

MAR 10 2017

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NOT FOR PUBLICATION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. NV-16-1115-LJuKu
6	JOHN BADEA,)	Bk. No. 2:15-bk-10638-LED
7	Debtor.)	Adv. No. 2:15-ap-01035-LED
8	_____)	
9	JOHN BADEA,)	
10	Appellant,)	
11	v.)	MEMORANDUM*
12	EMIL BOTEZATU; GABRIELA)	
13	BOTEZATU,)	
14	Appellees.)	
	_____)	

Argued and Submitted on February 24, 2017
at Las Vegas, Nevada

Filed - March 10, 2017

Appeal from the United States Bankruptcy Court
for the District of Nevada

Honorable Laurel E. Davis, Bankruptcy Judge, Presiding

Appearances: Appellant John Badea argued pro se; Michael R. Mushkin argued for appellees Emil and Gabriela Botezatu.

Before: LAFFERTY, JURY, and KURTZ, 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 After John Badea filed his chapter 7¹ petition, creditors
3 Emil and Gabriela Botezatu filed a complaint seeking denial of
4 Badea's discharge under § 727. After a trial, the bankruptcy
5 court entered a judgment denying discharge (the "Judgment") based
6 upon Badea's pre-petition transfer of property with intent to
7 hinder, delay or defraud a creditor and for false oaths in his
8 schedules and statements of financial affairs.

9 Badea moved for reconsideration, arguing that the bankruptcy
10 court had erroneously interpreted the evidence presented in
11 finding that he had acted with fraudulent intent. After a
12 hearing, the bankruptcy court denied Badea's motion. Badea
13 timely appealed. Because Badea did not provide an adequate
14 record to permit our review of the Judgment, and because he did
15 not demonstrate any ground for reconsideration, we AFFIRM.

16 **FACTS²**

17 In October 2007 the District Court for Clark County, Nevada,
18 entered a judgment against Badea and in favor of the Botezatus in
19 the amount of \$47,401.29 for attorneys' fees and costs, plus
20 \$2,500 for sanctions, plus interest.

21 In January 2010, Badea purchased a condominium in Las Vegas
22 (the "Silverado Ranch Property") for \$52,000. On February 24,
23

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

² The facts are taken primarily from the bankruptcy court's
findings and conclusions.

1 2014, Badea transferred the Silverado Ranch Property to his
2 brother, George Badea, by quit claim deed. The deed noted that
3 no consideration was given in exchange for the transfer.

4 Less than a year later, on February 12, 2015, Badea filed a
5 petition for relief under chapter 7. At the initial meeting of
6 creditors, several problems with Badea's schedules came to light.
7 Badea failed to list his second motor vehicle or his interest in
8 a family home in Romania; misstated the date on which he
9 transferred the Silverado Ranch Property to George as "mid-2013";
10 listed zero income on Schedule I and \$2,579 in monthly expenses
11 on Schedule J; and listed a 2005 Mercedes Benz 350 on Schedule B
12 with a value of zero and a monthly car payment of \$800 on
13 Schedule J but did not list any secured creditor or lessor for
14 that vehicle. Although the chapter 7 trustee sent a written
15 request to Badea to amend his schedules and statements, no
16 amendments were ever filed that corrected these issues.

17 The Botezatus filed an adversary proceeding seeking denial
18 of Badea's discharge pursuant to § 727; the matter was tried on
19 December 4, 2015. As discussed below, Badea did not provide a
20 copy of the trial transcript; thus, we do not have a record of
21 the testimony or evidence presented at trial. However, the
22 bankruptcy court noted in its findings and conclusions that it
23 had declined to admit Badea's Trial Exhibit B entitled "Agreement
24 and Power of Attorney," which purportedly memorialized an
25 agreement for George to loan Badea \$50,000 in August 2009 to
26 purchase a condominium in Las Vegas. The bankruptcy court did
27 not admit this document because Badea had not laid a proper
28 evidentiary foundation for the agreement and for other concerns

1 related to the agreement's authenticity.

2 In December 2015 the bankruptcy court orally ruled on the
3 matters presented at trial, finding for the Botezatus on their
4 claims under §§ 727(a)(2)(A) and (a)(4); the bankruptcy court
5 thereafter entered the Judgment.

6 Badea timely moved for reconsideration, arguing that the
7 bankruptcy court had erred in finding that he intended to defraud
8 the Botezatus and that his failure to amend the schedules was
9 fraudulent. After a hearing, the bankruptcy court denied the
10 motion for reconsideration. Badea timely appealed.

11 JURISDICTION

12 The bankruptcy court had jurisdiction pursuant to 28 U.S.C.
13 § 1334 and 157(b)(2)(J). We have jurisdiction under 28 U.S.C.
14 § 158.

15 ISSUES

16 1. Whether the Panel has jurisdiction to review the
17 Judgment denying discharge.

18 2. Whether the Panel should affirm the bankruptcy court's
19 Judgment denying discharge under §§ 727(a)(2)(A) and (a)(4) based
20 on Badea's failure to provide an adequate record.

21 3. Whether the bankruptcy court abused its discretion in
22 denying Badea's motion for reconsideration.

23 STANDARDS OF REVIEW

24 We review the bankruptcy court's findings of fact for clear
25 error and its conclusions of law de novo. Carrillo v. Su
26 (In re Su), 290 F.3d 1140, 1142 (9th Cir. 2002). If an appellant
27 challenges a finding of fact, it is his responsibility to provide
28 an adequate record to show clear error. Massoud v. Ernie

1 Goldberger & Co. (In re Massoud), 248 B.R. 160, 163 (9th Cir. BAP
2 2000).

3 We review the bankruptcy court's denial of a motion to alter
4 or amend a judgment for abuse of discretion. Ta Chong Bank Ltd.
5 v. Hitachi High Techs. Am., Inc., 610 F.3d 1063, 1066 (9th Cir.
6 2010). Under the abuse of discretion standard, we "determine de
7 novo whether the [bankruptcy] court identified the correct legal
8 rule to apply to the relief requested." United States v.
9 Hinkson, 585 F.3d 1247, 1261-62 (9th Cir. 2009). If the
10 bankruptcy court identified the correct legal rule, we then
11 determine under the clearly erroneous standard whether its
12 factual findings and its application of the facts to the relevant
13 law were: "(1) illogical, (2) implausible, or (3) without support
14 in inferences that may be drawn from the facts in the record."
15 Id.

16 DISCUSSION

17 **A. The Panel has jurisdiction over the appeal of the Judgment**
18 **denying discharge, and Appellees will not be prejudiced by**
19 **our consideration of that matter on the merits.**

20 The Botezatus argue in their answering brief that we do not
21 have jurisdiction to consider Badea's appeal of the Judgment
22 because the notice of appeal references and attaches only the
23 order denying reconsideration. The Botezatus reason that there
24 was no timely notice of appeal filed from the Judgment, and thus
25 this Panel lacks jurisdiction to consider the appeal of the
26 Judgment.

27 The Botezatus misconstrue the applicable rules. As an
28 initial matter, Rule 8002 provides that, if a party timely moves

1 to alter or amend a judgment under Rule 9023, then the 14-day
2 deadline under Rule 8002 for filing an appeal runs from the entry
3 of the order disposing of the last such motion outstanding. We
4 consider a motion for reconsideration filed within 14 days of a
5 judgment to be a timely motion to "alter or amend" within the
6 meaning of Rule 8002(b). Shapiro ex rel. Shapiro v. Paradise
7 Valley Unified Sch. Dist., 374 F.3d 857, 863 (9th Cir. 2004). If
8 the motion is timely under Rule 9023, we have jurisdiction to
9 review both the underlying order and the order denying
10 reconsideration. Tennant v. Rojas (In re Tennant), 318 B.R. 860,
11 866 n.5 (9th Cir. 2004).

12 Here, the motion for reconsideration was filed less than
13 14 days after entry of the Judgment, and the notice of appeal was
14 filed less than 14 days after entry of the order denying
15 reconsideration. We thus have jurisdiction to review the
16 Judgment.

17 As for Badea's failure to reference the Judgment in the
18 notice of appeal, Rule 8001(a) does not require the underlying
19 order or judgment to be attached to the notice of appeal.
20 Although 9th Cir. BAP R. 8003 does require such a designation, we
21 may depart from this local rule absent a showing of prejudice.
22 Wall Street Plaza, LLC v. JSJF Corp. (In re JSJF Corp.), 344 B.R.
23 94, 100 (9th Cir. BAP 2006), aff'd, 277 F. App'x 718 (9th Cir.
24 2008). When a party seeks to argue the merits of an underlying
25 order that does not appear on the notice of appeal, the reviewing
26 court will generally consider (1) whether the intent to appeal a
27 specific judgment is fairly inferred and (2) whether the appellee
28 will be prejudiced by the mistake. See Lolli v. County of

1 Orange, 351 F.3d 410, 414 (9th Cir. 2003) (interpreting Fed. R.
2 App. P. 3).

3 Intent to appeal a specific order can be “fairly inferred”
4 by the issues raised in the appellant’s opening brief. Id.
5 Here, the intent to appeal the Judgment denying discharge is
6 easily inferred from the substantial discussion of the Judgment
7 in Badea’s brief, which focuses entirely on the request for a
8 reversal of the denial of discharge and requests remand for
9 further proceedings. Badea also designated the transcript of the
10 bankruptcy court’s December 22, 2015 ruling on denial of
11 discharge as part of the record on appeal. Thus, Badea’s intent
12 to appeal the Judgment can be fairly inferred.

13 There can be no claim of prejudice if both parties have
14 briefed the issues in the underlying order. Id. at 415. The
15 Botezatus addressed Badea’s reasoning in their answering brief.
16 Therefore, they will not be prejudiced by our review of the
17 Judgment.³

18 **B. We cannot find that the bankruptcy court clearly erred in**
19 **denying Badea’s discharge under §§ 727(a) (2) (A) or (a) (4)**
20 **because Badea has not provided an adequate record on appeal.**

21 Sections 727(a) (2) (A) and (a) (4) both require a finding of
22 fraudulent intent. Section 727(a) (2) (A) provides, in relevant
23 part:

24 The court shall grant the debtor a discharge, unless
25 . . . the debtor, with intent to hinder, delay, or
26 defraud a creditor or an officer of the estate charged

27 ³ Moreover, Botezatus’ counsel conceded at oral argument
28 that his clients were not prejudiced by Badea’s failure to attach
the Judgment to the Notice of Appeal.

1 with custody of property under this title, has
2 transferred, removed, destroyed, mutilated, or
3 concealed, or has permitted to be transferred, removed,
4 destroyed, mutilated, or concealed . . . property of
the debtor, within one year before the date of the
filing of the petition.

5 To succeed on a claim for denial of discharge under
6 § 727(a) (2) (A), the plaintiff must show by a preponderance of the
7 evidence (1) that a transfer or concealment took place within one
8 year before the filing of a bankruptcy petition, and (2) the
9 subjective intent of the debtor to hinder, delay or defraud a
10 creditor through the disposition of the property. Retz v.
11 Sampson (In re Retz), 606 F.3d 1189, 1200 (9th Cir. 2010). As
12 direct evidence is rarely available to determine fraudulent
13 intent, certain "badges of fraud" may support such a finding:

14 (1) a close relationship between the transferor and the
15 transferee; (2) that the transfer was in anticipation
16 of a pending suit; (3) that the transferor Debtor was
17 insolvent or in poor financial condition at the time;
18 (4) that all or substantially all of the Debtor's
19 property was transferred; (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.

20 Id.

21 Section 727(a) (4) (A) provides in relevant part: "The court
22 shall grant the debtor a discharge, unless . . . the debtor
23 knowingly and fraudulently, in or in connection with the case[,]
24 made a false oath or account." To prevail on a claim under this
25 subsection, the plaintiff must show by a preponderance of the
26 evidence that (1) the debtor made a false oath in connection to
27 the case, (2) that related to a material fact, (3) made
28 knowingly, (4) and fraudulently. In re Retz, 606 F.3d at 1197.

1 On appeal, Badea does not dispute that he transferred the
2 Silverado Ranch Property to his brother within a year of filing
3 his bankruptcy petition or that his schedules and statement of
4 financial affairs contained material misstatements. Badea
5 disputes only the bankruptcy court's finding of fraudulent
6 intent, which was based on the following badges of fraud: there
7 was a close relationship between transferor and transferee, the
8 transfer was made to avoid collection activity on the Botezatus'
9 renewed judgment, and Badea did not receive consideration for the
10 transfer of the Silverado Ranch Property. Badea disputes these
11 underlying factual findings.

12 However, under 9th Cir. BAP R. 8009-1:

13 The excerpts of record shall include the transcripts
14 necessary for adequate review in light of the standard
15 of review to be applied to the issues before the Panel.
16 The Panel is required to consider only those portions
17 of the transcript included in the excerpts of the
18 record.

19 When a complete record is not provided, we are entitled to
20 presume that the omitted portions do not further the appellant's
21 arguments. Gionis v. Wayne (In re Gionis), 170 B.R. 675, 680-81
22 (9th Cir. BAP 1994), aff'd, 92 F.3d 1192 (9th Cir. 1996).
23 "[F]ailure to provide a sufficient record to support informed
24 review of trial-court determinations may, but need not, lead
25 either to dismissal of the appeal or to affirmance for inability
26 to demonstrate error." Kyle v. Dye (In re Kyle), 317 B.R. 390,
27 393 (9th Cir. BAP 2004), aff'd, 170 F. App'x 457 (9th Cir. 2006).

28 As noted, Badea failed to provide a transcript of the trial
testimony in his excerpts of record, and no trial transcript was
filed with the bankruptcy court. To find clear error, we must be

1 able to review the entire record. See Anderson v. City of
2 Bessemer City, N.C., 470 U.S. 564, 573 (1985) (“A finding is
3 clearly erroneous when although there is evidence to support it,
4 the reviewing court **on the entire evidence** is left with the
5 definite and firm conviction that a mistake has been committed.”)
6 (emphasis added) (citation omitted). Because Badea did not
7 include the complete transcript necessary for us to review the
8 “entire evidence” for clear error, we must affirm the Judgment
9 denying discharge. See Morrissey v. Stuteville
10 (In re Morrissey), 349 F.3d 1187, 1191 (9th Cir. 2003) (affirming
11 this Panel’s dismissal of appeal based in part on the inadequacy
12 of the appellate record); In re Kyle, 317 B.R. at 393.

13 **C. The bankruptcy court did not abuse its discretion in denying**
14 **Badea’s motion for reconsideration.**

15 We construe a timely motion for reconsideration as a motion
16 to alter or amend judgment under Civil Rule 59(e), applicable in
17 bankruptcy via Rule 9023. Rule 59(e) allows for reconsideration
18 if the bankruptcy court (1) is presented with newly discovered
19 evidence, (2) committed clear error or the initial decision was
20 manifestly unjust, or (3) if there is an intervening change in
21 controlling law. Kona Enters., Inc. v. Estate of Bishop,
22 229 F.3d 877, 890 (9th Cir. 2000).

23 In his motion for reconsideration, Badea argued that the
24 bankruptcy court’s fraud finding was clearly erroneous. However,
25 he pointed to no newly discovered evidence, clear error, manifest
26 injustice, or intervening change in controlling law. Badea
27 simply disagreed with the inferences drawn by the bankruptcy
28 court. The bankruptcy court denied the motion because Badea had

1 not demonstrated any of the required grounds for reconsideration.
2 On appeal, Badea focused solely on the bankruptcy court's factual
3 findings supporting the § 727 Judgment and did not argue, much
4 less demonstrate, that he met the appropriate standard on
5 reconsideration or that the bankruptcy court abused its
6 discretion in denying that motion.

7 **D. Appellees' request for fees and costs is denied for failure**
8 **to file the request in a separate motion.**

9 In their brief, the Botezatus requested fees and costs under
10 Fed. R. App. P. 38 for filing a frivolous appeal. In bankruptcy
11 appeals, the relevant rule is Rule 8020, which provides:

12 If the district court or BAP determines that an appeal
13 is frivolous, it may, after a separately filed motion
14 or notice from the court and reasonable opportunity to
respond, award just damages and single or double costs
to the appellee.

15 Because the Botezatus did not make their request in a
16 separately filed motion, we must deny it. See Nghiem v. Ghazvini
17 (In re Nghiem), 264 B.R. 557, 560 n.4 (9th Cir. BAP 2001).

18 **CONCLUSION**

19 Badea failed to provide an adequate record to enable review
20 of the bankruptcy court's finding of fraudulent intent, and he
21 has not shown that the bankruptcy court abused its discretion in
22 denying Badea's motion for reconsideration. Accordingly, we
23 AFFIRM.