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NOT FOR PUBLICATION

SUSAN M. SPRAUL, CLERK
U.S. BKCY. APP. PANEL
OF THE NINTH CIRCUIT

UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT

5	In re:)	BAP No.	CC-15-1063-TaFC
6	INETA KOHLER,)	Bk. No.	12-17323-VK
7	Debtor.)	Adv. No.	12-01405-VK
8	_____)		
9	INETA KOHLER,)		
10	Appellant,)		
11	v.)	MEMORANDUM*	
12	LYDIA ETMAN,)		
13	Appellee.**)		
	_____)		

Argued and Submitted on January 21, 2016
at Pasadena, California

Filed - February 25, 2016

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

Honorable Victoria S. Kaufman, Bankruptcy Judge, Presiding

Appearances: Andrew S. Mansfield of Higson Cheney Mansfield,
PC argued for appellant Ineta Kohler.

* 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).

** Appellee did not file a brief; pursuant to the BAP Clerk of Court's conditional order of waiver, she waived her right to appear in this appeal.

1 Before: TAYLOR, FARIS, and CORBIT,*** Bankruptcy Judges.

2
3 **INTRODUCTION**

4 Chapter 7¹ debtor Ineta Kohler appeals from a judgment
5 excepting a debt from discharge under § 523(a)(2)(A) and denying
6 discharge under § 727(a)(4)(A). We AFFIRM the bankruptcy court.

7 **FACTS**

8 **The Etman Loan**

9 The Debtor and Etman were close friends for many years; so
10 much so that when the Debtor fell on hard times in late 2007,
11 Etman loaned the Debtor \$25,000. At the time, the Debtor told
12 Etman that she was selling or intended to sell her real property
13 residence, located in Simi Valley, California (the "Simi Valley
14 Property") and that she would repay Etman from the sale
15 proceeds. The Debtor assured Etman that the Simi Valley
16 Property provided "plenty of equity" for repayment. Unbeknownst
17 to Etman, however, the Debtor had recently refinanced the Simi
18 Valley Property and increased the debt owed by \$81,000.

19 The terms of the Etman loan were evidenced by a handwritten
20 promissory note, which provided that it matured three months
21 later, in March 2008, and was secured by the Simi Valley
22 Property. A deed of trust, however, was neither executed nor
23 recorded. Instead, the promissory note was notarized; according

24
25 *** The Honorable Frederick P. Corbit, Chief United States
26 Bankruptcy Judge for the Eastern District of Washington, sitting
by designation.

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

1 to Etman, the Debtor told her that notarizing the promissory
2 note was all that was required.

3 The Debtor sold the Simi Valley Property in May 2008 and
4 after payment of the debts secured by the property, a sales
5 commission, fees, and similar charges, the Debtor realized
6 \$6,341.99 from the sale. The Debtor did not pay Etman anything
7 from the proceeds. Instead, she apparently used the proceeds to
8 defray the costs of renting a house, moving, and storage.

9 According to Etman, she learned after the fact from the
10 Debtor's ex-husband that the sale of the Simi Valley Property
11 had closed, that the Debtor had received the sale proceeds, and
12 that the proceeds were insufficient to repay her loan. When
13 asked by Etman, the Debtor acknowledged the deficiency but
14 explained that she had forgotten that one of the debts was
15 subject to a prepayment penalty.

16 Over the next two years, the Debtor made 12 payments on the
17 loan at irregular intervals. Ultimately, she repaid \$8,350 of
18 the \$25,000 loan; a balance of \$16,650 remained at the time of
19 the petition.

20 Still, the women remained friends, and Etman learned from
21 the Debtor that she was working for a local doctor - Dr. Nguyen
22 - and being paid in cash for services rendered. Apparently,
23 Dr. Nguyen had also assisted the Debtor in obtaining benefits
24 from social security disability insurance. At that point, Etman
25 believed that the Debtor would never repay her, and, pro se, she
26 commenced litigation against the Debtor in state court.

27 Nearly five years after the Etman loan was made, the Debtor
28 filed a chapter 7 petition.

1 **The Adversary Proceeding**

2 The adversary complaint asserted claims for relief under
3 §§ 523(a)(2)(A) and 727(a)(4)(A). In particular, Etman sought
4 to except her loan from discharge and for denial of the Debtor's
5 discharge, based on allegations that the Debtor failed to
6 disclose or schedule numerous items on her bankruptcy schedules
7 and statement of financial affairs. The adversary complaint
8 alleged that the Debtor omitted: the income from Dr. Nguyen; a
9 pre-petition sale of a boat and trailer; valuable personal
10 property, including five gold pictures and two autographed
11 guitars; and fractional interests in two parcels of real
12 property in Arizona and New Mexico (the "Properties").²

13 As the case proceeded to trial, the bankruptcy court issued
14 an amended pretrial order, which provided for direct witness
15 testimony through the submission of declarations and limited
16 testimony at trial for rebuttal. Both parties submitted
17 declarations, both for themselves and for their witnesses.
18 Etman, in particular, submitted the declarations of five
19 witnesses who were either friends or acquaintances of the
20 Debtor; one witness also was a former employee of Dr. Nguyen.
21 Etman also filed a supplemental declaration; it appears that the
22 supplemental declaration was, in fact, a reply declaration as
23

24 ² The adversary complaint also alleged that the Debtor
25 omitted other valuable personal property assets and an interest
26 in a criminal restitution judgment in favor of the Debtor's
27 father and great-aunt, who died prior to the bankruptcy filing.
28 The bankruptcy court ultimately determined that Etman did not
meet her burden with respect to those items and no cross-appeal
was taken.

1 permitted by the pretrial order.

2 The Debtor filed evidentiary objections to all of the
3 declarations submitted by Etman. In a tentative ruling and with
4 one exception, the bankruptcy court addressed the Debtor's
5 objections to each individual declaration (including Etman's
6 supplemental declaration), stating its intent to sustain certain
7 objections and overrule others. It, however, did not, address
8 the Debtor's objections to Etman's initial declaration.

9 Following a trial, the bankruptcy court issued a detailed
10 memorandum decision in which it determined that Etman had met
11 her burden of proof under §§ 523(a)(2)(A) and 727(a)(4)(A). In
12 the subsequent judgment, the bankruptcy court liquidated the
13 § 523(a)(2)(A) judgment in Etman's favor in the amount of
14 \$16,650, taking into account the Debtor's payments on the Etman
15 loan.

16 The Debtor timely appealed.

17 JURISDICTION

18 The bankruptcy court had jurisdiction pursuant to 28 U.S.C.
19 §§ 1334 and 157(b)(2)(I) and (J). We have jurisdiction under
20 28 U.S.C. § 158.

21 ISSUES

- 22 1. Whether the bankruptcy court ruled on the Debtor's
23 evidentiary objections.
- 24 2. Whether the bankruptcy court's conduct of the trial
25 resulted in prejudice to the Debtor.
- 26 3. Whether the bankruptcy court erred in determining that the
27 loan was excepted from discharge under § 523(a)(2)(A).
- 28 4. Whether the bankruptcy court erred in denying discharge

1 pursuant to § 727(a) (4) (A).

2 **STANDARDS OF REVIEW**

3 In reviewing a bankruptcy court's determination of an
4 exception to discharge, we review its findings of fact for clear
5 error and its conclusions of law de novo. Oney v. Weinberg
6 (In re Weinberg), 410 B.R. 19, 28 (9th Cir. BAP 2009). A
7 debtor's intent is a factual finding reviewed for clear error.
8 Candland v. Ins. Co. of N. Am. (In re Candland), 90 F.3d 1466,
9 1469 (9th Cir. 1996). A factual finding is clearly erroneous if
10 it is illogical, implausible, or without support in inferences
11 that may be drawn from the facts in the record. Retz v. Samson
12 (In re Retz), 606 F.3d 1189, 1196 (9th Cir. 2010).

13 We review the denial of discharge as follows:

14 (1) determinations of the historical facts are reviewed for
15 clear error; (2) selection of the applicable legal rules under
16 § 727 are reviewed de novo; and (3) application of the facts to
17 those rules requiring the exercise of judgments about values
18 animating the rules are reviewed de novo. Id. We give great
19 deference to the bankruptcy court's findings when they are based
20 on its determinations as to the credibility of witnesses. Id.

21 Whether the bankruptcy court permitted evidence to be
22 presented at trial that violated or exceeded the scope of the
23 pretrial order is reviewed for an abuse of discretion. Cf.
24 Rafter Seven Ranches L.P. v. WNL Invs., LLC (In re Rafter Seven
25 Ranches L.P.), 414 B.R. 722, 732 (10th Cir. BAP 2009). A
26 bankruptcy court abuses its discretion if it applies the wrong
27 legal standard, misapplies the correct legal standard, or if its
28 factual findings are clearly erroneous. See TrafficSchool.com,

1 Inc. v. Edriver Inc., 653 F.3d 820, 832 (9th Cir. 2011).

2 **DISCUSSION**

3 We first address the Debtor's assertions of error on issues
4 of evidence, the pretrial order, and the bankruptcy court's
5 conduct of the trial.

6 **A. With one exception, there was no error in the bankruptcy**
7 **court's evidentiary rulings or its conduct of the trial;**
8 **and, on this record, the only error was harmless.**

9 The Debtor contends that her objections to the declarations
10 submitted by Etman were never addressed or properly ruled on by
11 the bankruptcy court. To the extent they were, however, she
12 argues summarily that we must review the rulings for foundation,
13 materiality, and probative value, as contained in her objections
14 before the bankruptcy court.

15 With one exception, the record shows that the bankruptcy
16 court ruled on the evidentiary objections. Prior to the first
17 day of trial, it issued a tentative ruling addressing the
18 objections on a declaration-by-declaration basis. It then
19 adopted and read its tentative ruling into the record at trial.

20 The sole exception relates to Etman's initial declaration.
21 Neither the tentative ruling nor the trial transcripts contain a
22 ruling on the Debtor's objections to that declaration. And the
23 ruling on the objections to Etman's supplemental declaration did
24 not resolve this problem; the supplemental declaration did not
25 incorporate or replace the initial declaration. Nonetheless,
26 this oversight does not constitute reversible error. That is
27 because, "[w]here the court fails to specifically rule on the
28 admission of evidence, and where both parties had opportunity to

1 urge their objections, in the absence of any indication to the
2 contrary, we can presume that admissible evidence was admitted
3 and that inadmissible evidence was rejected." Wagner Tractor,
4 Inc. v. Shields, 381 F.2d 441, 446 (9th Cir. 1967).

5 On this record, the bankruptcy court's failure to rule on
6 the Debtor's objections to the initial Etman declaration was
7 harmless error for two reasons. First, both the Debtor and
8 Etman testified at trial, and the bankruptcy court had the
9 opportunity to independently evaluate their testimony and
10 credibility. Second, the Debtor's objections to Etman's initial
11 declaration mostly related to evidence immaterial to the
12 bankruptcy court's final decision.

13 We further decline to review the rulings the bankruptcy
14 court did make. First, the Debtor does not specifically and
15 distinctly address the bankruptcy court's rulings on these
16 points. Second, the record shows that she did not raise each of
17 these particular objections before the bankruptcy court. And,
18 third, the bankruptcy court sustained some of the Debtor's
19 objections. As the appellant, it is the Debtor's responsibility
20 to advance these arguments with particularity and within the
21 framework of the Federal Rules of Evidence; she has not met her
22 burden here, and we decline to shoulder it for her.

23 In our interpretation, the Debtor also challenges the
24 bankruptcy court's conduct of the trial as unfairly prejudicial.
25 She complains that the trial transcripts are replete with
26 attacks on her character and asserts that "[a] short review of
27 the trial transcript demonstrates how many times this attack
28 recurred during the trial, infected the proceedings, and most

1 often came in the form of testimony from Ms. Standard,
2 Appellee's attorney." Standard, however, was not sworn in to
3 testify as a witness at trial; thus, by definition she did not
4 testify. That counsel sought to impeach the Debtor's
5 credibility as a witness did not render any of counsel's
6 arguments to the bankruptcy court inadmissible character
7 evidence.

8 The remainder of the Debtor's arguments with respect to the
9 trial are similarly unavailing. She complains that "[f]rom a
10 review of the trial transcript, it is apparent that most of the
11 provisions of the [pretrial order] were not followed." In
12 support of her argument, the Debtor broadly alleges that
13 exhibits were introduced at trial that were not attached to
14 declarations, as the pretrial order required. She, however,
15 does not particularly identify the exhibits she references. And
16 to the extent she refers obliquely to impeachment evidence,
17 there is no indication in the record that any such evidence was
18 admitted into the record.

19 The Debtor next asserts that, contrary to the pretrial
20 order's limitation of additional evidence at trial to true
21 rebuttal evidence, "[t]he parties, as can be seen through the
22 transcript, provided lengthy direct testimony under lax control
23 allowing no time for [the Debtor] to object." Again, she does
24 not specifically identify which testimony she refers to, where
25 she did not have an opportunity to object, and how the lack of
26 such an opportunity resulted in prejudice.

27 The Debtor further complains that cross-examination and
28 re-direct often exceeded the scope of direct testimony as

1 provided in the declarations. Once again, however, her argument
2 is vague, and she does not point to any specific instance in the
3 record.

4 And, finally, the Debtor argues that the order of the
5 witnesses' testimony was prejudicial and improper; namely, that
6 she was cross-examined first "when all that had happened (under
7 the declarations) was that [Etman] had presented her case in
8 chief." We do not quite understand this argument. But, to the
9 extent she contends that prejudice resulted because the
10 witnesses testified "out of order," it is without merit. The
11 record shows that, on the first day of trial, the Debtor
12 expressly asked the bankruptcy court to allow that Dr. Nguyen be
13 permitted to testify first, based on his schedule and limited
14 availability. And nothing in the record suggests that the order
15 of witnesses had any impact on the bankruptcy court's decision.

16 **B. The bankruptcy court did not err in denying the Debtor's**
17 **discharge under § 727(a) (4) (A) .**

18 Section 727(a) (4) (A) provides for discharge denial where
19 "the debtor knowingly and fraudulently, in or in connection with
20 the case[,] made a false oath or account." A false oath
21 includes "[a] false statement or an omission in the debtor's
22 bankruptcy schedules or statement of financial affairs"
23 Khalil v. Developers Sur. & Indem. Co. (In re Khalil), 379 B.R.
24 163, 172 (9th Cir. BAP 2007). "The fundamental purpose of
25 § 727(a) (4) (A) is to insure that the trustee and creditors have
26 accurate information without having to conduct costly
27 investigations." Id. (internal quotation marks and citation
28 omitted).

1 The objector to discharge must show, by a preponderance of
2 the evidence, that: "(1) the debtor made a false oath in
3 connection with the case; (2) the oath related to a material
4 fact; (3) the oath was made knowingly; and (4) the oath was made
5 fraudulently." In re Retz, 606 F.3d at 1196-97 (quoting Roberts
6 v. Erhard (In re Roberts), 331 B.R. 876, 882 (9th Cir. BAP
7 2005)). Objections to discharge are liberally construed in
8 favor of the debtor and against the objector. In re Khalil,
9 379 B.R. at 172. For that reason, the objector bears the burden
10 to prove by a preponderance of the evidence that the debtor's
11 discharge should be denied. Id.

12 Here, the Debtor focuses solely on the materiality element.
13 She contends that "[e]very single one of the alleged omissions
14 or false statements raised by [Etman] [were] immaterial or
15 relate to exempt property that [was] not property of the
16 estate." We disagree.

17 "A fact is material if it bears a relationship to the
18 debtor's business transactions or estate, or concerns the
19 discovery of assets, business dealings, or the existence and
20 disposition of the debtor's property." Id. at 173 (internal
21 quotation marks and citation omitted). Materiality requires an
22 impact in the bankruptcy case and may exist "even if it does not
23 cause direct financial prejudice to creditors." Id. at 177
24 (internal quotation marks and citation omitted).

25 The bankruptcy court determined that a significant
26 omission from the schedules was the Debtor's income from
27 Dr. Nguyen. Based on the testimony of Etman and her five
28 witnesses, the bankruptcy court found that, prepetition, the

1 Debtor worked for Dr. Nguyen and that she received money in
2 exchange for her work. It found the testimony of these
3 individuals more credible than that of the Debtor and Dr.
4 Nguyen, as the plaintiff's witnesses had no motivation to
5 provide false testimony. In contrast, the Debtor was receiving
6 benefits from social security disability insurance and did not
7 want to jeopardize her receipt of this money.

8 Contrary to the Debtor's assertion, this omission was
9 material. As the bankruptcy court pointed out, the omission
10 potentially impacted the Debtor's ability to file a chapter 7
11 case, given that she also received social security disability
12 benefits at the time of petition. And it frustrated the
13 chapter 7 trustee's access to a complete and honest snapshot of
14 the Debtor's financial landscape.

15 The bankruptcy court also found that the Debtor omitted or
16 misrepresented the following items on her schedules and SOFA:
17 five gold pictures, two autographed guitars, the Properties, and
18 the pre-petition sale of the boat and trailer. The Debtor
19 contends that these alleged omissions or misrepresentations were
20 immaterial based on the small value of the asset or the fact
21 that it was completely exempt in bankruptcy. That was perhaps
22 true in isolation in regards to a specific asset; here, however,
23 the bankruptcy court considered the omission of several assets
24 and a material pre-petition transaction that the Debtor was
25 required to disclose. We cannot conclude that the bankruptcy
26 court clearly erred in determining that the cumulative omissions
27 and misrepresentations were material.

28 The Debtor also attempts to defend herself on the basis

1 that later, she made payments to Etman on the loan. But the
2 discharge denial was based on the Debtor's false oaths on her
3 schedules and SOFA - not on the Etman loan. She also, again,
4 alleges improper trial procedures and that this somehow
5 undermined the bankruptcy court's rulings. For the reasons
6 already discussed, we disagree.

7 The Debtor does not challenge the other requirements of
8 § 727(a)(4)(A).³ On that basis, and given the bankruptcy
9 court's extensive findings and conclusions in its memorandum
10 decision, we conclude that it did not err in denying the
11 Debtor's discharge under § 727(a)(4)(A).

12 **C. The bankruptcy court did not err in excepting the Etman**
13 **loan from discharge under § 523(a)(2)(A).**

14 Section 523(a)(2)(A) excepts from discharge a debt
15 resulting from "false pretenses, a false representation, or
16 actual fraud, other than a statement respecting the debtor's or
17 an insider's financial condition." A creditor seeking to except
18 a debt from discharge based on fraud bears the burden of proof
19 of showing, by a preponderance of the evidence, satisfaction of
20 the following elements: (1) misrepresentation, fraudulent
21 omission or deceptive conduct; (2) knowledge of the falsity or
22 deceptiveness of such representation(s) or omission(s); (3) an
23 intent to deceive; (4) justifiable reliance by the creditor on
24 the subject representation(s) or conduct; and (5) damage to the

25
26 ³ The Debtor broadly argues that a false oath requires
27 fraudulent intent, which must be proven with particularity and
28 not simply alleged. She does not, however, argue that the
bankruptcy court's findings of fraudulent intent were clearly
erroneous.

1 creditor proximately caused by its reliance on such
2 representation(s) or conduct. Ghomeshi v. Sabban
3 (In re Sabban), 600 F.3d 1219, 1222 (9th Cir. 2010); Oney v.
4 Weinberg (In re Weinberg), 410 B.R. 19, 35 (9th Cir. BAP 2009).

5 On appeal, the Debtor's argument focuses solely on intent;
6 she argues, in effect, that she did not possess the intent to
7 deceive at the time that the loan was made because she believed
8 that the Simi Valley Property would sell for more than it
9 actually did. She also points to her subsequent payments as
10 proof that she always intended to repay the loan.

11 Whether a debtor possessed an intent to deceive within the
12 meaning of § 523(a)(2)(A) is a question of fact that "can be
13 inferred from surrounding circumstances." Cowen v. Kennedy
14 (In re Kennedy), 108 F.3d 1015, 1018 (9th Cir. 1997). The
15 bankruptcy court found that in order to induce Etman to make the
16 loan, the Debtor misrepresented her intent and ability to repay
17 the loan. And, insofar as the parties' version of events
18 resulting in the loan conflicted, it found that the Debtor was
19 not a credible witness, based on other instances of
20 misrepresentation.⁴

21 Based on the record, the bankruptcy court's intent finding
22 was not clearly erroneous. This is particularly true here,

23
24 ⁴ These misrepresentations included: the Debtor's
25 testimony that she was only a "volunteer" in Dr. Nguyen's office
26 when other evidence established that she worked there and
27 received income; false statements made by the Debtor in the 2007
28 refinancing application on the Simi Valley Property; incorrect
information regarding the sale of the boat and trailer in
documents submitted to the DMV; and a misrepresentation as to
the condition of the boat in the Debtor's SOFA.

1 where its findings were based in part on its evaluation of
2 witness credibility, to which we afford significant deference.

3 Several facts in the record are beyond dispute, namely
4 that: in November 2007, the Debtor told Etman that she would
5 repay the loan from the sale proceeds of the Simi Valley
6 Property; the Debtor promised to repay the loan by March 2008,
7 as evidenced by the promissory note; the Debtor did not repay
8 the loan under the terms of the note; when the Simi Valley
9 Property sale finally closed and she received the sale proceeds,
10 the Debtor did not tell Etman; and the Debtor did not pay Etman
11 anything from the net sale proceeds. The bankruptcy court
12 appropriately inferred from the Debtor's misrepresentation
13 regarding the loan repayment that she harbored the requisite
14 intent to deceive.

15 The Debtor does not particularly challenge the bankruptcy
16 court's findings or conclusions regarding the other elements of
17 § 523(a)(2)(A). Given that fact, and the quality of the
18 bankruptcy court's findings and conclusions on those elements in
19 its memorandum decision, we conclude that it did not err in
20 determining that the loan was excepted from discharge under
21 § 523(a)(2)(A).

22 **CONCLUSION**

23 Based on the foregoing, we AFFIRM.
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