

JAN 16 2018

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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NOT FOR PUBLICATION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. NV-17-1072-TiFL
)
 ANTHONY THOMAS and WENDI) Bk. No. 3:14-bk-50333-BTB
 THOMAS; AT EMERALD, LLC,)
)
 Debtors.) Adv. No. 3:14-ap-5067-BTB
)
)
 ANTHONY THOMAS,)
)
 Appellant,)
)
 v.) **M E M O R A N D U M**
)
 JOHN BEACH, AS TRUSTEE OF THE)
 BEACH LIVING TRUST DATED)
 JANUARY 22, 1999,)
)
 Appellee.)
)

Argued and Submitted on December 1, 2017
at Reno, Nevada

Filed - January 16, 2018

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

Honorable Bruce T. Beesley, Bankruptcy Judge, Presiding

Appearances: Laury Miles Macauley of Macauley Law Group, P.C.
 argued for appellant Anthony Thomas; Joseph Went
 of Holland & Hart LLP argued for appellee John
 Beach, as Trustee of the Beach Living Trust Dated
 January 22, 1999.

*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 Before: TIGHE,** LAFFERTY, and FARIS, Bankruptcy Judges.

2 **INTRODUCTION**

3 This appeal arises from a grant of summary judgment in favor
4 of plaintiff John Beach as Trustee of the Beach Living Trust
5 Dated January 22, 1999 ("Beach"). Beach made a motion for
6 summary judgment (the "Motion") in this adversary proceeding on
7 claims under § 523(a)(2)(A)¹, Nevada state law fraud, and
8 § 727(a)(4)(A). The bankruptcy court granted the Motion by order
9 entered on February 21, 2017.

10 Admittedly, debtor and defendant Anthony Thomas ("Thomas")
11 failed to file a written response to the Motion; nevertheless,
12 the evidence introduced in support of the Motion was inadequate.
13 Specifically, Beach provided insufficient proof of the required
14 false statements, and the court's finding of knowledge and
15 fraudulent intent must have been based, impermissibly, upon
16 material inferences drawn against the nonmoving party. We
17 therefore REVERSE and REMAND.

18 **FACTS²**

19 _____
20 **Hon. Maureen A. Tighe, U.S. Bankruptcy Judge for the
21 Central District of California, sitting by designation.

22 ¹Unless otherwise indicated, all chapter, section, and rule
23 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532, and
24 to the Federal Rules of Bankruptcy Procedure, Rules 1001-9037.
All "Civil Rule" references are to the Federal Rules of Civil
Procedure.

25 ²We have exercised our discretion to review the bankruptcy
26 court docket and various documents filed through the electronic
27 docketing system. See O'Rourke v. Seaboard Sur. Co. (In re E.R.
28 Fegert, Inc.), 887 F.2d 955, 957-58 (9th Cir. 1988); Atwood v.
Chase Manhattan Mortg. Co. (In re Atwood), 293 B.R. 227, 233 n.9

(continued...)

1 This case involves a \$500,000 loan secured by a 23 kilogram
2 black schist stone containing a 22,500 carat emerald, known as
3 the "Thomas Emerald." The Thomas Emerald was purchased by Thomas
4 on September 17, 2001 for \$20,000 in Sao Paulo, Brazil. Thomas
5 obtained a "Certificado" dated November 5, 2001, providing an
6 appraisal of the Thomas Emerald and estimating it to be worth
7 \$800,000,000. A portion of the Certificado reads:

8 In my 35 years as a professional, I have never
9 encountered anything similar, and due to its
10 uniqueness, there is nothing I can refer to in order to
11 establish a monetary value for this rock.
12 Consequently, it is entirely up to the owner of the
13 crystal and the party interested in purchasing it to
14 establish the crystal's market value.

15 If I were to quote the commercial value of this
16 stone, it would be superior to the value of the solid
17 block found in the British Museum, Great Russell
18 Street, England WCI which measures 203 x 172 x 160 mm,
19 weighs 3,296 gr. And is worth US\$ 792 million (seven-
20 hundred, ninety-two million dollars). The specimen in
21 this report, which weighs 1,204 grams (6,020 cts) more
22 than the rock in the British Museum, I estimate is
23 worth US\$800 million (eight-hundred million dollars).

24 The Certificado is signed by a "Dimitri Paraskevopulos, Expert
25 Appraiser and Gemologist." Thomas claims to have obtained
26 subsequent "appraisals" of the Thomas Emerald for "over
27 \$200,000,000," and a signed asset purchase agreement dated
28 February 5, 2009 for \$340 million. However, no evidence of any
subsequent appraisals or the referenced sale, other than
statements by Thomas, exists in the record.³ By all accounts,

25 ²(...continued)
26 (9th Cir. BAP 2003).

27 ³Beach submitted an appraisal to the bankruptcy court in
28 support of the Motion, but the court declined to admit the
appraisal into evidence.

1 however, the Thomas Emerald is unique and therefore very
2 difficult to value.

3 At some point between 2001 and 2013, Thomas transferred the
4 Thomas Emerald to AT Emerald, LLC, a Nevada limited liability
5 company ("AT Emerald"), with himself as the sole member. By
6 2013, Thomas became liable for \$4.5 million in connection with a
7 settlement agreement with Kenmark Ventures. In order to satisfy
8 that debt in part, Thomas sought to borrow money using the Thomas
9 Emerald as collateral.

10 Thomas met Beach through Beach's wife and her cousins.
11 Around January 17, 2013, AT Emerald executed a promissory note
12 (the "Note") evidencing the trust's loan to AT Emerald of
13 \$500,000 at 7% interest per annum with a 1-year maturity date.
14 The Note was secured by the Thomas Emerald, as described by the
15 attached copy of the Certificado. On January 18, 2013, Beach
16 wired the \$500,000 loan funds to "Wells Fargo, Beneficiary ABA
17 . . . Mr. Tony Thomas/AT Emerald Transfer." AT Emerald never
18 made any payments to Beach under the Note.⁴ Beach later recorded
19 a UCC-1 financing statement.

21 ⁴At the hearing on the Motion, Thomas argued repeatedly
22 that this was not his debt, but the debt of AT Emerald. Beyond a
23 short statement in the brief, Thomas makes no argument and cites
24 no law in this appeal that Beach sued the wrong party. Even if
25 Thomas had adequately raised the issue in this appeal, it is
26 easily rejected. Thomas's Schedule F (and amended Schedule F)
27 admits that he owes a \$540,000 debt to Beach. He did not mark
28 the debt as disputed, contingent, or unliquidated. Furthermore,
Beach filed a proof of claim against Thomas and his wife
personally; no objection to that proof of claim was ever filed.
A claim for which a proof of claim is filed is deemed allowed
unless a party in interest objects. § 502(a). Here, no party in
interest objected to the proof of claim filed by Beach.

1 On March 4, 2014, Thomas and his wife, Wendi Thomas,⁵ filed
2 a joint chapter 11 bankruptcy in the District of Nevada.
3 Simultaneously, AT Emerald filed a separate chapter 11 case in
4 the District of Nevada. On May 12, 2014, the bankruptcy court
5 ordered the two cases to be jointly administered. They were
6 later converted to chapter 7. Thomas listed as an asset in his
7 Schedule B a 100% interest in AT Emerald valued at \$200,000,000
8 "based on appraisal." AT Emerald listed in its Schedule B:
9 "[o]ne Emerald Based on Appraisal Value Exceeds \$200,000,000.00."

10 1) Valuation and Alleged Sale

11 At all times relevant, the Thomas Emerald was held at
12 Sarasota Vault in Sarasota, Florida ("Sarasota Vault"). On
13 June 20, 2014, Beach filed an Ex Parte Motion for an Order
14 Requiring the Person Most Knowledgeable of the Sarasota Vault to
15 Appear for 2004 Examination (the "Rule 2004 Examination" motion).

16 Three days later, on June 23, 2014, Thomas and AT Emerald
17 filed in their respective bankruptcy cases identical motions to
18 sell the Thomas Emerald free and clear of liens (the "Motion to
19 Sell"). Attached to the Motion to Sell was a Purchase and Sale
20 Agreement dated June 19, 2014, between AT Emerald and Koyo
21 Shipping and Trading Corporation ("Koyo Agreement") with all
22 references to the sales price redacted. The Koyo Agreement is
23 signed by one "David Charles Clarke, Finance Director &
24 International Trustee." While the sale price under the Koyo
25 Agreement is not known, according to the Motion it was allegedly

27
28 ⁵This action was dismissed as to Wendi Thomas; Debtor
Anthony Thomas is the only appellant.

1 "hundreds of millions of dollars." Beach alleged that the Koyo
2 Agreement was fabricated in order to delay any inspection or
3 appraisal of the Thomas Emerald.

4 The Rule 2004 Examination was scheduled for July 10, 2014.
5 Beach received a letter on July 2 from counsel for Sarasota
6 Vault. The letter informed Beach that access to the subject box
7 at Sarasota Vault required two keys; Sarasota Vault had one key,
8 and Thomas had the other. Without Thomas's key, the box
9 containing the Thomas Emerald could be opened only by having a
10 locksmith drill and replace the locks, for a cost of roughly
11 \$200. On July 9, Beach continued the 2004 Examination.⁶ The
12 Motion to Sell, along with accompanying declarations, was
13 withdrawn by AT Emerald on the same day.⁷

14 On July 17, Beach filed a motion to compel Thomas to produce
15 the key or alternatively to authorize the drilling of the lock at
16 Sarasota Vault. At a hearing on that motion, the court ordered
17 AT Emerald and/or its principal, Thomas, to turn over the
18 Sarasota Vault key by August 1. Sometime after that hearing and
19 before August 8, Thomas contacted Beach via text message:

20 John you said you weren't going to do anything to
21 interfere with the sale of the Emerald I told you we
22 are in contract and the buyer doesn't want you or
23 anyone else to view the Emerald because he's already
approved it for the purchase. The buyer said he would
back out of the sale agreement if anybody interfered
with the sale my attorneys are going to opposed you

24
25 ⁶It is not clear if the examination was ever conducted.

26 ⁷While the Motion to Sell was withdrawn from the AT Emerald
27 bankruptcy docket, the Motion to Sell filed by Thomas in his
28 individual bankruptcy was not withdrawn. Curiously, the Motion
to Sell in Thomas' case was granted on July 23, 2014. No sale
ever occurred.

1 view the Emerald today 10am o'clock. [sic]

2 A separate text stated: "[t]he emerald is sold and I'm waiting
3 for confirmation, when they will wire the funds. I don't see
4 your point in going to Florida."

5 On August 8, Thomas sent Beach a text message containing a
6 letter allegedly from David C. Clarke of Koyo Shipping ("Koyo
7 Letter"), the same individual who signed the original agreement.
8 The Koyo Letter stated that Koyo had entered into an agreement
9 with Thomas for the sale of the Thomas Emerald. The letter
10 further stated that Mr. Clarke and an appraiser had visited the
11 vault on July 7 to inspect the stone and had approved it for
12 sale. The letter further warned that if Beach visited the vault,
13 Koyo would either have to withdraw from the agreement or arrange
14 another inspection of the Thomas Emerald.

15 Thomas subsequently produced the key. The Sarasota Vault
16 produced a sign-in sheet for the box where the Thomas Emerald is
17 stored, which showed two entries: 1) May 23, 2008 by A. Thomas,
18 and 2) July 9, 2014 by A. Thomas. Beach cites the sign-in sheet
19 as evidence that nobody other than Thomas visited the vault, and
20 that the Koyo Letter was a "sign of desperation" after Thomas
21 failed to prevent an independent inspection of the Thomas
22 Emerald. Beach argues that the Koyo Agreement for an alleged
23 sale of the Thomas Emerald for hundreds of millions of dollars
24 was a "fantasy sale" which not only failed to materialize, but
25 that nothing was ever heard again from "David Clarke" of "Koyo
26 Shipping and Trading Corporation."

27 2) The Adversary Action

28 Beach filed this adversary proceeding on November 24, 2014.

1 The First Amended Complaint charges that Thomas misrepresented
2 the value of the stone in obtaining the loan and that he knew
3 that the value of his interest in AT Emerald, set forth as
4 \$200,000,000 in Thomas' schedules, was not accurate. Beach
5 further argues in the Motion that Thomas's attempts to block an
6 independent inspection of the Thomas Emerald indicate an attempt
7 to prevent the true value of the stone from being determined.

8 On January 25, 2016, Beach filed the Motion, along with a
9 Statement of Undisputed Facts as required by District of Nevada
10 Local Bankruptcy Rule 7056. Thomas, who was representing
11 himself, failed to file a written response to the Motion.

12 A hearing on the Motion was held on March 9, 2016. Thomas
13 appeared in court and was permitted to argue. Thomas's
14 statements at the hearing on the Motion were wide-ranging. He
15 addressed the uniqueness of the Thomas Emerald and denied the
16 allegations that he had fabricated the Koyo Letter. Thomas
17 discussed the circumstances under which he obtained the Thomas
18 Emerald:

19 You know, these emeralds were a curse to me. I bought
20 them in Brazil, you know, from people that were
21 supposed to know what they were. I went and got expert
22 appraisals, and they ended up being worth a lot more.
23 The next thing you know, I'm losing my house and
24 everything I got, and I did nothing wrong. I have
25 committed no fraud to nobody. [sic]

26 Our review of the bankruptcy court transcript leads us to
27 conclude that Thomas's oral opposition was not considered in the
28 court's ruling on the Motion. At the end of Thomas's statement,
the judge stated:

There was a default in responding to this. I am
entering judgment against Mr. Thomas. . . . Please
upload an order consistent with the representations

1 made and the evidence produced.
2 Judgment was entered on April 13, 2017, and Thomas timely
3 appealed. On appeal, Thomas now argues that the court did not
4 allow him to present an oral opposition or grant him a
5 continuance to file a written opposition.⁸

6 Lastly, Thomas argues that, whether or not he raised any
7 disputed facts at the hearing on the Motion, summary judgment
8 should not have been entered because plaintiff failed to offer
9 sufficient evidence to support the alleged claims.

10 **ISSUES**

11 I. Did the bankruptcy court err in granting summary
12 judgment in favor of Beach under § 523(a)(2)(A)?

13 II. Did the bankruptcy court err in granting summary
14 judgment in favor of Beach for fraud under Nevada state
15 law?

16 III. Did the bankruptcy court err in granting summary
17 judgment in favor of Beach under § 727(a)(4)(A)?

18 **JURISDICTION**

19 The bankruptcy court had jurisdiction pursuant to 28 U.S.C.
20 §§ 1334 and 157(b)(2)(I), (J), and (O). See Dietz v. Ford
21 (In re Dietz), 469 B.R. 11, 22 (9th Cir. BAP 2012), aff'd,
22 760 F.3d 1038 (9th Cir. 2014) (bankruptcy court may enter a
23 monetary judgment on a disputed state law fraud claim in the
24 course of determining that a debt is nondischargeable). We have
25

26 ⁸Because we determine that the decision should be reversed
27 on other grounds, we do not reach the question of whether the
28 bankruptcy court erred in denying Thomas a continuance to file a
written opposition to the Motion.

1 jurisdiction over this appeal under 28 U.S.C. § 158.

2 **STANDARD OF REVIEW**

3 We review the bankruptcy court's granting of a summary
4 judgment motion de novo. Foster v. Double R Ranch Ass'n
5 (In re Foster), 435 B.R. 650, 655 (9th Cir. BAP 2010).⁹

6 **DISCUSSION**

7 To succeed on a summary judgment motion, the movant must
8 establish the lack of a genuine issue of material fact and
9 entitlement to judgment as a matter of law. Aubrey v. Thomas
10 (In re Aubrey), 111 B.R. 268, 272 (9th Cir. BAP 1990). The
11 moving party must support its motion with credible evidence, as
12 defined in Civil Rule 56(c), which would entitle it to a directed
13 verdict if not controverted at trial. Id. If a party fails to
14 address another party's assertion of fact, the court may consider
15 the fact undisputed for purposes of the summary judgment motion.
16 Civil Rule 56(e)(2). The court must view all the evidence in the
17 light most favorable to the nonmoving party. Barboza v. New
18 Form, Inc. (In re Barboza), 545 F.3d 702, 707 (9th Cir. 2008).
19 "Even where no evidence is presented in opposition to the motion,
20 summary judgment should not be granted if the evidence in support
21

22 ⁹The order granting summary judgment includes findings of
23 fact. Findings of fact on summary judgment pinpoint for the
24 appellate court which facts are undisputed and indicate the basis
25 for summary judgment. Beach argues that because the lower court
26 entered "findings of fact," a clearly erroneous standard should
27 apply. This is incorrect. As stated by the 9th Circuit: "[t]hey
28 are not findings of fact in the sense that the trial court has
weighed the evidence and resolved disputed factual issues. As
the findings are not entitled to deference upon review, the
clearly erroneous standard is simply inapplicable." Heiniger v.
City of Phoenix, 625 F.2d 842, 843 (9th Cir. 1980).

1 of the motion is insufficient.” Hoover v. Switlik Parachute Co.,
2 663 F.2d 964, 967 (9th Cir. 1981).

3 The bankruptcy court apparently granted the motion for
4 summary judgment solely because Thomas did not file a timely
5 opposition. This was error. Under governing Ninth Circuit
6 precedent, even if a motion for summary judgment is unopposed,
7 the court must evaluate the sufficiency of the movant’s evidence.
8 Id. The bankruptcy court did not do so. As explained below, the
9 movant’s evidence was not sufficient to sustain summary judgment.

10 **I. Section 523(a)(2)(A)**

11 Section 523(a)(2)(A) excepts from discharge any debt “to the
12 extent obtained by false pretenses, a false representation, or
13 actual fraud, other than a statement respecting the debtor’s or
14 an insider’s financial condition.” § 523(a)(2)(A). A creditor’s
15 claim of nondischargeability based on § 523(a)(2)(A) must satisfy
16 five elements: (1) the debtor made a false statement or engaged
17 in deceptive conduct; (2) the debtor knew the representation to
18 be false; (3) the debtor made the representation with the intent
19 to deceive the creditor; (4) the creditor justifiably relied on
20 the representation; and (5) the creditor sustained damage
21 resulting from its reliance on the debtor’s representation.
22 Turtle Rock Meadows Homeowners Ass’n v. Slyman (In re Slyman),
23 234 F.3d 1081, 1085 (9th Cir. 2000). In order to avoid
24 unjustifiably impairing a debtor’s fresh start, exceptions to
25 discharge should be strictly construed against creditors and in
26 favor of debtors. Klapp v. Landsman, 706 F.2d 998, 999 (9th Cir.
27 1983).

1) False Statement or Deceptive Conduct

The false statement or deceptive conduct relied on in this matter was an alleged representation by Thomas that the Thomas Emerald could provide adequate collateral to secure the full amount of the loan. Attached to the Note and security agreement was a copy of the Certificado claiming the value of the Thomas Emerald to be \$800,000,000. Beyond the Certificado, Beach provided no evidence in support of the Motion that Thomas represented at the time of the loan that the loan would be fully secured. The Note itself makes no such statement, nor does it allege that the Certificado represents the true value of the Thomas Emerald. The Certificado itself states that "it is entirely up to the owner of the crystal and the party interested in purchasing to establish the crystal's market value." To establish that Thomas made a false statement, Beach relies in part on Request for Admission No. 2, which states:

No. 2: Admit that you represented to Plaintiff that you could provide collateral to Plaintiff for loan proceeds in the form of the Thomas Emerald.

A: Admit, Anthony Thomas represented this on behalf of AT Emerald, LLC.

This admission does not state, however, that the emerald would fully secure the value of the loan.¹⁰

¹⁰At oral argument in this appeal, Beach alleged that he had previously filed a declaration in the action in which Beach declared that Thomas represented that the value of the Thomas Emerald would be sufficient to completely secure repayment of the loan proceeds and that the declaration was referenced in Beach's motion for summary judgment. The panel was not able to locate any such declaration on the docket of either the adversary or

(continued...)

1 Even if Thomas' statement is considered a representation
2 that the Thomas Emerald would fully secure the loan, the true
3 value of the emerald was not proven. Without an appraisal, the
4 falsity of Thomas' representation that the loan would be fully
5 secured is a disputed material fact.

6 Even without considering Thomas's oral statements, Beach's
7 evidence and his argument showed that the Thomas Emerald is
8 unique and that there is "nothing like it." Beach's own papers
9 revealed a genuine issue of material fact regarding the falsity
10 of Thomas' statements.

11 2) Thomas Knew the Representation to be False

12 Assuming for purposes of this element that the statement was
13 false, to prevail under § 523(a)(2)(A), it was insufficient for
14 Beach to show that Thomas knew at the time of the loan that the
15 \$800,000,000 figure was a gross overvaluation; Beach must have
16 shown that Thomas knew that the value of the Thomas Emerald was
17 less than the amount of the loan. Even if Thomas believed at the
18 time of the loan that the Thomas Emerald was only worth \$600,000,
19 the loan would still have been fully collateralized and therefore
20 the second element would not be satisfied.

21 In a request for admission submitted with the Motion, Thomas
22 denied that he knew that the Thomas Emerald was worth less than
23 \$200,000,000, or that he misrepresented the value of the Thomas
24 Emerald to Beach in order to induce him to make the \$500,000
25 loan.

26
27 ¹⁰ (...continued)
28 main bankruptcy case, nor was the panel able to locate a
reference to such a declaration in the Motion.

1 Beach alleges that the court can infer knowledge of the
2 falsity of Thomas's alleged representation from the following
3 "undisputed facts":

- 4 1) Thomas purchased the Thomas Emerald for \$20,000 in
5 2001;
- 6 2) Thomas was "reduced to begging for money from Beach,
7 even though he allegedly held a valuable stone, which
8 could have been used to secure financing from a
9 traditional lending source";
- 10 3) Thomas attempted to block an independent evaluation of
11 the Thomas Emerald; and
- 12 4) "Thomas's production of the Koyo Letter, which
13 threatened to pull out of a proposed purchase of the
14 Thomas Emerald if anyone else looked at it."

15 Beach asked the court to infer from the circumstances
16 surrounding the production of the Koyo Letter that there was no
17 proposed sale and that Thomas fabricated the deal and the letter
18 in order to forestall an appraisal because he knew it would
19 reveal a low value. Drawing such an inference against Thomas,
20 however, violates the requirement that, on summary judgment, the
21 court must view all the evidence in the light most favorable to
22 the nonmoving party. In re Barboza, 545 F.3d at 707. Beach
23 asked the court to draw inferences against the nonmoving party.
24 For example, Beach would like the court to infer from the
25 Sarasota Vault sign-in sheet that nobody other than Thomas
26 visited the vault. The sign-in sheet shows Thomas' signature for
27 a date that appears to be "7/9/14," although the "9" is difficult
28 to read. The Koyo Letter states that Mr. Clarke and his

1 appraiser visited the vault on July 7. In interrogatory No. 10,
2 Thomas states that he met with Mr. Clarke and his appraiser on
3 July 7 and they viewed the Thomas Emerald.

4 One reasonable inference from the facts in favor of the
5 nonmoving party is that Thomas visited the vault and was
6 accompanied by Mr. Clarke and an appraiser, who were simply not
7 required to sign the sign-in sheet, on either July 7 or July 9.
8 No evidence was introduced to show that the visit reflected on
9 the sign-in sheet was not the visit described in the Koyo Letter
10 and in the interrogatories.

11 In order to conclude that the Koyo Letter was a fabrication
12 intended to forestall an inspection and appraisal, the court
13 essentially had to make credibility findings against Thomas.
14 While such a conclusion could be drawn at trial, it was not
15 permissible on summary judgment. Cal. Steel & Tube v. Kaiser
16 Steel Corp., 650 F.2d 1001, 1003 (9th Cir. 1981).

17 More importantly, Beach never drew a clear connection
18 between the alleged actions surrounding the Koyo Letter and
19 Thomas' knowledge of the Thomas Emerald's value **at the time of**
20 **the loan**. Beach did not meet his burden of showing that Thomas
21 knew at the time the loan was made that the Thomas Emerald's
22 value was less than the amount of the loan.

23 3) Intent to Deceive

24 Intent to deceive may be inferred from the totality of
25 circumstances. Eashai v. Eashai (In re Eashai), 87 F.3d 1082,
26 1087-88 (9th Cir. 1996). Where intent is at issue, summary
27 judgment is seldom granted; however, "summary judgment is
28 appropriate if all reasonable inferences defeat the claims of one

1 side, even where intent is at issue.” Gertsch v. Johnson &
2 Johnson, Fin. Corp. (In re Gertsch), 237 B.R. 160, 165 (9th Cir.
3 BAP 1999).

4 Beach argues that intent to deceive can be inferred from the
5 same facts as those which establish knowledge. When viewed in a
6 light most favorable to the nonmoving party, the record does not
7 establish that Thomas intended to deceive Beach. For the
8 foregoing reasons, the bankruptcy court erred in granting summary
9 judgment in favor of Beach under § 523(a) (2) (A).¹¹

10 **II. Nevada State Fraud Claim**

11 Under Nevada law, plaintiff has the burden of proving each
12 and every element of a fraudulent misrepresentation claim by
13 clear and convincing evidence: (1) a false representation made by
14 defendant; (2) defendant’s knowledge or belief that its
15 representation was false or that defendant has an insufficient
16 basis of information for making the representation; (3) defendant
17 intended to induce plaintiff to act or refrain from acting upon
18 the misrepresentation; and (4) damage to plaintiff as a result of
19 relying on the misrepresentation. Barmettler v. Reno Air, Inc.,
20 956 P.2d 1382, 1386 (Nev. 1998); Bulbman, Inc. v. Nev. Bell,
21 825 P.2d 588, 592 (Nev. 1992).

22 _____
23 ¹¹The result of this action differs from our decision in a
24 similar action brought against Thomas by Kenmark Ventures, LLC
25 (“Kenmark case”). Thomas v. Kenmark Ventures, LLC
26 (In re Thomas), BAP No. NV-16-1058-KuLJu, 2017 WL 1160868 (9th
27 Cir. BAP Mar. 28, 2017). The Kenmark case was decided after a
28 trial and with significant evidence that was not before the court
on this summary judgment motion. Our divergent results are a
reflection of the differing procedural posture as well as the
limited evidence in the record in this case. Also, Kenmark
asserted a failure to disclose argument not made here.

1 The elements of fraud under Nevada state law are essentially
2 identical to the elements of § 523(a)(2)(A); however, the state
3 law fraud claim uses a higher "clear and convincing" evidentiary
4 standard, whereas § 523(a)(2)(A) merely requires a preponderance
5 of the evidence. In re Slyman, 234 F.3d at 1085. Given the
6 similar intent requirements of the fraud claim in addition to the
7 higher evidentiary standard, summary judgment on the Nevada state
8 law fraud claim should be reversed for the same reasons as the
9 § 523(a)(2)(A) claim.

10 III. Section 727(a)(4)(A)

11 The bankruptcy court must grant a discharge to a chapter 7
12 debtor unless one of the twelve enumerated grounds in § 727(a) is
13 satisfied. Claims for denial of discharge under § 727(a) are
14 liberally construed in favor of the debtor and against the
15 objector to discharge. Khalil v. Developers Sur. & Indem. Co.
16 (In re Khalil), 379 B.R. 163, 172 (9th Cir. BAP 2007), aff'd,
17 578 F.3d 1167 (9th Cir. 2009).

18 A debtor's discharge may be denied if the debtor "knowingly
19 and fraudulently, in or in connection with the case . . . made a
20 false oath or account." § 727(a)(4)(A). To prevail on such a
21 claim, plaintiff must show, by a preponderance of the evidence,
22 that: "(1) the debtor made a false oath in connection with the
23 case; (2) the oath related to a material fact; (3) the oath was
24 made knowingly; and (4) the oath was made fraudulently." Retz v.
25 Samson (In re Retz), 606 F.3d 1189, 1197 (9th Cir. 2010).

26 The "knowing and fraudulent" intent standard of § 727(a)(4)
27 means that the debtor must have actual, not constructive, intent
28 in concealing records or making an omission in schedules. Fogal

1 Legware of Switzerland, Inc. v. Wills (In re Wills), 243 B.R. 58,
2 64 (9th Cir. BAP 1999). Fraudulent intent may be proved by
3 circumstantial evidence; reckless disregard combined with other
4 circumstances may support an inference of fraudulent intent.
5 Stamat v. Neary, 635 F.3d 974, 982 (7th Cir. 2011) (reckless
6 disregard shown where debtors who failed to disclose business
7 interests were highly educated and had significant business
8 experience); In re Retz, 606 F.3d at 1199; Sholdra v. Chilmark
9 Fin. LLP (In re Sholdra), 249 F.3d 380, 382 (5th Cir. 2001);
10 In re Khalil, 379 B.R. at 174. Intent can be established by
11 consideration of the totality of the circumstances. Devers v.
12 Bank of Sheridan, Mont. (In re Devers), 759 F.2d 751, 753-54 (9th
13 Cir. 1985).

14 The allegedly false oath on which Beach's claim relies is
15 the estimate of the value of Thomas' interest listed on
16 Schedule B as "AT EMERALD, LLC 100% BASED ON APPRAISAL VALUE
17 EXCEEDS \$200,000,000." This statement is distinct from the value
18 of the Thomas Emerald itself, which is valued in AT Emerald's
19 separate bankruptcy case.¹² Beach failed to submit any evidence
20 that this valuation of the Thomas Emerald was false or that
21 Thomas made the statement with knowledge of its falsity or with
22 fraudulent intent.

23 _____
24 ¹²Thomas correctly points out that Beach's statement of
25 undisputed facts in support of the Motion attached and referenced
26 only the value of the Thomas Emerald in the AT Emerald case and
27 did not include the schedules of Thomas's personal bankruptcy.
28 Thomas claims that the failure to attach the schedules to the
Motion is a fatal flaw because no evidence was presented of a
false oath; however, as noted previously, the panel has exercised
its discretion to review the schedules filed on the docket.

1 Beach's argument regarding the "false oath" element of
2 § 727(a)(4)(A) depends on the court believing Beach's assertion
3 that Thomas's valuation of the Thomas Emerald was "not based in
4 reality" or "fantastical." There is no evidence in the record as
5 to the value of the Thomas Emerald other than the purchase price
6 of \$20,000 and the \$800,000,000 Certificado appraisal, both of
7 which date from roughly the same time. The only appraisal on the
8 record far exceeds the scheduled value of the asset. Viewing the
9 evidence in this record in favor of the nonmoving party, Thomas
10 could have reasonably based his estimate on the Certificado.

11 Beach failed to establish that Thomas knowingly and
12 fraudulently misrepresented the value of the Thomas Emerald in
13 his bankruptcy schedules.

14 **CONCLUSION**

15 For the foregoing reasons, we REVERSE the bankruptcy
16 court's determination on summary judgment as to § 523(a)(2)(A),
17 § 727(a)(4)(A), and the Nevada state law fraud claim and REMAND
18 the case for further proceedings.