

JUN 01 2015

SUSAN M. SPRAUL, CLERK
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NOT FOR PUBLICATION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.	CC-14-1361-TaPaKi
6	JESUS BENCOMO,)	Bk. No.	13-11245-BR
7	Debtor.)	Adv. No.	13-01451-BR
8	_____)		
9	JESUS BENCOMO,)		
10	Appellant,)		
11	v.)	MEMORANDUM*	
12	WESLEY HOWARD AVERY,)		
13	Chapter 7 Trustee; UNITED STATES TRUSTEE,)		
14	Appellees.)		
	_____)		

Argued and Submitted on March 19, 2015
at Pasadena, California

Filed - June 1, 2015

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

Honorable Barry Russell, Bankruptcy Judge, Presiding

Appearances: Glenn Ward Calsada of the Law Offices of Glenn
Ward Calsada argued for appellant; Stella A.
Havkin of Havkin & Shrago argued for appellee.

Before: TAYLOR, PAPPAS, and KIRSCHER, 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 8024-1(c)(2).

1 Chapter 7¹ debtor Jesus Bencomo appeals from a judgment
2 denying his bankruptcy discharge pursuant to § 727(a)(4)(A). We
3 determine that the bankruptcy court did not err when it included
4 the Debtor's misconduct in a prior bankruptcy as a basis for its
5 decision. The bankruptcy court, however, did not make findings
6 that allow us to review how it resolved the Debtor's objections
7 to the admissibility of expert testimony from the bankruptcy
8 trustee's sole witness. As a result, we VACATE the judgment and
9 REMAND the case to the bankruptcy court.

10 **FACTS**

11 The Debtor filed a chapter 7 petition on January 16, 2013.
12 Wesley H. Avery was appointed as the chapter 7 trustee
13 ("Trustee"). The bankruptcy case was the Debtor's second. He
14 filed a chapter 7 petition in May of 1998 and received a
15 discharge three months later.

16 In the second case, the Debtor scheduled real property
17 located in Norwalk, California (the "Property") at a value of
18 \$175,000.² He also scheduled a \$145,879 claim secured by the
19 Property and claimed a \$29,121 exemption in the Property under
20

21 ¹ Unless otherwise indicated, all chapter and section
22 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532.
23 All "Rule" references are to the Federal Rules of Bankruptcy
24 Procedure, all "Civil Rule" references are to the Federal Rules
25 of Civil Procedure, and all "Evidence Rule" references are to
the Federal Rules of Evidence.

26 ² We exercise our discretion to take judicial notice of
27 documents electronically filed in the adversary proceeding and
28 the underlying bankruptcy case. See Atwood v. Chase Manhattan
Mortg. Co. (In re Atwood), 293 B.R. 227, 233 n.9 (9th Cir. BAP
2003).

1 state law.

2 Following the § 341(a) meeting of creditors, the Trustee
3 filed an application to employ Re/Max of Santa Clarita and
4 Miguel Soler as the broker for the estate preparatory to
5 marketing and selling the Property. The employment application
6 asserted that the actual current value of the Property was
7 between \$305,000 and \$333,000. Thus, even if the Debtor claimed
8 the maximum statutory exemption against the Property, the
9 Trustee estimated a net realization for the estate of between
10 \$60,000 and \$86,000.

11 Two weeks later, the Debtor amended his schedules; he
12 increased the scheduled value of the Property from \$175,000 to
13 \$245,000 and the amount of the claim secured by the Property
14 from \$145,879 to \$214,929.27. He also increased his claimed
15 exemption from \$29,121 to \$100,000.

16 The Debtor also opposed the Trustee's application to employ
17 a broker. Following various continued hearings, the bankruptcy
18 court entered an order granting the employment application.

19 Meanwhile, the Trustee commenced an adversary proceeding
20 against the Debtor, objecting to his bankruptcy discharge under
21 § 727(a)(2)(A) and (a)(4)(A). As relevant to this appeal, the
22 adversary complaint alleged that the Debtor was a longtime real
23 estate professional and, as a result, knew that at the time of
24 the filing of the petition the value of the Property was in the
25 \$300,000 range, rather than \$175,000 as initially scheduled.
26 The adversary complaint also alleged that the Debtor knowingly
27 and fraudulently "severely undervalued" the Property in his
28 schedules.

1 The bankruptcy court entered the parties' joint pretrial
2 conference order; it disclosed Soler and the Debtor as the
3 Trustee's intended witnesses at trial. Pursuant to another
4 bankruptcy court order, Soler provided his direct testimony by
5 declaration.

6 In his declaration, Soler attested that he was a licensed
7 real estate agent and specialized in residential real estate
8 sales. Soler opined that the value of the Property was at least
9 \$305,000 at the time of the petition, based initially on a
10 review of multiple listings in the area; he confirmed his
11 opinion almost a year later by a physical inspection.

12 The Debtor objected to Soler's declaration and moved to
13 strike his testimony. He disputed Soler's qualifications and
14 the methodology Soler employed in rendering his opinion that the
15 Property was valued at \$305,000. The Debtor particularly
16 challenged Soler's failure to provide a written report or to
17 identify the sources of data used to render the \$305,000 value.
18 As a result, the Debtor complained that he was hindered from
19 evaluating the accuracy and completeness of Soler's analysis.

20 The bankruptcy court held a one-day trial on June 17, 2014.
21 Both the Debtor and Soler provided additional testimony.

22 The Debtor, over his counsel's objections, responded to the
23 Trustee's specific inquiries regarding several prior transfers
24 of the Property. He testified that within a two-week period in
25 December 1996, there were three transfers of the Property: from
26 the previous owner to him, then from him to a third party, and
27 finally from the third party back to him. The last deed
28 transferring the Property back to the Debtor remained in his

1 possession for approximately six years, without recordation,
2 until he finally recorded the deed in 2002. He acknowledged
3 that he did not disclose the Property in his 1998 chapter 7
4 case.

5 At the conclusion of trial, the bankruptcy court recognized
6 that it was a close case; nonetheless, it sustained the
7 Trustee's objection to discharge under § 727(a)(4)(A) based on
8 the Debtor's undervaluation of the Property in his schedules.

9 The bankruptcy court found that the value of the Property
10 was "significantly higher" than \$175,000. It also found that
11 the Debtor knew that he undervalued the Property. Conversely,
12 the bankruptcy court found credible the testimony of Soler, as
13 the Trustee's "qualified expert"; Soler both attacked the
14 Debtor's value and valuation methodology and gave his own
15 opinion of value. The bankruptcy court also found that the
16 Debtor's actions in his first bankruptcy case constituted an
17 inappropriate manipulation of the bankruptcy system and
18 supported its credibility determinations.

19 The bankruptcy court entered findings of fact and
20 conclusions of law and a judgment denying discharge. The Debtor
21 timely appealed.

22 **JURISDICTION**

23 The bankruptcy court had jurisdiction pursuant to 28 U.S.C.
24 §§ 1334 and 157(b)(2)(J). We have jurisdiction under 28 U.S.C.
25 § 158.

26 ///

27 ///

28 ///

1 **ISSUES³**

- 2 1. Whether Soler was required to file a written expert report
3 pursuant to Civil Rule 26(a)(2)(B) and whether, in the
4 absence of such a report, the bankruptcy court erred in
5 permitting Soler's testimony.
6 2. Whether the bankruptcy court erred by "widening the scope"
7 of trial so as to include a false oath made in the Debtor's
8 first bankruptcy case.

9 **STANDARDS OF REVIEW**

10 In a proceeding for denial of discharge, we review: (1) the
11 bankruptcy court's determinations of the historical facts for
12 clear error; (2) its selection of the applicable legal rules
13 under § 727 de novo; and (3) its application of the facts to
14 those rules requiring the exercise of judgments about values
15 animating the rules de novo. Searles v. Riley (In re Searles),
16 317 B.R. 368, 373 (9th Cir. BAP 2004), aff'd, 212 F. App'x. 589
17 (9th Cir. 2006).

18 To reverse an evidentiary ruling, we must find that the
19 bankruptcy court abused its discretion and that the error was
20 prejudicial to the appellant. Van Zandt v. Mbunda
21 (In re Mbunda), 484 B.R. 344, 351 (9th Cir. BAP 2012). A
22 bankruptcy court abuses its discretion if it applies the wrong
23

24 ³ The Debtor delineates 20 issues on appeal, some of which
25 are substantively identical, but posed in the converse. In his
26 opening brief, however, the Debtor only specifically addresses
the issues we identify above.

27 Given our ultimate determination, we do not address whether
28 the bankruptcy court erred in determining that sufficient
evidence existed supporting the \$305,000 value.

1 legal standard, misapplies the correct legal standard, or if its
2 factual findings are illogical, implausible, or without support
3 in inferences that may be drawn from the facts in the record.
4 See TrafficSchool.com, Inc. v. Edriver Inc., 653 F.3d 820, 832
5 (9th Cir. 2011) (citing United States v. Hinkson, 585 F.3d 1247,
6 1262 (9th Cir. 2009) (en banc)).

7 **DISCUSSION**

8 Section 727(a)(4)(A) provides that the debtor's discharge
9 may be denied where: (1) the debtor made a false oath in
10 connection with the bankruptcy case; (2) the oath related to a
11 material fact; (3) the oath was made knowingly; and (4) the oath
12 was made fraudulently. Retz v. Sampson (In re Retz), 606 F.3d
13 1189, 1197 (9th Cir. 2010) (citation and internal quotation
14 marks omitted).

15 Objections to discharge are liberally construed in favor
16 of the debtor and against the objector. Khalil v. Developers
17 Sur. & Indem. Co. (In re Khalil), 379 B.R. 163, 172 (9th Cir.
18 BAP 2007), aff'd, 578 F.3d 1167 (9th Cir. 2009). For that
19 reason, the objector bears the burden to prove by a
20 preponderance of the evidence that the debtor's discharge should
21 be denied. Id.

22 On appeal, the Debtor argues that the bankruptcy court
23 erred by permitting Soler to testify at trial when he did not
24 file a written expert report and by expanding the scope of trial
25 so as to include an alleged false oath that the Debtor made in
26 his first bankruptcy case. He does not raise issues related to
27 any of the elements expressly required for a denial of discharge
28 under § 727(a)(4)(A), and, in particular, he does not even

1 implicitly discuss the second or third elements of a
2 § 727(a)(4)(A) claim. Therefore, we do not address those
3 elements here.

4 **A. On this record, we cannot tell how the bankruptcy court**
5 **ruled on the issue of Soler's testimony.**

6 The Debtor argues that Civil Rule 37(c)(1) compelled the
7 exclusion of Soler's testimony based on his failure to produce a
8 written report in accordance with Civil Rule 26(a)(2)(B). This
9 failure, the Debtor contends, was not harmless as the Trustee's
10 case was based entirely on Soler's testimony. The Debtor
11 alleges that without the report, he was unable to adequately
12 prepare for cross-examination.

13 The Trustee disagrees that any report was required; he
14 argues that Soler was retained to market and sell the Property,
15 not to testify. He further asserts that Soler's duties in
16 connection with his authorized employment did not regularly
17 involve giving expert testimony. Rather, the Trustee argues,
18 Soler's testimony was that of a percipient witness.

19 Civil Rule 26(a)(2)(B) requires "a written report -
20 prepared and signed by the witness - if the witness is one
21 retained or specially employed to provide expert testimony in
22 the case or one whose duties as the party's employee regularly
23 involve giving expert testimony." If a party fails to provide a
24 written report, Civil Rule 37(c)(1) dictates that both testimony
25 and information supplied by the expert witness are prohibited at
26 trial. An exception exists if the failure was substantially
27 justified or harmless. See id.

28 Here, the bankruptcy court did not expressly rule on the

1 Debtor's objections to Soler's testimony. It permitted Soler to
2 testify on cross-examination, subject to a later determination.
3 It subsequently deemed Soler's testimony credible and referred
4 to Soler as a "qualified expert." It thus appears that it
5 overruled the Debtor's evidentiary objections.

6 On this record, however, we cannot determine with any
7 certainty how the bankruptcy court ruled. And that the
8 bankruptcy court did not expressly address or resolve the
9 Debtor's objection to Soler's testimony is a serious concern
10 because we are unable to appropriately review the merits of the
11 Debtor's argument absent adequate findings by the bankruptcy
12 court on this subject.

13 The bankruptcy court apparently treated Soler as an expert
14 witness. Its lone finding in this regard is not particularly
15 helpful: "Trustee's qualified expert, Miguel Soler, testified
16 that the true value of [the Debtor's] Property at the time that
17 he filed the Second Bankruptcy was at least \$305,000.00 and not
18 \$175,000.00 as claimed by [the Debtor] in his original
19 bankruptcy schedules." Findings of Fact and Conclusions of Law
20 Following the Trial (Adv. ECF No. 52) at 3 ¶ 13. In that
21 circumstance, Soler's failure to provide a written report is
22 problematic under Civil Rule 26(a)(2)(B), unless, of course, the
23 bankruptcy court determined that the error was substantially
24 justified or harmless pursuant to Civil Rule 37(c)(1). On this
25 record, we cannot discern what the bankruptcy court determined.
26 In particular, we do not know what value the bankruptcy court
27 utilized when it determined that the Debtor "severely
28 undervalued" the Property. Soler gave his opinion that the

1 value was at least \$305,000, while the Debtor conceded some
2 undervaluation when he revalued the Property at \$245,000.

3 Civil Rule 52(a) requires that the bankruptcy court find
4 the facts specifically and state its conclusions of law
5 separately.⁴ Without complete findings, we may vacate a
6 judgment and remand the case to the bankruptcy court to make the
7 requisite findings. First Yorkshire Holdings, Inc. v. Pacifica
8 L 22, LLC (In re First Yorkshire Holdings, Inc.), 470 B.R. 864,
9 870 (9th Cir. BAP 2012).

10 We conclude that the bankruptcy court abused its discretion
11 by failing to make sufficient findings regarding Soler's opinion
12 testimony. Consequently, we VACATE the judgment and REMAND the
13 matter to the bankruptcy court with instructions that it enter
14 appropriate findings concerning the Debtor's objection to
15 Soler's testimony, and that it consider the impact of those
16 findings upon its conclusions and judgment.

17 **B. The Debtor's prior acts in regards to the Property were**
18 **admissible impeachment evidence.**

19 The Debtor also argues that the bankruptcy court erred by
20 admitting into evidence his prior acts involving the Property.
21 He questions whether this evidence constituted appropriate
22 impeachment and argues that it was irrelevant and prejudicial as
23 the events in the prior bankruptcy were too remote in time. He
24 finally argues that there was no evidence that he made a false
25 oath in the first bankruptcy case and that, in any event, it was
26

27 ⁴ Civil Rule 52 is incorporated in adversary proceedings
28 by Rule 7052.

1 a collateral matter where he was not provided with reasonable
2 notice and a fair opportunity for rebuttal.

3 In response, the Trustee contends that he utilized evidence
4 of actions in the Debtor's first bankruptcy case only to show
5 that the Debtor had "gone to every conceivable length to protect
6 his interest in the [] Property" - not to revoke his discharge
7 in the first case.

8 The joint pretrial conference order in this case resolves
9 this debate. The parties stipulated to the terms of this order,
10 which identified the exhibits each intended to offer at trial.
11 It also qualified the identification of documents with the
12 statement that it was complete except for "exhibits to be used
13 for **impeachment only.**" Joint Pretrial Conference Order (Adv.
14 ECF No. 26) (emphasis added). There was no due process problem
15 with introducing the evidence for purposes of impeaching the
16 Debtor's generalized assertion of truthfulness.

17 Pursuant to Evidence Rule 608(b), the bankruptcy court may
18 permit a witness to be cross-examined about specific instances
19 of conduct in order to attack the witness's character for
20 truthfulness. Determining whether the testimony is probative of
21 truthfulness or untruthfulness is committed to the discretion of
22 the bankruptcy court. In exercising its discretion, the
23 bankruptcy court may take into consideration how remote in time
24 the impeaching conduct occurred. See United States v. Jackson,
25 882 F.2d 1444, 1448 (9th Cir. 1989) ("[R]emoteness remains a
26 relevant factor for the trial court to consider in assessing the
27 probative value of the evidence" for impeachment under Evidence
28 Rule 608(b)).

1 Here, the bankruptcy court permitted the Trustee to cross-
2 examine the Debtor regarding the transfers of the Property and
3 his failure to schedule the Property in his first bankruptcy
4 case in order to raise questions as to the Debtor's character
5 for truthfulness. In doing so, it implicitly determined that
6 this evidence constituted appropriate impeachment and was more
7 probative of the Debtor's truthfulness than prejudicial. It
8 also implicitly concluded that the evidence was not too remote
9 in time.

10 We agree. Evidence of the Debtor's prior acts in relation
11 to the Property - namely, omitting the Property from his
12 schedules in the first bankruptcy case despite his possession of
13 a deed transferring the Property to him - was probative of his
14 truthfulness. That the acts occurred years before the second
15 bankruptcy case and the adversary proceeding did not mandate
16 exclusion. See Jackson, 882 F.2d at 1448 (prosecution was
17 permitted to question a witness attorney about his disbarment
18 fourteen years earlier for misappropriation of client funds).

19 The bankruptcy court did not improperly expand the scope of
20 the trial. Nor did it abuse its discretion in permitting the
21 impeachment evidence.

22 **CONCLUSION**

23 Based on the foregoing, we VACATE the judgment and REMAND
24 to the bankruptcy court for entry of appropriate findings
25 concerning the Debtor's objection to Soler's testimony.
26
27
28