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1:19-11696 Peter M. Seltzer **Chapter 7**
Adv#: 1:19-01151 Kessler v. Seltzer

#1.00 Motion for summary judgment against defendant Peter M. Seltzer denying debtor's discharge under 11 U.S.C. § 727(a)(2)(A), (a)(4)(A), and (a)(5), or, in the alternative, for summary adjudication

fr. 11/18/20

Docket 44

Tentative Ruling:

Grant in part and deny in part.

I. BACKGROUND

On July 9, 2019, Peter M. Seltzer ("Debtor") filed a voluntary chapter 11 petition. On December 26, 2019, the Court entered an order converting this case to a chapter 7 case [Bankruptcy Docket, doc. 98].

On December 16, 2019, Darren Kessler filed a complaint against Debtor, initiating this adversary proceeding. On May 12, 2020, Mr. Kessler filed the operative first amended complaint against Debtor (the "FAC") [doc. 15], requesting denial of Debtor's discharge under 11 U.S.C. § 727(a)(2), (a)(4) and (a)(5) and an exception to discharge under 11 U.S.C. § 523(a)(2), (a)(4) and (a)(6).

On October 7, 2020, Mr. Kessler filed a motion for summary judgment, requesting judgment on his claims under 11 U.S.C. § 727 (the "Motion") [doc. 44] or partial summary adjudication. Debtor timely opposed the Motion [doc. 52].

A. The Original Schedules and Statement of Financial Affairs

On July 21, 2019, Debtor filed his original set of schedules and statements (the "Original Schedules") [Bankruptcy Docket, doc. 10]. Debtor signed the Original Schedules under penalty of perjury. Undisputed Fact from Debtor's Responsive Separate Statement ("Undisputed Fact") [doc. 52], ¶ 7. In his schedule A/B, Debtor

identified real and personal property totaling $7,098,581, including a fee simple interest in real property located at 4179 Prado de la Puma, Calabasas, CA 91302 (the "Calabasas Property"). Debtor noted that the Calabasas Property "is in disrepair because of smoke damage caused by the fire in November 2018…."

In the Original Schedules, Debtor also identified, among other things: (A) a Chase checking account with $121,000, which Debtor stated was "held in trust for insurance proceeds for property damage to house and furniture;" (B) a Merrill Lynch account with $435,967, which Debtor stated was encumbered; and (C) a Frost IRA with $69,678 [Bankruptcy Docket, doc. 10].

In his Statement of Financial Affairs ("SOFA"), filed with the Original Schedules, Debtor indicated that: (A) in 2019, he received no income from employment or operation of a business; (B) in 2018, he received $250,000 from employment; (C) within 90 days before he filed for bankruptcy, he did not make any transfers within the scope of Item 6; (D) within one year before he filed for bankruptcy, he made no payments to insiders within the scope of Items 7 or 8; (E) within two years before he filed for bankruptcy, he did not give any gifts within the scope of Items 13 and 14; (F) within one year before he filed for bankruptcy, he did not lose anything because of theft, fire, other disaster or gambling; (G) within two years before he filed for bankruptcy, he did not make any transfers within the scope of Item 18; and (H) within four years before he filed for bankruptcy, he was a member of three business entities: ITM, 2305 LLC and Jakdyl LLC. Undisputed Fact, ¶ 13.

B. The § 341(a) Meeting of Creditors and Mr. Kessler's Discovery

On August 15, 2019, Debtor appeared for his § 341(a) meeting of creditors (the "Meeting of Creditors"), where he testified under oath regarding his assets and liabilities. Undisputed Fact, ¶ 14. Subsequently, Mr. Kessler conducted discovery; specifically, from August 26, 2019 through September 26, 2019, Mr. Kessler filed several motions to examine, under Federal Rule of Bankruptcy Procedure ("Rule") 2004, Debtor and several other entities (collectively, the "Rule 2004 Examinations") [Bankruptcy Docket, docs. 21, 22, 36, 45, 47, 50]. With the exception of the motion to examine Debtor, which the Court denied based on Mr. Kessler's initiation of this adversary proceeding against Debtor, the Court entered orders granting Mr. Kessler's requests for Rule 2004 Examinations [Bankruptcy Docket, docs. 39, 40, 48, 52, 54].

Documents obtained by Mr. Kessler, coupled with Debtor's testimony at the Meeting of Creditors, revealed the following:

i. Transfers from the accounts of 2305 LLC and ITM

At the Meeting of Creditors, the U.S. Trustee (the "UST") asked questions about Debtor's interests in 2305 LLC and ITM. Regarding his interest in 2305 LLC, Debtor testified that the company had approximately $35,000 in an account, and that it was Debtor's personal LLC that he used for various businesses. Undisputed Fact, ¶¶ 21-22; Declaration of Craig G. Margulies ("Margulies Declaration") [doc. 46], ¶ 4, Exhibit A, 22:19-24. As to ITM, Debtor testified that he set up the company to receive his salary from ACC Enterprises, LLC ("ACC Enterprises") in 2018, but that ITM was "being let go" because he no longer worked for ACC Enterprises. Margulies Declaration, ¶ 4, Exhibit A, 23:8-13.

During the chapter 11 portion of this case, monthly operating reports ("MORs") filed by Debtor reflected that Debtor maintained an account under the name of 2305 LLC (the "2305 Account") and an account under the name of ITM (the "First ITM Account"). Undisputed Fact, ¶ 39. For instance, on September 18, 2019, Debtor filed his July 2019 MOR [Bankruptcy Docket, doc. 41], which showed that 2305 LLC maintained a bank account with Wells Fargo (the "2305 Account").

On October 31, 2019, after Debtor had filed the July 2019 MOR, Mr. Kessler filed a Rule 2004 motion to examine Wells Fargo [Bankruptcy Docket, doc. 61]. The bank statements from Wells Fargo reveal the following prepetition transfers from the 2305 Account: (A) on February 26, 2019, a wire transfer to Fidelity National Title in the amount of $50,000; (B) on March 18, 2019, a wire transfer to Etw Management in the amount of $150,000; (C) on April 19, 2019, a wire transfer to Harris Ritoff in the amount of $100,000; (D) on May 20, 2019, two withdrawals in the amounts of $28,000 and $7,000; and (E) on May 28, 2019, a withdrawal in the amount of $4,000. Margulies Declaration, ¶ 12, Exhibit D.

Debtor's July 2019 MOR, filed on September 18, 2019 [Bankruptcy Docket, doc. 41], also showed that ITM maintained a bank account with Frost Bank, ending in x0639 (the "First ITM Account"). On September 26, 2019, Mr. Kessler filed a Rule 2004 motion to examine Frost Bank [Bankruptcy Docket, doc. 50]. Subsequently, Mr.

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Kessler obtained bank statements from Frost Bank regarding a different bank account, ending in x0647 (the "Second ITM Account" and, together with the First ITM Account, the "ITM Accounts"). Margulies Declaration, ¶ 13, Exhibit E.

The bank statements show that, in January 2019, the First ITM Account had $73,823.80 and the Second ITM Account had $809,850.56. *Id*. In July 2019, shortly before the petition date, the First ITM Account had $37,449.76 and the Second ITM Account had $12.53. *Id*. Mr. Kessler also references the following transfers: (A) on August 27, 2018, Debtor transferred $800,000 from the First ITM Account to the Second ITM Account; (B) on February 7, 2019, Debtor wired $10,000 from the Second ITM Account to the 2305 Account; (C) on February 12, 2019, Debtor wired $500,000 from the Second ITM Account to Fidelity National Title; (D) on March 13, 2019, Debtor transferred $170,000 from the Second ITM Account to the First ITM Account; (D) on March 15, 2019, Debtor wired $170,000 from the First ITM Account to the 2305 Account; (E) on March 15, 2019, Debtor transferred $60,000 from the Second ITM Account to the First ITM Account; (F) on May 13, 2019, Debtor transferred $20,000 from the Second ITM Account to the First ITM Account; and (G) on May 28, 2019, Debtor transferred $45,431.68 from the Second ITM Account to the First ITM Account. Margulies Declaration, ¶¶ 13, 16, Exhibits E, G. Prior to and during the chapter 11 portion of Debtor's bankruptcy case, Debtor used the 2305 Account and the First ITM Account to pay most of his personal expenses, such as gas, restaurants, travel, utilities and car payments. UF, ¶ 40.

ii. The Harris Transfer

At the Meeting of Creditors, Debtor testified that he had never provided anyone money for the purchase of real property. Margulies Declaration, ¶ 4, Exhibit A, 30:6-17. When questioned about an individual named Neal Harris, Debtor responded that Mr. Harris was a former employee of ACC Enterprises. *Id*., 31:6-9. Debtor also testified he was not suing Mr. Harris. *Id*., 10-12.

The bank statements from Frost Bank show that, in February 2019, Debtor transferred a total of $550,000 from the 2305 Account and the Second ITM Account to Fidelity National Title in Las Vegas, Nevada. Margulies Declaration, ¶¶ 12-13, 16, Exhibits D-E, G. The outgoing wire transfer receipt included a memo line that read "sale/purchase of property." Margulies Declaration, ¶ 16, Exhibit G.

In two gift letters regarding this "sale/purchase of property" (the "Gift Letters"), Debtor indicated the funds were a gift to be applied toward the purchase of real property located at 4201 San Alivia Court, Las Vegas, NV (the "LV Property"). Margulies Declaration, ¶ 18, Exhibit H. Despite contributing 30% of the purchase price, the LV Property was not acquired in Debtor's name, or in the name of one of Debtor's businesses. Undisputed Fact, ¶ 70. Instead, the LV Property was purchased in the name of Neal and Francesca Harris. *Id*. The Gift Letters stated that Mr. and Mrs. Harris are Debtor's nephew and niece. Margulies Declaration, ¶ 18, Exhibit H.

iii. The Fire Damage and Insurance Proceeds

During the Meeting of Creditors, Debtor testified that the Calabasas Property was damaged by the Woolsey Fire, and that Debtor had submitted a claim with his insurance company. Margulies Declaration, ¶ 4, Exhibit A, 9:21 – 10:8. When asked by the UST about the claim, Debtor stated that the insurance company had accepted "some things" but that Debtor was in the process of negotiating reimbursement for other things. *Id*., 10:18-25. Debtor further testified that the funds were "not [his] money," and that he placed the insurance proceeds in "the debtor account… to pay for all the construction workers to do all the different work." *Id*., 11:1-6.

Through discovery, Mr. Kessler obtained bank statements from Chase Bank for an account in Debtor's name, ending in x7875 (the "Chase Account"). Margulies Declaration, ¶ 9, Exhibit B. The Chase Account reflected that, in May 2019, Debtor made deposits from Nat Gen Premier totaling approximately $178,750. *Id*. The statements also show that, on May 29, 2019, Debtor transferred $40,000 to Tactical Mitigation Services. Margulies Declaration, ¶ 15, Exhibit F. In addition, on July 8, 2019, Debtor withdrew $9,866.64 from the Chase Account. Margulies Declaration, ¶ 9, Exhibit B. On July 22 and July 23, 2020, i.e., postpetition, Debtor withdrew another $126,000 and $2,832.76, respectively. *Id*.

C. The Amended Schedules

On October 15, 2019, Debtor filed amended schedules and statements (the "Amended Schedules") [Bankruptcy Docket, doc. 56]. The following chart reflects information

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in the Amended Schedules that was not included in the Original Schedules:

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Regarding the businesses, at the Meeting of Creditors, Debtor's counsel had noted that the UST identified a total of 20 businesses about which the UST needed additional information. Margulies Declaration, ¶ 4, Exhibit A, 4:1-5. Debtor's counsel stated that, of the 20 businesses, Debtor identified "two or three businesses" that would be added to an amended SOFA. *Id*., 4:11-13. During the Meeting of Creditors, the UST and Debtor also discussed ACC Enterprises and ACG Industries, Inc. ("ACG Industries"). *Id*., 4:22-25, 19:1-15.

In the Amended Schedules, Debtor stated that he held an interest in ACG Industries and that ACG Industries was shut down in 2017. Undisputed Fact, ¶ 83. Debtor also testified, at the Meeting of Creditors, that he shut down ACG Industries in 2017. Undisputed Fact, ¶ 84. In the Amended Schedules, Debtor also indicated that, in 2018, he made $250,000 in employment income and $6,850 in income from operating a business. Undisputed Fact, ¶ 82.

The Second ITM Account's bank statements show that, in March 2018, this account received $20,000 from ACC Enterprises. Margulies Declaration, ¶ 13, Exhibit E, p. 104. The bank statements also show that, from March 2018 through May 2018, this account received wire transfers totaling $925,000. *Id*., pp. 104, 106, 109.

On January 9, 2020, Debtor filed another amended schedule A/B [Bankruptcy Docket, doc. 106], adding an interest in Resurgent valued at $9,500.

II. ANALYSIS

A. General Motion for Summary Judgment Standard

Pursuant to Federal Rule of Civil Procedure ("Rule") 56, applicable to this adversary proceeding under Federal Rule of Bankruptcy Procedure ("FRBP") 7056, the Court shall grant summary judgment if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. *Anderson v. Liberty Lobby*, *Inc.,* 477 U.S. 242, 247, 106 S.Ct. 2505, 2509-10, 91 L.Ed.2d 202 (1986); Rule 56; FRBP 7056. "By its very terms, this standard provides that the mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for

summary judgment; the requirement is that there be no *genuine* issue of *material* fact." 477 U.S. at 247–48 (emphasis in original).

> As to materiality, the substantive law will identify which facts are material. Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. Factual disputes that are irrelevant or unnecessary will not be counted. . . . [S]ummary judgment will not lie if the dispute about a material fact is "genuine," that is, if the evidence is such that a reasonable jury could return a verdict for the nonmoving party. . . .

Id. at 248–50 (internal citations omitted). Additionally, issues of law are appropriate to be decided in a motion for summary judgment. *See Camacho v. Du Sung Corp.*, 121 F.3d 1315, 1317 (9th Cir. 1997).

The initial burden is on the moving party to show that no genuine issues of material fact exist based on "the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S.Ct. 2548, 2553, 91 L.Ed. 265 (1986). Once the moving party meets its initial burden, the nonmoving party bearing "the burden of proof at trial on a dispositive issue" must identify facts beyond what is contained in the pleadings that show genuine issues of fact remain. *Id*., at 324; *see also Anderson*, 477 U.S. at 256 ("Rule 56(e) itself provides that a party opposing a properly supported motion for summary judgment may not rest upon mere allegation or denials of his pleading, but must set forth specific facts showing that there is a genuine issue for trial.").

The nonmoving party meets this burden through the presentation of "evidentiary materials" listed in Rule 56, such as depositions, documents, electronically stored information, affidavits or declarations, stipulations, admissions, and interrogatory answers. *Id.* To establish a genuine issue, the nonmoving party "must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Electrical Industry Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586, 106 S.Ct. 1348, 1356, 89 L.Ed.2d 538 (1986); *see also Anderson*, 477 U.S. at 252 ("The mere existence of a scintilla of evidence in support of the [nonmoving party's] position will be insufficient."). Rather, the nonmoving party must provide "evidence of such a caliber that 'a fair-minded jury could return a verdict for the [nonmoving

party] on the evidence presented.'" *U.S. v. Wilson*, 881 F.2d 596, 601 (9th Cir. 1989) (quoting *Anderson*, 477 U.S. at 266).

B. *11 U.S.C. § 727(a)(2)(A)*

Regarding objections to discharge, as a whole, "[i]n keeping with the 'fresh start' purposes behind the Bankruptcy Code, courts should construe § 727 liberally in favor of debtors and strictly against persons objecting to discharge. This does not alter the burden on the objector, bur rather means that actual, rather than constructive, intent is required on the part of the debtor." *In re Retz*, 606 F.3d 1189, 1196 (9th Cir. 2010) (internal citations and quotations omitted).

11 U.S.C. § 727(a)(2)(A) provides that a court shall grant a debtor a discharge unless "the debtor, with intent to hinder, delay or defraud a creditor or an officer of the estate charged with custody of property ... has transferred, removed, destroyed, mutilated, or concealed ... property of the debtor, within one year before the date of the filing of the petition…."

"Two elements comprise an objection to discharge under § 727(a)(2)(A): 1) a disposition of property, such as transfer or concealment, and 2) a subjective intent on the debtor's part to hinder, delay or defraud a creditor..." *In re Beauchamp*, 236 B.R. 727, 732 (B.A.P. 9th Cir. 1999). The transfer must occur within one year prepetition. *In re Lawson*, 122 F.3d 1237, 1240 (9th Cir. 1997).

In examining the circumstances of a transfer under § 727(a)(2), certain "badges of fraud" may support a finding of fraudulent intent. These factors, not all of which need be present, include (1) a close relationship between the transferor and the transferee; (2) that the transfer was in anticipation of a pending suit; (3) that the transferor debtor was insolvent or in poor financial condition at the time; (4) that all or substantially all of the debtor's property was transferred; (5) that the transfer so completely depleted the debtor's assets that the creditor has been hindered or delayed in recovering any part of the judgment; and (6) that the debtor received inadequate consideration for the transfer. *In re Retz*, 606 F.3d at 1200.

Intent may be inferred from the actions of the debtor. *In re Devers*, 759 F.2d 751, 753–54 (9th Cir. 1985). The necessary intent under § 727(a)(2) "may be established

by circumstantial evidence, or by inferences drawn from a course of conduct." *In re Adeeb*, 787 F.2d 1339, 1343 (9th Cir.1986) (quoting *Devers*, 759 F.2d at 753–54).

"Where intent is at issue, summary judgment is seldom granted." *In re Gertsch*, 237 B.R. 160, 165 (B.A.P. 9th Cir. 1999) (citing to *Provenz v. Miller*, 102 F.3d 1478, 1489 (9th Cir. 1996), *cert. denied*, 522 U.S. 808 (1997)). "Summary judgment is ordinarily not appropriate in a § 727 action where there is an issue of intent." *In re Wills*, 243 B.R. 58, 65 (B.A.P. 9th Cir. 1999). "Evidence of fraud is conclusive enough to support summary judgment in a § 727(a)(2)(A) action when it yields no plausible conclusion but that the debtor's intent was fraudulent." *In re Marrama*, 445 F.3d 518, 522 (1st Cir. 2006) (affirming denial of the debtor's discharge on summary judgment). "Fraud claims, in particular, normally are so attended by factual issues (including those related to intent) that summary judgment is seldom possible." *In re Stephens*, 51 B.R. 591, 594 (B.A.P. 9th Cir. 1985).

i. ***Transfers from the 2305 Account***

With the exception of the $50,000 wired to Fidelity National Title from the 2305 Account in February 2019, Mr. Kessler has not met his burden of proving that Debtor concealed or transferred property of *Debtor*. Margulies Declaration, ¶ 12, Exhibit D. As to the $50,000, the Gift Letters state that the funds were gifted to Debtor's relatives, and named Debtor, personally, as the donor. Margulies Declaration, ¶ 18, Exhibit H. Debtor also indicated in the Amended Schedules that he has a personal claim against Mr. Harris for $550,000 [Bankruptcy Docket, doc. 56]. Thus, the Court will adjudicate that Debtor transferred $50,000 of his property from the 2305 Account within one year of the petition date.

While the bank statements for the 2305 Account show the other transfers to which Mr. Kessler refers, there is no showing that the transferred funds belonged to *Debtor*, instead of to the company. For instance, Mr. Kessler has not proven that Debtor otherwise would be entitled to receive the transferred funds. Although Mr. Kessler contends that the 2305 Account was used as Debtor's personal account, at the Meeting of Creditors, Debtor testified that he used 2305 LLC for "various businesses." Margulies Declaration, ¶ 4, Exhibit A, 22:19-24. The record does not include any contradictory evidence showing that the referenced transfers were not used for business purposes. As such, with the exception of the $50,000 transfer to Fidelity

National Title in February 2019, it is not clear that the transfers from the 2305 Account were transfers of property of Debtor.

Mr. Kessler has not met his burden of proving that Debtor made these transfers with intent to hinder, delay or defraud creditors. In the Motion, Mr. Kessler states, in a conclusory fashion, that Debtor transferred funds between his business accounts, such as the 2305 Account and the ITM Accounts, in an effort to shield funds from creditors. However, Mr. Kessler has not provided any circumstantial evidence demonstrating intent, and has not provided evidence showing the presence of the applicable badges of fraud.

As evidence of the requisite intent, Mr. Kessler also points to the fact that Debtor did not schedule the 2305 Account in his Original Schedules or Amended Schedules. However, Mr. Kessler has not identified where in the schedules or statements Debtor was required to identify an account in the name of one of his businesses. In his Original Schedules, Debtor *did* identify 2305 LLC as a business in which he had an interest. In addition, Debtor attached bank statements from the 2305 Account to his first filed MOR. Mr. Kessler's referenced pattern of transfers from one account to another may be a factor in demonstrating intent at trial. However, at this summary judgment stage, the evidence as a whole is not so strong as to yield "no plausible conclusion but that the debtor's intent was fraudulent." *Marrama*, 445 F.3d at 522.

ii. Transfers from the ITM Accounts

The same issues are present with respect to the transfers from the ITM Accounts. Although Debtor testified at the Meeting of Creditors that ITM was a vehicle for receiving his salary from ACC, the bank statements reflect funds wired from other, unspecified sources. As such, with the exception of the $500,000 transfer to Fidelity National Title, it is not clear that the transfers from the ITM Accounts were of Debtor's property.

However, the Court will adjudicate that the $500,000 gift to his relatives, evidenced by the Gift Letters in which Debtor was named as the donor, was a transfer of Debtor's property within one year of the petition date. As noted above, Debtor himself stated in his Amended Schedules that he has a personal claim against Mr. Harris, worth $550,000.

Nevertheless, Mr. Kessler has not proven that Debtor acted with the requisite intent. Mr. Kessler has not provided evidence of the relevant badges of fraud, or other circumstantial evidence that would prove intent by a preponderance of the evidence.

Further, Mr. Kessler notes that Debtor did not identify the ITM Accounts in his Original Schedules or Amended Schedules. As with the 2305 Account, Mr. Kessler has not identified where in the schedules or statements Debtor was required to list accounts in the name of his businesses; Debtor identified ITM in his Original Schedules. Once again, while the pattern of transfers may be a factor evidencing intent after trial, at this time, Mr. Kessler has not satisfied his burden of proof.

iii. The Harris Transfer

As discussed above, the Court will adjudicate that, within one year of the petition date, Debtor transferred $550,000 of his property to the Harrises.

At this time, the Court will not enter judgment as to intent. Certain badges of fraud may be present, such as a close relationship between Debtor and the Harrises (if they are related), and that Debtor may have received inadequate consideration for the transfer, if it was a gift. Mr. Kessler also references certain inconsistencies between Debtor's testimony at the Meeting of Creditors, the Gift Letters and the Amended Schedules.

However, Mr. Kessler has not provided any evidence as to the remaining factors. In addition, the Court will need to assess Debtor's credibility regarding the inconsistencies noted above, which must be done at trial.

iv. The Burr Transfer

The Court will adjudicate that, within one year of the petition date and according to Debtor's own Amended Schedules, Debtor transferred $50,000 to Mr. Burr. However, Mr. Kessler has not met his burden of proving that Debtor made this transfer with intent to hinder, delay or defraud creditors.

Mr. Kessler does not provide evidence of any badges of fraud related to this transfer,

such as a close relationship between Mr. Burr and Debtor, collection efforts by creditors at the time Debtor transferred the funds, whether the transfer depleted all or substantially all of Debtor's assets or any other factor that would support a finding of intent. Instead, Mr. Kessler merely argues that Debtor's comments regarding this transfer, in the Amended Schedules, do not make sense. This is insufficient to show intent, and an assessment of whether Debtor's testimony "makes sense" requires a credibility determination by the Court. Thus, at this time, the Court will not enter judgment as to this transfer.

v. Concealment of Businesses and Insurance Proceeds

Section 727(a)(2)(A) involves a debtor's *prepetition* concealment of property. The failure to disclose the businesses and insurance proceeds occurred postpetition, when Debtor filed the Original Schedules and Amended Schedules. As such, these concerns are more appropriately addressed by § 727(a)(4), below.

C. *11 U.S.C. § 727(a)(4)*

Section 727(a)(4)(A) denies a discharge to a debtor who "knowingly and fraudulently" made a false oath or account in the course of the bankruptcy proceedings. To bring a successful § 727(a)(4)(A) claim for false oath, the plaintiff must show: (1) the debtor made a false oath in connection with the case; (2) the oath related to a material fact; (3) the oath was made knowingly; and (4) the oath was made fraudulently. *In re Wills,* 243 B.R. 58, 62 (B.A.P. 9th Cir. 1999). "[A] false oath may involve a false statement or omission in the debtor's schedules." *In re Roberts*, 331 B.R. 876, 882 (B.A.P. 9th Cir. 2005), *aff'd and remanded on other grounds*, 241 F. App'x 420 (9th Cir. 2007).

"A fact is material if it bears a relationship to the debtor's business transactions or estate, or concerns the discovery of assets, business dealings, or the existence and disposition of the debtor's property." *Retz*, 606 F.3d at 1198 (quoting *In re Khalil*, 379 B.R. 163, 173 (B.A.P. 9th Cir. 2007)). "A debtor acts knowingly if he or she acts deliberately and consciously." *Retz*, 606 F.3d at 1198 (quoting *Khalil*, 379 B.R. at 173) (internal quotation omitted).

The fraud provision of § 727(a)(4) is similar to common law fraud, which the Ninth

Circuit Court of Appeals has described as follows:

> The creditor must show that (1) the debtor made the representations; (2) that at the time he knew they were false; (3) that he made them with the intention and purpose of deceiving the creditors; (4) that the creditors relied on such representations; (5) that the creditors sustained loss and damage as the proximate result of the representations having been made.

Roberts, 331 B.R. at 884. Intent usually must be established by circumstantial evidence or inferences drawn from the debtor's course of conduct. *Khalil*, 379 B.R. at 174 (circumstances might include multiple omissions or failure to clear up omissions).

i. Debtor's 2018 Income

Mr. Kessler contends that Debtor misrepresented the amount of income he received in 2018, and falsely represented that ACG Industries shut down in 2017. The evidence does not support Mr. Kessler's contention. Regarding Mr. Kessler's assertion that Debtor received $905,000 from ACG Industries in 2018, the relevant bank statements actually reflect a $20,000 receipt from *ACC Enterprises*, not ACG Industries, and $925,000 of transfers from unspecified sources. There is no evidence that Debtor received funds from ACG Industries in 2018, and, as such, no evidence that Debtor misrepresented that ACG Industries shut down in 2017.

Next, Mr. Kessler contends that Debtor testified that he used the ITM Accounts solely to receive salary from ACG Industries, which, in turn, must mean that the receipt of funds into the First ITM Account constituted Debtor's salary from ACG Industries. However, during the Meeting of Creditors, Debtor actually testified that he used the ITM Accounts to receive salary from *ACC Enterprises*. In addition, the bank statements reflect that Debtor frequently transferred funds from one business account to another. Thus, it is not clear that the receipt of $925,000 came from income or operation of business, as opposed to transfers of existing funds from different accounts. During the time period referenced by Mr. Kessler, the bank statements show only $20,000 received from ACC Enterprises. Consequently, Plaintiff has not demonstrated that Debtor made a false oath as to ACG Industries shutting down in 2017, or with respect to Debtor's stated income in 2018.

ii. The Harris Transfer

The Court will adjudicate that Debtor made a false oath in connection with the Harris Transfer by failing to include the transfer in his Original Schedules, and failing to identify his claim against Mr. Harris in the Original Schedules. In the Amended Schedules, Debtor indicated he was supposed to get investment returns from this transaction, and valued his claim at $550,000. As such, the Court also will adjudicate that the omission was material.

However, Mr. Kessler has not proven that Debtor omitted this information knowingly or fraudulently. As discussed above, in connection with § 727(a)(2)(A), "[w]here intent is at issue, summary judgment is seldom granted." *Gertsch*, 237 B.R. at 165. To prove intent conclusively, Mr. Kessler would have to show that the record "yields no plausible conclusion but that the debtor's intent was fraudulent." *Marrama*, 445 F.3d at 522. At this time, the evidence is not so conclusive as to show that Debtor acted knowingly and fraudulently in omitting information about the Harris Transfer. The Court will assess Debtor's credibility at trial.

iii. Failure to Disclose Fire Damage and Insurance Payments

The Court will adjudicate that Debtor did not disclose the prepetition transfers of insurance proceeds in his Original Schedules or Amended Schedules. The Court also will adjudicate that Debtor did not respond to Item 15 of his original SOFA, which calls for information about loss suffered from fire or other disaster. The Court also will adjudicate that these omitted facts were material.

However, Mr. Kessler has not met his burden of proving intent. Although Debtor did not respond to Item 15 of the SOFA in his Original Schedules, Debtor stated in his *original* schedule A/B that the Calabasas Property was "in disrepair because of smoke damage caused by the" November 2018 Woolsey Fire. Thus, Debtor *did* make certain disclosures about the fire damage. As to the insurance proceeds, Debtor testified at the Meeting of Creditors that the proceeds were "not [his] money," and were meant to be used to pay for construction work. In the Original Schedules, Debtor indicated the insurance proceeds were in a checking account held "in trust" for the purpose of fixing property damage.

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Further, at the Meeting of Creditors, Debtor discussed both the fire damages and receipt of certain insurance proceeds. *See In re Mereshian*, 200 B.R. 342, 347 (B.A.P. 9th Cir. 1996) (holding that disclosure of transactions not included in schedules at the first § 341(a) meeting of creditors may show lack of intent). In light of these facts negating intent, at this time, Mr. Kessler has not proven that Debtor acted knowingly and fraudulently.

iv. Transfers from the 2305 Account and the ITM Accounts

Mr. Kessler has not demonstrated that Debtor had an obligation to disclose, in his schedules and statements, the specified transfers from the 2305 Account and the ITM Accounts. Given that these accounts are in the name of Debtor's businesses, and because Debtor disclosed both businesses in his Original Schedules, Mr. Kessler has not shown where in the schedules and statements Debtor should have disclosed transfers made by these businesses.

To the extent Mr. Kessler argues the funds actually belonged to Debtor, and not the businesses, Mr. Kessler has not made such a showing. For instance, Mr. Kessler has not demonstrated that the entities were sham entities hiding Debtor's personal funds, or that the transferred funds otherwise would have been paid to Debtor as his income. Although Mr. Kessler makes conclusory statements asserting these companies were "shell" entities, Mr. Kessler has provided no evidence or legal authority in support of this conclusion. Thus, Mr. Kessler has not proven that Debtor made a false oath in connection with the transfers from the 2305 Account and the ITM Accounts.

Even if Debtor made a false oath, Mr. Kessler has not made a showing of intent. Debtor identified 2305 LLC and ITM as businesses in which he had an interest in the Original Schedules. Debtor also attached bank statements from both businesses to his first filed MOR, and discussed both businesses at the Meeting of Creditors. In light of these facts negating intent, Mr. Kessler has not shown, at this time, that Debtor acted knowingly or fraudulently.

v. The Omitted Businesses

The Court will adjudicate that Debtor omitted nine businesses from his Original

Schedules. The Court also will adjudicate that the missing information was material, because the information relates to Debtor's business transactions.

However, Mr. Kessler has not met his burden of proving intent. In the Amended Schedules, Debtor indicated that the omitted businesses either were shut down or nonoperational, or that Debtor was no longer involved with the business. Mr. Kessler has not provided contradictory evidence. In addition, Debtor openly discussed a few of these businesses at the Meeting of Creditors, prior to any discovery by Mr. Kessler. Given these factors that negate intent, Mr. Kessler has not, at this time, met his burden regarding intent.

D. ***11 U.S.C. § 727(a)(5)***

Pursuant to 11 U.S.C. § 727(a)(5), a debtor's discharge will be denied if "the debtor has failed to explain satisfactorily, before determination of denial of discharge under this paragraph, any loss of assets or deficiency of assets to meet the debtor's liabilities." Under § 727(a)(5), the objecting party must demonstrate that:

> (1) debtor at one time, not too remote from the bankruptcy petition date, owned identifiable assets; (2) on the date the bankruptcy petition was filed or order of relief granted, the debtor no longer owned the assets; and (3) the bankruptcy pleadings or statement of affairs do not reflect an adequate explanation for the disposition of the assets.

Retz, 606 F.3d at 1205. *See also Devers*, 759 F.2d at 754 (concluding that debtors could be denied discharge under § 727(a)(5) where they failed to offer a "satisfactory explanation" for the "disappearance" of a tractor they had owned that they did not produce for repossession).

"The sufficiency of the debtor's explanation, if any, is a question of fact. The bankruptcy court has broad discretion in making this determination." *In re Hazelrigg*, 2013 WL 6154102, at *5 (B.A.P. 9th Cir. Nov. 19, 2013) (citing *Retz*, 606 F.3d at 1205).

"Section 727(a)(5) does not require that the explanation itself be meritorious, or that the loss or other disposition of assets be proper; it only requires that the explanation

satisfactorily account for the disposition." *In re Chu*, 511 B.R. 681, 687 (Bankr. D. Haw. 2014) (internal quotation omitted). "This definition of 'satisfactory' is consistent with the basic principle that section 727 must be interpreted in favor of the debtor." *Id*.

i. The Transfers from the 2305 Account and the ITM Accounts

Mr. Kessler has not met his burden of proof regarding the transfers from the 2305 Account and the ITM Accounts. As noted above, with the exception of the $550,000 transferred to the Harrises, Mr. Kessler has not shown that the funds in these accounts belong to *Debtor*, instead of to ITM or 2305 LLC. Moreover, Mr. Kessler has not demonstrated where in Debtor's schedules or statements Debtor was required to provide an explanation of transfers from the accounts of nondebtor entities.

Moreover, even assuming the assets belong to Debtor, and that Debtor had an obligation to disclose the assets in his schedules and statements, Mr. Kessler has not demonstrated that he received an inadequate response from Debtor regarding the transfers. First, Mr. Kessler has not shown that he actually asked for additional information about the transfers. *See In re MacMillan*, 2020 WL 3634255, at *3 (Bankr. C.D. Cal. Apr. 9, 2020) (denying summary judgment under 11 U.S.C. § 727(a)(5) because there was "insufficient evidence that Debtors were ever asked to explain their loss or deficiency of these alleged assets"). Second, the line items from the bank statements related to these accounts include a description of the nature of the transfer.

Even if Debtor did not initially schedule transfers of his property, Mr. Kessler now has the benefit of detailed bank statements. To the extent Mr. Kessler was unclear about where certain funds went, Mr. Kessler has not specified any such line items in the Motion, and there is no indication Mr. Kessler has asked Debtor to clarify the nature of such transfers.

ii. The Insurance Proceeds

Mr. Kessler contends that Debtor transferred approximately $52,000 of the insurance proceeds without providing a satisfactory explanation about the nature of these transfers. First, Mr. Kessler's calculation of transferred funds appears to include the

postpetition transfer of $2,832. Section 727(a)(5) applies only to *prepetition* transfers. *In re Choy*, 569 B.R. 169, 184-185 (Bankr. N.D. Cal. 2017).

As to the remaining transfers, Mr. Kessler has not met his burden of proving that Debtor provided an unsatisfactory explanation. At the Meeting of Creditors, Debtor indicated the insurance proceeds were being used to pay construction workers. In addition, Mr. Kessler has not provided any evidence that he actually requested additional information about these transfers. As such, Mr. Kessler has not met his burden of proof as to the insurance proceeds.

iii. The Harris Transfer

As to the $550,000 transfer to the Harrises, Mr. Kessler asserts that Debtor only disclosed this transfer after discovery by Mr. Kessler. Courts deny debtors their discharge under § 727(a)(5) only if debtors fail to provide a satisfactory explanation "*before determination of denial of discharge under this paragraph*…." 11 U.S.C. § 727(a)(5) (emphasis added). Here, long before Mr. Kessler moved for a determination regarding denial of Debtor's discharge, Debtor disclosed information in the Amended Schedules.

Mr. Kessler also argues that the disclosures regarding the Harris Transfer are not satisfactory. However, Mr. Kessler has not specified what additional information he needs about this transfer. The evidence submitted by Mr. Kessler indicates that Mr. Kessler already has information about the recipients, the use of the funds for purchase of real property and Debtor's statements that the transfer was meant as a business investment. Mr. Kessler has not met his burden of proving that Debtor failed to satisfactorily explain this transfer.

iv. The Burr Transfer

The same problems are present with the Burr Transfer. Once again, Mr. Kessler's argument that Debtor disclosed the Burr Transfer after discovery by Mr. Kessler is irrelevant to whether Debtor made appropriate disclosure before a determination regarding his discharge.

Moreover, although Mr. Kessler argues that Debtor's disclosures regarding the Burr

Transfer are not sufficiently specific, Debtor has filled out the information required by schedule A/B and the SOFA. Mr. Kessler has not specified what information is missing. Further, if Mr. Kessler believes he needs additional information about this transfer, there is no evidence that Mr. Kessler has requested such information.

Finally, Mr. Kessler appears to suggest that Debtor did not respond to questions posed by the UST. However, Mr. Kessler's citations to the transcript of the Meeting of Creditors do not support this conclusion. The transcript reflects that Debtor answered the questions that were posed. Thus, as to all the transfers above, the transcript of the Meeting of Creditors does not reflect that Debtor failed to answer any specific question asked by the UST.

III. CONCLUSION

The Court will grant partial summary adjudication as set forth above. The Court otherwise will deny the Motion.

Mr. Kessler must submit an order within seven (7) days.

Party Information

Debtor(s):

Peter M. Seltzer	Pro Se

Defendant(s):

Peter M. Seltzer	Represented By Kathleen C Hipps

Plaintiff(s):

Darren Kessler	Represented By Craig G Margulies Noreen A Madoyan

Trustee(s):

Diane C Weil (TR)	Represented By

2:30 PM

CONT... Peter M. Seltzer **Chapter 7**

David Seror
Jorge A Gaitan
Jessica L Bagdanov