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NOT FOR PUBLICATION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

In re:)	BAP No. WW-17-1067-KuFB
)	
ZHEN CHEN,)	Bk. No. 16-10632-TWD
)	
Debtor.)	Adv. No. 16-01166-TWD
)	
ZHEN CHEN,)	
)	
Appellant,)	
)	
v.)	M E M O R A N D U M*
)	
UNITED STATES TRUSTEE,)	
)	
Appellee.)	

Argued and Submitted on September 28, 2017
at Seattle, Washington

Filed - October 17, 2017

Appeal from the United States Bankruptcy Court
for the Western District of Washington

Honorable Timothy W. Dore, Bankruptcy Judge, Presiding

Appearances: Glyn E. Lewis argued for appellant; Hilary B. Mohr argued for appellee.

Before: KURTZ, FARIS, and BRAND, 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 8013-1.

1 Appellant, chapter 7¹ debtor Zhen Chen, appeals from the
2 bankruptcy court's summary judgment in favor of the United
3 States Trustee (Trustee) denying Chen's discharge under
4 § 727(a)(3). Because the record shows that there are no genuine
5 disputes of material fact, we AFFIRM.

6 I. FACTS

7 A. Chen's Background

8 Chen lived and worked in China for most of her life. Her
9 native language is Mandarin. She attended college in Beijing
10 and received her degree in Foreign Trade in 1989. From 1989-
11 2000, Chen worked as an importing agent in China. In 2000, Chen
12 moved to the United States.

13 The record is spotty regarding her employment after her
14 move. In 2010, she earned a bookkeeping certificate from
15 Bellevue Community College in Bellevue, Washington. In 2014,
16 Chen and a colleague formed an import/export business called BTS
17 Trading, LLC (BTS) of which Chen owned ten percent. That same
18 year, Chen worked for a small Chinese company part-time and a
19 restaurant for two months.

20 Chen was unemployed in 2015 and had no income. During 2014
21 and 2015, Chen received large wire transfers into her bank
22 accounts from Chinese nationals. Since February 2016, Chen has
23 been employed by Richful, LLC as a bookkeeper. In that
24 position, she interfaces with an accountant for payroll and tax

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

1 return preparation.

2 According to the record, Chen was a high stakes gambler.
3 Chen incurred significant debt related to her gambling.

4 **B. Bankruptcy Events**

5 Chen filed a chapter 7 petition in early 2016. Her amended
6 Schedule E/F shows \$417,090.77 in non-priority unsecured debt
7 consisting primarily of gambling debt owed to casinos in Las
8 Vegas and Washington. Her initial Statement of Financial
9 Affairs (SOFA) showed that she had lived at 35th Place,
10 Sammamish, Washington (35th Place Property) from January 1, 2009
11 to May 1, 2015. Chen also disclosed that two months before her
12 bankruptcy filing, she transferred her title interest in real
13 property located on 201st Court, Sammamish, Washington (201st
14 Court Property) to her sister for zero dollars because her
15 sister had provided all the funds for the purchase of the
16 property. The SOFA showed that Chen was a member of BTS, but
17 she indicated that the company had "never done business."
18 Finally, Chen disclosed \$295,000 in gambling losses.

19 Shortly after Chen filed her petition, Trustee sought and
20 obtained an order directing Chen to submit to examination and
21 produce documents under Rules 2004 and 9016. Trustee issued a
22 subpoena to Chen seeking production of documents pertaining to
23 her financial condition including, among others:

24 (1) copies of financial statements, balance sheets, or
25 loan or credit applications prepared or submitted by
26 Chen or an entity she controlled for the two years
27 prior to her bankruptcy (Requested Period);

28 (2) tax returns for tax years 2012 through 2014;

(3) statements for any type of bank or financial
account Chen controlled for the Requested Period, and

1 related documents (e.g., canceled checks, check
2 registers, wire transfers, deposit slips);

3 (4) copies of cashier's checks she or an entity she
4 controlled obtained during the Requested Period; and

5 (5) all documents related to real property in which
6 Chen had an interest in the past five years,
7 specifically including her interest in two parcels of
8 residential real property - the 201st Court Property
9 and the 35th Place Property.

10 Chen produced some documents in response, but many were
11 missing. She later produced more documents, but several were
12 duplicative and others were still missing.

13 In June 2016, Trustee conducted Chen's 2004 exam and gave
14 her a further opportunity to produce documents pertaining to:
15 (1) a line of credit (LOC) on the 35th Place Property and its
16 sale that occurred within the year preceding the petition,
17 including the disposition of the sale proceeds; (2) Chen's joint
18 purchase of the 201st Court Property with her sister, also in
19 the year preceding the bankruptcy; (3) Chen's disposition of
20 \$30,000 in proceeds from the sale of a 2013 Lexus about three
21 months before she filed bankruptcy; and (4) millions in
22 unexplained deposits and withdrawals into and out of Chen's bank
23 accounts in the two years preceding her petition.

24 After her exam, Chen made her largest production of the
25 requested documents, but still many were missing. She also
26 amended her SOFA to show the sale of the 35th Place Property for
27 \$672,000, and disclosed that the sale proceeds were used to pay
28 back her gambling debt to casinos in Las Vegas and to pay the
mortgage. She further disclosed that she had transferred
approximately \$30,000 in sale proceeds from the Lexus to her
friend, Ms. Yin, for repayment of a gambling loan. In the

1 amended SOFA, Ms. Chen reflected her gambling losses as
2 \$400,000. Finally, Chen made adjustments to her income from
3 employment for 2015, changing her gross income from \$15,000 to
4 \$0.00 and increasing her 2014 gross income from \$15,000 to
5 \$20,000. She also showed gross income of \$15,000 from gambling
6 for the year 2014.

7 Following Trustee's repeated failed attempts to obtain
8 documents relating to the various transactions, Trustee filed an
9 adversary complaint against Chen seeking to deny her discharge
10 under § 727(a)(2)(A), (a)(3), (a)(4), and (a)(5). After Chen
11 answered the complaint, Trustee filed a motion for summary
12 judgment (MSJ) on the § 727(a)(3) claim, alleging that there
13 were significant transactions (two property sales, a vehicle
14 sale, and the flow of millions of dollars into and out of Chen's
15 accounts in the two years before the petition date) that were
16 undocumented or inadequately documented to the extent that
17 parties in interest could not ascertain her financial condition
18 as of the petition date.

19 In support of the MSJ, Trustee submitted the declaration of
20 bankruptcy analyst Young-Mi Petteys (Petteys). Attached to
21 Petteys' declaration were bank statements, a two-page ledger
22 from Chen regarding her draws and payments on the LOC for the
23 35th Place Property, and communications regarding requests to
24 Chen for the further production of documents.

25 Trustee also submitted the declaration of Hilary Mohr, the
26 trial attorney for Trustee in this matter. Attached to
27 Ms. Mohr's declaration were the transcript of Chen's 2004 exam
28 and various communications regarding Ms. Mohr's efforts to

1 obtain the relevant documents.

2 Based on Chen's testimony and documents that were produced,
3 Petteys' declaration set forth the four areas where it was
4 impossible to trace, verify, or otherwise piece together Chen's
5 financial condition:

6 **Unexplained deposits and withdrawals:** Relying on the bank
7 statements produced, Petteys declared that there were \$2,329,000
8 in unexplained deposits and \$2,244,000 in unexplained
9 withdrawals from Chen's accounts for the years 2014 and 2015.

10 **201st Court Property:** Relying on Chen's testimony and the
11 documents produced, Petteys declared that she was unable to
12 verify the source of the funds used to purchase the 201st Court
13 Property. Chen testified that the 201st Court Property belonged
14 to her sister and that Chen was on title only for her sister's
15 convenience because her sister lives in China. Chen also
16 testified that after her sister learned of Chen's gambling
17 habits, her sister requested that Chen quitclaim the property to
18 her. Chen did so two months before she filed her petition.
19 Although Trustee requested that Chen provide all documents
20 relating to the purchase of the 201st Court Property, she
21 produced documents in draft form only. The draft deed of trust
22 identified Chen as a "co-borrower" on the loan to purchase the
23 201st Court Property. She did not produce a final HUD-1
24 statement for the purchase of the 201st Court Property or
25 provide final loan or security documents.²

26
27 ² There is no explanation in the record why Chen did not
28 attempt to obtain final documents pertaining to the sale or, if
(continued...)

1 account. Chen testified that she believed the wire was the net
2 proceeds from the sale after full payment of the East West Bank
3 mortgage. The following day, Chen made two wire transfers for
4 \$118,000 and \$163,000. She testified that these transfers were
5 to repay gambling debts. However, she produced no records to
6 show who received the wire transfers. Chen also did not produce
7 a final HUD-1 settlement statement or other document from which
8 the final sale proceeds or mortgage payoff from the sale of the
9 35th Place Property could be verified.³

10 Petteys declared that the U.S. Bank statement was the only
11 document to support Chen's claim that she received \$313,000 from
12 the sale of the 35th Place Property, and that \$118,000 and
13 \$163,000 went to pay back casinos. However, using this bank
14 statement alone, Petteys concluded that she was unable to
15 confirm the source of the \$313,000, or to confirm the recipients
16 of the two outgoing wire transfers.

17 **Sale of the 2013 Lexus and disposition of sale proceeds:**

18 In October 2015, Chen sold a 2013 Lexus for \$33,500. Chen
19 testified that she sold the 2013 Lexus to repay a gambling debt
20 to a friend, Ms. Yin, in the amount of \$30,000. The only
21 document she produced about the sale of the 2013 Lexus is a copy
22 of her deposit slip which includes a copy of a check. The check
23 is from Lexus of Bellevue for \$33,500 and dated October 25,
24 2015. According to Chen's U.S. Bank statement, she deposited

25
26 ³ Again, there is no indication in the record that Chen
27 attempted to obtain the final HUD-1 settlement statement or other
28 closing documents or that she contacted the casinos to obtain
documents showing that they received the wire transfers she
testified to.

1 \$30,000 four days later. Petteys declared that she could not
2 find a corresponding withdrawal for \$30,000 and therefore it was
3 unclear if Chen's friend was ever owed the money or repaid.

4 Chen responded to the MSJ by accusing Trustee of engaging
5 in "creative accounting," misleading arguments, and outright
6 falsehoods. Chen contended that Trustee used "creative
7 accounting" to come up with \$3.2 million that Chen allegedly
8 received over two years. Chen argued that she would withdraw
9 money to gamble and then deposit the same money the next day.

10 Chen also asserted that it is undisputed that she lost
11 money gambling and was a gambling addict. According to Chen, a
12 "reasonable person" standard should not be applied to her
13 because gambling against the odds is an inherently unreasonable
14 activity. Finally, Chen contended that Trustee was using
15 disputed facts to support her MSJ and therefore summary judgment
16 should not be granted.

17 In her declaration, Chen explained that the only money she
18 received from China were gifts from her mother and sister who,
19 together, transferred approximately \$900,000 to her from 2013 to
20 2015. Chen stated that she could not receive the money directly
21 from her sister because of Chinese currency controls and
22 therefore her sister's friends would send Chen the money. Chen
23 further declared that she sold the 35th Place Property to pay
24 off her gambling debt to casinos in Las Vegas and that only her
25 sister had provided funds for the purchase of the 201st Court
26 Property. She also explained that she used \$30,000 in proceeds
27 from the sale of her Lexus to pay back a personal loan from one
28 of her gambling friends, Ms. Yin.

1 Finally, Chen stated that she did not keep all the
2 documents she received from the casinos showing her gambling
3 losses because it was "too depressing" for her to think about.
4 In addition, she did not document personal loans made to her
5 gambling friends because they trusted each other: "To ask for
6 documentation among such close friends may have been considered
7 insulting." Chen further declared that her native language was
8 Mandarin and she did not understand all the English language
9 documents that she has, such as the purchase and sale documents
10 for the 201st Court Property and 35th Place Property.

11 The bankruptcy court heard the matter and stated its ruling
12 granting Trustee's MSJ on the record. On December 23, 2016, the
13 court entered the order granting Trustee's MSJ and denying
14 Debtor's discharge on the basis of § 727(a)(3).

15 Chen did not file a notice of appeal by the January 6, 2017
16 deadline. On January 20, 2017, Chen filed a timely motion to
17 extend the time to file an appeal from the order based on
18 excusable neglect – Chen's counsel thought there were 30 days to
19 file an appeal instead of 14 days. See Rule 8002(d)(1)(B).
20 Trustee opposed. The bankruptcy court granted Chen's motion and
21 extended the time to appeal to March 3, 2017. Chen filed her
22 notice of appeal on March 2, 2017.

23 II. JURISDICTION

24 The bankruptcy court had jurisdiction over this proceeding
25 under 28 U.S.C. §§ 1334 and 157(b)(2)(J). We have jurisdiction
26
27
28

1 under 28 U.S.C. § 158.⁴

2 **III. ISSUE**

3 Did the bankruptcy court err when it granted summary
4 judgment and denied Chen's discharge under § 727(a)(3)?

5 **IV. STANDARD OF REVIEW**

6 We review a summary judgment de novo. Caneva v. Sun
7 Communities Operating Ltd. P'ship (In re Caneva), 550 F.3d 755,
8 760 (9th Cir. 2008). We thus independently conduct our review
9 giving no deference to the bankruptcy court's conclusion. Roth
10 v. Educ. Credit Mgmt. Agency (In re Roth), 490 B.R. 908, 915
11 (9th Cir. BAP 2013). Viewing the evidence in the light most
12 favorable to the non-moving party, we must determine whether
13 there are any genuine disputes of material fact that remain for
14 trial and whether the prevailing party is entitled to judgment
15 as a matter of law. New Falls Corp. v. Boyajian (In re
16 Boyajian), 367 B.R. 138, 141 (9th Cir. BAP 2007).

17 **V. DISCUSSION**

18 The court shall grant summary judgment when the pleadings,
19 depositions, and admissions on file, together with the
20 affidavits, show that there are no genuine disputes as to any
21 material fact and the movant is entitled to judgment as a matter
22 of law. Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986).
23 Credibility determinations, the weighing of the evidence, and

24
25 ⁴ The bankruptcy court's order contained a Civil Rule 54(b)
26 certification thereby making the order final for purposes of this
27 appeal. There is no separate judgment. See Rule 7058, making
28 Civil Rule 58 applicable in adversary proceedings. However, the
separate judgment requirement is not jurisdictional and can be
easily waived as occurred here. See Bankers Tr. Co. v. Mallis,
435 U.S. 381, 384-85 (1978).

1 the drawing of legitimate inferences from the facts are jury
2 functions, not those of a judge when he is ruling on a motion
3 for summary judgment. Anderson v. Liberty Lobby, Inc., 477 U.S.
4 242, 255 (1986).

5 After the moving party has met her initial burden of proof,
6 the nonmoving party must produce evidence to support her claim
7 or defense. Nissan Fire & Marine Ins. Co., Ltd., v. Fritz Cos.,
8 Inc., 210 F.3d 1099, 1103 (9th Cir. 2000). "The evidence of the
9 non-movant is to be believed, and all justifiable inferences are
10 to be drawn in his favor." Anderson, 477 U.S. at 255. However,
11 "[a] conclusory, self-serving affidavit, lacking detailed facts
12 and any supporting evidence, is insufficient to create a genuine
13 issue of material fact." FTC v. Publ'g Clearing House, Inc.,
14 104 F.3d 1168, 1171 (9th Cir. 1997). "If the nonmoving party
15 fails to produce enough evidence to create a genuine issue of
16 material fact, the moving party wins the motion for summary
17 judgment." Nissan Fire & Marine, 210 F.3d at 1103.

18 For purposes of summary judgment, "the substantive law will
19 identify which facts are material." Anderson, 477 U.S. at 248.
20 The substantive law at issue in Trustee's MSJ is § 727(a)(3).
21 The statute directs the bankruptcy court to deny a debtor's
22 discharge when:

23 the debtor has . . . failed to keep or preserve any
24 recorded information, including books, documents,
25 records, and papers, from which the debtor's financial
26 condition or business transactions might be
27 ascertained, unless such act or failure to act was
28 justified under all the circumstances of the case.

27 Section 727(a)(3) places an affirmative duty on the debtor
28 to keep and preserve records accurately documenting his or her

1 business and personal affairs. See In re Caneva, 550 F.3d at
2 762. Requiring accurate documentation “removes the risk to
3 creditors of ‘the withholding or concealment of assets by the
4 bankrupt under cover of a chaotic or incomplete set of books or
5 records.’” Id. (quoting Burchett v. Myers, 202 F.2d 920, 926
6 (9th Cir. 1953). We strictly construe this exception to
7 discharge in favor of the debtor’s fresh start. Id.

8 To succeed on its objection to discharge under § 727(a)(3),
9 Trustee must show “(1) that [Chen] failed to maintain and
10 preserve adequate records, and (2) that such failure rendered it
11 impossible to ascertain [Chen’s] financial condition and
12 material⁵ business transactions.” Lansdowne v. Cox
13 (In re Cox), 41 F.3d 1294, 1296 (9th Cir. 1994) (quoting
14 Meridian Bank v. Alten, 958 F.2d 1226, 1232 (3d Cir. 1992)).
15 Generally, records are sufficient if they allow the court and
16 creditors to trace the debtor’s financial dealings.
17 In re Ridley, 115 B.R. 731, 733 (Bankr. D. Mass. 1990).

18 Once Trustee met her initial burden showing these elements,
19 the burden of proof then shifted to Chen to justify the
20 inadequacy or nonexistence of the records. In re Caneva,
21 550 F.3d at 761. The issue of justification is decided under an
22 objective standard and depends on what a normal, reasonable
23 person would do under similar circumstances. Id. at 763
24 “Justification for [a] bankrupt’s failure to keep or preserve
25

26 ⁵ The bankruptcy court correctly observed that although the
27 language in § 727(a)(3) does not require the unexplained
28 transactions be material, the Ninth Circuit added a materiality
requirement in both In re Cox and In re Caneva.

1 books or records will depend on . . . whether others in like
2 circumstances would ordinarily keep them.'").

3 In applying this objective standard, the court may
4 consider: (1) the debtor's education, experience, and
5 sophistication; (2) the volume of the debtor's business; (3) the
6 complexity of the debtor's business; (4) the amount of credit
7 extended to the debtor in his business; and (5) any other
8 circumstances that should be considered in the interest of
9 justice. Meridian Bank, 958 F.2d at 1231. Generally, "when a
10 debtor is sophisticated and carries on a business involving
11 substantial assets, 'creditors have an expectation of greater
12 and better record keeping.'" In re Caneva 550 F.3d at 762
13 (quoting In re Juzwiak, 89 F.3d 424, 428 (7th Cir. 1996)).

14 Finally, "[o]ral testimony is not a valid substitute or
15 supplement for concrete written records." In re Juzwiak,
16 89 F.3d at 429.

17 It is not enough that Debtor merely recite from
18 records ostensibly 'kept in his head' and detail from
19 memory what transactions he engaged in and how the
20 funds were dissipated. Records of substantial
21 completeness and accuracy are necessary in order that
22 they may be checked against Debtor's oral statements.
Creditors, in other words, are not required to rely on
a debtor's oral representations concerning these
matters without also having some independent means of
substantiating such representations.

23 Id.; see also Meridian Bank, 958 F.2d at 1233 ("Vague and
24 indefinite explanations of losses that are based upon estimates
25 uncorroborated by documentation are unsatisfactory."); McBee v.
26 Sliman, 512 F.2d 504, 506 (5th Cir. 1975) ("Where a debtor's
27 explanation for inadequate records is gambling, the debtor must
28 provide direct or circumstantial evidence to show that money was

1 in fact lost and that the gambling explanation was not merely a
2 ruse to evade creditors.”).

3 The bankruptcy court used the above-referenced standards
4 and so do we in assessing the record before us. It shows that
5 Chen dealt with substantial sums of cash keeping little or no
6 verifiable records. Although Chen produced some documents,
7 there are no genuine disputes of material fact that the records
8 produced were inadequate. Trustee could not verify the details
9 of the transactions discussed or trace Chen’s financial
10 dealings. Petteys’ uncontroverted declaration showed:

11 • Chen received and transferred substantial sums of money
12 to third parties for which she provided no documentation. The
13 transfer of substantial amounts of money to a third party, with
14 no documentation, establishes a prima facie violation of
15 § 727(a)(3). In re Caneva, 550 F.3d at 762. Although Chen
16 disputed Trustee’s contention that millions of dollars flowed
17 into and out of her bank accounts, Chen admitted that
18 approximately \$900,000 had been received from family members -
19 either directly or indirectly - in the roughly two years prior
20 to her bankruptcy. The bankruptcy court properly concluded that
21 “no reasonable trier of fact could find that the transfer or
22 other expenditure of \$900,000 in those two years by an
23 individual debtor with very modest income and few other assets
24 was not material.” Accordingly, even if Chen received the
25 \$900,000 versus the millions alleged by Trustee, the bank
26 statements show large withdrawals of cash. Chen provided no
27 documentation regarding how she used the money.

28 • Chen admitted to frequently borrowing and loaning money

1 to friends for gambling. She conceded that she had no
2 documentation for any of the transactions.

3 • Chen admitted that she failed to keep all documents that
4 would show her gambling expenses.⁶

5 • Chen testified during her 2004 exam that she used \$30,000
6 in proceeds from the sale of her 2013 Lexus to repay a gambling
7 debt to Ms. Yin. Yet, she provided no documentation of any debt
8 owed to Ms. Yin or that she repaid it with the sale proceeds.

9 • The documents produced regarding Chen's potential
10 interest in the 201st Court Property were inadequate. Although
11 Chen attached some documents showing the down payment was made
12 by her sister, she did not produce a final HUD-1 or documents to
13 show where approximately \$86,000⁷ in deposits, in addition to
14 the down payment, came from. Although Chen tried to explain the
15 purchase transaction, Chen's oral testimony was not a valid
16 substitute or supplement for the requested records.

17 In re Juzwiak, 89 F.3d at 429.

18 • Chen's documents pertaining to the sale of her home on
19 35th Place and the disposition of the sale proceeds were also
20 inadequate. She did not provide the final HUD-1 closing

21
22 ⁶ Federal regulations require casinos to maintain extensive
23 records about transactions with their customers. See, e.g.,
24 31 C.F.R. § 1021.410. Chen never explained why she failed to
25 obtain - or even request - records from the casinos at which she
26 gambled.

27 ⁷ Attached to Chen's reply brief is a declaration from her
28 attorney with a copy of a \$86,309.00 check written on Chen's
account to Toll WA and allegedly returned to Chen. We do not
consider this evidence which is presented for the first time on
appeal. See Cold Mountain v. Garber, 375 F.3d 884, 891 (9th Cir.
2004).

1 statement or other closing documents for the sale of her home
2 nor did she provide documents to show how she used the net sale
3 proceeds. Although she said she used the money she received to
4 pay gambling debts to Las Vegas casinos, she never produced
5 documents showing the transfer of the sale proceeds to those
6 entities nor does the record show that she tried to obtain them.

7 Chen suggested in her brief opposing the MSJ that Trustee
8 could have obtained the records regarding her payments to the
9 casinos, but she chose not to. Trustee was not required to
10 investigate and acquire Chen's records. Id.; Peters v. Michael
11 (In re Michael), 433 B.R. 214, 225 (Bankr. N.D. Ohio 2010)
12 (Under § 727(a)(3), "[a] creditor, even if they have the power
13 to obtain the records, such as through a subpoena, is not under
14 an obligation to do so."). It was Chen's duty to keep and
15 preserve records and provide sufficient information.

16 In the end, the records produced were incomplete and raised
17 more questions than they answered. It was impossible for
18 Trustee or any other party in interest to ascertain any
19 meaningful picture of Chen's financial condition. Since Trustee
20 showed that no genuine disputes of material fact existed as to
21 its prima facie case, the burden shifted to Chen to present
22 evidence sufficient to show that a question of material fact did
23 exist as to whether her failure to keep or preserve the records
24 was justified under the circumstances of her case.

25 Chen submitted no evidence in opposition to the MSJ other
26 than her declaration which repeated much of her 2004 exam
27 testimony and contained her justifications for her failure to
28 keep or preserve records in connection with the transactions

1 discussed. Chen's cursory affidavit does not create any genuine
2 disputes of material fact.

3 Chen declares that "she did her best" to produce all the
4 documents in her possession, custody and control in response to
5 Trustee's document requests. However, her best efforts in
6 producing the documents is not sufficient to satisfy the
7 requirements of § 727(a)(3). In re Caneva, 550 F.3d at 763; see
8 also Desiderio v. Devani (In re Devani), 556 B.R. 37, 43-44
9 (Bankr. E.D.N.Y. 2016) (debtor's assertion that he produced what
10 was available to him in his possession is not a sufficient
11 justification for his failure to produce financial records as he
12 could have requested them from the relevant banks).

13 Chen's justifications for her failure to keep relevant and
14 material records because "it was too depressing," "may have been
15 considered insulting" to her friends, or "she did not understand
16 all the documents" due to a language barrier, fail as a matter
17 of law for several reasons. First, Chen's justifications are
18 simply bald assertions without any specifics. "[F]actually
19 unsupported claims [and] defenses" are insufficient to withstand
20 summary judgment." Harrington v. Simmons (In re Simmons),
21 810 F.3d 852, 859 (1st Cir. 2016) (citing Celotex, 477 U.S. at
22 323); see also Publ'g Clearing House, Inc., 104 F.3d at 1171.
23 Second, her justifications do not address all the records that
24 she failed to keep. They do not address her failure to document
25 how she spent the money obtained from the LOC on the 35th Place
26 Property and the numerous deposits and withdrawals from her bank
27 accounts.

28 Third, the test for determining whether Chen has adequately

1 justified the inadequacy or lack of financial records is an
2 objective one. In re Caneva, 550 F.3d at 763; see also
3 In re Simmons, 810 F.3d at 859. It is undisputed that Chen was
4 educated and had a grasp of business and financial matters. She
5 worked as an import agent, earned a bookkeeping certificate, and
6 started her business - BTS. As the bankruptcy court found,
7 "[n]o reasonable trier of fact could conclude that a person with
8 [Chen's] background would be justified by failing to keep
9 records of the voluminous and large transactions, many
10 apparently in cash, that [Chen] engaged in during the, roughly,
11 two years prior to filing her bankruptcy case."

12 Last, Chen's alleged gambling addiction does not absolve
13 her from keeping records. Indeed, since gambling earnings are
14 "income" for tax purposes, the Internal Revenue Service requires
15 gambling documentation, such as "[a]n accurate diary or similar
16 record regularly maintained by the taxpayer, supplemented by
17 verifiable documentation."⁸ Person v. Dep't. of Revenue,
18 No. TC-MD 091421D, 2011 WL 2222261 (Or. Tax Magistrate Div.
19 June 6, 2011). Many courts have denied a debtor's discharge
20 under § 727(a)(3) for failure to maintain gambling records.

21 _____
22 ⁸ The court explained:

23 In general, the diary should contain at **least** the
24 following information:

- 24 1) Date and type of specific wager or wagering activity;
- 25 2) Name of gambling establishment;
- 26 3) Address or location of gambling establishment;
- 27 4) Names[s] of other person(s) (if any) present with
taxpayer at gambling establishment; and
- 27 5) Amount(s) won or lost.

28 Id. at *3.

1 United States Tr. v. Macway (In re Macway), No. 14-16680, 2016
2 WL 4039745 (9th Cir. July 28, 2016) (affirming denial of
3 discharge where debtor failed to maintain records for his
4 gambling activities); Dolin v. N. Petrochemical Co.
5 (In re Dolin), 799 F.2d 251 (6th Cir. 1986) (chemical dependence
6 and compulsive gambling did not excuse the debtor's failure to
7 keep adequate records); United States Tr. v. Hong Minh Tran
8 (In re Hong Minh Tran), 464 B.R. 885 (Bankr. S.D. Cal. 2012)
9 (denying discharge where debtor provided no contemporaneous
10 personal or casino records of his gambling wins and losses).
11 This is the price Chen pays for seeking bankruptcy protection
12 and the privilege of a discharge. See In re Macway, 2014 WL
13 3817103, at *3.

14 On appeal, Chen's primary argument is that the bankruptcy
15 court erred in granting summary judgment because her credibility
16 was at issue. Chen is mistaken. Intent is not a necessary
17 element for the denial of discharge under § 727(a)(3).
18 In re Cox, 41 F.3d at 1297; In re Juzwiak, 89 F.3d at 430.
19 Trustee met her burden of showing that Chen failed to maintain
20 and preserve adequate records such that it was impossible to
21 ascertain her financial condition. The burden then shifted to
22 Chen to show that her failure to keep records was justified
23 under the circumstances of her case. Such justification is
24 measured by an objective standard - that of a normal, reasonable
25 person in like circumstances. As required under summary
26 judgment standards, we accept as true (as did the bankruptcy
27 court) Chen's justifications for her failure to keep or preserve
28 records. Measured under objective standards, Chen's

1 justifications failed as a matter of law.

2 In sum, on this record there are no genuine disputes of
3 material fact on the essential elements for denial of discharge
4 under § 727(a)(3).⁹

5 **VI. CONCLUSION**

6 For the reasons stated, we AFFIRM.

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24 ⁹ Debtor's counsel contends many of the cases cited by
25 Trustee are distinguishable from this case. This may well be
26 true because Chen's justification for failing to keep or preserve
27 the records is determined under the circumstances of her case and
28 each debtor has unique circumstances. Therefore, it is
unnecessary to discuss in detail each of the cases cited by the
parties in their briefs.