

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NOT FOR PUBLICATION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)	
	P. BRONSON,)	
12)	
	Appellees.)	
13	<hr/>)	

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:

 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.

 * 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 7¹ 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.²

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
21

22 ¹ 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 ² 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 Service³ 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
26

27 ³ 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.⁴

22 _____
23 ⁴ 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)⁵ 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.

23
24 ⁴(...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 ⁵ 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,⁶ "(1) that the debtor failed
22

23 ⁶ 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, 2010.⁷ 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 ⁷ 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.⁸ 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

26
27 ⁸ 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.⁹ "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

26
27 ⁹ 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.
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