

NOT FOR PUBLICATION

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

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IN RE WAYNE R. OGDEN,  
Debtor.

BAP No. UT-98-042

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STEVEN R. BAILEY, Trustee,  
Plaintiff-Appellee,

Bankr. No. 97-25192  
Adv. No. 97-02303  
Chapter 7

v.

WAYNE R. OGDEN,  
Defendant-Appellant.

ORDER AND JUDGMENT\*

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

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Before PUSATERI, PEARSON, and CORNISH, Bankruptcy Judges.

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PUSATERI, Bankruptcy Judge.

This Court has before it for review the summary judgment order of the United States Bankruptcy Court for the District of Utah, Northern Division, denying Wayne R. Ogden (“Debtor”) a discharge of his debts, pursuant to 11 U.S.C. § 727(a).

**NATURE OF CASE**

The Debtor appeals the bankruptcy court order in an adversary proceeding commenced by the Chapter 7 trustee, Steven R. Bailey (“Trustee”). The Trustee

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\* 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.

sought to deny the Debtor a discharge under various subsections of 11 U.S.C. § 727(a), and filed a motion for summary judgment on all counts of his complaint. The parties filed briefs, affidavits and other pleadings related to the motion. At the conclusion of a hearing on the motion, the bankruptcy court granted partial summary judgment in favor of the Trustee, denying the Debtor a discharge under § 727(a)(3) for failure to maintain adequate records and § 727(a)(4)(A) for a false oath. The Debtor timely appealed. For the reasons discussed below, the bankruptcy court's grant of summary judgment is reversed and the case is remanded for further proceedings.

### APPELLATE JURISDICTION

A bankruptcy appellate panel, with the consent of the parties, has jurisdiction to hear appeals from final judgments, orders and decrees of bankruptcy judges within this circuit. 28 U.S.C. § 158(a), (b)(1). As neither party has opted to have the appeal heard by the District Court for the District of Utah, they are deemed to have consented to our jurisdiction. 10th Cir. BAP L.R. 8001-1(d).

Nevertheless, we are bound to consider the question of our jurisdiction to hear an appeal even if the parties have not raised it. *Liberty Mut. Ins. Co. v. Wetzel*, 424 U.S. 737, 740 (1976). The finality of the bankruptcy court's order might be doubted since it resolved the Trustee's claims under § 727(a)(3) and § 727(a)(4)(A), but did not resolve his claim that the Debtor had violated § 727(a)(2)(B) when he transferred property of the estate postpetition.

“Generally, an order is final if it ends the litigation on the merits and leaves nothing for the court to do but execute the judgment.” *Adelman v. Fourth Nat'l Bank and Trust Co. (In re Durability, Inc.)*, 893 F.2d 264, 265 (10th Cir. 1990). Since the Trustee sought the same relief on all three of his counts—the denial of the Debtor's discharge—the bankruptcy court's order already entitles him to all the relief he requested. A ruling on the third count cannot increase the relief

awarded to the Trustee or decrease the liability imposed on the Debtor. We have found cases deciding that an order was final and appealable because it necessarily foreclosed relief on claims it did not expressly rule on, *see American Nat'l Bank and Trust Co. v. Secretary of HUD*, 946 F.2d 1286, 1290 (7th Cir. 1991); *United States v. \$5,644,540.00 in U.S. Currency*, 799 F.2d 1357, 1361 (9th Cir. 1986), but none deciding that an order was final even though it expressly declared that one claim could not yet be resolved. Under the circumstances, however, neither party has any incentive to proceed to trial on the Trustee's third count because neither can obtain meaningful relief by doing so. Indeed, the bankruptcy court itself might decline to proceed on that count on the ground a trial is unnecessary so long as the summary judgment ruling stands. Consequently, we conclude the ruling must be regarded as a final, appealable order.

A bankruptcy appellate panel may affirm, modify, or reverse a bankruptcy court's judgment, order or decree, or remand with instructions for further proceedings. "Summary judgment is appropriate when there is no genuine dispute over a material fact and the moving party is entitled to judgment as a matter of law." *Russillo v. Scarborough*, 935 F.2d 1167, 1170 (10th Cir. 1991). *See* Fed. R. Civ. P. 56(c). A court can make no findings of fact when ruling on a motion for summary judgment. If findings are necessary for the ruling to be made, there is a genuine dispute over a material fact, and summary judgment may not be granted.

### **BACKGROUND FACTS**

When reviewing a grant of summary judgment, we must view the record in the light most favorable to the party that opposed the summary judgment motion. *Connolly v. Baum (In re Baum)*, 22 F.3d 1014, 1016 (10th Cir. 1994). Consequently, we state here the facts most favorable to the Debtor that could be found based on the materials presented to the bankruptcy court.

On May 28, 1997, the Debtor left his home town of Ogden, Utah, and went

to Las Vegas because he had received death threats. Before that time, he had maintained records of his business transactions that were sufficient for him to know what was happening and what had happened in his business. Apparently he left his business records in Ogden when he left, and although he could not have personal knowledge of this fact, he believes the local county attorney there seized those records in connection with a criminal investigation of his financial transactions. The county attorney denies that his office seized the records. This assertion does not dispute the Debtor's claim that he had records or that those records have disappeared, only his explanation of how they disappeared. The Debtor has turned over to the Trustee the portion of his business records that he has been able to locate since the time that many of his records disappeared. The Trustee's accountant believes the records the Debtor has produced are insufficient to enable the Trustee or the Debtor's creditors to ascertain his financial condition or business transactions.

An involuntary bankruptcy petition was filed against the Debtor on June 16, 1997. The Debtor stipulated to an order for relief against him two to three weeks later. The Trustee was appointed as permanent trustee at the subsequent meeting of creditors.

Bankruptcy Schedules and a Statement of Financial Affairs were filed for the Debtor on September 3. On the Statement of Financial Affairs, the answer to question one indicated that the Debtor had significant income from Coldwell Banker in 1995, 1996, and 1997. The answer to question two indicated he had no income from a source other than employment or operation of a business during the two years immediately preceding the commencement of his bankruptcy case. Questions three through nine were left blank.<sup>1</sup>

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<sup>1</sup> We note additional problems with the copy of the Statement that appears in the record on appeal. Official Bankruptcy Form 7, the Statement of Financial  
(continued...)

On September 12, an attorney for the Trustee questioned the Debtor in an examination authorized by Fed. R. Bankr. P. 2004. During that exam, the Debtor answered some questions but made clear in response to numerous others that he intended to claim the Fifth Amendment privilege against self-incrimination. For example, the following relevant colloquy took place:

[Trustee's attorney]: And you won't be answering those questions. I have some questions regarding the statements [sic].

We've sort of covered the schedules, but the statements [sic], sir, you list certain income from Caldwell [sic] Banker, but you did not answer some of the others.

Did you have any income during the year 1996, or '97 from any source other than Caldwell [sic] Banker? Did you have any income from the sale of land or from the sale of stock or from any other source other than your commissions?

[Debtor]: Again, I'll have to exercise my Fifth on that right now.  
.....

[Trustee's attorney]: Let's go back on the record. I'm going to make a suggestion, Mr. Ogden. I'm going to point out what I think are deficiencies in the statements, and I'm going to ask you to go through those with your attorney sometime in the next 10 days and either amend them to reflect the information that is needed, or what it is. If you need to take the Fifth as to those specific questions, take it as to those specific questions.

[Debtor]: Do you want me to answer that now? Anything else that's on there that was not previously answered I'll take the Fifth on at this time. That would take care of that.

[Trustee's attorney]: Would you do this. You have answered the question two, income other than from employment or operation of business, "None." And if what you intended by that "none" was to take the Fifth, please amend it within the next 10 days.

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<sup>1</sup> (...continued)

Affairs, is a multi-page form. A new page begins with question ten and the form continues through question twenty-one. Apparently, the form filed for the Debtor completely omitted questions ten through twenty-one. Furthermore, the signature page attached to the copy of the Statement is the signature page for the Schedules, not for the Statement. The parties have not mentioned these discrepancies. Thus, we are uncertain whether the Debtor ever signed the declaration under penalty of perjury for Form 7 indicating that he had read the answers contained in the Statement and that they were true and correct. If the copy in our record accurately reflects the actual Statement filed, we believe the Debtor's attorney, not the Debtor, must be blamed for using an incomplete form and failing to have the Debtor sign the declaration that the answers on the Statement were true and correct. Debtors must be able to rely on attorneys to use proper and complete forms.

[Debtor]: Okay.

[Trustee's attorney]: It is a matter of confusion, and if what you're saying is that you intend to take the Fifth Amendment to the questions regarding payments to creditors, the questions regarding suits or executions, the questions regarding repossessions, foreclosures and returns, the question regarding assignments and receivables, receiverships, the questions regarding gifts, and losses and payments to debt counseling, I think that's fine. You probably want to answer the payments to debt counseling because I think your attorney has already provided a statement on that to the Court.

[Debtor's attorney]: Duane, I think that's an oversight. We'll go over those.

[Trustee's attorney]: Would you?

[Debtor's attorney]: That's no problem.

[Trustee's attorney]: And I think there may be an appropriate exercise of — well, I guess it's not for me to decide whether it's appropriate or not. I understand that you've taken the Fifth on some of those questions.

It is clear that the document the Trustee's attorney was referring to was the Statement of Financial Affairs and the unanswered questions were questions three through nine on the Statement.

After he was appointed trustee for the Debtor's bankruptcy estate, the Trustee discovered that the Debtor made a number of transfers of money or property that should have been reported in response to questions three and seven of the Statement of Financial Affairs, and omitted a number of possible assets from his Schedules. These included: (1) a \$150,000 payment to a company called Nelson Capital Investment, L.L.C.; (2) \$70,000 he invested in a company called Utah Jerky Company and salary payments he made to his brother for running the company; (3) the transfer of his interest in Utah Jerky Company to a Dar Nelson in exchange for a \$50,000 credit on money he owed Nelson; (4) over \$20,000 in loans or investments he gave his brother in connection with the development of a patented product; (5) an interest in a money market account in Zurich, Switzerland, the transfer to his wife of most of the money in that account, a payment to State Farm from the account, and the withdrawal of the balance then

left in the account; (6) an interest in certain real property located in North Ogden, Utah; (7) the transfer to his wife of an interest in a storage unit; (8) the gift of a \$20,000 ring to his wife; and (9) transfers within 90 days of the filing of the bankruptcy petition of more than \$600 each to at least 94 creditors. The Trustee also complains that the Debtor incorrectly reported the cash value of a life insurance policy as \$0.

In the adversary proceeding commenced by his complaint based on § 727(a), the Trustee moved for summary judgment denying the Debtor a discharge based on these undisclosed transfers and assets, and the incorrect statement of value. In opposition, the Debtor submitted a declaration in which he denied having any intent to conceal any assets or transfers, or to hinder, delay, or defraud any creditor, the Trustee, or anyone else. He also stated that he had hired an attorney to represent him when the involuntary petition was filed, and relied on the attorney to complete the necessary bankruptcy documents properly. He then offered lengthy explanations about the transfers and assets, essentially conceding all the transfers had occurred but explaining why the unreported assets had been omitted and stating why he did not think he had interests in some of them. He claimed he did not know the insurance policy had any cash value when he reported it had none.

The parties argued the summary judgment motion, and then the bankruptcy court ruled. We quote the full ruling:

The matter was well presented by both sides, that's why I had a difficult time making my decision, but here it is.

As to the allegations under Section 727(a)(2)(b), the declaration of Mr. Ogden creates a questions [sic] of fact concerning the intent, so I cannot grant summary judgment on that section.

As to Section 727(a)(3), dealing with records, there is adequate information evidenced in the file that's undisputed to show the records, books, documents, and papers that Mr. Ogden should have kept that he didn't. That doesn't require intent.

As to Section 727(a)(4)(a), there is adequate evidence undisputed in the record to show that Mr. Ogden filed false information in his schedules and statement of affairs. He can't hide behind his attorney, and the circumstances of the case are such that I can infer knowing and fraudulent,

so that he knowingly and fraudulently made a false oath, so, the summary judgment is granted denying a discharge under Section 727(a)(3), and 727(a)(4)(a).

The Debtor timely appeals.

We will mention additional factual allegations in our discussion of the issues raised before us.

### **DISCUSSION**

Summary judgment is governed by Fed. R. Civ. P. 56, which is incorporated into bankruptcy practice by Fed. R. Bankr. P. 7056. Pursuant to Rule 56, in reviewing a grant of summary judgment, legal issues in the case are reviewed *de novo*, applying the same legal standards used by the bankruptcy court. *Hollytex Carpet Mills, Inc. v. Oklahoma Employment Sec. Comm'n (In re Hollytex Carpet Mills, Inc.)*, 73 F.3d 1516, 1518 (10th Cir. 1996). *De novo* review requires an independent determination of the issues, giving no special weight to the bankruptcy court's decision. *Salve Regina College v. Russell*, 499 U.S. 225, 238 (1991). The record must be viewed in a light most favorable to the party opposing the summary judgment motion. *Connolly v. Baum (In re Baum)*, 22 F.3d 1014, 1016 (10th Cir. 1994). Questions about a person's intent or other state of mind require consideration of intangible factors such as witness credibility and can rarely be resolved by summary judgment. *Prochaska v. Marcoux*, 632 F.2d 848, 851 (10th Cir. 1980), *cert. denied*, 451 U.S. 984 (1981); *see also* 10B Charles Alan Wright, Arthur R. Miller, & Mary Kay Kane, *Federal Practice and Procedure* § 2730 (3d ed. 1998) (indicating actions involving state of mind can rarely be determined by summary judgment, except when the opposing party does not present sufficient circumstantial evidence to support a potential finding contrary to the person's professed state of mind). Because the bankruptcy court did not explain its reasons for granting the Trustee's motion, we can only assume the court accepted some or all of the Trustee's arguments and are forced to review them to see whether they support the decision.



### **Failure To Maintain Records**

The bankruptcy court ruled that the debtor had failed to maintain adequate records under § 727(a)(3). Section 727 states:

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

...

(3) the debtor has concealed, destroyed, mutilated, falsified, or failed to keep or preserve any recorded information, including books, documents, records, and papers, from which the debtor's financial condition or business transactions might be ascertained, unless such act or failure to act was justified under all of the circumstances of the case . . . .

11 U.S.C. § 727(a)(3). The scope of the debtor's duty to maintain records depends on the nature of the debtor's business and the facts and circumstances of each case. One authority explains as follows:

The debtor's obligation to present records of financial information is intended to protect the trustee and creditors by enabling them to determine or confirm the debtor's financial condition and the cause of the debtor's financial difficulty. . . .

....

There are cases in which no duty to keep books arises; in general, consumer debtors have no obligation to keep books. On the other hand, a debtor who is a sophisticated business person will be held to a higher level of accountability in record keeping. If the nature and extent of the debtor's transactions were such that others in like circumstances would ordinarily keep financial records, the debtor must show that because of unusual circumstances there was no duty to keep them.

6 *Collier on Bankruptcy* ¶727.03[3][a],[b] (Lawrence P. King ed., 15th ed. rev. 1998) (footnotes omitted). The court in *Keystone Automotive Warehouse, Inc. v. LaBonte (In re LaBonte)*, 13 B.R. 887, 892 (Bankr. D. Kan. 1981), quoted the rule long recognized in the Tenth Circuit that:

“Records need not be so complete that they state in detail all or substantially all of the transactions taking place in the course of the business. It is enough if they sufficiently identify the transactions that intelligent inquiry can be made respecting them.” *Hedges v. Bushnell*, 106 F.2d 979, 982 (10th Cir. 1939).

See *Johnson v. Bockman (In re Bockman)*, 282 F.2d 544, 546 (10th Cir. 1960) (same).

The Trustee produced evidence that the records the Debtor eventually

turned over to him were inadequate to enable the Trustee or the creditors to ascertain the Debtor's financial condition. In response, the Debtor asserted that he had kept records sufficient for him to know about his business, including bank statements, promissory notes, title company closing statements, correspondence, and other documents, but that after he left his home town in May 1997, most of his records were confiscated by the county attorney.

Attacking the first part of this response, the Trustee declares: “[The Debtor's] personal opinion that the records were adequate for him to know what was happening is insufficient. He must have more specifically identified the records he kept and he must have produced his own accounting expert's affidavit stating the opinion that [the] records meet the standards under section 727(a)(3).” Appellee's brief at 24-25. While the Debtor's assertions about his record-keeping were not extensive and would not likely be terribly convincing at trial without further elaboration or, even better, discovery and production of the missing records, we believe they are sufficient to raise a genuine issue of material fact about the adequacy of his records that precludes summary judgment, at least since the records purportedly cannot now be produced for review. The Debtor's assertion that his records enabled him to know what was happening with his business implies that others could glean the same knowledge from them. The Trustee cites no authority for the claim that the Debtor had to produce an expert witness to verify the adequacy of his records, and we are aware of none. Meeting such an obligation would certainly be difficult, if not impossible, for missing records. Because the alleged records are no longer available for review, the Debtor's opinion alone is sufficient to get him to trial on the question; whether he will be believed at trial is another matter, not properly considered at the summary judgment stage.

The Trustee attacks the second part of the Debtor's response by producing evidence that the county attorney did not seize the Debtor's records and pointing

out that the Debtor could have no personal knowledge of their seizure since he was not in Ogden, Utah, when the alleged seizure would have to have occurred. However, the Debtor clearly claims that he had adequate records when he left Ogden and that those records are now gone. The fact he may be mistaken about the cause of their disappearance does not negate his claim that he had adequate records that are no longer available to him. This defense, if found by the factfinder at trial to be true, could qualify under § 727(a)(3) as justification for the Debtor's failure to produce the records after the order for relief was entered against him.

We are forced to conclude that the bankruptcy court erred in granting the Trustee summary judgment under § 727(a)(3).

#### **False Oath**

Section 727 of the Bankruptcy Code provides:

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

. . . .

(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)(4)(A). This provision sanctions debtors who deliberately fail to make proper disclosures, and is intended to ensure that dependable information is supplied to interested parties so they can rely on it without having to uncover true facts through investigation. *Job v. Calder (In re Calder)*, 93 B.R. 734, 737 (Bankr. D. Utah 1988), *aff'd*, 907 F.2d 953 (10th Cir. 1990).

To the extent the Trustee's summary judgment motion was based on the Debtor's failure to answer questions three through nine on the Statement of Financial Affairs, though, we believe this provision is inapplicable. The declaration under penalty of perjury for the Statement declares only that the answers given are true and correct, not that all the information sought in the Statement has been supplied. Consequently, a failure to answer some of the

questions does not constitute a false oath or account. Instead, § 727(a)(6) applies to a refusal to respond to a question. It provides that a discharge should be denied if:

(6) the debtor has refused, in the case—

(A) to obey any lawful order of the court, other than an order to respond to a material question or to testify;

(B) on the ground of privilege against self-incrimination, to respond to a material question approved by the court or to testify, after the debtor has been granted immunity with respect to the matter concerning which such privilege was invoked; or

(C) on a ground other than the properly invoked privilege against self-incrimination, to respond to a material question approved by the court or to testify . . . .

This provision indicates that a debtor may refuse to answer questions based on the Fifth Amendment privilege without being denied a discharge on that basis unless certain conditions are met. Since the Debtor relied on that privilege in failing to answer questions three through nine on the Statement of Financial Affairs, we believe his non-answers cannot be violations of § 727(a)(4)(A). Nothing in the record indicates the Debtor was ever ordered to answer questions three through nine on the Statement, was granted immunity for responding to those questions, or refused to answer them on a ground other than the properly invoked privilege against self-incrimination. This reduces the Trustee's false oath claim to the Debtor's omission of assets from his schedules and listing the cash value of a life insurance policy as \$0.

Some time after filing the Statement and testifying at the 2004 exam, the Debtor apparently stopped relying on the Fifth Amendment at least with respect to the transfers and assets the Trustee used as the bases for his summary judgment motion. In his declaration in response to the Trustee's motion, the Debtor conceded the specified transactions occurred, though he describes the circumstances of some of them differently than the Trustee alleged, and instead offered explanations for the omissions from his Schedules. The assets the Trustee

alleged the Debtor failed to list on his schedules were the Zurich money market account, a possible interest in Nelson Capital arising from his \$150,000 payment to the company, his interest in his brother's patent product if he invested in the product or an account receivable from his brother if he instead loaned the money, and his interest in the real property located in North Ogden, Utah. The Trustee also complains that the Debtor listed the value of an insurance policy with Lincoln Life Insurance Company ("Lincoln Life") as \$0 and repeated that value during the 2004 exam, even though twelve days after the exam, he applied for the value of the policy and certified to the insurance company "that no proceedings or bankruptcy or insolvency have been filed or are now pending against" him. The Debtor concedes these facts, but offers an explanation about them as well.

On July 10th and 14th, 1997, the Debtor transferred to his wife and an insurance company all but \$263.91 of the \$6,994.84 that had previously been in the Zurich account. Since the value of a specific number of dollars can generally not be in doubt, this raises the question whether the Debtor's failure in September to list an asset then worth only \$263.91 was a material omission for purposes of § 727(a)(4)(A). In his declaration, the Debtor claimed he made a notation about the account on the schedules, a claim the Trustee disputes, and pointed out that he provided the May 31, 1997, statement for the account to the Trustee. In *Gullickson v. Brown (In re Brown)*, 108 F.3d 1290, 1295 (10th Cir. 1997), the Tenth Circuit said that the fact a debtor comes forward with omitted material of his own accord is strong evidence he did not omit it with a fraudulent intent. The record on appeal does not make clear whether the Debtor's disclosure of the Zurich account was voluntary, but the *Brown* analysis could apply if it was.

The Debtor explained that his \$150,000 payment to Nelson Capital was in part a payment on a debt he owed to Dar Nelson and another company and in part to purchase an interest in a triplex, but that he was to obtain an interest in the triplex only when he finished paying off his debt to Nelson and the other

company. By the time his schedules were filed, he added, he believed that his potential interest had been lost because he had failed to pay off the debt. If accepted as true at trial, this explanation would make his omission of this potential asset not knowing and fraudulent.

The Debtor explained that the money he gave to his brother to help him develop a patented product was essentially a loan to be repaid with interest, but that he and his brother had a vague understanding that he would share in the product's success if it ever had any. He stated that he did not list the patent because he did not believe he had an interest in it and also considered it to be of little or no value. Finally, he claimed the amount of the transaction was insignificant in comparison to his real estate transactions, apparently suggesting he might have forgotten to list it. Although these explanations are fairly weak, we believe they are sufficient to raise as a genuine issue for trial whether his failure to list the transaction was knowing and fraudulent. *See Brown*, 108 F.3d at 1294 (“A debtor will not be denied discharge if a false statement is due to mere mistake or inadvertence.”).

The Debtor explained that he and a friend had agreed to purchase the North Ogden property, but that he never paid his share of the purchase price, so he assumed he never obtained an interest in it. He added, “If the house is titled in my name as a joint owner, that is probably in anticipation of my payment for half of the property which did not occur.” We believe this assertion must be interpreted, for summary judgment purposes, to mean that the Debtor claims he did not know his name was on the title and thought his failure to pay his share had kept him from getting an interest. If he did not pay for any interest in the property, the apparent joint owner who had actually paid the full price could likely sue and have the Debtor's name removed from the title. If the Debtor's assertions are believed, this would constitute a legitimate defense to the Trustee's claim of a knowing and fraudulent false oath.

Finally, the Debtor explained that he did not believe the Lincoln Life insurance policy had any cash value when he signed his Schedules and testified at the 2004 exam, but only found out later that it had value. He claimed that the man who had sold him a life insurance policy with Northwestern Mutual Life (“Northwestern”) became concerned that the Northwestern policy was going to be canceled because the Debtor could no longer pay the premiums on it. This man, according to the Debtor, investigated the Lincoln Life policy, found that it had cash value that could be used to pay the Northwestern premiums, and arranged for the Lincoln Life policy to be surrendered so the cash value could be used to keep the Northwestern policy in force. Because, the Debtor continued, he had received death threats he believed were serious and if they were carried out, his family would have been left without financial support, he cashed in the Lincoln Life policy solely to keep the Northwestern policy in force, not to deprive the Trustee or any creditors of assets of his bankruptcy estate. The bankruptcy court apparently concluded this explanation was sufficient to raise a question of fact about the Debtor’s intent in making this postpetition transfer of property of the bankruptcy estate, but not to raise one about whether his incorrect assertions that the Lincoln Life policy had no value were knowing and fraudulent. If the Debtor’s explanations about the policy are accepted at trial, though, they would mean he did not know the policy had any cash value when he indicated it did not and only learned of the value later. As a result, his misstatements about the value would not have been knowing and fraudulent. Although the Debtor offered no explanation for having certified to Lincoln Life that he was not the subject of a bankruptcy case, that false statement was not made “in or in connection with” his case, as required for it to be covered by § 727(a)(4)(A). This certification would certainly be some evidence that the Debtor is not trustworthy and acted with improper intent, so the veracity of his various explanations might more likely be rejected by the factfinder, but it does not establish that he knew his assertions the

policy had no value were false when he made them.

In sum, we are forced to conclude that the Trustee failed to establish for summary judgment purposes that the Debtor “knowingly and fraudulently . . . made a false oath.” The Debtor denied that he acted with the necessary intent, and that is sufficient to create an issue for trial. Indeed, we have difficulty understanding why the bankruptcy court believed the Debtor’s declaration created an issue for trial under § 727(a)(2)(B) about whether he had the “intent to hinder, delay, or defraud a creditor or an officer of the estate” when he transferred property of the estate postpetition, but did not create an issue for trial under § 727(a)(4)(A) about whether the omissions from his schedules were made “knowingly and fraudulently.”

The Trustee cites numerous cases that discuss how a debtor’s bad intent may be inferred from various circumstances despite his or her claims of innocent intent. All but one of them, however, involved a decision reached following a trial, not on a summary judgment motion. *See Job v. Calder (In re Calder)*, 93 B.R. 734, 737 (Bankr. D. Utah 1988), *aff’d*, 907 F.2d 953 (10th Cir. 1990); *Congress Talcott Corp. v. Sicari*, 187 B.R. 861 (Bankr. S.D.N.Y. 1994); *Tastee Donuts, Inc., v. Bruno*, 169 B.R. 588 (E.D. La. 1994); *Aweida v. Cooper (In re Cooper)*, 150 B.R. 462 (D. Colo. 1993); *Ingersoll v. Kriseman (In re Ingersoll)*, 124 B.R. 116 (M.D. Fla. 1991); *In re Caldwell*, 101 B.R. 728 (Bankr. D. Utah 1989); *American State Bank v. Montgomery*, 86 B.R. 948 (Bankr. N.D. Ind. 1988); *National Bank v. Butler (In re Butler)*, 38 B.R. 884 (Bankr. D. Kan. 1984); *Loeber v. Loeber (In re Loeber)*, 12 B.R. 669 (Bankr. D.N.J. 1981). These decisions all discuss what evidence is sufficient to support a finding at trial that is contrary to the debtor’s assertion that he or she did not have the requisite bad intent; they should not be read to mean the debtor’s testimony alone is insufficient to support a finding at trial that the debtor did not have the requisite intent. In the only summary judgment case the Trustee cites, there is no indication that the



debtor denied he had the necessary bad intent. *Nisselson v. Wolfson (In re Wolfson)*, 152 B.R. 830 (S.D.N.Y. 1993). The court indicated only that the debtor had made contradictory assertions at different times—for example, at one time he denied having any involvement in various corporations and at another admitted having ownership interests or being an officer in the same corporations. *Id.* at 833-34.

We recognize that the circumstances demonstrated by the Trustee present a strong case for refusing to believe the Debtor's assertions that he had no intent to lie or defraud anyone, and indicate the Trustee may be likely to succeed at trial. However, the Debtor's assertions do raise questions that are issues of fact generally resolved at trial, and the bankruptcy court did not explain how it reached the opposite conclusion. The Debtor's assertions are not contrary to incontrovertible facts of the sort that might be judicially noticed, but only contrary to inferences that can be—but do not have to be—drawn from circumstances he concedes will be established at trial. Consequently, the Debtor's credibility cannot be determined by summary judgment, but only at trial.

### **CONCLUSION**

For these reasons, we conclude that the Debtor's declaration was sufficient to raise genuine issues for trial about the adequacy of his business records, whether his failure to produce those records was justified, and his intent in filing his Statement of Financial Affairs, omitting assets from his Schedules, and reporting the value of the Lincoln Life policy as \$0. We emphasize that we do not mean to suggest that we think the Debtor should or is likely to succeed on these issues at trial, only that he has produced sufficient evidence to defeat the Trustee's motion for summary judgment.

The dissent accuses us of going beyond the requirement to review the summary judgment materials in the light most favorable to the non-moving party and instead ignoring undisputed facts that do not support the Debtor's view. We

cannot agree. We have considered whether the Debtor's explanations and inferences that might reasonably be drawn from them could be believed and would constitute defenses to the Trustee's claims. So far as we have been able to ascertain, those explanations and inferences do not conflict with any conceded or incontestible facts, and that means they cannot be rejected at this stage of the proceeding. It seems to us that the dissent is saying that the Debtor cannot be believed. All we are saying is that the bankruptcy court must hold a trial before deciding whether or not to believe him and whether to draw inferences favorable to the Trustee from the circumstantial evidence he has accumulated.

The bankruptcy court's order granting summary judgment for the Trustee under 11 U.S.C. §§ 727(a)(3) and 727(a)(4)(A) is hereby reversed, and the matter is remanded for further proceedings.

PEARSON, Bankruptcy Judge, Dissenting.

I respectfully dissent. While we examine the record on appeal in the light most favorable to the Debtor, we are not required to cast aside our common sense and accept unsubstantiated contentions of the Debtor that are completely implausible in light of uncontroverted evidence. While the majority has exerted great effort in an attempt to discover genuine issues of material fact that would justify a trial,<sup>1</sup> in my opinion, no genuine issues of material fact exist on either the false oath or failure to maintain records claims. I would affirm.

### FACTS

The majority does not just view the evidence in the light most favorable to the Debtor, they set forth only those facts that are favorable to the Debtor and largely ignore undisputed facts that do not support the Debtor's view. A more detailed statement of the facts is necessary.

The Debtor was a real estate agent with Coldwell Banker in Ogden, Utah. In addition to his real estate activities with Coldwell Banker, the Debtor also apparently operated a Ponzi scheme where he received "loans" from at least 572 "investors" for what he referred to as "a real estate investment business." Appellant Appendix at 000255, ¶ 41; 000310, ¶ 4.<sup>2</sup>

After an involuntary petition for relief was filed, the Debtor filed his Schedules and Statement of Affairs pursuant to Fed. R. Bankr. P. 1007 on September 3, 1997. Appellant's Appendix at 000009. It is uncontroverted that in

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<sup>1</sup> The majority has even gone so far as to raise the issue that the Debtor may not have signed his Statement of Financial Affairs under penalty of perjury. The Debtor never raised this argument. If the Debtor had not signed his Statement of Financial Affairs, I would assume *he* would have raised that defense to the false oath claim long before it was raised by the majority.

<sup>2</sup> Funds from the "loans" were deposited into escrow accounts at title companies and later were distributed to the Debtor or to investors in repayment of previous loans. Appellant's Appendix at 000314, ¶ 3. In some cases, the Debtor simply cashed investors' checks and purchased cashiers' checks payable to other previous investors. Appellant's Appendix at 000314, ¶ 4.

his Schedules and Statement of Financial Affairs, the Debtor omitted or provided inaccurate information on numerous assets and transactions.<sup>3</sup> Although the

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<sup>3</sup> In addition to the Zurich account discussed in the majority opinion and the Lincoln Life Insurance Company policy discussed below, the Debtor does not dispute that he omitted or inaccurately reported the following assets and transfers on his Schedules and Statement of Financial Affairs:

(1) Approximately two months before the bankruptcy was filed, the Debtor made a transfer of \$150,000.00 to Nelson Capital Investment, L.L.C. (“Nelson Capital”), relating to the purchase of a triplex rental property located on Porter Street in Ogden, Utah. Appellant’s Appendix at 000042-47; 0000249, ¶ 8. Nelson Capital was owned by Dar Nelson (“Nelson”), a longtime business associate of the Debtor. Appellant’s Appendix at 000249, ¶ 9. The Debtor alleged that the transfer was in partial payment of a pre-existing loan in the amount of \$500,000.00 (“Nelson Loan”) that was owed to Nelson and/or another business entity related to Nelson. Appellant’s Appendix at 000249. The Debtor alleged that he had omitted his interest in the triplex from his Schedules because he assumed that he had forfeited any claim he had in the triplex, since he had not paid back the Nelson Loan in full. Appellant’s Appendix at 000250, ¶ 16.

(2) Two weeks before the bankruptcy filing, the Debtor transferred his one-third interest in the Utah Jerky Company and its holding company in exchange for a \$50,000.00 credit against the Nelson Loan. Appellant’s Appendix at 000110-111, 000113-124. The Debtor had originally purchased his interest in the jerky business for \$50,000.00. Also, between October 1996 and May 1997, the Debtor paid his brother approximately \$28,000.00 in salary for running the business and invested an additional \$59,500.00 in the business. The Debtor claimed that he omitted the transfer from his Statement of Financial Affairs because he believed that he had transferred something of no value for something of measurable value. Appellant’s Appendix at 000252, ¶¶ 29-30.

(3) Within a year prior to the commencement of the bankruptcy case, the Debtor transferred over \$20,000.00 to his brother for the development of a patent product. Appellant’s Appendix at 00009, ¶ 1; 000254, ¶¶ 35, 37. At various times, the Debtor characterized the transaction as an “investment” or as a “loan.” He stated that he did not disclose the transaction because he did not think he had an interest in the patent venture. Appellant’s Appendix at 000255, ¶ 40.

(4) The Debtor did not disclose an interest in real property located at 200 East 2550 North, North Ogden, Utah (“Ogden Property”), which is titled to the Debtor and Eric Stevenson as tenants in common. Appellant’s Appendix at 000160; 000127, ¶ 11; 000138. The Debtor stated that he did not disclose his one-half interest because he did not consider himself to be an owner. Appellant’s Appendix at 000258, ¶ 60. The initial investment to purchase the Ogden Property totaled \$45,000.00 to \$50,000.00. Appellant’s Appendix at 000258, ¶ 56.

(5) Approximately two months prior to the bankruptcy filing, the Debtor executed a quit claim deed in favor of his wife which conveyed his fee simple interest in a storage unit in the South Pointe Bays commercial

(continued...)

Debtor appears to have omitted answers to many of the questions, there is nothing in the record to indicate that he asserted his Fifth Amendment right against self incrimination at the time he filed his Schedules and Statement of Financial Affairs.

The Trustee took the Debtor's deposition under Fed. R. Bankr. P. 2004 on September 12, 1997. During the examination, the Debtor asserted the Fifth Amendment and refused to answer numerous questions. Appellant's Appendix at 000262, ¶¶ 78-81. The Debtor also failed to produce records subpoenaed by the Trustee in conjunction with the Rule 2004 examination. Appellant's Appendix at 000037, ¶ 10. The Trustee, however, issued more than sixty-seven Rule 2004 subpoenas to third parties in order to obtain records related to the Debtor's business. Appellant's Appendix at 000328, ¶ 4; 000330-355.

After the Trustee filed this adversary proceeding, the Debtor turned over three boxes of records to the Trustee.<sup>4</sup> Appellant's Appendix at 000312, ¶ 8. The records that the Debtor turned over to the Trustee included copies of 286 promissory notes, but contained only partial information concerning the

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<sup>3</sup> (...continued)  
condominium project in Washington Terrace, Utah. Although the Debtor listed the storage unit in his Schedules as property of his wife, he failed to disclose that he had transferred the property to his wife two months before the bankruptcy filing.

(6) The Debtor failed to disclose that within one year preceding the commencement of the bankruptcy case, he had given his wife a ring valued at \$20,000.00. Appellant's Appendix at 036, ¶ 8; 000068; 000102-103; 000127, ¶ 16; 000134.

(7) The Debtor failed to disclose twelve pending civil actions against him that claimed the right to recover over \$3,000,000.00 under promissory notes that were in default. Appellant's Appendix at 000357-417.

<sup>4</sup> Three boxes of records were provided to the Trustee on October 17, 1997. A partial listing of the records is set out in the Trustee's brief. Appellee's Brief at 4.

transactions.<sup>5</sup> Appellant's Appendix at 000312, ¶ 2. The Trustee's accountant identified in his affidavit at least 1,094 individual loans.<sup>6</sup> Thus, the Debtor produced, at most, partial information pertaining to only 25% of his transactions. Appellant's Appendix at 000314, ¶ 6. The accountant stated in his affidavit that "[t]he documents produced by Ogden's counsel are so incomplete that it is not possible to ascertain Ogden's financial condition or business transactions therefrom." Appellant's Appendix at 000204, ¶ 10.

As noted by the majority, after the Trustee filed a motion for summary judgment, the Debtor submitted his Declaration, alleging that he was unable to provide his business records to the Trustee because the records had been seized in a criminal investigation conducted by the county attorney in Weber County, Utah. Appellant's Appendix at 000252, ¶ 70. In response, the Trustee submitted an affidavit from the chief investigator for the county attorney's office that denied that the Debtor's records had been seized.

The trial court granted summary judgment in favor of the Trustee under § 727(a)(3) for failing to maintain adequate business records and § 727(a)(4)(A) for false oath.<sup>7</sup> The debtor timely appealed.

### DISCUSSION

"Summary judgment is appropriate when there is no genuine dispute over a

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<sup>5</sup> The notes contained the lender's name, the expected date of repayment and the expected amount of repayment. However, the promissory notes did not identify the amounts loaned or the dates of the loans. Appellant's Appendix at 000312, ¶ 2.

<sup>6</sup> The accountant's affidavit indicated that his estimate that 1,094 loans were made to the Debtor was conservative since many of the investors rolled their loan repayments into subsequent notes, thereby creating a new note without investing new money. The accountant could only track those loans where new cash was given to the Debtor. Therefore, rollover notes could not be identified. Appellant's Appendix at 000314-315, ¶ 6.

<sup>7</sup> Additionally, the court denied the Trustee's motion for summary judgment under § 727(a)(2)(A) & (B) for the transfer or concealment of property and did not rule on the Trustee's motion for summary judgment on the claim under § 727(a)(4)(D) for withholding records.

material fact and the moving party is entitled to judgment as a matter of law.” *Russillo v. Scarborough* , 935 F.2d 1167, 1170 (10th Cir. 1991).    *See* Fed. R. Civ. P. 56(c). “Once the moving party meets its burden, the burden shifts to the nonmoving party to demonstrate a genuine issue for trial on a material matter.” *Connolly v. Baum (In re Baum)*,    22 F.3d 1014, 1016 (10th Cir. 1994).    “[T]he nonmoving party may not rest on its pleadings but must set forth *specific* facts showing that there is a genuine issue for trial as to those dispositive matters for which it carries the burden of proof.”    *Applied Genetics Int’l, Inc. v. First Affiliated Sec., Inc.*,    912 F.2d 1238, 1241 (10th Cir. 1990) (emphasis added) (citing *Celotex Corp. v. Catrett* , 477 U.S. 317, 324 (1986)). In the present case, the Debtor has wholly failed to identify specific facts which demonstrate that there is a genuine issue of material fact for trial. Indeed, for the most part, the Debtor’s claims are unsupported protests of innocence.

#### **Failure to Maintain Records**

The Trustee sought to bar the Debtor’s discharge under    § 727(a)(3) on the theory that the Debtor had failed to maintain adequate records. The majority has correctly set forth the relevant law regarding    § 727(a)(3), which requires a debtor to maintain records sufficient for the trustee and creditors to determine the debtor’s financial condition and transactions for the period preceding the bankruptcy filing.

The Trustee met his burden of establishing that the Debtor failed to maintain adequate records, in part, through the introduction of the affidavit from his accounting expert stating that, after the issuance of sixty-seven subpoenas, the records of the Debtor’s financial dealings were still so incomplete that they constituted partial information on only 25% of the Debtor’s transactions.

The Debtor did not dispute the accountant’s statements. Rather, the Debtor offered the following defenses: 1) his records had been seized prior to the bankruptcy filing by the Weber County Attorney’s office in conjunction with a

criminal investigation; and 2) prior to the alleged seizure, he maintained records and knew where to obtain additional records from third parties such as title companies, sufficient for *him* to “know what was happening and had happened in [his] business.” *See* Appellant’s Appendix at 000263. In response, the Trustee produced an affidavit from the Weber County Attorney’s office stating that they had not confiscated any records from the Debtor.

The Debtor failed to produce any statement or affidavit to substantiate his claim that his records had been seized. As noted previously, in *Celotex* the Court determined that a non-moving party may not rest on its pleadings, but must bring forth *specific* facts in order to avoid summary judgment. *Celotex Corp. v. Catrett* , 477 U.S. 317, 324 (1986). In my opinion, the Debtor’s conclusory allegation that the Weber County Attorney’s office seized his records, without a factual basis for that conclusion, is woefully short of the *Celotex* requirement that the Debtor must set forth specific facts to support his allegations.

Nonetheless, even assuming that the Debtor’s records were seized and that his records prior to the seizure were sufficient for *his* purposes, those contentions are insufficient to establish that a genuine issue of material fact exists under § 727(a)(3). The test is not whether the *debtor* could determine what was happening in his business (a subjective standard), but whether a third-party such as a trustee or creditor could determine from the records what was happening in the debtor’s business (an objective standard).

The majority opinion glosses over this inadequacy with one simple statement: “The Debtor’s assertion that his records enabled him to know what was happening with his business implies that others could glean the same knowledge from them.” There is no basis in the record for the majority’s conclusion that a third party could determine the Debtor’s business dealings from his records.

Even the Debtor never argued that his record-keeping met the objective



standard of § 727(a)(3). When asked directly by the trial court whether the subjective standard asserted by the Debtor was sufficient, counsel for the Debtor never contended that the records were adequate for third-parties to determine the Debtor's business dealings. *See* Appellant Appendix at 000458-461. Yet the majority has seen fit to manufacture that argument for the Debtor. On appeal, our responsibility is to review the record as it exists, not to manufacture a new record.

The Debtor's vague statements that his records were seized and that his records prior to the seizure were adequate for his purposes do not establish a genuine issue of material fact so as to require a trial under the § 727(a)(3) claim. The trial court correctly granted the Trustee's motion for summary judgment and denied the Debtor a discharge for failing to maintain adequate records.

#### **False Oath**

The two-fold purpose of § 727(a)(4)(A) is to provide information on the Debtor's current assets at the time of filing and to bring to light any assets that the Debtor had immediately prior to the filing. *Job v. Calder (In re Calder)*, 93 B.R. 734, 737 (Bankr. D. Utah 1988), *aff'd*, 907 F.2d 953 (10th Cir. 1990). "The veracity of the statements filled out by the Debtor is essential to the successful administration of the Bankruptcy Code." *Id.* at 738 (citing *Chalik v. Moorefield (In re Chalik)*, 748 F.2d 616, 618 (11th Cir. 1984); *Diorio v. Kreisler-Borg Constr. Co. (In re Diorio)*, 407 F.2d 1330, 1331 (2d Cir. 1969)). One court explained the function of § 727(a)(4)(A) as follows:

The primary purpose of § 727(a)(4)(A) is to ensure that dependable information is supplied to those interested in the administration of the bankruptcy estate so they can rely upon it without the need for the trustee or other interested parties to dig out these true facts in examination or investigation. . . .

. . . The trustee and the creditors are entitled to honest and accurate signposts on the trail showing what property has passed through the debtor's hands during the period prior to bankruptcy.

*Id.* at 737.

“In order to sustain an objection to discharge under 11 U.S.C. § 727(a)(4)(A), the evidence must establish: (1) that the debtor made a false oath or account in connection with his bankruptcy proceeding; and (2) that such false oath or account was knowingly and fraudulently made.”    *Camacho v. Martin (In re Martin)* , 88 B.R. 319, 323 (D. Colo. 1988) (citing    *Chalik*, 748 F.2d at 618). Additionally, the false oath or account must have related to a material fact. *Kunce v. Kessler (In re Kessler)* , 51 B.R. 895, 898 (Bankr. D. Kan. 1985) . See also *Martin*, 88 B.R. at 323.

While it is clear that providing false information constitutes a false oath, a deliberate omission on the Schedules and Statement of Financial Affairs also constitutes a false oath under § 727(a)(4)(A).    *E.g.*, *Calder* , 907 F.2d at 955-56. See also *Thibodeaux v. Olivier (In re Olivier)* , 819 F.2d 550 (5th Cir. 1987); *Martin* , 88 B.R. at 319; *Continental Bank v. Bobroff (In re Bobroff)* , 58 B.R. 950 (Bankr. E.D. Pa. 1986), *aff'd*, 69 B.R. 295 (E.D. Pa. 1987); *Comprehensive Accounting Corp. v. Morgan (In re Cycle Accounting Servs.)*, 43 B.R. 264 (Bankr. E.D. Tenn. 1984).

A plaintiff objecting to discharge bears the burden of proving that the debtor acted with the requisite intent.    *In re Caldwell* , 101 B.R. 728, 732-33 (Bankr. D. Utah 1989). “While the plaintiff has the ultimate burden of persuasion, the burden of going forward with the evidence shifts to the debtor once the plaintiffs have shown that the acts complained of occurred.”    *Martin* , 88 B.R. at 321. See also *Caldwell*, 101 B.R. at 735 (“Once a sworn statement is shown to be false, the burden to prove that the statement or omission was an honest mistake shifts to the debtor.”) (quoting    *Poolquip-McNeme, Inc. v. Hubbard (In re Hubbard)*, 96 B.R. 739, 747 (Bankr. W.D. Tex. 1989)).

For purposes of § 727(a)(4)(A), the debtor’s fraudulent intent may be inferred from the facts and circumstances of the case.    *Calder* , 907 F.2d at 956. “Fraudulent intent . . . may be established by circumstantial evidence, or by

inferences drawn from a course of conduct.” *Caldwell* , 101 B.R. at 735 (quoting *Farmers Coop. Ass’n v. Strunk (In re Strunk)* , 671 F.2d 391, 395 (10th Cir. 1982)). *See also Thibodeaux v. Olivier (In re Olivier)* , 819 F.2d 550 (5th Cir. 1987). The Tenth Circuit noted:

The problem in ascertaining whether a debtor acted with fraudulent intent is difficult because, ordinarily, the debtor will be the only person able to testify directly concerning his intent and he is unlikely to state that his intent was fraudulent. Therefore, fraudulent intent [under § 727(a)(4)(A)] may be deduced from the facts and circumstances of a case.

*Calder*, 907 F.2d at 955-56 (citations omitted).

Additionally, “[a]n inference of irregularity may arise from a series of assets or potential assets omitted from the debtor’s schedules.” *Calder* , 93 B.R. at 735. “The cumulative effect of evidence of assets not listed will satisfy the creditor’s burden of proof.” *Id.* In *Caldwell* , the court noted the cumulative effect of numerous omissions:

“While the omission of one or two relatively small or immaterial matters would not affect the ability to obtain a discharge, it is this court’s determination that the extent and volume of the omissions as well as the importance of the information omitted is sufficient to substantiate the denial of discharge under 11 U.S.C. § 727(a)(4)(A).”

*Caldwell* , 101 B.R. at 737 (quoting *Friedman v. Alfonso (In re Alfonso)* , 94 B.R. 777, 778 (Bankr. S.D. Fla. 1988)).

Further, reckless disregard for accuracy in submitting the Schedules or Statement of Financial Affairs is sufficient to satisfy the element of intent in § 727(a)(4)(A). *Calder*, 93 B.R. at 736 (citing *In re Tully* , 818 F.2d 106 (1st Cir. 1987)). *See also Bobroff* , 58 B.R. at 953 (indicating that “[t]he requisite intent under § 727 may be predicated on evidence of a pattern of reckless and cavalier disregard for the truth”); *Diodati* , 9 B.R. at 808. In *Calder* , the court stated:

While it is true that a false statement in the bankruptcy Schedule or Statement of Financial Affairs caused by mere mistake or inadvertence is not sufficient to require denial of discharge, because the debtor must have fraudulently intended to make a false oath or account; nevertheless, the courts have held that a reckless disregard of both the serious nature of the information sought and the

necessary attention to detail and accuracy in answering may give rise to the level of fraudulent intent necessary to bar a discharge.

*Calder*, 93 B.R. at 737.

It is undisputed that the Debtor failed to reveal, or provided inaccurate information, on numerous assets and transactions. The majority struggles at great length to ignore the undisputed omissions and inaccuracies. Simply focusing on one undisputed transaction should demonstrate that a basis for summary judgment exists.

The Debtor listed an insurance policy with Lincoln Life Insurance Co. (“Lincoln Life”) on his Schedules, but indicated the value as zero. Appellant’s Appendix at 000143, ¶ 9. On September 2, 1997, the Debtor signed the “Declaration Concerning Debtor’s Schedules” indicating under penalty of perjury that the information contained in his Schedules was true and correct. Appellant’s Appendix at 000135. On September 12, 1997, the Debtor testified at a Rule 2004 examination that the policy had no cash value. Appellant’s Appendix at 000036, ¶ 7; 000069. Twelve days after his Rule 2004 examination, on September 24, 1997, the Debtor filled out a “Life Policy Service Request Surrender Form” requesting full surrender of the cash value of his life insurance policy with Lincoln Life. Appellant’s Appendix at 000181, ¶9; 000199. By signing the surrender form, the Debtor certified “that no proceedings or bankruptcy or insolvency have been filed or are now pending against the undersigned.” Appellant’s Appendix at 000181, ¶ 10; 000199. Lincoln Life issued a check to the Debtor in the amount of \$6,889.63, which represented the cash value of \$9,533.65, minus a surrender fee of \$2,644.02. Appellant’s Appendix at 000181, ¶ 11; 000187. The Debtor spent the money. Appellant’s Appendix at 000239.

In his Declaration, the Debtor offered the following explanations for the Lincoln Life transaction: 1) he mistakenly believed that the cash value of the policy was zero, so he had innocent intent; and 2) when he later learned the policy

had value, he spent the money postpetition because he needed it in order to pay the premiums on another insurance policy.<sup>8</sup> Appellant's Appendix at 000257.

The Debtor's contention that he spent the money postpetition because he needed it to pay for another policy is not a valid defense. Many debtors could demonstrate the "need" for estate funds in order to pay postpetition obligations. However, the Bankruptcy Code simply does not allow a Debtor to raid estate assets for his own postpetition use, and it discourages that behavior by denying debtors their discharges for doing so.

With respect to the Debtor's claim of innocent intent, no reasonable factfinder could conclude that the Debtor acted innocently in listing the policy as valueless, cashing in the policy and spending the proceeds postpetition. If the Debtor mistakenly believed when he signed his Schedules that there was no cash value in the policy and later learned he was wrong, he should have filed amended Schedules, notified the Trustee and *turned the money over to the estate*. The sum involved was not trivial and clearly constituted a false oath knowingly made, since the Debtor twice indicated the value as zero and immediately thereafter cashed in the policy. In the process of signing the surrender form, he certified that "no proceedings or bankruptcy or insolvency" had been filed or were pending against him at a time when he was involved in twelve civil lawsuits claiming the right to recover over \$3,000,000.00.

On the basis of the Lincoln Life transaction alone, the Debtor should be

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<sup>8</sup> In defense of the Trustee's false oath claims, the Debtor generally asserted as additional defenses that he relied on counsel to correctly prepare his Schedules and Statement of Financial Affairs and that the omitted or inaccurate information was of no value. The Debtor indicated in his Declaration that at the time he testified and assisted counsel in the preparation of the Schedules, he mistakenly believed that the policy had no cash value. Based on that belief, he presumably furnished that information to his counsel. Therefore, the reliance on counsel defense is not applicable to the Lincoln Life policy. After receiving the proceeds from the policy, the Debtor also apparently abandoned any defense that Lincoln Life policy had no value. *See* Appellant's Appendix at 000257.

denied a discharge for a false oath.<sup>9</sup>

The majority apparently concludes that a mere statement from the Debtor that his intent was innocent is sufficient to create a genuine issue of material fact so as to justify a trial. I disagree. As the court in *Calder* noted, few debtors are likely to admit outright that they acted with fraudulent intent. *See, e.g., Calder*, 907 F.2d at 955-56.

Although as a general rule the issue of intent involving a person's state of mind is a question of fact that may preclude summary judgment, summary judgment is still appropriate if the facts and circumstances of the case so warrant. As the court in *Hunter v. Sowers (In re Sowers)*, 229 B.R. 151 (Bankr. N.D. Ohio 1998), stated:

When ascertaining whether a violation of §§ 727(a)(2)(B) or 727(a)(4)(A) has occurred, the trier of fact is necessarily required to make a subjective inquiry into the debtor's state of mind. Such an inquiry normally requires explanatory testimony by the debtor and an assessment by the trier of fact of the debtor's demeanor and credibility. Accordingly, questions involving a person's state of mind are generally inappropriate for resolution by summary judgment. Nevertheless, there is no per se rule that state of mind issues are inappropriate for disposition on summary judgment as long as there is no possibility that the facts presented at trial would demonstrate a lack of fraud or intent. However, in making this determination, a court is not to consider whether the nonmoving party may be able to support the claim by presenting a scintilla of evidence based upon improbable inferences and unsupported speculation. Rather, Fed. R. Civ. P 56(c) requires that there be no genuine issue of material fact.

*Id.* at 159 (citations omitted).

In a recent case, the Seventh Circuit Court of Appeals discussed whether the debtor's assertion of innocent intent precluded summary judgment:

A denial of knowledge may be so utterly implausible in light of

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<sup>9</sup> There is also a cumulative effect to the Debtor's numerous omissions and inaccuracies. The record compels the conclusion that the Debtor undertook to furnish only carefully selected information that he wanted to furnish on his Schedules and Statement of Financial Affairs. Many of the Debtor's assets and financial transactions were revealed only when he was caught by the Trustee's accountant. Some of the transactions were revealed only after the Debtor had spent estate assets postpetition.

conceded or irrefutable evidence that no rational person could believe it; and if so, there is no occasion to submit the issue of knowledge to determination at trial. “[F]actors other than demeanor and inflection go into the decision whether or not to believe a witness. Documents or objective evidence may contradict the witness’ story; or the story itself may be so internally inconsistent or implausible on its face that a reasonable factfinder would not credit it.”

*In re Chavin*, 150 F.3d 726, 728 (7th Cir. 1998) (citations omitted) (quoting *Anderson v. City of Bessemer City*, 470 U.S. 564, 575 (1985)). See also *Seshadri v. Kasraian*, 130 F.3d 798, 801-02 (7th Cir. 1997); *United States v. Premises Known as 717 S. Woodward St.*, 2 F.3d 529, 533-34 (3d Cir. 1993); *United States v. One Parcel of Property Located at 15 Black Ledge Drive*, 897 F.2d 97, 102 (2d Cir. 1990).

Certainly, there is no *per se* rule that summary judgment is improper under § 727(a) where intent is in issue. See, e.g., *Chavin*, 150 F.3d at 728 (granting summary judgment under § 727(a)(4) where debtor failed to reveal valuable stock options and a partnership interest); *Meeks v. Trammell (In re Trammell)*, 197 B.R. 309 (Bankr. W.D. Ark. 1996) (granting summary judgment under § 727(a)(2) on the basis of debtor’s prepetition transfer of two vehicles and concealment of wages); *Nassar v. Kablaoui (In re Kablaoui)*, 196 B.R. 705, 708 (Bankr. S.D.N.Y. 1996) (determining summary judgment was appropriate under § 727(a)(2) where the debtor failed to offer sufficient rebuttal evidence); *Nisselson v. Wolfson (In re Wolfson)*, 139 B.R. 279 (Bankr. S.D.N.Y. 1992) (granting summary judgment under § 727(a)(4) where the debtor repeatedly changed his answers regarding debtor’s involvement with various corporations), *aff’d*, 152 B.R. 830 (S.D.N.Y. 1993).

If ever a case cried out for summary judgment on the issue of intent, it is this one. “The purpose of the bankruptcy code is to give the *honest* debtor a new start.” *Gullickson v. Brown (In re Brown)*, 108 F.3d 1290, 1294 (10th Cir. 1997) (emphasis supplied). The pattern of subterfuge engaged in by the Debtor places

him squarely outside that category.

**CONCLUSION**

The trial court correctly granted summary judgment in favor of the Trustee under § 727(a)(3) for failing to maintain adequate records and § 727(a)(4)(A) for false oath. For the foregoing reasons, I would affirm and, therefore, must respectfully dissent.