1 statements, invoices, and "everything else" for River City's  
2 business. However, besides the bid proposals, there are no bank  
3 statements or invoices in the record on appeal, and it does not  
4 appear that they were presented to the trial court. Debtor also  
5 maintains that he gave tax returns and bank statements to the  
6 trustee. The fact that debtor may have been forthcoming in  
7 producing those records to the trustee is insufficient.<sup>9</sup> "The  
8 terms of [§] 727(a)(3) do not condition a debtor's discharge on  
9 the presentation of the documents that he did keep and  
10 preserve." In re Caneva, 550 F.3d at 764. In any event,  
11 debtor's tax returns and bank statements are but summaries of  
12 information and incomplete unless debtor provided source  
13 materials. We found no source materials in the record on  
14 appeal.

15 Given the lack of documentation in the record, it is  
16 apparent in this case that the bankruptcy court's decision  
17 rested almost entirely on debtor's testimony and credibility  
18 determinations. Debtor's testimony shows that he could not  
19 confirm his commissions from car sales or how much he made from  
20 the sale of the BMW. Debtor admitted that he was missing bid  
21 proposals for the Bronsons' projects. Debtor admitted that he  
22 did not have check numbers for the Bronsons' payments so he  
23 could not determine what was paid or not paid. Finally, nothing  
24 in debtor's testimony established that his income from River  
25 City and his automotive related businesses was sufficient to pay

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26  
27 <sup>9</sup> The bankruptcy court also took the view that it drew no  
28 inference from the fact that the trustee had not objected to  
debtor's discharge.

1 his personal expenses. We thus conclude that debtor's testimony  
2 provided a plausible basis for the bankruptcy court to find that  
3 debtor failed to keep or preserve records from which his  
4 financial condition and business transactions could be  
5 ascertained.

6 It is not enough that Debtor merely recite from  
7 records ostensibly 'kept in his head' and detail from  
8 memory what transactions he engaged in and how the  
9 funds were dissipated. Records of substantial  
10 completeness and accuracy are necessary in order that  
11 they may be checked against Debtor's oral statements.  
12 Creditors, in other words, are not required to rely on  
13 a debtor's oral representations concerning these  
14 matters without also having some independent means of  
15 substantiating such representations.

16 In re Juzwiak, 89 F.3d 424, 429-30 (7th Cir. 1996).

17 In short, we found no documentary proof in the record for  
18 the majority of the transactions debtor describes in his  
19 testimony. Without being able to trace the financial history of  
20 debtor's various businesses, it is impossible to fully  
21 understand debtor's finances in this case. Accordingly, the  
22 bankruptcy court correctly found that the Bronsons met their  
23 burden of proof on their prima facie case.

### 24 **C. Debtor's Proof of Justification**

25 The bankruptcy court found that debtor's failure to keep  
26 and preserve records was not justified considering all the  
27 circumstances in the case. "'Justification for [a] bankrupt's  
28 failure to keep or preserve books or records will depend  
29 on . . . whether others in like circumstances would ordinarily  
30 keep them.'" In re Caneva, 550 F.3d at 763. This is an  
31 objective inquiry.

32 In considering the nature of River City's business, the

1 court concluded a contracting business would require  
2 documentation such as contracts. The court explained that it  
3 had not seen a single contract for construction for any of the  
4 Bronsons' projects. The court viewed debtor as running River  
5 City's business as though he were a handyman. In other words,  
6 an informal "I do the work and you pay for it" approach.

7 Debtor's brief on appeal misconstrues the court's comments  
8 regarding River City's use of bid proposals rather than a formal  
9 document called a "contract" for its business. The point was  
10 that River City did not have the most basic records, used by  
11 other construction businesses in like circumstances, that would  
12 have documented its business transactions with the Bronsons or  
13 other customers. Debtor's reliance on the bid proposals is  
14 misplaced when the proposals were missing crucial information,  
15 not the least of which were the signatures of the parties.

16 Debtor attempts to justify the lack of records for River  
17 City on the grounds that he was in the process of taking over  
18 his father's business, he had no formal training or education,  
19 he relied on the services of his CPA to manage the tax returns  
20 and his wife performed data entry. According to debtor, he did  
21 all that was necessary for a person reasonably to assume that  
22 his records were adequate and accurate.

23 It does not appear that debtor made these arguments in the  
24 bankruptcy court. Debtor's opening brief did not cite to any  
25 portion of the record where his training or education was  
26 discussed. In general, we do not consider an issue raised for  
27 the first time on appeal. Cold Mountain v. Garber, 375 F.3d  
28 884, 891 (9th Cir. 2004). Even so, the bankruptcy court found



1 that as between debtor's father and debtor, it was debtor's  
2 responsibility to keep the books and records of River City based  
3 upon the circumstances surrounding their "transaction" for the  
4 transition of the business from father to son. On appeal,  
5 debtor does not contend this finding is clearly erroneous.  
6 Indeed, the record shows that debtor was essentially treating  
7 the business as his own even though a formal transfer from  
8 father to son had not taken place.

9 The bankruptcy court further stated, after listening  
10 carefully to the testimony of debtor's wife, Sabrina Donohue,  
11 that she was filing whatever debtor gave her to file and  
12 recording whatever debtor gave her to record. This finding,  
13 based on credibility determinations, is also one we do not  
14 disturb on appeal. Accordingly, even if debtor had preserved  
15 his arguments for purposes of this appeal, we conclude that the  
16 record supports the bankruptcy court's finding that debtor  
17 failed to prove that the lack of records was justified under the  
18 circumstances of the case.

19 **VI. CONCLUSION**

20 For the reasons stated, we AFFIRM.