

AUG 21 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NOT FOR PUBLICATION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

In re:	)	BAP No. CC-16-1439-LTaKu
	)	
BRYN F. POOLE,	)	Bk. No. 9:15-bk-11394-PC
	)	
Debtor.	)	Adv. No. 9:15-ap-01072-PC
	)	
BARBARA DONAHUE,	)	
	)	
Appellant,	)	
	)	
v.	)	<b>MEMORANDUM*</b>
	)	
BRYN F. POOLE,	)	
	)	
Appellee.	)	
	)	

Argued and Submitted on July 27, 2017  
at Pasadena, California

Filed - August 21, 2017

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

Honorable Peter H. Carroll, Bankruptcy Judge, Presiding

Appearances: Barbara Donahue, Appellant, appeared pro se; no  
appearance by Appellee.

Before: LAFFERTY, TAYLOR, 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 trial, the bankruptcy court entered judgment for  
3 defendant on Appellant Barbara Donahue's complaint against  
4 chapter 7<sup>1</sup> debtor Bryn Poole. The complaint sought (i) a  
5 declaration that a state court judgment arising out of a motor  
6 vehicle accident was nondischargeable under §§ 523(a)(6) and  
7 (a)(9) and (ii) denial of discharge under various subsections of  
8 § 727(a).

9 The bankruptcy court entered judgment for Debtor because  
10 Ms. Donahue failed to meet her burden of proof on any of her  
11 claims. In this appeal, Ms. Donahue has not provided us with a  
12 sufficient record of the trial for us to ascertain any error in  
13 the bankruptcy court's findings. Accordingly, we AFFIRM.

14 **FACTS**

15 Debtor filed a chapter 7 petition on July 6, 2015.  
16 Ms. Donahue and her son, Connor, acting pro se, filed a timely  
17 complaint objecting to the discharge of the debt owed to them and  
18 seeking denial of discharge.<sup>2</sup>

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21  
22 <sup>1</sup>Unless specified otherwise, all chapter and section  
23 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532, all  
24 "Rule" references are to the Federal Rules of Bankruptcy  
Procedure, and all "Civil Rule" references are to the Federal  
Rules of Civil Procedure.

25 <sup>2</sup>The complaint and amended complaint were filed jointly by  
26 Ms. Donahue and Connor. The underlying state court judgment is  
27 in Connor's name only. According to the bankruptcy court's  
28 findings, the state court judgment was assigned to Ms. Donahue on  
June 20, 2014; thus it is unclear why Connor was included as a  
plaintiff in the subsequently filed adversary proceeding.

1           According to the original complaint,<sup>3</sup> in 2013 Connor  
2 obtained a judgment in small claims court against Debtor for  
3 \$7,500 for property damage and personal injuries arising from a  
4 2011 automobile accident in which Debtor was allegedly under the  
5 influence of prescription pain medication. Debtor appealed the  
6 judgment, which was affirmed by the Los Angeles County Superior  
7 Court. The complaint alleged that Debtor admitted under oath  
8 that he had taken prescription pain killers.

9           The complaint and amended complaint<sup>4</sup> also alleged that  
10 Debtor had failed to respond to subpoenas and that Debtor had  
11 made misrepresentations and/or failed to disclose assets and  
12 liabilities in his bankruptcy schedules and statements, including  
13 Debtor's interests in a family trust and businesses and an  
14 allegedly nondischargeable \$616.50 debt owed to the Los Angeles  
15 Superior Court.

16           The complaint sought a judgment of nondischargeability  
17 pursuant to § 523(a)(6), for debt incurred as a result of willful  
18 and malicious injury, and under § 523(a)(9), which excepts from  
19 discharge debts arising from "death or personal injury caused by  
20 the debtor's operation of a motor vehicle, vessel, or aircraft if  
21 such operation was unlawful because the debtor was intoxicated  
22 from using alcohol, a drug, or another substance[.]"

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23  
24           <sup>3</sup>We have exercised our discretion to take judicial notice of  
25 documents electronically filed in the adversary proceeding and in  
26 the underlying bankruptcy case. See Atwood v. Chase Manhattan  
27 Mortg. Co. (In re Atwood), 293 B.R. 227, 233 n.9 (9th Cir. BAP  
28 2003).

<sup>4</sup>The "amended complaint" appears to be an addendum to the  
original complaint.

1           Additionally, the bankruptcy court interpreted the complaint  
2 as alleging claims for denial of discharge under § 727(a) (2) (A)  
3 (fraudulently concealing assets); (a) (3) (failure to keep  
4 adequate records); (a) (4) (false oath); (a) (5) (failure to  
5 explain loss of assets); and (a) (6) (refusal to obey lawful court  
6 order).

7           After Debtor answered the complaint, the bankruptcy court  
8 granted the parties' request to assign the matter to mediation.  
9 Debtor did not appear at the scheduled mediation, and the  
10 bankruptcy court set the matter for trial on November 4, 2016.  
11 For reasons that are not entirely clear, the trial was then  
12 postponed to December 12, 2016.

13           At the conclusion of the trial, the bankruptcy court made  
14 oral findings and stated legal conclusions on the record and  
15 entered judgment in favor of Debtor. Ms. Donahue timely appealed  
16 but subsequently filed a motion for reconsideration, which the  
17 bankruptcy court denied for lack of jurisdiction. Debtor has not  
18 filed a brief or otherwise participated in this appeal.

19           Ms. Donahue did not provide a hearing transcript with her  
20 excerpts of the record. In response to the Panel's order, she  
21 filed a partial transcript that included only the bankruptcy  
22 court's findings and conclusions.

#### 23   **JURISDICTION**

24           The bankruptcy court had jurisdiction pursuant to 28 U.S.C.  
25 §§ 1334 and 157(b) (2) (I) and (J). We have jurisdiction under  
26 28 U.S.C. § 158.

#### 27   **ISSUES**

28           A.    Did the bankruptcy court err in entering judgment in

1 favor of Debtor on Ms. Donahue's claims under §§ 523(a)(6) and  
2 (a)(9)?

3 B. Did the bankruptcy court err in entering judgment in  
4 favor of Debtor on Ms. Donahue's claims under §§ 727(a)(2)(A),  
5 (a)(3), (a)(4), (a)(5), and (a)(6)?

#### 6 **STANDARDS OF REVIEW**

7 We review the bankruptcy court's findings of fact for clear  
8 error and its conclusions of law de novo. See Petralia v.  
9 Jercich (In re Jercich), 238 F.3d 1202, 1205 (9th Cir. 2001).

10 A finding that an injury is willful under § 523(a)(6) is a  
11 factual finding that is reviewed for clear error, see Gee v.  
12 Hammond (In re Gee), 173 B.R. 189, 192 (9th Cir. BAP 1994), as is  
13 a finding that an injury is malicious. Thiara v. Spycher Bros.  
14 (In re Thiara), 285 B.R. 420, 427 (9th Cir. BAP 2002).

15 Similarly, findings of fraudulent intent under § 727(a)(4)  
16 and whether a debtor harbors an intent to hinder, or delay, or  
17 defraud a creditor under § 727(a)(2) are questions of fact  
18 reviewed for clear error. Retz v. Samson (In re Retz), 606 F.3d  
19 1189, 1197 (9th Cir. 2010); Wolkowitz v. Beverly (In re Beverly),  
20 374 B.R. 221, 243 (9th Cir. BAP 2007), aff'd in part, dismissed  
21 in part, 551 F.3d 1092 (9th Cir. 2008). And whether a debtor has  
22 satisfactorily explained a loss of assets under § 727(a)(5) is  
23 also a question of fact that we review for clear error.  
24 In re Retz, 606 F.3d at 1205.

25 A factual determination is clearly erroneous if it is  
26 "illogical, implausible, or without support in the record."  
27 United States v. Hinkson, 585 F.3d 1247, 1261-62 & n.21 (9th Cir.  
28 2009) (en banc). Where two permissible views of the evidence

1 exist, the factfinder's choice between them cannot be clearly  
2 erroneous. Anderson v. City of Bessemer City, 470 U.S. 564, 574  
3 (1985). We are to give "due regard to the trial court's  
4 opportunity to judge the witnesses' credibility." Civil  
5 Rule 52(a)(6) (incorporated via Rule 7052). See also Anderson,  
6 470 U.S. at 575 (when factual findings are based on  
7 determinations regarding the credibility of witnesses, the  
8 appellate court must give great deference to the bankruptcy  
9 court's findings because the bankruptcy court had the opportunity  
10 to note variations in demeanor and tone of voice that bear  
11 heavily on the listener's understanding of and belief in what is  
12 said).

13 We also give deference to inferences drawn by the trial  
14 court. Beech Aircraft Corp. v. United States, 51 F.3d 834, 838  
15 (9th Cir. 1995).

## 16 DISCUSSION

17 **A. Appellant has not demonstrated that the bankruptcy court**  
18 **erred in granting judgment in favor of Debtor on Appellant's**  
19 **§ 523 claims.**

20 Exceptions to discharge are construed liberally in favor of  
21 debtors and strictly against creditors. In re Retz, 606 F.3d at  
22 1196. The party asserting that a claim is nondischargeable bears  
23 the burden of proof by a preponderance of the evidence. Grogan  
24 v. Garner, 498 U.S. 279, 286-91 (1991).

25 The bankruptcy court found that Ms. Donahue had not met her  
26 burden on either of her nondischargeability claims against  
27 Debtor. Taking each claim in turn:

28

1           **1. Section 523(a) (6) - Debt for willful and malicious**  
2           **injury**

3           Section 523(a) (6) prevents discharge of a debt "for willful  
4 and malicious injury by the debtor to another entity or to the  
5 property of another entity." For this exception to apply, the  
6 debtor must have intended the consequences of the act, not simply  
7 the act itself. Ormsby v. First Am. Title Co. of Nev.  
8 (In re Ormsby), 591 F.3d 1199, 1206 (9th Cir. 2010) (citing  
9 Kawaauhau v. Geiger (In re Geiger), 523 U.S. 57, 60 (1998)). The  
10 plaintiff must show both willfulness and maliciousness. Id.  
11 Section 523(a) (6)'s willful injury requirement is met "only when  
12 the debtor has a subjective motive to inflict injury or when the  
13 debtor believes that injury is substantially certain to result  
14 from his own conduct." Id. (quoting Carrillo v. Su (In re Su),  
15 290 F.3d 1140, 1142 (9th Cir. 2002)).

16           The bankruptcy court found for Debtor on this claim because  
17 Ms. Donahue had not presented any evidence at trial establishing  
18 that Debtor committed an intentional tort in conjunction with the  
19 accident. Ms. Donahue does not explicitly contend that this  
20 finding was in error, and in any event, without a complete trial  
21 transcript, we cannot determine that this finding was clearly  
22 erroneous.

23           **2. Section 523(a) (9) - Debt for personal injury caused by**  
24           **debtor's operation of a motor vehicle while intoxicated**

25           Section 523(a) (9) excepts from discharge any debt "for death  
26 or personal injury caused by the debtor's operation of a motor  
27 vehicle, vessel, or aircraft if such operation was unlawful  
28 because the debtor was intoxicated from using alcohol, a drug, or

1 another substance.” To except a debt from discharge under this  
2 subsection, the bankruptcy court must find (1) that a personal  
3 injury or death occurred; (2) as a result of a motor vehicle  
4 accident; (3) caused from a debtor’s operation of a motor vehicle  
5 while (4) unlawfully intoxicated by alcohol, a drug or another  
6 substance. Bucher v. Hughes (In re Hughes), 488 B.R. 169, 175  
7 (Bankr. D. Mont. 2013).

8 According to the bankruptcy court’s ruling, no evidence was  
9 presented at trial that Debtor was operating the motor vehicle  
10 unlawfully because he was intoxicated or using a drug or other  
11 substance. The court noted that Debtor had testified at trial  
12 that he was not using pain killers at the time of the accident  
13 and that Ms. Donahue had presented no evidence to the contrary.  
14 Again, we cannot find clear error without a complete trial  
15 transcript.

16 **B. Appellant has not demonstrated that the bankruptcy court**  
17 **erred in granting judgment in favor of Debtor on Appellant’s**  
18 **§ 727 claims.**

19 As with claims seeking to except a debt from discharge, the  
20 party who seeks denial of discharge bears the burden of proof by  
21 a preponderance of the evidence. In re Retz, 606 F.3d at 1196.  
22 And as with the § 523(a) claims, the bankruptcy court found that  
23 Ms. Donahue had not met her burden of proof on any of the  
24 § 727(a) claims.

25 **1. Section 727(a) (2) (A) - transfer or concealment of**  
26 **property with intent to hinder, delay, or defraud a**  
27 **creditor**

28 Under § 727(a) (2) (A), the debtor will not receive a



1 discharge if the bankruptcy court finds that

2 the debtor, with intent to hinder, delay, or defraud a  
3 creditor or an officer of the estate charged with  
4 custody of property under this title, has transferred,  
5 removed, destroyed, mutilated, or concealed, or has  
6 permitted to be transferred, removed, destroyed,  
7 mutilated, or concealed[,] . . . property of the  
8 debtor, within one year before the date of the filing  
9 of the petition[.]

7 A plaintiff asserting a claim under this subsection must  
8 prove (1) a disposition of property, such as transfer or  
9 concealment, and (2) a subjective intent on the debtor's part to  
10 hinder, delay or defraud a creditor through the act of disposing  
11 of the property. In re Retz, 606 F.3d at 1200.

12 Although Debtor did not initially list on his schedules his  
13 interest in the family trust, he amended his Schedule B to  
14 disclose it approximately three months after the petition date.  
15 According to the bankruptcy court, Debtor testified that he knew  
16 he was a beneficiary of the trust but that he knew nothing about  
17 the trust itself, other than that his father was the trustee.  
18 Debtor also testified that he did not know anything about the  
19 corpus of the trust and had not received any distributions from  
20 the trust. And the bankruptcy court found that no evidence had  
21 been presented that the three-month interval between the petition  
22 date and the date Debtor filed his amended Schedule B misled the  
23 trustee, delayed administration of the estate, or resulted in  
24 prejudice to creditors.

25 According to the bankruptcy court's findings, the evidence  
26 showed that on February 20, 2016, the chapter 7 trustee had gone  
27 to the residence of Debtor's father, William Poole, and reviewed  
28 the family trust documents. The trustee discovered that when

1 William's first wife had died, an irrevocable bypass trust was  
2 formed that was "contingent upon the passing" of William and that  
3 Debtor was a beneficiary under that trust (presumably meaning  
4 that the vesting of Debtor's rights in the irrevocable trust was  
5 contingent upon William's death). Thereafter, the trustee  
6 withdrew his no asset report and, at the time of trial, was  
7 investigating whether the estate's interest in any of the trust's  
8 assets should be liquidated for the benefit of creditors. The  
9 bankruptcy court observed that the trustee had not filed an  
10 adversary proceeding to recover any trust assets, but, because  
11 Ms. Donahue was the only creditor listed in Debtor's schedules,  
12 she would be the beneficiary of any liquidation that the trustee  
13 elected to do.

14 Finally, although the bankruptcy court noted that Debtor was  
15 "probably guilty of sloppiness in the preparation of schedules  
16 and statements in his rush to discharge the Plaintiffs' debt in  
17 this bankruptcy case[,] " it could not find that Debtor "initially  
18 failed to disclose that he was a beneficiary of a trust with the  
19 intent to hinder, delay, or defraud a creditor of this bankruptcy  
20 case."

21 Ms. Donahue argues that Debtor "fraudulently concealed" the  
22 trust, noting that Debtor did not amend his schedules until after  
23 the 341 meeting at which he was "called out" for his failure to  
24 disclose the trust. Ms. Donahue, however, does not point to any  
25 evidence she presented at trial suggesting that Debtor acted with  
26 intent to hinder, delay, or defraud and, again, without a  
27 complete trial transcript and admitted exhibits, we cannot find  
28 clear error in the bankruptcy court's findings.

1           **2. Section 727(a)(3) - Failure to Keep Adequate Records**

2           Under § 727(a)(3) the debtor may be denied a discharge if he  
3 or she has "concealed, destroyed, mutilated, falsified, or failed  
4 to keep or preserve any recorded information, including books,  
5 documents, records, and papers, from which the debtor's financial  
6 condition or business transactions might be ascertained, unless  
7 such act or failure to act was justified under all of the  
8 circumstances of the case[.]" The purpose of this subsection is  
9 "to make discharge dependent on the debtor's true presentation of  
10 his financial affairs. . . . the debtor must present sufficient  
11 written evidence which will enable his creditors reasonably to  
12 ascertain his present financial condition and to follow his  
13 business transactions for a reasonable period in the past."

14 Caneva v. Sun Cmtys. Operating Ltd. P'ship (In re Caneva),  
15 550 F.3d 755, 761 (9th Cir. 2008) (citations omitted).

16           This claim was based on Debtor's failure to maintain any  
17 books and records for his sole proprietorship, Horizon Home  
18 Theater. According to the bankruptcy court, Debtor had testified  
19 that he did not keep any books or records for that entity because  
20 it generated very little income, an average of \$391 per month  
21 according to Debtor's Schedule I. No evidence to the contrary  
22 was presented and, given the minimal amount of income involved,  
23 the bankruptcy court found that Debtor had satisfactorily  
24 explained his financial condition prior to the bankruptcy filing.

25           Ms. Donahue argues that the bankruptcy court erred in  
26 granting judgment for Debtor on this claim because Debtor  
27 admitted to being paid in cash and personal checks and having no  
28 financial records, which made it impossible to verify his income.

1 Again, we do not have a complete record from which to ascertain  
2 whether the bankruptcy court clearly erred. Moreover, the  
3 bankruptcy court apparently believed Debtor's explanation, and we  
4 must defer to the bankruptcy court's credibility determinations.  
5 Anderson, 470 U.S. at 575.

### 6 **3. Section 727(a)(4) - False Oath**

7 Section 727(a)(4)(A) provides that a discharge shall be  
8 denied if "the debtor knowingly and fraudulently, in or in  
9 connection with the case[,] made a false oath or account." A  
10 false statement or omission in the debtor's bankruptcy schedules  
11 or statement of financial affairs may constitute a false oath.  
12 In re Retz, 606 F.3d at 1196. "The fundamental purpose of  
13 § 727(a)(4)(A) is to insure that the trustee and creditors have  
14 accurate information without having to conduct costly  
15 investigations." Id. (citation omitted).

16 A plaintiff seeking denial of discharge under this  
17 subsection must prove that: (1) the debtor made a false oath in  
18 connection with the case; (2) the oath related to a material  
19 fact; (3) the oath was made knowingly; and (4) the oath was made  
20 fraudulently. Id. at 1197.

21 Ms. Donahue's claim under this subsection was based in part  
22 upon Debtor's failure initially to list his interest in the  
23 family trust. Although the bankruptcy court found that the  
24 omission was material, the bankruptcy court granted judgment for  
25 Debtor on this claim for the same reason it granted judgment on  
26 the § 727(a)(2)(A) claim: no evidence was presented that Debtor's  
27 initial failure to list the trust was knowing and intentional.

28 Ms. Donahue also alleged that Debtor had not disclosed all

1 of his income on Schedule I. The bankruptcy court, however,  
2 found that there was no evidence that Debtor had income other  
3 than what was disclosed on Schedule I or the Statement of  
4 Financial Affairs.

5 On appeal, Ms. Donahue contends that Debtor made a false  
6 oath by not disclosing that the family trust pays his living  
7 expenses. From the record provided, it does not appear that this  
8 argument was raised in the bankruptcy court. Accordingly, it is  
9 waived. Conn. Gen. Life Ins. Co. v. New Images of Beverly Hills,  
10 321 F.3d 878, 882 (9th Cir. 2003).

11 **4. Section 727(a)(5) - Failure to Satisfactorily Explain a**  
12 **Loss of Assets**

13 Under § 727(a)(5), a discharge shall be denied if the court  
14 finds that "the debtor has failed to explain satisfactorily,  
15 before determination of denial of discharge under this paragraph,  
16 any loss of assets or deficiency of assets to meet the debtor's  
17 liabilities." The objecting party must demonstrate: (1) debtor  
18 at one time, not too remote from the bankruptcy petition date,  
19 owned identifiable assets; (2) debtor no longer owned the assets  
20 on the petition date; and (3) the bankruptcy pleadings or  
21 statement of affairs do not reflect an adequate explanation for  
22 the disposition of the assets. In re Retz, 606 F.3d at 1205.  
23 Once this showing is made, the debtor must offer credible  
24 evidence regarding the disposition of the missing assets. Id.

25 Regarding this claim, the bankruptcy court found that there  
26 was no evidence of a failure to explain a loss of assets. The  
27 only testimony presented was concerning Debtor's omission of his  
28 interest in the family trust on Schedule B, which had been

1 corrected by amendment; and again, no evidence had been presented  
2 that Debtor had income other than what was disclosed on  
3 Schedule I. Without a complete trial transcript, we cannot  
4 conclude that these findings were clearly erroneous.

5 **5. Section 727(a)(6)(A) - Refusal to Obey Any Lawful Order**  
6 **of the Court**

7 According to the bankruptcy court, this claim was based on  
8 Debtor's failure to comply with four subpoenas to appear and  
9 testify and his failure to appear at mediation.

10 Under § 727(a)(6)(A), a debtor is not entitled to a  
11 discharge if "the debtor has refused, in the case . . . to obey  
12 any lawful order of the court, other than an order to respond to  
13 a material question or to testify[.]" The party objecting to  
14 discharge bears the burden to prove by a preponderance of the  
15 evidence that the debtor (a) was aware of the order; and  
16 (b) willfully or intentionally refused to obey the order, which  
17 requires more than a mere failure to obey the order through  
18 inadvertence, mistake or inability to comply. Gugino v. Clark  
19 (In re Clark), 525 B.R. 442, 463 (Bankr. D. Idaho 2015), aff'd,  
20 No. AP 13-06042-TLM, 2016 WL 1377807 (9th Cir. BAP Mar. 29,  
21 2016), aff'd sub nom., Clark v. Gugino (In re Clark),  
22 No. 16-60026, 2017 WL 2963539 (9th Cir. July 12, 2017). The  
23 burden then shifts to the debtor to demonstrate why the discharge  
24 should not be denied. Id.

25 The bankruptcy court correctly noted that under the  
26 applicable standard, failure to respond to a subpoena is not  
27 sufficient to deny discharge; rather, there must be evidence of a  
28 **refusal** to respond to a lawfully issued and properly served

1 subpoena to testify and produce documents.

2 According to the bankruptcy court's findings, no proofs of  
3 service were presented at trial showing that subpoenas were  
4 properly served on Debtor. Ms. Donahue argues that this finding  
5 was in error because the subpoenas were date stamped and showed  
6 they were filed with the court and served. Ms. Donahue does not  
7 explain where in the record those subpoenas may be found, and as  
8 noted, without a complete record of the trial, we are unable to  
9 determine whether the bankruptcy court clearly erred in this  
10 finding.

11 In any event, based on the testimony at trial, the  
12 bankruptcy court inferred that Debtor had received one or more of  
13 the subpoenas but that he did not respond because he did not have  
14 the trust documents in his possession or control. Accordingly,  
15 the court found that there was insufficient evidence from which  
16 to find that Debtor had refused to comply with the subpoenas.

17 Ms. Donahue seems to argue that the bankruptcy court erred  
18 in not holding Debtor in contempt of court, denying his  
19 discharge, or continuing the hearing and demanding that Debtor  
20 furnish the subpoenaed information. However, the bankruptcy  
21 court has "broad discretion to determine if a particular  
22 violation of its orders is so serious as to require the denial of  
23 discharge under § 727(a)(6)(A)." In re Clark, 525 B.R. at 463  
24 (citing Devers v. Bank of Sheridan, Montana (In re Devers),  
25 759 F.2d 751, 755 (9th Cir. 1985), and Cutter v. Seror  
26 (In re Cutter), 2010 WL 6467694, at \*12 (9th Cir. BAP Oct. 21,  
27 2010)). Ms. Donahue has not shown that the bankruptcy court  
28 abused that discretion.

1 Similarly, the bankruptcy court found that there was  
2 insufficient evidence from which to find a refusal to comply with  
3 the court's order directing the parties to mediation. Although  
4 the mediator testified that she had provided notice to Debtor,  
5 Debtor testified that he did not attend the mediation because he  
6 did not receive the notice. Again, the bankruptcy court  
7 apparently believed Debtor's testimony, and we must defer to its  
8 credibility finding.

9 **C. Appellant's procedural arguments are unavailing.**

10 In addition to her arguments regarding the merits,  
11 Ms. Donahue contends that the bankruptcy court erred by  
12 continuing the trial date from November 4, 2016 to December 12,  
13 2016 without consulting her. Ms. Donahue argues that she had  
14 spent money on subpoenas, travel fees, and witness fees for the  
15 November 4 trial date and could not afford to serve new subpoenas  
16 or pay additional fees to her witnesses. Nothing in the record  
17 before us definitively explains why the trial was postponed,  
18 although the bankruptcy docket reflects that on October 27, 2016,  
19 shortly before the scheduled trial date, Debtor filed a  
20 substitution of attorney. Four days later, Ms. Donahue filed a  
21 document entitled "Judicial Notice & Opposition to Any Motion  
22 That May Be Filed to Postpone Trial." In that document,  
23 Ms. Donahue stated that she opposed any postponement of the trial  
24 because she had "spent hundreds of dollars on witness' fees and  
25 serving subpoenas all for November 4. It would not only be a  
26 hardship but financially impossible for Plaintiff to afford to  
27 re-serve these people, pay their fees and hope that they are  
28 available on another date."



1 Nothing in the record reflects whether the bankruptcy court  
2 considered this pleading or if Ms. Donahue raised this argument  
3 at trial. Again, without a complete record, we cannot find error  
4 in the bankruptcy court's postponement of the trial.

5 Ms. Donahue also argues that the bankruptcy court erred in  
6 permitting Debtor's new counsel, Andrew Smyth, to file papers and  
7 be heard at trial because he had not been substituted as counsel.  
8 Mr. Smyth, however, did not file any papers in the bankruptcy  
9 court before he filed the substitution of counsel on October 27.  
10 Ms. Donahue seems to conflate filing the substitution of counsel  
11 with serving it: she states that she was not served with any  
12 substitution of counsel. The proof of service attached to the  
13 substitution of counsel shows that it was served on Ms. Donahue,  
14 but the P.O. Box number listed on the proof of service appears to  
15 be missing a number when compared to Ms. Donahue's address listed  
16 on the bankruptcy court docket. Thus it is possible that  
17 Ms. Donahue did not receive it. Ms. Donahue also alleges that  
18 Mr. Smyth called her and threatened her if she did not settle the  
19 case for \$100. Ms. Donahue, however, does not explain how any of  
20 these circumstances were prejudicial to her or constituted error  
21 by the bankruptcy court on the merits.

22 **D. Appellant has not provided an adequate record on appeal.**

23 An appellant's excerpts of the record are required to  
24 contain "any findings, conclusions, or opinions relevant to the  
25 appeal" and "any relevant transcript or portion of it."  
26 Rule 8018(b)(1)(D) & (F). BAP Local Rule 8009-1 provides that  
27 "[t]he excerpts of the record shall include the transcripts  
28 necessary for adequate review in light of the standard of review

1 to be applied to the issues before the Panel. The Panel is  
2 required to consider only those portions of the transcript  
3 included in the excerpts of the record.”

4 Pro se litigants are not excused from complying with court  
5 rules. Clinton v. Deutsche Bank Nat’l Trust Co. (In re Clinton),  
6 449 B.R. 79, 83 (9th Cir. BAP 2011). As noted, Ms. Donahue did  
7 not provide a hearing transcript with her excerpts of the record  
8 but she eventually filed a partial transcript containing only the  
9 bankruptcy court’s findings and conclusion.

10 While the findings and conclusions are useful, without a  
11 complete transcript of the trial, we cannot determine whether the  
12 bankruptcy court clearly erred in its factual findings. Such  
13 review requires us to have before us the entire transcript and  
14 all other relevant evidence considered by the bankruptcy court.  
15 Massoud v. Ernie Goldberger & Co. (In re Massoud), 248 B.R. 160,  
16 162-63 (9th Cir. BAP 2000). Moreover, Ms. Donahue’s excerpts of  
17 record are not helpful. Those documents include copies of  
18 subpoenas, emails, and other documents that may or may not have  
19 been filed or admitted into evidence in the bankruptcy court.  
20 Without a complete trial transcript, we cannot ascertain whether  
21 any of those documents were considered by the bankruptcy court at  
22 trial.

23 Additionally, Ms. Donahue’s brief does not include any  
24 citations to the record, as required under Rule 8014(a)(6) and  
25 (a)(8). We are not obligated to search the record for error.  
26 Cogliano v. Anderson (In re Cogliano), 355 B.R. 792, 803 (9th  
27 Cir. BAP 2006).

28 We may affirm where the record is inadequate to show clear

1 error, see Friedman v. Sheila Plotsky Brokers, Inc.  
2 (In re Friedman), 126 B.R. 63, 68 (9th Cir. BAP 1991), overruled  
3 on other grounds by Zachary v. Cal. Bank & Tr., No. 13-16402,  
4 811 F.3d 1191, 2016 WL 360519 (9th Cir. Jan. 28, 2016), and, as  
5 explained above, we do so here.<sup>5</sup>

6 **CONCLUSION**

7 For all of these reasons, we AFFIRM.  
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26 <sup>5</sup>On July 19, 2017, Ms. Donahue filed with the BAP Clerk a  
27 "Presentation of Additional Citations" listing various case  
28 citations. The purpose of this filing is unclear. In any event,  
it was filed too late to be considered by the Panel.