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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NOT FOR PUBLICATION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

In re:)	BAP No.	EC-15-1173-TaJuD
)		
ARVIND KAUR SETHI,)	Bk. No.	2:10-bk-40553
)		
Debtor.)	Adv. No.	2:11-ap-2273
)		
_____)		
ARVIND KAUR SETHI,)		
)		
Appellant,)		
)		
v.)	MEMORANDUM*	
)		
WELLS FARGO BANK, NATIONAL)		
ASSOCIATION,)		
)		
Appellee.)		
_____)		

Argued and Submitted on June 23, 2016
at Sacramento, California

Filed - July 12, 2016

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

Honorable David E. Russell, Bankruptcy Judge, Presiding

Appearances: Michael R. Totaro of Totaro & Shanahan for
Appellant; Amanda Nicole Griffith of Ellis Law
Group, LLP for Appellee.

Before: TAYLOR, JURY, and DUNN, 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 The first case was unsuccessful and dismissed on the
2 trustee's motion. The Debtor then commenced the second
3 chapter 13 case, culminating in the discharge denial on appeal
4 for the second time.

5 On remand, the bankruptcy court attempted to clarify its
6 factual findings on the record at a continued hearing. See Hr'g
7 Tr. (Mar. 12, 2015). For the purposes of § 727(a)(2) and, by
8 extension, § 727(a)(5), it determined that the equipment
9 transferred prepetition was property of the estate because the
10 Debtor was the sole shareholder of the medical corporation and
11 controlled the assets; the bankruptcy court, thus, reasoned that
12 any assets owned by the medical corporation came into the
13 bankruptcy estate. Even if the equipment was not property of
14 the estate, the bankruptcy court found that the Debtor concealed
15 the equipment in her first bankruptcy case and continued the
16 concealment in this second case. It found that this supported
17 discharge denial.

18 The bankruptcy court further clarified that, for purposes
19 of § 727(a)(4)(A), it had relied on two false statements: the
20 Debtor's false statement at the § 341(a) meeting in the first
21 bankruptcy case and the Debtor's October 2010 declaration filed
22 in the second bankruptcy case. Counsel for Wells Fargo pressed
23 the bankruptcy court for additional clarity on the issue of
24 intent. The bankruptcy court then reiterated that the Debtor
25 harbored an intent to hinder or delay Wells Fargo when she
26 concealed and lied about the whereabouts of the equipment in the
27 first bankruptcy case.

28 After the bankruptcy court issued a civil minute order

1 denying discharge as supported by the findings made on the
2 record, the Debtor timely appealed.

3 **JURISDICTION**

4 The bankruptcy court had jurisdiction pursuant to 28 U.S.C.
5 §§ 1334 and 157(b)(2)(J). We have jurisdiction under 28 U.S.C.
6 § 158.

7 **ISSUE**

8 Whether the bankruptcy court erred in denying the Debtor's
9 discharge following remand by the Panel for sufficient fact
10 finding.

11 **STANDARDS OF REVIEW**

12 We review the denial of discharge as follows:

13 (1) determinations of the historical facts are reviewed for
14 clear error; (2) selection of the applicable legal rules under
15 § 727 are reviewed de novo; and (3) application of the facts to
16 those rules requiring the exercise of judgments about values
17 animating the rules are reviewed de novo. Retz v. Samson
18 (In re Retz), 606 F.3d 1189, 1196 (9th Cir. 2010). A factual
19 finding is clearly erroneous if it is illogical, implausible, or
20 without support in inferences that may be drawn from the facts
21 in the record. Id.

22 **DISCUSSION**

23 The Debtor argues that the bankruptcy court abused its
24 discretion by disregarding the law of the case as established by
25 Sethi I and by considering matters beyond the scope of the
26 remand. She also argues that the bankruptcy court erred in its
27 application of the standards for denial of discharge.

28 Based on our review of the record, we agree that the

1 bankruptcy court considered matters beyond the scope of the
2 remand in Sethi I and, thus, that it exceeded the Panel's
3 mandate. This error was not harmless.

4 Discharge denial under § 727(a)(2) is warranted where the
5 debtor, with the "intent to hinder, delay, or defraud a creditor
6 . . . transferred, removed, destroyed, mutilated, or concealed"
7 either property of the debtor (within one year before the date
8 of petition) or property of the estate (after case
9 commencement). Section 727(a)(5), in turn, provides for
10 discharge denial where "the debtor has failed to explain
11 satisfactorily, before determination of denial of discharge
12 under this paragraph, any loss of assets or deficiency of assets
13 to meet the debtor's liabilities."

14 In Sethi I, the Panel recognized that "[t]he plain language
15 of the statute support[ed] [the Debtor's] legal proposition that
16 the assets disposed of must have been her assets, rather than
17 property of one of her corporations." 2014 WL 2938276, at *6.
18 It found that the bankruptcy court had not made any alter ego
19 findings and, in fact, that Wells Fargo had raised the issue for
20 the first time on appeal. The Panel, thus, concluded that
21 "Wells Fargo was entitled to prevail on its § 727(a)(2) claim
22 only if it proved that the property [the Debtor] concealed was
23 her own property and not property of one of her corporations."
24 Id. It explicitly remanded for findings on whether the
25 concealed equipment was owned by the Debtor personally or by one
26 of her two corporations. In doing so, the Panel expressly
27 advised that "if the bankruptcy court on remand based on the
28 evidence presented [did] not find that [the Debtor] personally

1 owned some of the concealed equipment, then it should rule
2 against Wells Fargo on its § 727(a)(2) claim." Id. at *9.

3 On remand, the bankruptcy court effectively dismissed this
4 instruction. It rejected the applicability of alter ego theory
5 based on its determination that the Debtor was the sole
6 shareholder of the medical corporation and, thus, that the
7 corporation's assets were property of the Debtor's individual
8 bankruptcy estate. This was error.

9 As we explained in Sethi I, "California law recognizes the
10 separateness of corporate assets and liabilities." 2014 WL
11 2938276, at *6 (citing Sonora Diamond Corp. v. Superior Court,
12 83 Cal. App. 4th 523, 538 (2000)). And, moreover, "so have the
13 better-reasoned federal cases interpreting the scope of
14 § 727(a)(2)." Id. (collecting cases). The bankruptcy court's
15 refusal to acknowledge the separateness of asset ownership
16 between the Debtor and her corporations is troublesome. That
17 the Debtor personally guaranteed the loans to purchase the
18 equipment is irrelevant, as is the fact that the Debtor was the
19 sole shareholder of the medical corporation. While that may
20 have meant that the corporate stock was estate property, the
21 reach of § 541(a) in an individual bankruptcy case did not
22 automatically extend to corporate assets.

23 The record further reveals that the bankruptcy court
24 improperly conflated the concept of property of the debtor under
25 § 727(a)(2)(A) with property of the estate under § 727(a)(2)(B).
26 To the extent that this error formed the basis of its analysis
27 as to the equipment, it was also error. There is no dispute
28 that the equipment was transferred prior to commencement of the

1 first case. Thus, as a matter of law, the equipment could not
2 constitute property of the estate in the second case. Such an
3 interpretation would render § 727(a)(2)(A) superfluous.

4 In sum, the bankruptcy court erred in determining that the
5 equipment was property of the Debtor's estate. As a result, it
6 erred in denying discharge under § 727(a)(2). By extension, the
7 bankruptcy court also erred in determining discharge denial
8 under § 727(a)(5). Given that the equipment was owned by one or
9 both of the Debtor's corporations and not the Debtor personally,
10 the equipment was not an asset of the Debtor within the scope of
11 § 727(a)(5).

12 The bankruptcy court did not fare better on remand as to
13 Wells Fargo's § 727(a)(4)(A) claim. That section provides for
14 discharge denial where "the debtor knowingly and fraudulently,
15 in or in connection with the case[,] made a false oath or
16 account." A false oath includes false statements in a
17 declaration signed by the debtor under penalty of perjury and
18 submitted to the bankruptcy court. Abbey v. Retz (In re Retz),
19 438 B.R. 237, 301 (Bankr. D. Mont. 2007), aff'd, 2008 WL 8448824
20 (9th Cir. BAP 2008), aff'd, 606 F.3d 1189 (9th Cir. 2010). "The
21 fundamental purpose of § 727(a)(4)(A) is to insure that the
22 trustee and creditors have accurate information without having
23 to conduct costly investigations." Khalil v. Developers Sur. &
24 Indem. Co. (In re Khalil), 379 B.R. 163, 172 (9th Cir. BAP 2007)
25 (internal quotation marks and citation omitted), aff'd, 578 F.3d
26 1167 (9th Cir. 2009).

27 The objector to discharge must show, by a preponderance of
28 the evidence, that: "(1) the debtor made a false oath in

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

10 The Sethi I Panel’s remand for findings was limited² to
11 just two areas: first, whether the bankruptcy court relied on
12 the Debtor’s statements in the first bankruptcy case; to the
13 extent it did so, the Panel advised that such reliance was
14 improper as a false oath in the second bankruptcy case. Id. at
15 *10. And, second, whether the Debtor made the statements in the
16 October 2010 declaration fraudulently. Id.

17 **The false oath.** Once again, despite the Panel’s
18 instructions, the bankruptcy court affirmed that it had relied
19 on both the Debtor’s statements at the § 341(a) meeting in the
20 first bankruptcy case and her October 2010 declaration filed in
21 the second case. As the Panel previously pointed out, however,
22 the Debtor’s statements in the first bankruptcy case could not
23

24 ² The Panel determined that the Debtor’s October 2010
25 declaration and subsequent admissions constituted a false oath.
26 2014 WL 2938276, at *10. In doing so, it determined that the
27 record established that the Debtor made the false statements
28 knowingly and that they were material. Id. at *9. We deem
these determinations law of the case and, thus, we do not review
the second and third elements on appeal.

1 serve as a false oath in the second bankruptcy case. 2014 WL
2 2938276, at *10. Thus, the bankruptcy court's reliance on this
3 statement was erroneous. As the Sethi I Panel determined,
4 however, the bankruptcy court appropriately relied on the
5 October 2010 declaration as a false oath.

6 **Fraudulent intent.** To demonstrate fraudulent intent, the
7 objector bears the burden of showing that the debtor: (1) made
8 the false oath; (2) at the time he knew it was false; and
9 (3) with the intent and purpose of deceiving creditors. In re
10 Retz, 606 F.3d at 1198-99 (internal quotation marks and citation
11 omitted). Intent is typically shown by circumstantial evidence
12 or by inferences drawn from the debtor's conduct. Id. at 1199.
13 "Reckless indifference or disregard for the truth may be
14 circumstantial evidence of intent, but is not sufficient, alone,
15 to constitute fraudulent intent." Id. (internal quotation marks
16 and citation omitted).

17 On remand, the bankruptcy court repeatedly discussed the
18 state of mind necessary for discharge denial under § 727(a)(2)
19 in relation to the § 727(a)(4)(A) claim. As stated, counsel for
20 Wells Fargo requested clarification on this point. Nonetheless,
21 in response, the bankruptcy court continued to focus on
22 § 727(a)(2):

23 I'm referring specifically to the language of
24 727(a)(2) which talks about hinder, delay, or defraud.
25 Well, hinder and delaying is basically the same in my
26 view as defraud. In other words, hiding the assets;
27 that's an attempt to defraud the creditor of the
28 creditor's rights, so I don't think there needs to be
a distinction, but if that is what the BAP requires,
then deception is certainly part of -- I think my
finding that she was lying is sufficient for the
finding that she was defrauding. The whole purpose of
lying is to defraud, so anyway, I don't think I need

1 to go any further than that.

2 Hr'g Tr. (Mar. 12, 2015) at 29:15-25.

3 This was error. Contrary to the bankruptcy court's
4 conclusions, an intent to hinder or delay a creditor for the
5 purposes of § 727(a)(2) is not synonymous to or interchangeable
6 with an intent to deceive a creditor within the meaning of
7 § 727(a)(4)(A).

8 We also note that the only false oath appropriately at
9 issue was the Debtor's October 2010 declaration. That
10 declaration, however, was filed in connection with the Debtor's
11 motion to convert from chapter 13 to chapter 11. Although
12 intent to deceive a creditor is typically established by
13 circumstantial evidence, here, the context of the Debtor's
14 statements makes it impossible to assume that the bankruptcy
15 court inferred deceptive intent sufficient for discharge denial
16 based on the Debtor's statements in her declaration. In other
17 words, it is a stretch to infer that the Debtor intended to
18 deceive creditors when she stated in the October 2010
19 declaration that she filed the second bankruptcy case pro se,
20 when this statement is considered in the context of her motion
21 to convert and in the context of her second bankruptcy case. It
22 is far more plausible to assume, as her attorney argued, that
23 this statement was a result of blindly signing a document
24 containing an error created by counsel.³

25 Given that the bankruptcy court erred by relying on the
26 _____

27 ³ To be clear, this type of conduct might be sanctionable
28 but it does not support cleanly a determination of intent to
commit fraud sufficient for discharge denial.

1 Debtor's statements in the first bankruptcy case to find a false
2 oath in the second bankruptcy case and that it failed to make
3 findings as to the requisite state of mind on remand directly in
4 relation to § 727(a) (4) (A) and the Debtor's statements in the
5 October 2010 declaration, we conclude that it erred in denying
6 the Debtor's discharge under § 727(a) (4) (A).

7 **CONCLUSION**

8 Based on the foregoing, we REVERSE.

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