

September 19, 2001

Barbara A. Schermerhorn
Clerk

NOT FOR PUBLICATION

**UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE TENTH CIRCUIT**

IN RE DILLIS L. HART
and BEVERLY J. HART,

Debtors.

BAP No. KS-01-019

BARBARA WARDRIP,

Plaintiff – Appellant,

v.

DILLIS L. HART,

Defendant – Appellee.

Bankr. No. 97-10446
Adv. No. 97-5087
Chapter 7

ORDER AND JUDGMENT*

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

Before CLARK, BOHANON, and MICHAEL, Bankruptcy Judges.

MICHAEL, Bankruptcy Judge.

Barbara Wardrip (“Wardrip”) appeals from orders of the United States Bankruptcy Court for the District of Kansas (“bankruptcy court”) (1) denying her motion for summary judgment, and (2) denying her objection to discharge pursuant to 11 U.S.C. §§ 727(a)(2)(A) and 727(a)(4).¹ After examining the briefs and appellate record, the Court has determined unanimously that oral argument would not materially assist in the determination of this appeal. *See Fed. R.*

* This order and judgment has no precedential value and may not be cited, except for the purposes of establishing the doctrines of law of the case, res judicata, or collateral estoppel. 10th Cir. BAP L.R. 8010-2.

¹ Unless otherwise noted, all statutory references are to title 11 of the United States Code.

Bankr. P. 8012; 10th Cir. BAP L.R. 8012-1(a). The case is therefore ordered submitted without oral argument. For the reasons set forth below, we affirm.

I. Background

This dispute originated in 1996, when the United States District Court for the District of Kansas entered judgment for Wardrip on a medical malpractice claim against Debtor Dillis L. Hart (“Debtor”). Pursuant to the judgment, Wardrip was to receive \$850,000 in actual damages, \$200,000 in punitive damages, and \$2,000 in sanctions for the Debtor’s failure to cooperate during discovery (the “Federal Judgment”).

The Debtor and his spouse filed a joint chapter 7 petition on February 7, 1997. On March 10, 1997, Wardrip filed a complaint seeking a determination that the Federal Judgment was nondischargeable under § 523(a)(6). On July 11, 1997, Wardrip amended her complaint, abandoning her § 523(a)(6) claim and objecting to Debtor’s discharge pursuant to §§ 727(a)(2)(A) and (a)(4)(A).² The gravamen of Wardrip’s complaint is that the Debtor failed to disclose certain items in his

² These sections provide:

(a) The court shall grant the debtor a discharge, unless –

....

(2) the debtor, with the intent to hinder, delay, or defraud a creditor or an officer of the estate, charged with custody of property under this title, has transferred, removed, destroyed, mutilated, or concealed, or has permitted t be transferred, removed, destroyed, mutilated, or concealed –

(A) property of the debtor, within one year before the date of the filing of the petition;

....

(4) the debtor knowingly and fraudulently, in or in connection with the case –

(A) made a false oath or account[.]

11 U.S.C. § 727 (a)(2)(A), (a)(4)(A).

petition, statement of financial affairs, and bankruptcy schedules. Beginning in June 1997 and continuing through September 1999, the Debtor amended his petition, statements, and schedules to remedy many of the omissions noted by Wardrip as more fully described below.

Income and Expenses: In the statement of financial affairs, the Debtor listed his 1995 income as \$58,697 and his wife's income as \$5,750. On or about June 10, 1997, Debtor filed an amendment showing joint gross income for 1995 of \$545,817 and adjusted gross income of \$64,447. The Debtor initially listed his 1996 income as \$57,000 and his wife's income as \$5,750. This was amended to show a joint gross income of \$245,890 and an adjusted gross income of \$82,618. The Debtor's bankruptcy schedules initially listed a combined monthly income of \$18,787 and monthly expenses of \$19,474. The schedules were amended to reflect a combined monthly income of \$17,813 and monthly expenses of \$18,896.

Personal Property: The Debtor did not list any office equipment, supplies, furnishings, fixtures or similar items on his bankruptcy schedules. On September 10, 1999, the Debtor amended his schedules to add several pieces of medical office equipment to the list of personal property. The Debtor claimed the items exempt as tools of trade. None of the Debtor's creditors objected to the exemption.

Prepetition Transfers: In his statement of financial affairs, Debtor stated that he made no transfers of property within one year of the bankruptcy filing. The Debtor also stated that, at the time of the filing, he was not holding any property for another. In an amendment filed on or about June 10, 1997, he revealed that he was holding office equipment and furniture valued at approximately \$2,000 on behalf of the DLH Trust. At trial, the Debtor testified that DLH Trust is actually DLH Farms, an entity controlled by his son, Steven Hart ("Steven"). The Debtor also disclosed that he was holding a 1988 Chevrolet

van, valued at approximately \$2,000, for Steven. The Debtor testified that he transferred the equipment and the van to Steven more than a year before the bankruptcy as partial payment for unpaid wages. The Debtor also testified that he claimed tax deductions for both the office equipment and the van, even after the transfer, and that he paid all expenses related to the van.

Automobiles: The Debtor listed no automobiles on his bankruptcy schedules. On or about May 11, 1999, he amended his schedules to include a 1991 Oldsmobile, which he claimed as exempt. No objections were made to the claim of exemption. The Debtor testified that his failure to list the automobile was an oversight.

Leases/Executory Contracts: The Debtor stated in his bankruptcy schedules that he held no leases or executory contracts. On or about June 10, 1997, the Debtor amended his schedules to include a year-to-year lease with St. Joseph Development Corporation (“St. Joseph”) and a month-to-month lease with his brother, George Hart, on a townhouse. St. Joseph and George Hart were both listed as unsecured creditors at the time of the bankruptcy filing. Both leases are oral agreements. The Debtor testified that the St. Joseph lease was actually a month-to-month lease.

Potential Causes of Action: The Debtor did not list any potential causes of action in the original schedules filed with his petition. On or about March 30, 1998, he amended his schedules to include a potential cause of action against former attorneys, his insurance company, and insurance company attorneys for an unknown amount stemming from the medical malpractice suit. He also included a possible cause of action for an unknown amount against unspecified doctors, hospitals, and medical providers for restricting his practice of medicine. The Debtor testified that he initially excluded the potential causes of action from his schedules because counsel advised him that the claims lacked viability.

Credit Card Debt: The Debtor listed a credit card debt of more than \$50,000 on his list of unsecured creditors. The Debtor attributed this debt largely to Dillis Hart II (“Dillis II”), another of his sons, who was authorized to use the card but was not listed on the account. Wardrip argues that it was improper for the Debtor to list this debt in his schedules, and that the Debtor should have included a claim against Dillis II for unauthorized use of the credit card.

Wardrip filed a Motion for Summary Judgment and Memorandum in Support of the Motion for Summary Judgment (collectively “Motion for Summary Judgment”) on December 3, 1999. On December 27, 1999, the Debtor filed his Memorandum in Response by Defendant Dillis L. Hart to Motion for Summary Judgment by Barbara Wardrip. On December 28, 1999, Wardrip filed her Response by Plaintiff Barbara Wardrip to Response by Dillis L. Hart. On February 8, 2000, the bankruptcy court entered an order denying the Motion for Summary Judgment, citing issues of material fact regarding the Debtor’s intent and state of mind.

Trial was held June 7, 2000. On September 25, 2000, the bankruptcy court entered judgment denying Wardrip’s objection to discharge (the “Judgment”). Wardrip filed a Motion for Reconsideration and accompanying memorandum on October 4, 2000. On February 26, 2001, the bankruptcy court entered an order denying the Motion for Reconsideration. Wardrip timely filed a notice of appeal on March 8, 2001.

II. Jurisdiction

This Court has jurisdiction to hear timely-filed appeals from “final judgments, order, and decrees” of bankruptcy courts within the Tenth Circuit, unless one of the parties elects to have the district court hear the appeal. 28 U.S.C. § 158(a)(1), (b)(1), and (c)(1); Fed. R. Bankr. P. 8002; 10th Cir. BAP L.R. 8001-1(a) & (d). Neither party elected to have this appeal heard by the United

States District Court for the District of Kansas; thus they have consented to our review. A decision is considered final if it “‘ends the litigation on the merits and leaves nothing for the court to do but execute the judgment.’” *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 712 (1996) (quoting *Catlin v. United States*, 324 U.S. 229, 233 (1945)). The bankruptcy court’s Judgment following trial of Wardrip’s § 727(a)(2)(A) and § 727(a)(4)(A) claims is a final order and is appealable for purposes of 28 U.S.C. § 158(a)(1). *See Holaday v. Seay (In re Seay)* 215 B.R. 780, 785 (10th Cir. BAP 1997).

III. Standard of Review

We review a ruling on summary judgment de novo, applying the same legal standard used by the bankruptcy court. *Kojima v. Grandote Int’l Ltd. Liability Co. (In re Grandote Country Club Co., Ltd.)*, 252 F.3d 1146, 1149 (10th Cir. 2001). Summary judgment is appropriate “if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” Fed. R. Civ. P. 56(c) (incorporated by Fed. R. Bankr. P. 7056). “In reviewing a summary judgment motion, the court is to view the record ‘in the light most favorable to the nonmoving party.’” *Grandote*, 252 F.3d at 1149 (quoting *Thournir v. Meyer*, 909 F.2d 408, 409 (10th Cir. 1990)).

Questions of fact are reviewable for clear error. *See Pierce v. Underwood*, 487 U.S. 552, 558 (1988). “A factual finding is clearly erroneous when ‘it is without factual support in the record, or if the appellate court, after reviewing all the evidence, is left with the definite and firm conviction that a mistake has been made.’” *Payne v. Clarendon Nat’l Ins. Co. (In re Sunset Sales, Inc.)*, 220 B.R. 1005, 1012 (10th Cir. BAP 1998) (quoting *Las Vegas Ice & Cold Storage Co. v. Far West Bank*, 893 F.2d 1182, 1185 (10th Cir. 1990)) (further internal quotes

omitted). In reviewing findings of fact, we must give “due regard . . . to the opportunity of the bankruptcy court to judge the credibility of the witnesses.” Fed. R. Bankr. P. 8013.

IV. Discussion

As an initial matter, we note that in making her arguments, Wardrip has failed to provide references to the lengthy appendix filed concurrently with her brief. In essence, Wardrip has submitted a conglomeration of general allegations without pointing to any specific facts that would establish either the Debtor’s intent to defraud his creditors or to knowingly and fraudulently make a false oath in the bankruptcy case. To the extent Wardrip makes any legal arguments, said arguments are not supported by reference to controlling authority.

“It is obligatory that an appellant, claiming error by the [trial] court as to factual determinations, provide [the appellate] court with the essential references to the record to carry his burden of proving error.” *SEC v. Thomas*, 965 F.2d 825, 827 (10th Cir. 1992) (citing *Sil-Flo, Inc. v. SFHC, Inc.*, 917 F.2d 1507, 1514 (10th Cir. 1990)). A reviewing court will not “sift through” the record to find support for the claimant’s arguments. *Thomas*, 965 F.2d at 827. Nor will it manufacture arguments for a party to an appeal. *See Sil-Flo*, 917 F.2d at 1513-14. Nevertheless “the law favors the resolution of legal claims on the merits.” *Walker v. United Parcel Serv., Inc.*, 240 F.3d 1268, 1272 (10th Cir. 2001) (quoting *Gocolay v. New Mexico Fed. Sav. & Loan Ass’n*, 968 F.2d 1017, 1021 (10th Cir. 1992)). We therefore proceed to address Wardrip’s arguments, but caution her that such latitude may not be forthcoming in the future.

Wardrip has the burden of proving by a preponderance of evidence that the Debtor’s discharge should be denied. *See Gullickson v. Brown (In re Brown)*, 108 F.3d 1290, 1293 (10th Cir. 1997). The provisions denying discharge “must be construed liberally in favor of the debtor and strictly against the creditor.” *Id.* at

1292. To prevail on an objection to discharge brought under § 727(a)(2)(A), the creditor must show by a preponderance of the evidence that (1) the debtor transferred, removed, concealed, destroyed, or mutilated, (2) property of the estate, (3) within one year prior to the bankruptcy filing, (4) with the intent to hinder, delay, or defraud a creditor. *Id.* at 1293. Before the court may deny a debtor’s discharge pursuant to § 727(a)(4)(A), a creditor must demonstrate that the debtor knowingly and fraudulently made an oath and that the oath relates to a material fact. *Id.* at 1294. A false statement caused by mere mistake or inadvertence does not warrant denying a debtor’s discharge. *Id.* at 1294 – 95. “[F]raudulent intent may be deduced from the facts and circumstances of a case.” *Job v. Calder (In re Calder)*, 907 F.2d 953, 956 (10th Cir. 1990). A bankruptcy court’s determination on fraudulent intent will not be set aside unless clearly erroneous. *Id.*

A. The Summary Judgment Order

Wardrip argues that the bankruptcy court erred when it denied her Motion for Summary Judgment. As mentioned above, Wardrip’s brief is full of allegations concerning omissions from the Debtor’s statement of financial affairs and schedules. Nowhere, however, does Wardrip point to any undisputed facts that would tend to prove the omissions were intended to hinder, delay, or defraud a creditor. Nor does Wardrip direct us to any undisputed material facts regarding the Debtor’s intent to make false oaths. Our own review of the record yields little to support Wardrip’s argument aside from the fact that the Debtor omitted certain information from his statement and schedules. This alone is not enough to warrant a denial of discharge. *See Brown*, 108 F.3d at 1295.

The purpose of a summary judgment motion is to determine if there is evidence to support a party’s factual claims. *Grandote*, 252 F.3d at 1149. “Unsupported conclusory allegations do not create a genuine issue of fact.” *Id.* at

1149-50 (citing *United States v. Simons*, 129 F.3d 1386, 1388-89 (10th Cir. 1997)). “[S]ummary judgment is generally inappropriate where questions of intent and state of mind are implicated.” *Gelb v. Bd. of Elections*, 224 F.3d 149, 157 (2d Cir. 2000); see *Mendocino Env'tl. Ctr. v. Mendocino County*, 192 F.3d 1283, 1302 (9th Cir. 1999); *United States ex rel. Cantekin v. Univ. of Pittsburgh*, 192 F.3d 402, 411 (3d Cir. 1999); *Gordon v. Kidd*, 971 F.2d 1087, 1094 (4th Cir. 1992); *Wright v. State Farm Mut. Auto. Ins. Co.*, 911 F.Supp. 1364, 1369 (D. Kan. 1995), *aff'd without published opinion*, 94 F.3d 657 (10th Cir. 1996).

Cases where fraudulent intent is at issue are “peculiarly fact specific.” *Marine Midland Bus. Loans, Inc. v. Carey (In re Carey)*, 938 F.2d 1073, 1077 (10th Cir. 1991). The bankruptcy court noted the dearth of undisputed facts present in this case. Indeed, the only uncontroverted facts before the bankruptcy court pertained to the Federal Judgment and the date of the bankruptcy filing. Memorandum Opinion and Order Denying Motion for Summary Judgment at 2, Appellant’s Appendix at 97. The Debtor provided explanations for many of the omissions in his statement and schedules and claimed that the deficiencies were cured by his amendments. Defendant’s Memorandum in Opposition to Motion for Summary Judgment, Appellee’s Supplemental Appendix at 47-57. The bankruptcy court correctly found that factual issues regarding the Debtor’s intent precluded summary judgment.

B. The Judgment

Wardrip argues that the bankruptcy court should have barred the Debtor’s discharge for failing to schedule a claim against Dillis II for the use of the credit card. This issue was not raised in either the complaint or pretrial order, but was presented in Wardrip’s Memorandum in Support of the Motion for Reconsideration. The bankruptcy court rejected this argument, finding that the Debtor, as the cardholder, was obligated to list the debt on his schedules and was

liable for the full amount of the debt because he had given Dillis II permission to use the card.

Deposition testimony introduced at trial indicated that the Debtor made some of the charges to pay for office expenses. Wardrip offered no evidence regarding the amount of the debt attributable to Dillis II's charges. Nor did Wardrip offer evidence contradicting the Debtor's testimony that Dillis II was authorized to use the card, or that the Debtor was responsible for the entire debt. The bankruptcy court's finding on this matter does not amount to clear error.

Wardrip next argues that the Debtor's failure to list the medical equipment, his automobile, and the leases on the townhouse and business office should prevent the Debtor's discharge. Each of the omissions Wardrip complains of were addressed by the Debtor's amended schedules. These amendments constitute evidence that there was no fraudulent intent in the omission. *See Brown*, 108 F.3d at 1295.

The Debtor testified that he transferred the medical equipment to Steven more than a year prior to the bankruptcy filing as partial compensation for Steven's assistance in the medical practice. There are no records reflecting the purported transfer and no records reflecting Steven's ownership of the equipment. The Debtor retained possession of the equipment, used it in his practice, and paid for repairs and maintenance. After Wardrip filed the complaint, the Debtor amended his schedules to include the equipment. "A debtor's willingness to amend his Schedules corroborates a good faith intention to complete the Schedules accurately." *Croge v. Katz (In re Katz)*, 203 B.R. 227, 235 (Bankr. E.D. Pa. 1996). The Debtor also claimed the equipment exempt as tools of trade. Wardrip declined to object to the exemption.

The Debtor's retention and use of the equipment post-transfer is, to say the least, disconcerting. The bankruptcy court found that the retention constituted a

continuing concealment for purposes of § 727(a)(2)(A), but concluded that Wardrip failed to show that the Debtor possessed the requisite intent to defraud his creditors. Where two permissible views of the evidence are present “the factfinder’s choice between them cannot be clearly erroneous.” *Manning v. United States*, 146 F.3d 808, 813 (10th Cir. 1998) (quoting *Anderson v. City of Bessemer City*, 470 U.S. 564, 574 (1985)). Resolving such conflicts is not within the purview of this Court. *See Quezada v. County of Bernalillo*, 944 F.2d 710, 721 (10th Cir. 1991) (resolution of conflicting evidence and credibility determination are for the trial judge who personally hears the evidence and observes the demeanor of the witnesses). We concern ourselves only with whether the bankruptcy court reached a permissible decision in light of the evidence. *Id.* Although a factfinder could infer from the Debtor’s retention of the property that he intended to defraud his creditors, we do not have a “definite and firm conviction that a mistake has been made” in this instance. *Las Vegas Ice*, 893 F.2d at 1185.

With respect to the Oldsmobile, the Debtor offered conflicting testimony; first stating that he thought the title to the vehicle listed his wife as the owner but later saying that he owned the vehicle but forgot to list it. As noted above, failure to list items through inadvertence does not constitute a knowingly false statement made with the intent to defraud creditors. *Brown*, 108 F.3d at 1294. The bankruptcy court found that the omission of the Oldsmobile from the original schedules did not rise to the level of a false oath for purposes of § 727(a)(4)(A). While we are troubled by the inconsistencies in the Debtor’s testimony, we cannot say that the bankruptcy court’s finding was clearly erroneous.

Wardrip contends that the bankruptcy court erred when it found that the failure to disclose the leases on the office and townhouse was not sufficient to bar the Debtor’s discharge under § 727(a)(4)(A). The bankruptcy court determined

that these omissions did not relate to a material fact. ““The subject matter of a false oath is “material,” and thus sufficient to bar discharge if it bears a relationship to the bankrupt's business transactions or estate, or concerns the discovery of assets, business dealings, or the existence and disposition of his property.”” *Calder*, 907 F.2d at 955 (quoting *In re Chalik*, 748 F.2d 616, 618 (11th Cir. 1984)). The Debtor testified that both leases were oral, month-to-month agreements that were terminable at his option without penalty. Thus, the arrangements bore no relationship to the Debtor’s estate nor did they concern any assets that could have been used to benefit creditors. We do not find that the bankruptcy court’s finding constitutes clear error.

The same reasoning applies to Wardrip’s contention that the bankruptcy court erred when it found that the Debtor’s failure to list potential causes of action against the insurer, the hospital, medical providers, and attorneys. The Debtor testified that he was advised by counsel that pursuing such claims would be futile. Furthermore, the Debtor included the potential claims in his amended schedules, notwithstanding their lack of merit. The initial omission of these claims had no material effect on the estate.

Lastly, Wardrip argues that the bankruptcy court should have considered the Debtor’s failure to list a transfer of \$8,000 to his attorneys within ninety days of filing bankruptcy, and that the punitive damage portion of the Federal Judgment should not be discharged because it is based upon the Debtor’s intentional failure to produce financial records. We find no indication that Wardrip raised either issue below. A federal appeals court need not address an issue that was not brought before the trial court. *See FDIC v. Noel*, 177 F.3d 911, 915 (10th Cir. 1999), *cert. denied*, 528 U.S. 1116 (2000). Accordingly, we decline to consider Wardrip’s final two arguments.

V. Conclusion

For the reasons stated herein, the Judgment of the bankruptcy court is affirmed.