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NOT FOR PUBLICATION

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U.S. BKCY. APP. PANEL
OF THE NINTH CIRCUIT

UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT

In re:) BAP No. CC-13-1192-TaKuPa
)
 6 TAWNI T.T. NGUYEN,) Bk. No. 10-23224-TA
)
 7 Debtor.) Adv. No. 11-01003-TA
)
 8 _____)
)
 9 NGU NGUYEN; MAI HUONG NGUYEN,)
)
 10 Appellants,)
)
 11 v.) **MEMORANDUM***
)
 12 TAWNI T.T. NGUYEN,)
)
 13 Appellee.)
 _____)

Argued and Submitted on February 20, 2014
at Pasadena, California

Filed - March 10, 2014

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

Honorable Theodor C. Albert, Bankruptcy Judge, Presiding

Appearances: _____
 David Brian Lally argued for appellants Ngu Nguyen
 and Mai Huong Nguyen; Anerio Ventura Altman of
 Lake Forest Bankruptcy argued for appellee Tawni
 T.T. Nguyen.

Before: TAYLOR, PAPPAS, and KURTZ, 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 Appellants Ngu Nguyen and Mai Huong Nguyen appeal from a
2 judgment in favor of Debtor Tawni T.T. Nguyen on their
3 § 727(a)(3)¹ and (a)(4)(A) objection to discharge claims. We
4 AFFIRM.

5 **FACTS**

6 The Debtor is a news reporter and public figure in the
7 Vietnamese community of Orange County, California. Prior to
8 filing her chapter 7 case, the Debtor owned a local television
9 production company named Vietnamese Abroad Communications, Inc.,
10 doing business as Vietnamese Abroad Television ("VA-TV"). When
11 VA-TV experienced financial difficulty, the Appellants loaned the
12 Debtor \$50,000. VA-TV ultimately folded, and the Debtor repaid
13 some, but not all, of the loan; at the time of trial \$22,500 plus
14 interest remained owing.

15 The Debtor was also a licensed real estate broker who owned
16 and operated a real estate brokerage firm, Alpha Funding & Real
17 Estate ("Alpha"). In 2008, Alpha earned two commissions in the
18 amount of \$11,225.

19 Following the collapse of VA-TV, the Debtor worked, as an
20 independent contractor, at Vietnamese Broadcasting System
21 ("VBS"). Her engagement with VBS concluded on August 31, 2010 -
22 19 days before she filed her chapter 7 case.

23 The Appellants objected to the Debtor's discharge. Their
24 complaint alleged that she "misfiled" and incorrectly disclosed
25 certain information on her bankruptcy petition and schedules. In
26

27 ¹ Unless otherwise indicated, all chapter and section
28 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532.

1 their pre-trial brief, the Appellants argued that the Debtor:
2 omitted from her Statement of Financial Affairs ("SOFA") the 2008
3 Alpha commissions; falsely stated in her Certification of
4 Employment Income Pursuant to 11 U.S.C. § 521(a)(1)(B)(iv)
5 ("Certification") that she was unemployed in the 60 days prior to
6 the petition date; falsely stated in her Schedule I that she then
7 had no current income; failed to identify the source of income
8 listed in her form B22A; and failed to produce bank statements
9 from a personal bank account as requested through formal
10 discovery.²

11 After trial, the bankruptcy court issued findings of fact
12 and conclusions of law and determined that the Debtor was
13 entitled to judgment on both § 727 claims. The Appellants timely
14 appealed.

15 JURISDICTION

16 The bankruptcy court had jurisdiction pursuant to 28 U.S.C.
17 §§ 1334 and 157(b)(2)(J). We have jurisdiction under 28 U.S.C.
18 § 158.

19 ISSUES

- 20 1. Whether the bankruptcy court violated the Appellants' due
21 process rights by admitting the Debtor's bank records at
22 trial?
- 23 2. Whether the bankruptcy court erred in granting judgment in
24 favor of the Debtor on the Appellants' adversary complaint
25 objecting to her bankruptcy discharge?

26
27 ² The Appellants also disputed a number of other factual
28 issues, a majority of which are not challenged on appeal.

1 these documents through discovery, but that they were never
2 produced.³ The Debtor responded at trial and on appeal that her
3 counsel had produced the documents via email to Appellants'
4 counsel. While the exact date of the electronic production is
5 unclear on this record, the Appellants do not expressly dispute
6 receipt of the email attaching the bank records. Further, these
7 bank records were listed as Debtor exhibits in the parties' joint
8 pre-trial order.

9 Fundamentally, due process requires the opportunity to be
10 heard. Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306,
11 314 (1950). It is well-established that "[a]n elementary and
12 fundamental requirement of due process in any proceeding which is
13 to be accorded finality is notice reasonably calculated, under
14 all the circumstances, to apprise interested parties of the
15 pendency of the action and afford them an opportunity to present
16 their objections." Id. (citation omitted).

17 Here, the record establishes that the Appellants had actual
18 access to these bank records prior to trial and actual notice
19 that they would be introduced into evidence at trial. Thus,
20 there was neither a due process violation nor error in admitting
21 these documents at trial.

22 **B. The bankruptcy court did not err in granting judgment in**
23 **favor of the Debtor on the Appellants' § 727 claims.**

24 In general, the bankruptcy court must grant a chapter 7
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26 ³ The Appellants also argue that the bankruptcy court's
27 decision violated Rule 7026. Other than citing to the rule, the
28 Appellants advance no argument on this point and, thus, we do not
address it on appeal.

1 discharge unless an objector establishes that a denial of
2 discharge is appropriate under one of the twelve enumerated
3 grounds in § 727(a). In the spirit of the "fresh start"
4 principles that the Bankruptcy Code embodies, claims for denial
5 of discharge are liberally construed in favor of the debtor and
6 against the objector. Khalil v. Developers Sur. & Indem. Co.
7 (In re Khalil), 379 B.R. 163, 172 (9th Cir. BAP 2007), aff'd,
8 578 F.3d 1167 (9th Cir. 2009). For that reason, the objector
9 bears the burden to prove by a preponderance of the evidence that
10 the debtor's discharge should be denied. Id.

11 **1. There was no error as to the bankruptcy court's**
12 **§ 727(a)(3) determination.**

13 Section 727(a)(3) provides for denial of discharge where,
14 among other things, a debtor concealed or falsified recorded
15 information from which the debtor's financial condition or
16 business transactions might be ascertained. The underlying
17 purpose of this subsection is "to make discharge dependent on the
18 debtor's true presentation of his financial affairs." Caneva v.
19 Sun Communities Operating Ltd. P'ship (In re Caneva), 550 F.3d
20 755, 761 (9th Cir. 2008). Even so, § 727(a)(3) "does not require
21 absolute completeness in making or keeping records." Id.
22 Instead, a debtor must only "present sufficient written evidence
23 which will enable his creditors reasonably to ascertain his
24 present financial condition and to follow his business
25 transactions for a reasonable period in the past." Id. A
26 debtor's "duty to keep records is measured by what is necessary
27 to ascertain [her] financial status." Moffett v. Union Bank,
28 378 F.2d 10, 11 (9th Cir. 1967); see also In re Hong Minh Tran,

1 464 B.R. 885, 893 (Bankr. S.D. Cal. 2012) (type of debtor, as
2 well as debtor's sophistication, informs the bankruptcy court's
3 determination).

4 An objector establishes a prima facie case under § 727(a)(3)
5 by showing that: (1) the debtor failed to maintain and preserve
6 adequate records; and (2) this failure rendered it impossible to
7 ascertain the debtor's financial condition and material business
8 transactions. In re Caneva, 550 F.3d at 761. Once the objector
9 makes this showing, the burden shifts to the debtor to justify
10 the inadequacy or nonexistence of records. Id. Whether a debtor
11 failed to maintain and preserve adequate records is a finding of
12 fact, which we review for clear error. Cox v. Lansdowne
13 (In re Cox), 904 F.2d 1399, 1401 (9th Cir. 1990).

14 Emphasizing the Debtor's duty to preserve records, the
15 Appellants argue that she failed to produce complete documents
16 and "hid" documents until trial. They, however, do not
17 specifically identify the documents that the Debtor failed to
18 produce.

19 If their concern relates to the bank records, there is no
20 dispute that the Debtor did not retain physical records for
21 either her personal bank account or the joint account with Alpha.
22 The bankruptcy court, however, found the Debtor's explanation
23 reasonable; she moved residences twice prior to filing for
24 bankruptcy and failed to retain physical possession of the
25 records. It also observed that "in this day and age persons
26 often forego keeping much of the paper records that cluttered up
27 desks and cabinets in years past, relying instead on the computer
28 and the internet." Statement of Decision After Trial at 5. The

1 fact that Alpha ceased operating prepetition and the size of that
2 business further supported its finding that the omissions or
3 non-disclosures were reasonable and, thus, excused. In any
4 event, the bankruptcy court determined that the Appellants'
5 argument as to bank records was rendered moot when the Debtor
6 produced them to the Appellants.

7 These findings were not clearly erroneous. See In re Retz,
8 606 F.3d at 1196; see also Palmdale Hills Prop., LLC v. Lehman
9 Commercial Paper, Inc. (In re Palmdale Hills Prop., LLC),
10 457 B.R. 29, 40 (9th Cir. BAP 2011) (when there are two
11 permissible views of the evidence, the bankruptcy court's choice
12 between them cannot be clearly erroneous). As a result, the
13 bankruptcy court did not err in determining that the Debtor's
14 failure to preserve physical records was justified under the
15 circumstances and, thus, granting judgment in the Debtor's favor
16 on the § 727(a)(3) claim.

17 **2. There was no error as to the bankruptcy court's**
18 **§ 727(a)(4)(A) determination.**

19 Section 727(a)(4)(A) provides for denial of discharge where:
20 (1) the debtor made a false oath in connection with the
21 bankruptcy case; (2) the oath related to a material fact; (3) the
22 oath was made knowingly; and (4) the oath was made fraudulently.
23 In re Retz, 606 F.3d at 1197 (citation and internal quotation
24 marks omitted).

25 Appellants first contend that the bankruptcy court erred by
26 finding that the Debtor did not make a false oath. In
27 particular, they focus on her failure to disclose the 2008 income
28 in her SOFA and her failure to accurately disclose her income and

1 employment during the 60 days prior to her bankruptcy.

2 The bankruptcy court, however, found that the Debtor's
3 disclosure on her SOFA of zero income for 2008 was not
4 "technically correct," because, subsequently, the Debtor admitted
5 that Alpha earned \$11,225 in 2008. Similarly, the bankruptcy
6 court found that the Debtor's Certification was incorrect. There
7 the Debtor asserted that she was unemployed in the 60 days prior
8 to filing bankruptcy. Subsequently the Debtor acknowledged that
9 she was an independent contractor (but not an employee) of VBS,
10 and that her engagement with VBS ended less than a month before
11 her bankruptcy filing. The record also reflects that she listed
12 \$1,965 in her form B22A in response to "income from the operation
13 of a business, profession, or farm." These statements, thus,
14 constituted a false oath. See In re Searles, 317 B.R. at 377 ("A
15 false oath is complete when made.").

16 Even if the Appellants met their burden of establishing that
17 the Debtor made a false oath, they also bore the burden under
18 § 727(a)(4)(A) of establishing that the Debtor did so
19 fraudulently. A debtor acts with fraudulent intent when: (1) she
20 makes a misrepresentation; (2) that at the time she knew was
21 false; and (3) with the intention and purpose of deceiving
22 creditors. In re Retz, 606 F.3d at 1198-99. Fraudulent intent
23 is typically "proven by circumstantial evidence or by inferences
24 drawn from the debtor's conduct." Id. at 1199. A pattern of
25 falsity or a debtor's reckless indifference or disregard for the
26 truth may support a finding of intent. Id. Fraudulent intent is
27 a finding of fact reviewed for clear error. Id. at 1197.

28 Here, the bankruptcy court found that the Debtor's

1 explanation as to her omission of the 2008 income was reasonable.
2 The Debtor testified that she erroneously believed that the SOFA
3 called for information as to net rather than gross income. Thus,
4 she listed zero income for 2008 because, based on her erroneous
5 assumption, the \$11,225 was offset by rental payments and
6 advertising costs for Alpha during 2008. The bankruptcy court
7 accepted this explanation and, notably, observed that the
8 "discrepancy was trivial and in good faith," particularly given
9 the period of time between receipt of the income in 2008 and the
10 bankruptcy filing in 2010.

11 The bankruptcy court also found acceptable the explanation
12 as to the errors in the Certification. It noted that the
13 Debtor's Schedule I contained a favorable clarification; namely,
14 a statement that the Debtor was "unemployed since September 1,
15 2010." It also noted that the Debtor disclosed \$1,965 in
16 business income in her form B22A. It construed these facts
17 together with the Debtor's apparent confusion regarding employee
18 versus independent contractor status and found insufficient
19 evidence of an intent to deceive.

20 While the record may contain facts supportive of alternate
21 inferences, the bankruptcy court was in the best position to
22 evaluate the documentary and testimonial evidence. See
23 In re Retz, 606 F.3d at 1196. The record shows that, after
24 evaluating the evidence, the bankruptcy court declined to infer
25 fraudulent intent based on the Debtor's course of conduct and
26 other circumstantial evidence. Viewed through the required
27 deferential lens on appellate review, the bankruptcy court's
28 findings were not clearly erroneous. See id. Thus, it did not

1 err in finding a lack of fraudulent intent.

2 This analysis likewise applies to the Appellants' argument
3 that the evidence sufficiently demonstrated the Debtor's reckless
4 indifference or disregard for the truth. Although the bankruptcy
5 court did not make explicit findings in this regard, as
6 previously discussed, the record reflects that it declined to
7 find the requisite state of mind necessary for denial of
8 discharge. Its analysis, thus, is inconsistent with a finding of
9 a reckless indifference or disregard for the truth based on the
10 totality of the evidence.

11 Along the same lines, the Appellants argue that the
12 bankruptcy court erred in failing to determine that a sufficient
13 pattern and practice of dishonesty existed in the Debtor's
14 schedules and SOFA to warrant denial of discharge. We disagree.
15 The bankruptcy court determined that, even if construed in the
16 aggregate, the Debtor's omissions and misstatements were
17 ultimately inconsequential and, thus, insufficient to warrant a
18 denial of discharge. It observed that the omissions and
19 misstatements were likely the product of inadvertence or perhaps
20 the fact that English was the Debtor's second language. Once
21 again, the bankruptcy court findings were not clearly erroneous.
22 See id. Thus, it did not err in determining a lack of dishonest
23 pattern or practice.⁴

24 In sum, the Appellants have shown no error in the bankruptcy
25

26 ⁴ Given the determination that the Appellants failed to meet
27 their burden of proof as to fraudulent intent, it is unnecessary
28 to consider whether the bankruptcy court correctly considered the
other elements of a § 727(a)(4)(A) claim.

1 court's judgment as to the § 727(a)(4)(A) claim.

2 **CONCLUSION**

3 We AFFIRM the bankruptcy court's judgment in favor of the
4 Debtor.

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