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U.S. Bankruptcy Appellate Panel
of the Tenth Circuit
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Barbara A. Schermerhorn
Clerk

NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL

OF THE TENTH CIRCUIT

IN RE HENRY DEAN VAUGHAN and JESSIE ELAINE VAUGHAN, Debtors.	BAP No. WO-05-028
ROBERT D. GARRETT, Trustee, Plaintiff – Appellee, BANK OF CUSHING, Appellee, v. HENRY DEAN VAUGHAN, and JESSIE ELAINE VAUGHAN, Defendants – Appellants.	Bankr. No. 99-17361-NLJ Adv. No. 01-1021-NLJ Chapter 7 ORDER AND JUDGMENT*

Appeal from the United States Bankruptcy Court
for the Western District of Oklahoma

Before McFEELEY, Chief Judge, NUGENT, and THURMAN, Bankruptcy Judges.

NUGENT, Bankruptcy Judge.

Appellants Henry Dean Vaughan and Jessie Elaine Vaughan ("the Vaughans" or "the debtors") appeal from an order of the Bankruptcy Court for the Western District of Oklahoma granting summary judgment in favor of Appellee Robert D. Garrett ("Trustee") on his general objection to the Vaughans'

* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. 10th Cir. BAP L.R. 8018-6(a).

discharge. We AFFIRM, but for different reasons than those stated by the bankruptcy court.

I. Jurisdiction

This Court has jurisdiction over this appeal. The bankruptcy court's judgment disposed of the adversary proceeding on the merits and is a final order subject to appeal under 28 U.S.C.§ 158(a)(1). The Appellants timely filed their notice of appeal. The parties have consented to this Court's jurisdiction because they have not elected to have the appeal heard by the United States District Court for the Western District of Oklahoma.[1]

II. Background

Henry Dean Vaughan is an osteopathic physician who owned an interest in a home healthcare business ("Americare") operated by his former son-in-law, Charles Mirilez. In the course of his ownership, Vaughan formed a banking relationship with the Bank of Cushing ("Bank"). The Bank loaned money to Americare. Dr. Vaughan, along with Mrs. Vaughan, guaranteed repayment of the company's debt. After the business failed, this relationship soured and, in April of 1998, the Vaughans and the Bank entered into a settlement agreement pursuant to which the Vaughans were to turn over certain of their assets to the Bank. Between the time they agreed to settle and execute the settlement agreement, the Vaughans transferred or disclaimed certain valuable assets. The Vaughans filed their bankruptcy case on August 17, 1999, as a Chapter 13. On May 2, 2000, they converted the case to Chapter 7. Thereafter, the Bank filed a complaint to except its debt from the Vaughans' discharge for actual fraud under § 523(a)(2) (the "§ 523 Action"), arguing that the Vaughans had committed fraud in inducing the Bank to make the settlement agreement. Thereafter, the Trustee filed a complaint, objecting to the debtors' discharge in its entirety, under § 727(a)(2) and (a)(4) (the

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[1] 28 U.S.C. §158(b)-(c); Fed. R. Bankr. P. 8001(e).

"§ 727 Action"), claiming that the Vaughans' transfers and other acts were done with "intent to hinder, delay or defraud" their creditors and that the Vaughans had made false oaths in the course of their bankruptcy case, both in their initial papers and in the course of discovery post-petition.

After extensive discovery, the Bank sought summary judgment in the § 523 Action on its allegation that the debtors had fraudulently induced the Bank to enter into the settlement agreement. In granting that motion, the bankruptcy court concluded that the debtors induced the Bank to enter into the settlement agreement after a series of false statements and misrepresentations concerning their financial condition. The bankruptcy court further concluded that the debtors engaged in fraudulent conduct after the agreement was signed and that they damaged the Bank's position by liquidating property without its permission and generally not complying with the agreement, supplying a predicate for excepting the Bank's debt from discharge under both § 523(a)(2)(A) and (a)(6). The Vaughans' appeal from that summary judgment order is the subject of a companion appeal before this panel.[2]

After the § 523 Action judgment was entered, the Trustee filed his own summary judgment motion in the § 727 Action. The bankruptcy court granted it, essentially holding that the findings concerning the debtors' fraudulent conduct in the § 523 Action were the "law of the case" and dictated a finding that the debtors had acted to hinder, delay or defraud their creditors under § 727(a)(2). In disposing of the motion, the bankruptcy court made no mention of the Trustee's § 727(a)(4) claim. It is this order that is the subject of the present appeal.

There are at least arguable questions about the validity, finality, and correctness of the § 523 Action summary judgment upon which the bankruptcy court predicated its denial of the Vaughans' discharge for fraud. Because of this,

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[2] BAP appeal number WO-04-039.

we first consider the merits of the § 727(a)(4) false oath claim. If it is ripe for summary judgment supporting the denial of the debtors' discharge on that ground, we need not consider the fraud-based denial of discharge.[3] If the debtors' discharge is denied on *any* grounds, the Bank's § 523 Action becomes moot and, with it, the companion appeal.

We heard oral argument in this case on February 3, 2006, and are now prepared to rule.[4]

III. Discussion

A. Standard of Review

The applicable standard of review of an order granting summary judgment is *de novo*, and this Court is to apply the same legal standard as was used by the bankruptcy court to determine whether either party is entitled to judgment as a matter of law. At the outset, we bear in mind that a debtor's discharge may only be denied under § 727(a)(4)(A) if it is shown that the debtor made a knowing and fraudulent false oath and that the oath related to a material fact.

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

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[3] Our reliance on § 727(a)(4) eliminates the need to discuss debtors' argument that the claim under § 727(a)(2), which imposes a one year pre-petition inclusion requirement, was based on debtors' conduct that occurred outside of that one year period.

[4] Thereafter, Non-Party Appellee Bank of Cushing submitted a Supplemental Statement to which Appellants have not responded. Fed. R. App. P. 29 provides, in pertinent part, that a non-party may file a brief only by leave of court or if the brief states that all parties have consented to its filing. The Bank's Supplemental Statement does not state that all parties have consented to its filing. In addition, contrary to the Bank's assertion that this Court "authorized [it to submit an analysis of] the applicability of the undisputed facts found by Judge TeSelle's Order granting summary judgment in favor of the Bank," this Court did not solicit or authorize submission of a statement from the Bank. Thus, the Bank's unsolicited submission runs afoul of Fed. R. App. P. 29. For that reason, we STRIKE the Bank's Supplemental Statement.

entitled to a judgment as a matter of law."[5] A factual dispute is "material" only if it "might affect the outcome of the suit under the governing law."[6] An issue of fact is genuine if the evidence is sufficient for a reasonable jury to return a verdict for the nonmoving party.[7] The moving party bears the initial burden of showing that there is an absence of any genuine issue of material fact.[8] Once the moving party meets its burden, the burden shifts to the nonmoving party to demonstrate that genuine issues remain for trial "as to those dispositive matters for which it carries the burden of proof."[9] The nonmoving party may not rest on its pleadings but must set forth specific facts that they contend are disputed.[10] The court must consider the record in the light most favorable to the party opposing the motion.[11] The Court determines "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law."[12] In making such a determination, the Court should not weigh the evidence or credibility of witnesses. In determining whether any genuine issues of material fact exist, the Court must construe the record liberally in favor of the party opposing the summary judgment.[13] If an inference can be

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5 Fed. R. Civ. P. 56(c); accord Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247 (1986); Vitkus v. Beatrice Co., 11 F.3d 1535, 1538-39 (10th Cir. 1993).

6 Anderson, 477 U.S. at 248.

7 Id.

8 Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986); Hicks v. City of Watonga, 942 F.2d 737, 743 (10th Cir. 1991).

9 Applied Genetics Int'l, Inc. v. First Affiliated Secs., Inc., 912 F.2d 1238, 1241 (10th Cir. 1990) (citing Celotex, 477 U.S. at 324).

10 Id.

11 Bee v. Greaves, 744 F.2d 1387, 1396 (10th Cir. 1984).

12 Anderson, 477 U.S. at 251-52.

13 McKibben v. Chubb, 840 F.2d 1525, 1528 (10th Cir. 1988).

deduced from the facts that would allow the nonmovant to prevail, summary judgment is inappropriate.[14]

B. The Trustee's statement of uncontroverted facts is deemed admitted.

Necessary to the effective rebuttal of a summary judgment motion is the non-moving party's demonstration that genuine issues of fact remain.[15] Non-moving parties raise genuine issues of material fact by controverting the moving party's factual averments with particularity. Local Rule 56.1 of the United States District Court for the Western District of Oklahoma, made applicable to that district's bankruptcy court by Local Bankruptcy Rule 1001(a), recites the familiar requirements for practice and procedure under Rule 56 of the Federal Rules of Civil Procedure (as it is made applicable to bankruptcy by Rule 7056 of the Federal Rules of Bankruptcy Procedure.) Local Rule 56.1 provides, in pertinent part:

> The brief in opposition to a motion for summary judgment (or partial summary judgment) shall begin with a section which contains a concise statement of material facts as to which the party asserts genuine issues of fact exist. Each fact in dispute shall be numbered, shall refer with particularity to those portions of the record upon which the opposing party relies and, if applicable, shall state the number of the movant's facts that is disputed.[16]

In deciding a motion for summary judgment, a bankruptcy court begins its analysis by determining what facts are uncontroverted. These facts can be gleaned from the pleadings when they have been fairly pleaded in the complaint and have been admitted in the non-moving party's answer. A bankruptcy court can also determine uncontroverted facts based on the parties' admissions and their answers to interrogatories, as well as from deposition testimony and statements

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[14] United States v. O'Block, 788 F.2d 1433, 1435 (10th Cir. 1986).

[15] See Fed. R. Civ. P. 56(c); Fed. R. Bankr. P. 7056; Anderson, 477 U.S. at 247; Vitkus v. Beatrice Co., 11 F.3d at 1538-39.

[16] LcvR56.1(c) (2006); Local Bankruptcy Rule 1001(a) (2006).

made in affidavits. When a party relies on a document to establish a fact, that document must be identified, attached to, and incorporated within an affidavit, or must be an exhibit to deposition testimony.[17]

Here, the debtors nearly completely failed to comply with Local Rule 56.1 and summary judgment practice as this Court understands it. Instead of itemizing those statements of fact they sought to contest, the debtors supplied the bankruptcy court with a narrative statement supported by citations to Dr. Vaughan's deposition and affidavit. They provided no "concise statement" as the local rule requires. Nor did they respond to each factual averment, item by item, as the local rule and accepted practice contemplates.

Admittedly, the Trustee's statement of uncontroverted facts is lengthy and detailed. Yet, under Rule 56 as well as the local rule, the debtors were required to controvert the material facts asserted by the Trustee and to support that controversion with specific citations to the record consisting of pleadings, discovery documents, affidavits, and depositions. This they did not do with any consistency. To the extent the debtors attempted to controvert statements of fact, they did so by way of general denial and often without support. In sum, the debtors did not put forth a competent controversion of many key facts. It is not incumbent upon the bankruptcy court or this Court to "sift through" the record for facts controverting the Trustee's various assertions.[18] Rather, it was the debtors' task to locate and direct the court to those facts and their support in the record.[19]

We have reviewed the "support" offered by the Appellants and determine it

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[17] See Harris v. Beneficial Oklahoma, Inc. (In re Harris), 209 B.R. 990, 996 (10th Cir. BAP 1997).

[18] SIL-FLO, Inc. v. SFHC, Inc., 917 F.2d 1507, 1513 (10th Cir. 1990).

[19] Id. at 1514 ("[I]t is imperative that the appellant provide specific references to the relevant passages to carry its burden of showing error.").

to be lacking. Many of the deposition statements upon which the Appellants rely are simply statements by Dr. Vaughan that he relied on his counsel in preparing his schedules and other pleadings:

> Q: So with respect to the filing or conduct of the current case that you and your wife are involved in, that was done on the advice of Mr. Rose; is that correct?
> A: That is correct.
> Q: And you sought and received advice from Mr. Rayment prior to that time; is that a fair statement?
> A: Yes.[20]
>
> . . . .
>
> Q: Can you describe for me, please, how your bankruptcy schedules were prepared?
> A: I was asked for –
>
> MR. ROSE: That is subject to the attorney-client privilege, and I'd recommend that you not answer it.
>
> THE WITNESS: Okay.
>
> By Mr. Kirschner: Well, let me inquire, then. Did you prepare them personally?
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> A: No.
> Q: Did you have the assistance of counsel?
> A: Yes.
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> . . . .
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> Q: . . . So is it fair to say that it was a joint effort between you and your counsel to prepare your schedules?
> A: I believe so.[21]

Dr. Vaughan also testified that, upon the advice of counsel, he made a disclaimer of any interest he may have had in a family trust.[22] When asked for details about the disclaimer (i.e., its execution and delivery), Dr. Vaughan declined to answer and asserted the attorney-client privilege:

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[20] Transcript at 81-82, in Appellant's Appendix at 117-18.

[21] Id. at 196, in Appellant's Appendix at 184.

[22] Id. at 78, in Appellant's Appendix at 117.

> Q: Dr. Vaughan, I believe I had begun to ask you about the advice you had received from Mr. Rayment concerning the execution and delivery by you of what has been termed or what, I think, was entitled disclaimer. And on that basis, your [] counsel has an objection . . . .
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> MR. ROSE: I'm going to advise my client not to answer this line of questioning based on the attorney-client privilege.
>
> . . . .
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> Q: You're going to take the advice of your present counsel, Mr. Rose, I take it?
> A: Yes, I am.
> Q: And so you're refusing to answer any statements made by you to Mr. Rayment or by Mr. Rayment to you about the disclaimer or there may be other topics as well; is that correct?
> A: That is correct.[23]

Dr. Vaughan's affidavit is similarly unenlightening, not to mention self-serving. To hold that these self-serving, unsupported statements effectively controverted the facts in the Trustee's motion would divest the summary judgment process of any real effectiveness. A party's burden to controvert facts in opposition to a motion for summary judgment simply requires more than what was put forth in this case.

Because the Trustee's factual statement was not effectively controverted, there is no genuine issue of material fact to preclude summary judgment with respect to the Trustee's § 727(a)(4) claim.

C. The Trustee is entitled to summary judgment as to the denial of the debtors' discharge under Section 727(a)(4)(A).

To deny a debtor's discharge under § 727(a)(4)(A), a creditor must demonstrate by a preponderance of the evidence that the debtor (1) knowingly and fraudulently (2) made a false oath and (3) that the oath relates to a material fact.[24] The provisions denying discharge "must be construed liberally in favor of the

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[23] Id. at 79-80, in Appellant's Appendix at 117.

[24] Gullickson v. Brown (In re Brown), 108 F.3d 1290, 1294 (10th Cir. 1997).

debtor and strictly against the creditor."[25] An omission of assets from a Statement of Affairs or schedule may constitute a false oath under § 727(a)(4)(A).[26] A false statement caused by mere mistake or inadvertence, however, does not warrant denying a debtor's discharge.[27]

It is uncontroverted that the debtors did not disclose numerous assets in their statement of financial affairs and schedules. In addition, for the most part, the debtors do not dispute that the omissions were material. The debtors, however, claim the items omitted were by mistake or upon advice of counsel, to whom they disclosed all the facts relative to such items.[28] Therefore, debtors argue, there is a genuine issue of material fact as to intent.[29]

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. There is no per se rule that summary judgment is improper under §727(a) where intent is in issue.[30] If a denial of knowledge is utterly implausible, in light of

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[25] Id. at 1292.

[26] Calder v. Job (In re Calder), 907 F.2d 953, 955 (10th Cir. 1990).

[27] Gullickson, 108 F.3d at 1294-95.

[28] Defendants' Response To Trustee's Motion for Summary Judgment and Brief in Support at 23, in Appellants' Appendix at 93.

[29] Id.

[30] See, e.g., In re Chavin, 150 F.3d 726 (7th Cir. 1998) (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); Najjar 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 his involvement with various corporations), aff'd, 152 B.R. 830 (S.D.N.Y. 1993).

conceded or irrefutable evidence, that no rational person could believe it, there is no occasion to submit the issue of knowledge to determination at trial.[31]

Because few debtors are likely to admit outright that they acted with fraudulent intent, intent may be established through showing that the debtor made the statement either with fraudulent intent or with reckless indifference to the truth.[32] Knowing and fraudulent intent may be inferred through the facts and circumstances of a case.[33]

In its summary judgment motion, the Trustee offered the following circumstantial evidence of the debtors' knowing and fraudulent intent: (1) the debtors' failure to list the following assets: (a) their beneficial interest in the Frances Riddle Vaughan Trust ("the family trust"), (b) the 1973 Ford Mustang Mach II, (c) the 1999 Kawasaki All Terrain Vehicle, (d) the 1982 Robinson R22 Helicopter, (e) the Medical Building of Cushing, Inc. stock, (f) the agricultural property in Greer County, (g) the medical practice accounts receivable, (h) the 4.1 acre vacant land in Cushing, Oklahoma, and (i) other personal property; (2) their knowledge that these items were both in their possession, control or use, and that title was held by the debtors; and (3) their failure to report and surrender the vehicles and other items once the Trustee was aware of the same, short of litigation or other demand.

The debtors do not dispute that they omitted listing the above assets. With respect to their interest in the family trust and numerous pre- and post-petition transactions relating to trust assets, the debtors claim they believed they had validly disclaimed their interest, based upon advice of counsel, and thus were not

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31 In re Chavin, 150 F.3d at 728.

32 Larned v. Davison (In re Davison), No. KS-04-013, 2004 WL 2852352, at *3 (10th Cir. BAP June 29, 2004) (citing Diorio v. Kreisler-Borg Constr. Co., 407 F.2d 1330, 1331 (2nd Cir. 1969)).

33 In re Davison at *3.

required to list their interest in the family trust in their schedules. Interestingly enough, Appellants provide no record other than Dr. Vaughan's testimony and affidavit concerning what passed between him and counsel. In fact, Dr. Vaughan declined to respond to deposition questions on that very topic and claimed the attorney-client privilege.[34]

Reliance on counsel in completing statements and schedules does not inoculate a debtor from material misstatements they make, unless such reliance was reasonable.[35] The debtors had the duty to fully and accurately disclose all property interests on their statements and schedules.[36] The debtors may not decide for themselves the nature of their interest in property, the value of that property or the amount of their equity therein. Also, they may not decide which questions on the Statement of Affairs should be answered fully, completely and truthfully. The debtors cannot omit information required of them simply because they believe or decide the property omitted has no value or the information is not necessary. This is for the creditors and the Court to decide.[37]

Here, the debtors simply state they relied upon advice of counsel in preparing their schedules and other pleadings. The debtors do not provide this Court with any details about the advice given to determine whether their reliance was reasonable. Even if the debtors had provided either the bankruptcy court or

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[34] Transcript at 78-80, in Appellant's Appendix at 117.

[35] In re Eppers, 311 B.R. 826, 832-33 (Bankr. D. N.M. 2004) ("Claims that erroneous answers on a bankruptcy schedule stemmed from bad legal advice suffices as a legitimate excuse only if the finder of fact believes that the reliance was in good faith and if the debtor could not reasonably be expected to provide a sufficient answer without legal counsel." (citing In re Hatton, 204 B.R. 477, 484 (Bankr. E.D. Va. 1997)(citation omitted))).

[36] See Morrel, West, & Saffa, Inc. v. Riley (In re Riley), 128 B.R. 567, 570 (Bankr. N.D. Okla. 1991)(" 'A debtor has an uncompromising duty to disclose whatever ownership interest he holds in property.' ") (quoting In re Lunday, 100 B.R. 502, 508 (Bankr. D. N.D. 1989)).

[37] In re Riley at 569.

this Court with evidence concerning their "advice of counsel" defense, such reliance regarding the omission of their interest in the family trust became unreasonable in light of the bankruptcy court's ruling on the validity of the disclaimer. On August 10, 2000, the Trustee filed an adversary proceeding to set aside the debtors' purported disclaimer of their interest in the family trust. On February 16, 2001, the bankruptcy court granted the Trustee's Motion for Partial Summary Judgment to set aside the disclaimer. The bankruptcy court held that the disclaimer was ineffective as a statutory disclaimer under Oklahoma law. The debtors were aware that the court disallowed the disclaimer, yet they did not subsequently amend their schedules and/or their Statement of Financial Affairs to include their interest in the family trust.[38] That the debtors did not amend their schedules and statements to include their interest in the family trust after the bankruptcy court's order is a material omission constituting a false oath, which is addressed by § 727(a)(4)(A). Any reliance upon advice of counsel (i.e., that the disclaimer was valid) to omit their interest in the family trust became unreasonable once the debtors became aware the bankruptcy court disallowed the disclaimer. During his deposition in May 2001, Dr. Vaughan admitted he was "acquainted with the fact that the court [had] disallowed [his] disclaimer."[39] The debtors made no effort to amend their schedules and statement of affairs.

While the omission of one or two relatively small or immaterial matters would not affect the ability to obtain a discharge, the extent and amount of omissions, particularly of their interest in the family trust, substantiate the denial of discharge under 11 U.S.C. § 727(a)(4)(A). The Trustee's evidence established a reasonable inference that the debtors knowingly and fraudulently made a false oath and that oath related to a material fact. There is no genuine issue of fact that

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[38] Transcript at 96, in Appellant's Appendix at 121.

[39] Id.

the debtors made a series of false oaths and the Trustee was entitled to judgment as a matter of law.

IV. Conclusion

In sum, we AFFIRM the bankruptcy court's order granting summary judgment in favor of the Trustee and denial of discharge, albeit on grounds different from those stated by that court. Because denial of discharge is appropriate under Section 727(a)(4)(A), the debtors' remaining arguments on appeal are MOOT.