

APR 05 2016

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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NOT FOR PUBLICATION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

In re:)	BAP No.	CC-15-1075-KuFTa
)		
ZOHRA MURTAZA,)	Bk. No.	8:14-bk-11655-TA
)		
Debtor.)	Adv. No.	8:14-ap-01199-TA
)		
_____)		
ZOHRA MURTAZA,)		
)		
Appellant,)		
)		
v.)	MEMORANDUM*	
)		
JOEL SIGMUND; LESLIE SIGMUND;)		
QAYYUM KOCHAI; SHELLEY SLATEN,)		
)		
Appellees.)		
_____)		

Argued and Submitted on February 19, 2016
at Pasadena, California

Filed - April 5, 2016

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

Honorable Theodor C. Albert, Bankruptcy Judge, Presiding

Appearances: Mogeeb Weiss argued for appellant Zohra Murtaza;
Sally Gersten Sopkin argued for appellees Joel
Sigmund, Leslie Sigmund and Shelley Slaten; Martin
Deutsch argued for appellee Qayyum Kochai.

Before: KURTZ, FARIS and TAYLOR, 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.

1 **INTRODUCTION**

2 Zohra Murtaza appeals from the bankruptcy court's summary
3 judgment denying Murtaza a discharge under 11 U.S.C.
4 § 727(a)(4)(A).¹ The bankruptcy court erroneously utilized the
5 summary judgment proceedings to dispose of genuine issues of
6 material fact concerning whether Murtaza knowingly and
7 fraudulently made errors and omissions in her bankruptcy
8 schedules and in her statement of financial affairs. We VACATE
9 the summary judgment, and we REMAND for trial on the issues
10 concerning Murtaza's state of mind.

11 **FACTS**

12 Murtaza filed her chapter 7 bankruptcy petition in March
13 2014. The same day the bankruptcy case was commenced, the
14 bankruptcy court issued a notice to creditors informing them that
15 June 27, 2014 was the last day for filing complaints objecting to
16 the debtor's discharge and for filing complaints challenging the
17 dischargeability of particular debts. On the last day,
18 plaintiffs Shelley Slaten, Joel Sigmund and Leslie Sigmund and
19 plaintiff Qayyum Kochai filed complaints objecting to Murtaza's
20 discharge and challenging the dischargeability of specific debts.
21 The bankruptcy court entered an order consolidating the two
22 adversary proceedings.

23 Shortly after the adversary proceedings were consolidated,
24 the bankruptcy court heard and ruled on the plaintiffs' summary

25
26 ¹Unless specified otherwise, all chapter and section
27 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532, and
28 all "Rule" references are to the Federal Rules of Bankruptcy
Procedure, Rules 1001-9037. All "Civil Rule" references are to
the Federal Rules of Civil Procedure.

1 judgment motion. In relevant part, the bankruptcy court ruled
2 that the plaintiffs were entitled to summary judgment on their
3 § 727(a)(4)(A) claim for relief, which sought to deny Murtaza her
4 discharge based on her allegedly making knowing and fraudulent
5 false oaths in her bankruptcy schedules, in her statement of
6 financial affairs, and at a Rule 2004 examination. The
7 plaintiffs' summary judgment motion was supported by the
8 following facts relating to the § 727(a)(4)(A) claim:

- 9 • Murtaza omitted from her schedules and from her statement of
10 financial affairs her interest in her son Zaid's bank
11 account at U.S. Bank. This interest arose from the fact
12 that she sometimes cashed her payroll checks and then
13 deposited the cash in his bank account with the
14 understanding that the funds would be used to pay some of
15 her bills.
- 16 • Murtaza admitted using Zaid's bank account in this manner
17 and said that she did so because, otherwise, her judgment
18 creditors would have levied the funds from her own bank
19 account.
- 20 • Murtaza omitted from her schedules her interest in a debit
21 card account; her employer sometimes deposited her wages
22 into that account.
- 23 • Murtaza omitted from her schedules and from her statement of
24 financial affairs her interest in an inheritance from her
25 father's estate that was settled in her favor in 2012 in at
26 least the amount of \$200,000 and perhaps as much as
27 \$350,000.
- 28 • Murtaza omitted from her schedules and from her statement of

1 financial affairs the fact that she never received the
2 inheritance because her brother Bilal appropriated those
3 funds to offset losses Bilal allegedly suffered after
4 investing in or lending money to First AFG Financial.
5 According to Murtaza, she was an officer of that company but
6 was not personally responsible for its debts.

- 7 • In her original and amended Schedule I, Murtaza overstated
8 her net monthly take-home pay by more than \$1,000.
- 9 • In her statement of financial affairs, Murtaza understated
10 her 2012 income by at least \$40,000 and perhaps as much as
11 \$54,000, by omitting her independent contractor work for a
12 business known as "Seasons at Laguna"; in addition, she
13 initially did not report this income to the IRS.
- 14 • Murtaza was unable to reconcile the amount of contributions
15 she listed in her statement of financial affairs as received
16 from family members with the specific expenses she claimed
17 they regularly paid on her behalf.
- 18 • Murtaza's original current monthly income statement
19 overstated her household size as including five persons; she
20 later amended her current monthly income statement
21 apparently to exclude her ex-husband, who had resided
22 outside the country for a matter of years, but she still
23 claimed her 22-year old son as part of her household.
- 24 • Murtaza omitted from her schedules and statement of
25 financial affairs any reference to a parcel of real property
26 located on West Boulevard in Los Angeles (or any reference
27 to money lent against it), even though between 2004 and 2008
28 that property was transferred back and forth between First

1 AFG Financial on the one hand and Murtaza and her husband
2 Mostafa Ismail on the other hand, and even though millions
3 of dollars were lent against the property - some while
4 Murtaza and her husband owned it.

- 5 • Murtaza listed her sister (on her Schedule B) as a
6 lienholder on her 2010 Mercedes Benz but stated at her
7 Rule 2004 examination that she did not owe her sister any
8 money and that her sister actually owned the Mercedes.
- 9 • Murtaza omitted from her schedules her interest in certain
10 businesses including, among others, Orange Burger Burrito,
11 Rent to Own Car and A 2 B Mortgage.

12 In large part, Murtaza did not dispute that her schedules
13 and statement of financial affairs contained many of the above-
14 referenced errors and omissions. Instead, she primarily argued
15 that the errors and omissions were immaterial and that she did
16 not knowingly and fraudulently make the errors and omissions.
17 Murtaza's opposition was supported by a handful of exhibits and a
18 two-page declaration, in which she addressed some but not all of
19 the plaintiffs' allegations. In her declaration, Murtaza never
20 explicitly denied that she knowingly made errors and omissions in
21 her bankruptcy filings. Nor did she specifically say that she
22 never intended to deceive her creditors. At the same time, the
23 gist of the declaration is consistent with a lack of knowledge
24 and a lack of fraudulent intent.

25 The bankruptcy court disagreed with Murtaza. The court's
26 ruling concentrated on five general types of errors and
27 omissions: (1) Murtaza's failure to disclose interests in certain
28 businesses; (2) inconsistencies in Murtaza's scheduled income and

1 expenses; (3) Murtaza's failure to mention anywhere in her
2 schedules or statement of financial affairs the inheritance
3 co-opted by her brother Bilal; (4) Murtaza's failure to mention
4 anywhere in her schedules or statement of financial affairs the
5 funds she deposited in her son Zaid's bank account; and
6 (5) Murtaza's failure to amend her schedules and statement of
7 financial affairs to rectify the errors and omissions in the
8 original documents. The bankruptcy court determined that each of
9 these types of errors and omissions was material, deliberate and
10 made with the intent to deceive Murtaza's creditors or her
11 bankruptcy estate.

12 In determining Murtaza's state of mind, the bankruptcy court
13 explained, in part, that some of Murtaza's claims of ignorance
14 regarding her financial affairs were "not believable." The
15 bankruptcy court further explained that, "[f]rom Debtor's
16 multiple failures to be forthcoming the court can and does infer
17 the Debtor [had] fraudulent intent." In addition, the court
18 concluded that Murtaza affirmatively attempted to conceal the
19 inheritance.

20 The bankruptcy court entered its order granting summary
21 judgment on March 17, 2015, and entered separate findings of fact
22 and conclusions of law on that same date. Murtaza timely filed a
23 notice of appeal on March 4, 2015. Subsequently, in November
24 2015, after this Panel raised concerns regarding the finality of
25 the order on appeal, the bankruptcy court amended its summary
26 judgment order and its findings of fact and conclusions of law to
27 provide for dismissal of all of the plaintiffs' claims for relief
28 other than their § 727(a)(4)(A) claim.

1 is entitled to judgment as a matter of law." Wank v. Gordon
2 (In re Wank), 505 B.R. 878, 886 (9th Cir. BAP 2014) (citing Civil
3 Rule 56(a), which is made applicable in adversary proceedings by
4 Rule 7056). An issue is genuine if there is enough evidence for
5 a reasonable trier of fact to make a finding in favor of the
6 non-moving party, and an issue is material if it might legally
7 affect the outcome of the case. Far Out Prods., Inc. v. Oskar,
8 247 F.3d 986, 992 (9th Cir. 2001) (citing Anderson v. Liberty
9 Lobby, Inc., 477 U.S. 242, 248-49 (1986)).

10 In considering summary judgment, the court is not permitted
11 to weigh the evidence. In re Wank, 505 B.R. at 886. Nor may a
12 court's summary judgment ruling make credibility determinations
13 or make inferences - if it is possible to reasonably infer
14 otherwise. See Anderson, 477 U.S. at 255. As the Anderson court
15 aptly put it, "[t]he evidence of the non-movant is to be
16 believed, and all justifiable inferences are to be drawn in his
17 favor." Id.

18 **DISCUSSION**

19 One ground for denying discharge under § 727(a) arises
20 when "the debtor knowingly and fraudulently, in or in connection
21 with the case[,] made a false oath or account." § 727(a)(4)(A).
22 To establish a §727(a)(4)(A) claim for relief, a plaintiff must
23 demonstrate by a preponderance of the evidence that: "(1) the
24 debtor made a false oath in connection with the case; (2) the
25 oath related to a material fact; (3) the oath was made knowingly;
26 and (4) the oath was made fraudulently." In re Retz, 606 F.3d at
27 1196-97 (quoting Roberts v. Erhard (In re Roberts), 331 B.R. 876,
28 882 (9th Cir. BAP 2005)).

1 A false oath is knowingly made if it is made deliberately or
2 consciously. Khalil v. Developers Sur. & Indem. Co.
3 (In re Khalil), 379 B.R. 163, 173 (9th Cir. BAP 2007), aff'd,
4 578 F.3d 1167, 1168 (9th Cir. 2009) (citing In re Roberts,
5 331 B.R. at 883). And a false oath is fraudulently made if the
6 debtor: (1) made the false oath, (2) knowing at that time it was
7 false, and (3) with the intent and purpose of deceiving his or
8 her creditors. In re Retz, 606 F.3d at 1198-99. The fraudulent
9 intent element requires actual fraudulent intent; constructive
10 fraudulent intent is insufficient. Id. at 1196.

11 Unless the debtor admits fraudulent intent, the plaintiff
12 typically proves fraudulent intent by offering circumstantial
13 evidence and asking the bankruptcy court to infer fraudulent
14 intent based on the debtor's conduct. Id. at 1199. A plaintiff
15 can help support its fraudulent intent allegation by
16 demonstrating that the debtor exhibited a reckless indifference
17 or reckless disregard for the truth, but reckless indifference
18 and reckless disregard are not sufficient, by themselves, to
19 establish fraudulent intent. Id. (citing In re Khalil, 379 B.R.
20 at 173-75).

21 Murtaza does not deny on appeal that she made false oaths.
22 For purposes of § 727(a)(4)(A), errors and omissions made by
23 debtors in their bankruptcy schedules and in their statements of
24 financial affairs constitute false oaths. In re Retz, 606 F.3d
25 at 1196.

26 Nor can Murtaza seriously contend that none of her errors
27 and omissions were material. In the context of § 727(a)(4)(A),
28 materiality is conceived of broadly, as including any fact that

1 "bears a relationship to the debtor's business transactions or
2 estate, or concerns the discovery of assets, business dealings,
3 or the existence and disposition of the debtor's property." Id.
4 at 1198. The Retz court held that the materiality element was
5 satisfied when the error or omission detrimentally affected the
6 estate by interfering with estate administration. Id.

7 Under the undisputed facts in the summary judgment record,
8 the bankruptcy court correctly determined that Murtaza's errors
9 and omissions had interfered with the administration of Murtaza's
10 bankruptcy estate. A number of different property interests of
11 Murtaza's were either inaccurately reported or not reported at
12 all. These errors and omissions constituted a significant
13 obstacle to the expeditious and efficient administration of
14 Murtaza's bankruptcy estate. Congress enacted § 727(a)(4)(A) as
15 a means of discouraging debtors from intentionally creating such
16 obstacles. See generally In re Khalil, 379 B.R. at 172
17 (describing purpose of statute).

18 However, Murtaza can and does credibly argue on appeal that
19 the bankruptcy court erred when it determined, on summary
20 judgment, that Murtaza's errors and omissions were knowingly and
21 fraudulently made. Murtaza never admitted that she knew her
22 bankruptcy schedules and her statement of financial affairs were
23 inaccurate and incomplete at the time she signed them, nor did
24 she admit that she intended to deceive her creditors by filing
25 inaccurate and incomplete documents. Consequently, in making its
26 knowledge and intent determinations, the bankruptcy court relied
27 on the circumstantial evidence in the record and inferred
28 Murtaza's knowledge and intent based on her conduct.

1 We are troubled by the bankruptcy court's attempt, on
2 summary judgment, to delve into Murtaza's state of mind. It very
3 well might be reasonable, on this record, to infer that Murtaza's
4 errors and omissions were knowingly and fraudulently made.
5 Nonetheless, summary judgment should have been denied unless **no**
6 reasonable trier of fact could have found in Murtaza's favor on
7 the knowledge and intent issues. See Anderson, 477 U.S. at
8 249-52; see also Fogal Legware of Switz., Inc. v. Wills
9 (In re Wills), 243 B.R. 58, 65 (9th Cir. BAP 1999) ("Summary
10 judgment is ordinarily not appropriate in a § 727 action where
11 there is an issue of intent.").

12 On this record, we simply are not prepared to say that
13 inferences regarding Murtaza's knowledge and intent would have
14 been unreasonable if made in her favor. Under Anderson, 477 U.S.
15 at 255, all justifiable inferences must be drawn in the non-
16 moving party's favor. Because the bankruptcy court did not do
17 this when it ruled on the plaintiffs' summary judgment motion,
18 the bankruptcy court committed reversible error.

19 We recognize that the evidence Murtaza submitted in support
20 of her opposition to the summary judgment motion was quite thin.
21 Even so, there is no such thing as obtaining summary judgment by
22 default. Heinemann v. Setterberg, 731 F.3d 914, 916-17 (9th Cir.
23 2013). More importantly, focusing on the weaknesses in Murtaza's
24 opposition is a blind alley. The defects in the bankruptcy
25 court's summary judgment decision are controlling. The decision
26 impermissibly weighed the evidence, impermissibly determined
27 Murtaza's credibility and impermissibly made inferences against
28 her that reasonably could have been made in her favor.

CONCLUSION

For the reasons set forth above, we VACATE the bankruptcy court's summary judgment, and we REMAND for trial on the issues concerning Murtaza's state of mind.

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