

FEB 02 2015

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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NOT FOR PUBLICATION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

1 In re:) BAP No. CC-14-1032-PaTaD
2)
3 MOHSEN LOGHMANI,) Bankr. No. 12-12998-VK
4)
5 Debtor.) Adv. No. 12-01419-VK
6)
7)
8)
9 MOHSEN LOGHMANI,)
10)
11 Appellant,)
12)
13 v.) **MEMORANDUM**¹
14)
15)
16 UNITED STATES TRUSTEE;)
17)
18 AMY GOLDMAN, Chapter 7 Trustee,²)
19)
20)
21 Appellees.)
22)

Submitted Without Oral Argument
on January 22, 2015³

Filed - February 2, 2015

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

Honorable Victoria S. Kaufman, Bankruptcy Judge, Presiding

Appearances: Mohsen Loghmani, Appellant, pro se, on brief;
Russell Clementson, Trial Attorney, United States
Trustee, on brief for Appellee United States
Trustee.

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 8024-1.

² Appellee Amy Goldman, Trustee, did not file briefs or
participate in this appeal.

³ After examination of the briefs and record, and after
notice to the parties, in an order entered October 21, 2014, the
Panel unanimously determined that oral argument was not needed for
this appeal. 9th Cir. BAP Rule 8019-1.

1 Before: PAPPAS, TAYLOR, and DUNN, Bankruptcy Judges.

2 Chapter 7⁴ debtor Mohsen Loghmani ("Debtor") appeals the
3 judgment of the bankruptcy court denying him a discharge under
4 § 727(a)(2)(A) and (a)(4)(A) in an adversary proceeding prosecuted
5 by the United States Trustee ("UST"). We AFFIRM.

6 **I. FACTS**

7 The material facts are not in dispute. On August 24, 2005,
8 Debtor, along with his wife, purchased a parcel of vacant land in
9 San Bernardino County, California (the "Property"). Debtor and
10 his wife paid \$17,000 for the Property and took title as "husband
11 and wife as joint tenants."

12 In 2009, Debtor was sued by Tessie Cleveland Community
13 Services Corporation ("Tessie") in California state court. In the
14 state court action, Tessie alleged, among other things, that
15 Debtor breached a personal services contract. After trial, a jury
16 rendered a verdict in favor of Tessie on its breach of contract
17 claim and awarded Tessie \$388,325.47 in damages on December 28,
18 2011.

19 After the jury's verdict, but before a judgment was entered,
20 Debtor and his wife transferred the Property to their son via a
21 quitclaim deed signed by Debtor and his wife on February 2, 2012.
22 Debtor asserts that, at the time of this transfer, while he valued
23 the Property at approximately \$10,000, he and his wife did not
24 receive any payment from their son for the transfer because they
25 owed him money and this transfer was meant to satisfy a portion of

26
27 ⁴ Unless otherwise indicated, all chapter, section and rule
28 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532, and
to the Federal Rules of Bankruptcy Procedure, Rules 1001-9037.

1 that debt. Debtor's son was listed on Debtor's schedule F as
2 holding a "personal loan" unsecured claim. On the same day he
3 signed the quitclaim deed, Debtor drove from his home in North
4 Hollywood to the San Bernardino County Recorder's Office and
5 recorded the deed.⁵

6 Two weeks later, Debtor transferred a 2003 BMW Z4 Roadster to
7 the same son in exchange for \$5,200 in cash. Debtor later used
8 some of these funds to pay his bankruptcy counsel's fees.

9 On March 7, 2012, after Debtor's transfer of the Property and
10 the BMW, the state court entered a judgment against Debtor.⁶

11 On March 29, 2012, represented by counsel, Debtor filed a
12 chapter 7 petition. Debtor's schedules and statement of financial
13 affairs ("SOFA") did not disclose the transfers of the Property or
14 the BMW to his son. The schedules and SOFA, however, did list
15 Debtor's transfers of his interests in other real property in
16 which he lacked any equity.

17 On May 31, 2012, Debtor testified at his § 341(a) meeting
18 that his schedules and SOFA were true and correct, although he
19 noted that he might add a couple of unsecured creditors.
20 Thereafter, Debtor's bankruptcy case was selected by the UST for a
21 debtor audit. See 28 U.S.C. § 586(f). On July 2, 2012, the
22 auditors filed a report with the bankruptcy court concluding that

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25 ⁵ We take judicial notice of the fact that the distance
26 between North Hollywood, California and San Bernardino, California
Recorder's Office is approximately 70 miles. See Federal Rule of
Evidence 201.

27 ⁶ The state court later awarded Tessie attorney's fees in
28 the amount of \$1,458,101.25. The state court's judgment is
currently on appeal.

1 Debtor's schedules and SOFA contained a material misstatement
2 because they did not disclose Debtor's transfer of the BMW.
3 Debtor filed an amended SOFA listing the transfer of the BMW to
4 his son, but the amended SOFA did not disclose the transfer of the
5 Property.

6 The UST later discovered Debtor's prepetition transfer of the
7 Property to his son. On November 30, 2012, the UST filed an
8 adversary complaint against Debtor objecting to entry of a
9 discharge under § 727(a)(2)(A) and (a)(4)(A). Eight months later,
10 on July 31, 2013, Debtor filed a second amended SOFA wherein, for
11 the first time, he disclosed the Property transfer.

12 The UST and Debtor filed a joint pretrial stipulation
13 reciting various undisputed facts and identifying issues of fact
14 for trial. Notably, the UST and Debtor agreed it was undisputed
15 that Debtor and his wife "owed their son money and transferred
16 [the Property] to their son in order to remove the property from
17 their holdings and to give their son priority over their other
18 creditors." As to the fact issues, the parties advised the
19 bankruptcy court:

20 The following issues of fact, and no others,
21 remain to be litigated. Whether [Debtor]
22 intentionally and fraudulently failed to
23 disclose the transfer of [the Property] in
24 his [SOFA]. Whether [Debtor] knowingly and
25 fraudulently gave a false oath by failing to
26 disclose the transfer of [the Property] in
27 his [SOFA]. Whether [Debtor] transferred
28 [the Property] to his son to hinder, delay or
defraud a creditor, or the [t]rustee.

1 Notwithstanding the stipulation, at trial⁷ Debtor appeared
2 pro se and testified that he did not disclose the transfer of the
3 Property in his SOFA, amended SOFA, or at his § 341(a) meeting,
4 because he had thought the Property was his wife's separate
5 property. Trial Tr. 49:11-12, Dec. 3, 2013.

6 At the conclusion of the parties' submission of evidence,
7 testimony, and argument, the bankruptcy court recited its oral
8 ruling holding that, pursuant to § 727(a)(2)(A) and (a)(4)(A),
9 Debtor would be denied a discharge. On January 7, 2014, the
10 bankruptcy court entered written findings of fact and conclusions
11 of law incorporating its oral ruling. As it had in its oral
12 ruling, the court determined that Debtor's "testimony that he did
13 not disclose the transfer of [the Property] because he thought
14 [it] was his wife's [separate property]. . . is not credible." As
15 to § 727(a)(2)(A), the bankruptcy court concluded:

16 The facts and circumstances including (1) the
17 closeness of the relationship between
18 [Debtor] and the recipient of the [t]ransfer,
19 [Debtor's] son; (2) the transfer shortly
20 after the jury verdict . . .; (3) [Debtor's]
21 belief that he could not pay his creditors;
22 and (4) that [Debtor] personally signed and
23 personally recorded the quit-claim deed to
24 his son, all establish that [Debtor]
25 transferred [the Property] with the actual
26 intent to hinder, delay or defraud a
27 creditor.

28 ⁷ At a hearing the day before the trial was to begin, Debtor
advised the bankruptcy court of his plan to file a motion to
dismiss his chapter 7 case and thereby eliminate the need for the
trial on the objection to his discharge. After the hearing,
Debtor filed the motion to dismiss his case, and the next day
Debtor asked the bankruptcy court to rule on his motion before
making his opening remarks at the trial. The bankruptcy court
declined to do so due because Debtor had not given proper notice
of the motion to creditors. The bankruptcy court eventually
denied Debtor's motion to dismiss his case in an order dated
January 29, 2014.

1 As to the UST's § 727(a)(4)(A) claim, the bankruptcy court
2 concluded: "[t]he evidence shows that [Debtor] made false oaths
3 and accounts in his original [SOFA], his amended [SOFA], and at
4 his § 341(a) examination. [Debtor] knowingly and fraudulently
5 made these false oaths and accounts in connection with the case."

6 On January 7, 2014, the bankruptcy court entered a judgment
7 denying Debtor a discharge under both § 727(a)(2)(A) and
8 (a)(4)(A). Debtor filed a timely appeal.

9 II. JURISDICTION

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

12 III. ISSUE

13 Whether the bankruptcy court erred in denying Debtor a
14 discharge under § 727(a)(2)(A) and (a)(4)(A).

15 IV. STANDARD OF REVIEW

16 We review a bankruptcy court's decision resolving an
17 objection to discharge as follows:

18 "(1) the bankruptcy court's determinations of
19 the historical facts are reviewed for clear
20 error; (2) the selection of the applicable
21 legal rules under § 727 is reviewed de novo;
22 and (3) the application of the facts to those
23 rules requiring the exercise of judgments
24 about values animating the rules is reviewed
25 de novo."

23 Retz v. Samson (In re Retz), 606 F.3d 1189, 1196 (9th Cir. 2010)
24 (quoting Searles v. Riley (In re Searles), 317 B.R. 368, 373 (9th
25 Cir. BAP 2004), aff'd, 212 Fed. Appx. 589 (9th Cir. 2006)).

26 The bankruptcy court's determinations concerning the debtor's
27 intent are factual matters reviewed for clear error. Beauchamp v.
28 Hoose (In re Beauchamp), 236 B.R. 727, 729 (9th Cir. BAP 1999). A

1 factual finding is clearly erroneous if it is "illogical,
2 implausible, or without support in the record." In re Retz,
3 606 F.3d at 1196 (citing United States v. Hinkson, 585 F.3d 1247,
4 1261-62 & n.21 (9th Cir. 2009) (en banc)).

5 V. DISCUSSION

6 The party objecting to a debtor's discharge under § 727(a)
7 bears the burden of proving by a preponderance of the evidence
8 that the debtor's discharge should be denied. In re Retz,
9 606 F.3d at 1196. Courts are to "'construe § 727 liberally in
10 favor of debtors and strictly against parties objecting to
11 discharge.'" Id. (quoting Bernard v. Sheaffer (In re Bernard),
12 96 F.3d 1279, 1281 (9th Cir. 1996)).

13 Here, the bankruptcy court denied Debtor's discharge pursuant
14 to § 727(a)(2)(A) because he transferred the Property with the
15 intent to hinder, delay, or defraud his creditors, and under
16 § 727(a)(4)(A) because he failed to timely disclose his
17 prepetition transfer of the Property.⁸ Debtor argues that the
18 court erred because he lacked the required bad intent to deny him
19 a discharge because: (1) he believed the Property was owned solely
20 by his wife; (2) he was under extreme mental stress leading up to
21 and during his bankruptcy case due to the state court litigation
22 and judgment; and (3) he was ineffectively represented by his

24 ⁸ While Debtor's briefing discusses the Property and his
25 reasons for transferring and not disclosing the transfer to his
26 son, it also veers off topic in addressing his reasons for
27 transferring the BMW. The brief also includes Debtor's extensive
28 recitation about the actions and conduct of Tessie's counsel in
connection with the state court action. While these matters may
arguably provide context, at bottom, Debtor's perceptions about
the wrongs imposed upon him are not relevant or helpful in
resolving this appeal.

1 bankruptcy counsel. Debtor's arguments all lack merit.

2 **A. The bankruptcy court did not err in finding that Debtor**
3 **transferred the Property with the intent to hinder, delay, or**
4 **defraud creditors for the purposes of § 727(a)(2)(A).**

5 Section 727(a)(2)(A) provides:

6 (a) [t]he court shall grant the debtor a
7 discharge unless— . . . (2) the debtor, with
8 intent to hinder, delay, or defraud a
9 creditor or an officer of the estate . . .
10 has transferred, removed, destroyed,
11 mutilated, or concealed, or has permitted to
12 be transferred, removed, destroyed,
13 mutilated, or concealed— (A) property of the
14 debtor, within one year before the date of
15 the filing of the petition[.]

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11 Under § 727(a)(2)(A), a party objecting to a debtor's discharge
12 must prove by a preponderance of the evidence: "'(1) disposition
13 of property, such as a transfer or concealment, and (2) a
14 subjective intent on the debtor's part to hinder, delay, or
15 defraud a creditor through the act of disposing of the property.'"

16 In re Retz, 606 F.3d at 1200 (quoting Hughes v. Lawson
17 (In re Lawson), 122 F.3d 1237, 1240 (9th Cir. 1997)).

18 The presence of "badges of fraud" may support a bankruptcy
19 court's finding that a debtor acted with fraudulent intent in
20 transferring or concealing property, including:

21 (1) a close relationship between the
22 transferor and the transferee; (2) that the
23 transfer was in anticipation of a pending
24 suit; (3) that the transferor Debtor was
25 insolvent or in poor financial condition at
26 the time; (4) that all or substantially all
27 of the Debtor's property was transferred;
28 (5) that the transfer so completely depleted
the Debtor's assets that the creditor has
been hindered or delayed in recovering any
part of the judgment; and (6) that the Debtor
received inadequate consideration for the
transfer.

28 In re Retz, 606 F.3d at 1200 (quoting Emmett Valley Assocs. v.

1 Woodfield (In re Woodfield), 978 F.2d 516, 518 (9th Cir. 1992)).

2 In this case, it is undisputed that Debtor transferred his
3 interest in the Property to his son on February 2, 2012, and that
4 Debtor filed his bankruptcy petition on March 29, 2012. Debtor
5 argues, however, the bankruptcy court erred in finding that he
6 made this transfer with the intent to hinder, delay, or defraud
7 his creditors because, at the time, he believed his wife was the
8 sole owner of the Property and he did not realize his mistake due
9 to the stress he was under at the time.

10 The bankruptcy court rejected Debtor's contention. Because
11 the court's determination of Debtor's intent is a finding of fact,
12 we review it for clear error. In re Beauchamp, 236 B.R. at 729.
13 We find no clear error here.

14 To begin, the bankruptcy court found Debtor's testimony was
15 not credible when he testified that he did not know he owned the
16 Property when he deeded it away. As the trier of fact, the
17 bankruptcy court's findings as to credibility of witnesses are
18 afforded deference because the court had the opportunity "to note
19 'variations in demeanor and tone of voice that bear so heavily on
20 the listener's understanding of and belief of what is said.'" In re Retz,
21 606 F.3d at 1196 (quoting Anderson v. City of Bessemer
22 City, North Carolina, 470 U.S. 564, 575 (1985)). As a result, we
23 will not disturb the bankruptcy court's decision declining to
24 believe Debtor's testimony concerning his intent in transferring
25 the Property.

26 Beyond the credibility determination, we also agree with the
27 bankruptcy court's conclusion that the undisputed facts belie
28 Debtor's assertion that he thought he did not own the Property at

1 the time of the transfer. Debtor executed the quitclaim deed on
2 February 2, 2012, a short time after the jury had returned a
3 sizeable verdict against him in the state court action. The same
4 day that he signed the deed, he drove from his home in North
5 Hollywood to the San Bernardino Recorder's Office, a distance of
6 approximately seventy (70) miles, to record the deed.

7 In addition, the bankruptcy court identified several badges
8 of fraud in this case as support for the inference that Debtor had
9 acted with the requisite intent under § 727(a)(2)(A), including:
10 (1) the close relationship between Debtor and the transferee of
11 the Property; (2) the timing of the transfer, soon after entry of
12 the large jury verdict; (3) the fact that Debtor believed he could
13 not pay his creditors at the time of the transfer; and (4) the
14 fact that Debtor personally signed the quitclaim deed and
15 personally delivered it to be filed on the same day. The
16 bankruptcy court emphasized these factors and "all establish that
17 [Debtor] transferred [the Property] with intent to hinder, delay
18 or defraud." The bankruptcy court did not clearly err in making
19 these findings.

20 On this record, the bankruptcy court did not err in finding
21 that Debtor transferred his interest in the Property to his son
22 with the intent to hinder, defraud, or delay his creditors, and in
23 concluding that Debtor's discharge should be denied under
24 § 727(a)(2)(A).

25 **B. The bankruptcy court did not clearly err under § 727(a)(4)(A)**
26 **in finding Debtor knowingly and fraudulently made a false**
27 **oath or account in his SOFA, amended SOFA, and at the**
28 **§ 341(a) meeting.**

Section 727(a)(4)(A) provides: "(a) [t]he court shall grant

1 the debtor a discharge, unless- . . . (4) the debtor knowingly and
2 fraudulently, in or in connection with the case- (A) made a false
3 oath or account." The party objecting to a debtor's discharge
4 must prove under § 727(a)(4)(A), by a preponderance of the
5 evidence, "(1) that the debtor made a false oath in connection
6 with the case; (2) the oath related to a material fact; (3) the
7 oath was made knowingly; and (4) the oath was made fraudulently.'" "
8 In re Retz, 606 F.3d at 1197 (quoting Roberts v. Erhard
9 (In re Roberts), 331 B.R. 876, 882 (9th Cir. BAP 2005)). In order
10 to prove fraudulent intent under this Code provision, the
11 objecting party must show: (1) the debtor made a false statement
12 or omission in the bankruptcy case; (2) that he knew was false at
13 the time of making the statement; and (3) that he made the
14 statement with the "intention and purpose of deceiving the
15 creditors." Khalil v. Developers Sur. & Indem. Co.
16 (In re Khalil), 379 B.R. 163, 173 (9th Cir. BAP 2007) (quoting
17 In re Roberts), 331 B.R. at 884); see also In re Retz, 606 F.3d at
18 1199. "Intent is usually proven by circumstantial evidence or by
19 inferences drawn from the debtor's conduct." In re Retz, 606 F.3d
20 at 1199 (citing Devers v. Bank of Sheridan, Mont. (In re Devers),
21 759 F.2d 751, 753-54 (9th Cir. 1985)).

22 Here, the bankruptcy court did not err in deciding that
23 Debtor made a false oath in connection with his case, and that he
24 did so repeatedly.

25 Debtor filed his initial SOFA on March 29, 2012; it omitted
26 his transfer of the Property to his son. Debtor then testified at
27 his § 341(a) meeting on May 3, 2012, that his SOFA was true and
28 correct. After his case was audited by the UST, and he was

1 notified that he had not properly disclosed the transfer of his
2 BMW to his son, Debtor filed an amended SOFA that again omitted
3 the transfer of the Property. The bankruptcy court found that,
4 taken together, these facts were sufficient to show that Debtor
5 had made false oaths in connection with the case. We find no
6 error with this conclusion.

7 There is also no dispute that these false oaths related to a
8 material fact. The Property was purchased for \$17,000, and Debtor
9 testified he believed the value of the Property to be
10 approximately \$10,000 at the time of the transfer. Had the Debtor
11 disclosed the transfer, the trustee may have been able to avoid it
12 and liquidate Debtor's interest in the Property for the benefit of
13 his creditors. See § 547(b) (empowering a trustee to avoid
14 prepetition preferential transfers to creditors). Under these
15 facts, we agree with the bankruptcy court that the Property was a
16 significant asset of Debtor and that his omission of information
17 about the transfer would constitute a material fact under
18 § 727(a)(4)(A). See In re Khalil, 379 B.R. at 173 (discussing the
19 "broad test of materiality" that "[a] fact is material 'if it
20 bears a relationship to the debtor's business transactions or
21 estate, or concerns the discovery of assets, business dealings, or
22 the existence and disposition of the debtor's property.'")
23 (quoting Fogal Legware of Switz., Inc. v. Wills (In re Wills),
24 243 B.R. 58, 62 (9th Cir. BAP 1999)).

25 Debtor insists that the bankruptcy court erred in concluding
26 that he made knowing and fraudulent false oaths in connection with
27 his case because he allegedly did not know he owned the Property
28 when he transferred it. Again, however, we find no error in the

1 bankruptcy court's findings.

2 The bankruptcy court found, as it did under § 727(a)(2)(A),
3 that Debtor acted fraudulently. For the reasons discussed above,
4 we have concluded that this finding was not clear error.

5 We also find no error in the bankruptcy court's determination
6 that Debtor made the false oaths knowingly because it is supported
7 by sufficient evidence. See In re Khalil, 379 B.R. at 173 ("A
8 debtor 'acts knowingly if he . . . acts deliberately and
9 consciously.'") (quoting In re Wills, 243 B.R. at 62); see also
10 In re Retz, 606 F.3d at 1198 (holding that a debtor acts knowingly
11 if he or she deliberately and consciously signed the schedules and
12 SOFA knowing they were incomplete). Here, based upon the
13 evidence, the court properly found that Debtor deliberately and
14 consciously omitted the Property transfer in the SOFA, amended
15 SOFA, and in his testimony at the § 341(a) meeting.

16 Debtor argues that he should not be denied a discharge
17 because the omissions in his bankruptcy filings resulted from the
18 ineffective assistance of his bankruptcy counsel. We disagree.
19 It is generally correct that "'a debtor who acts in reliance on
20 the advice of his attorney lacks the intent to deny him a
21 discharge of his debts.'" In re Retz, 606 F.3d at 1199 (quoting
22 First Beverly Bank v. Adeeb (In re Adeeb), 787 F.2d 1339, 1343
23 (9th Cir. 1986)). But "[t]he advice of counsel is not a defense
24 when the erroneous information should have been evident to the
25 debtor." Id. (citing Boroff v. Tully (In re Tully), 818 F.2d 106,
26 111 (1st Cir. 1987)). Here, Debtor does not claim he informed his
27 counsel of the transfer of the Property, that it was counsel who
28 omitted this important information from the two versions of the

1 SOFA, or that counsel advised him not to mention the Property at
2 the § 341(a) meeting. Instead, Debtor focuses on other alleged
3 mistakes by his counsel to justify our reversal of the bankruptcy
4 court.⁹ Even if these matters raise some level of concern, they
5 do not excuse Debtor's repeated false assertions under oath that
6 he provided complete information; exactly the opposite was true.

7 The bankruptcy court did not err in denying Debtor a
8 discharge under § 727(a)(4)(A).

9 **VI. CONCLUSION**

10 We AFFIRM the judgment of the bankruptcy court denying Debtor
11 a discharge.

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⁹ The other alleged failures of counsel Debtor discusses in his brief include: (1) incorrectly claiming a homestead exemption on Debtor's wife's home; (2) completing and filing means test schedules even though Debtor's debts were primarily business debts; (3) losing the auditor's paperwork; (4) not listing the BMW as a prepetition transfer, even though Debtor told him about it; and (5) being an hour late to his first meeting with Debtor without excuse. Appellant Op. Brief at 9-11.