NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL

OF THE TENTH CIRCUIT

IN RE DONALD ALVIN CARLSON, also known as DC Production Services, Debtor.	BAP No. WY-06-027
COBRA WELL TESTERS, LLC, Plaintiff – Appellant, v. DONALD ALVIN CARLSON, Defendant – Appellee.	Bankr. No. 04-22255 Adv. No. 05-2013 Chapter 7 ORDER AND JUDGMENT*

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

Before CORNISH, MICHAEL, and BROWN, Bankruptcy Judges.

CORNISH, Bankruptcy Judge.

The parties did not request oral argument, and after examining the briefs and appellate record, the Court has determined unanimously that oral argument would not materially assist in the determination of this appeal. Fed. R. Bankr. P. 8012. The case is therefore ordered submitted without oral argument.

Plaintiff-Creditor Cobra Well Testers, LLC ("Cobra") appeals a judgment of the United States Bankruptcy Court for the District of Wyoming rejecting its claims that the Chapter 7 discharge of Defendant-Debtor Donald Alvin Carlson

* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. 10th Cir. BAP L.R. 8018-6(a).

("Debtor") should be denied pursuant to 11 U.S.C. § 727(a)(2)(A), (3), (4), or (5), or that its unsecured nonpriority claim should be excepted from discharge pursuant to 11 U.S.C. § 523(a)(2)(A).[1] Finding no reversible error, we affirm.

I. BACKGROUND FACTS

Prior to filing bankruptcy, Debtor operated an oil field service business.[2] Rick Adams ("Adams"), one of Cobra's principals, was previously employed by Debtor. After leaving Debtor's employ, Adams formed Cobra, which became a competitor. In late 2003, Debtor was facing financial difficulties and decided to cease operation of his business. Shortly thereafter, Cobra began negotiating with Debtor for the purchase of his business assets.

In connection with the purchase, Cobra engaged a mutual acquaintance, Dan Smith ("Appraiser"), to appraise the Debtor's assets. The Appraiser, with Adams, went to the storage yard and building in Rock Springs, Wyoming, where Debtor's equipment was located. Debtor was not present for the inspection. After inspection, Appraiser prepared an appraisal dated January 26, 2004 ("Appraisal"), that valued the assets at $315,950. It was not until August 2, 2004, that Debtor and Cobra actually executed a contract for sale ("Contract") regarding the oil field business assets. The agreed sales price was $155,000. The Contract was prepared by Cobra's attorney and contained a list of the assets on the Appraisal. When the closing occurred on August 24, 2004, in Casper, Wyoming, Cobra provided Debtor with a bill of sale ("Bill of Sale") that contained the same list of sale assets as the Appraisal and the Contract. Debtor executed the Bill of Sale, and a Cobra representative traveled to Rock Springs, Wyoming, to take

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[1] Unless otherwise indicated, all future statutory references in text are to the Bankruptcy Code, Title 11 of the United States Code.

[2] Debtor originally operated his business in the corporate name of DC Production Services, Inc., but the corporation's status lapsed prior to Debtor's bankruptcy.

possession of the purchased assets the next day.

A dispute arose between the parties as to some of the assets which were part of the sales transaction. Cobra alleged some items were missing and others were in a state of disrepair. The parties eventually agreed to a value of $24,000 for the missing and damaged assets.

Debtor filed his Chapter 7 petition on November 18, 2004. Cobra then filed this adversary proceeding, objecting to Debtor's Chapter 7 discharge pursuant to § 727(a)(2)(A), (3), (4) and (5). Cobra also objected to the dischargeabilty of the debt for the missing and damaged equipment pursuant to § 523(a)(2)(A) and (a)(6).[3] The bankruptcy court denied all of Cobra's claims and Cobra now appeals.[4]

II. JURISDICTION

This Court has jurisdiction to hear timely-filed appeals from "final judgments, orders, and decrees" of bankruptcy courts within the Tenth Circuit, unless one of the parties elects to have the district court hear the appeal. 28 U.S.C. § 158(a)(1), (b)(1), and (c)(1); Fed. R. Bankr. P. 8002. Neither party elected to have this appeal heard by the United States District Court for the District of Wyoming. The parties have thus consented to appellate review by this Court.

A decision is considered final "if it 'ends the litigation on the merits and leaves nothing for the court to do but execute the judgment.'" *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 712 (1996) (quoting *Catlin v. United States*, 324 U.S. 229, 233 (1945)). In this case, the decision of the bankruptcy court

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[3] The facts specific to each of Cobra's objections will be further developed in the analysis below.

[4] The § 523(a)(6) claim is not argued in Cobra's brief and is therefore deemed abandoned on appeal.

terminated the adversary proceeding at issue. Nothing remains for the bankruptcy court's consideration. Thus, the decision is a final order for purposes of review.

III. STANDARD OF REVIEW

We review the bankruptcy court's legal conclusions *de novo*. *De novo* review requires an independent determination of the issues, giving no special weight to the bankruptcy court's decision. *Salve Regina Coll. v. Russell*, 499 U.S. 225, 238 (1991). We review the bankruptcy court's factual findings under the clearly erroneous standard. A factual finding is "clearly erroneous" when "'it is without factual support in the record, or if the appellate court, after reviewing all the evidence, is left with the definite and firm conviction that a mistake has been made.'" *Las Vegas Ice & Cold Storage Co. v. Far W. Bank*, 893 F.2d 1182, 1185 (10th Cir. 1990) (quoting *LeMaire ex rel. Le Maire v. United States*, 826 F.2d 949, 953 (10th Cir. 1987)). In reviewing findings of fact, we are compelled to give due regard to the opportunity of the bankruptcy court to judge the credibility of the witnesses. Fed. R. Bankr. P. 8013. We review *de novo* mixed questions consisting primarily of legal conclusions drawn from facts. *Gullickson v. Brown (In re Brown)*, 108 F.3d 1290, 1292 (10th Cir. 1997) (citing *Clark v. Sec. Pac. Bus. Credit, Inc. (In re Wes Dor, Inc.)*, 996 F.2d 237, 241 (10th Cir. 1993)). Additionally, we note that the Bankruptcy Code must be construed liberally in favor of the debtor and strictly against the creditor. *Brown* at 1292-93 (citing *Bank of Pa. v. Adlman (In re Adlman)*, 541 F.2d 999, 1003 (2d Cir. 1976)).

IV. ANALYSIS

A creditor has the burden of proving the elements of a § 523 or § 727 claim by a preponderance of the evidence. *Grogan v. Garner*, 498 U.S. 279 (1991); *First Nat'l Bank of Gordon v. Serafini (In re Serafini)*, 938 F.2d 1156 (10th Cir. 1991). Once a creditor establishes the acts complained of, the debtor must then come forward with a credible explanation of his actions. *In re Martin*, 88 B.R. 319, 321 (D. Colo. 1988).

A. Cobra's § 727(a)(2)(A) claim

Section 727(a)(2)(A) provides in pertinent part:

> (a) The court shall grant the debtor a discharge, unless–
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> . . . .
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> (2) the debtor, with intent to hinder, delay, or defraud a creditor . . . has transferred, removed, destroyed, mutilated, or concealed . . .–
>
> (A) property of the debtor, within one year before the date of the filing of the petition . . . .

§ 727(a)(2)(A). In order to deny a discharge under this section, the United States Court of Appeals for the Tenth Circuit has held that "a court must find *actual* intent to defraud creditors." *In re Carey*, 938 F.2d 1073, 1077 (10th Cir. 1991). In *Carey*, the Tenth Circuit further stated that "'extrinsic evidence of fraudulent intent is required to establish fraud.'" *Id.* (quoting *In re Johnson*, 880 F.2d 78, 81 (8th Cir. 1989)). However, the Tenth Circuit also indicated that there are "[a]ctions from which fraudulent intent may be inferred . . . ." *Id.* (citations omitted). These actions "include situations in which a debtor gratuitously transfers property . . . and transfers property to family members . . . ." *Id.* (citations omitted). The cases, however, are peculiarly fact specific, and the activity in each situation must be viewed individually. *Cadle Co. v. Stewart (In re Stewart)*, 263 B.R. 608, 611 (10th Cir. BAP 2001), *aff'd*, 35 F. App'x 811 (10th Cir. 2002).

Cobra bases part of its § 727(a)(2)(A) claim on the following facts. Debtor did not schedule a 1998 Chevy Blazer ("Blazer") when he filed his bankruptcy petition. It is undisputed Debtor transferred the Blazer to his son less than two months prior to filing bankruptcy. Cobra claims Debtor deliberately and intentionally concealed the transfer of the Blazer to his son in an attempt to defraud creditors. At trial, Debtor testified that he had made a verbal commitment to transfer the Blazer to his son over a year before he filed

bankruptcy. The Debtor's explanation of the transfer was satisfactory to the trial court. "He believed the vehicle belonged to his son and that he had an obligation to transfer the title to his son. There is no showing of intent to defraud or to hide assets."[5] Cobra produced no evidence to refute Debtor's testimony.

The bankruptcy court's finding that Debtor believed the Blazer belonged to his son is a finding of fact we review under the clearly erroneous standard. In reviewing this finding of fact, we must give due regard to the opportunity of the bankruptcy court to judge the credibility of the witness. Fed. R. Bankr. P. 8013. The bankruptcy court believed this was an honest mistake made by the Debtor. Cobra produced no contrary evidence that would allow us to substitute our judgment for that of the bankruptcy court.

Cobra also contends §727(a)(2)(A) should bar Debtor's discharge because he concealed a $3,500 cash distribution to him out of the business assets sale proceeds immediately prior to filing bankruptcy. However, the $3,500 distribution was not completely concealed. It was declared on his Statement of Financial Affairs ("SOFA") at item 3, payments to creditors. The attached schedule shows a distribution of $3,000 to Debtor on November 11, 2004, for living expenses, and another distribution to Debtor on November 17, 2004 of $500, again for living expenses. If Debtor were attempting to defraud his creditors, as Cobra claims, it is doubtful these distributions would show up on the SOFA.

Cobra argues Debtor should have amended his bankruptcy schedules to correct the errors and that failure to do so is indicative of fraudulent intent. However, in *In re Brown*, the Tenth Circuit stated, "Although [debtor] should have amended his bankruptcy schedules to correct the error, we believe as a matter of law that no inference of fraudulent intent can be drawn from an

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[5] *Opinion on Complaint* ("*Opinion*") at 8, *in* Appellant's App. at 259.

omission when *the debtor promptly* brings it to the court's or trustee's attention *absent other evidence of fraud*." *Gullickson v. Brown (In re Brown)*, 108 F.3d 1290, 1294 (10th Cir. 1997). Debtor testified that he brought the $3,500 distribution to the trustee's attention at the § 341 meeting.[6] Cobra produced no other evidence of fraud. Under these circumstances, we cannot say the bankruptcy court erred in rejecting Cobra's § 727(a)(2)(A) claim.

B. Cobra's § 727(a)(3) claim

Section 727(a)(3) provides in pertinent part:

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

§ 727(a)(3). In *Brown*, the Tenth Circuit ruled that a prima facie case under this section would call for Cobra to show Debtor "failed to maintain and preserve adequate records and that the failure made it *impossible* to ascertain his financial condition and *material business* transactions." *Brown*, 108 F.3d at 1295. If the creditor makes such a showing, the burden then shifts to the debtor to justify his failure to maintain the records. *Id.*

In this case, Cobra argues Debtor's discharge should be denied under § 727(a)(3) because Debtor did not possess any records for his oilfield service business. It is uncontroverted that Debtor lacked any business records at the time the Chapter 7 petition was filed. The evidence presented to the bankruptcy court was that the business records were destroyed by the Debtor's former spouse who

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[6] *November 30, 2005, Trial Transcript* at 120, *in* Appellant's Supp. App. at 303.

had been the bookkeeper for the business, even post-divorce. However, the bankruptcy court found "no evidence that the business records may have been material to any questions raised about the [D]ebtor's financial condition."[7] We agree.

The sale of business assets from Debtor to Cobra shortly prior to the bankruptcy meant that Debtor had no business – he sold whatever assets he had to Cobra and got out of the business. Further, the SOFA accounts for all distributions made from the net proceeds received from the sale of the business assets. It is difficult to see then, how the destroyed records made it impossible to ascertain Debtor's financial condition or material business transactions. The bankruptcy court committed no error in ruling against Cobra's § 727(a)(3) claim.

C. Cobra's § 727(a)(4) claim

Section 727(a)(4)(A) provides in pertinent part:

> (a) The court shall grant the debtor a discharge, unless–
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> . . . .
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> (4) the debtor knowingly and fraudulently, in or in connection with the case–
>
> (A) made a false oath or account . . . .

§ 727(a)(4)(A). According to the Tenth Circuit:

> In order to deny a debtor's discharge pursuant to this provision, a creditor must demonstrate by a preponderance of the evidence that the debtor knowingly and fraudulently made an oath and that the oath relates to a material fact. . . . A debtor will not be denied discharge if a false statement is due to mere mistake or inadvertence. Moreover, an honest error or mere inaccuracy is not a proper basis for denial of discharge.

Brown, 108 F.3d at 1294-95. Cobra cannot prevail on its § 727(a)(4) claim under these standards.

The grounds for Cobra's § 727(a)(4) claim are as follows. Cobra complains

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[7] *Opinion* at 9, *in* Appellant's App. at 260.

Debtor made the fraudulent transfer of the Blazer to his son and held the $3,500 cash distribution from the asset sale proceeds on the petition date without scheduling these assets on the bankruptcy petition. Cobra also asserts Debtor failed to schedule several camper trailers.

After taking testimony, the bankruptcy court concluded that "Cobra failed to establish fraudulent intent under this section. The [D]ebtor explained the truck transfer, listed the $3,500 cash on the SOFA, explained the use of the cash to the trustee's satisfaction, [and] explained the reason that there were no camper trailers to schedule . . . ."[8]

Again, there is sufficient evidence in the record to support the bankruptcy court's conclusion that Debtor lacked fraudulent intent. Debtor disclosed the $3,500 distribution to the trustee at the § 341 meeting. In *Brown*, the Tenth Circuit reversed a bankruptcy court's denial of a discharge based on § 727(a)(4) for failure to schedule assets, stating "the fact that a debtor comes forward with omitted material of his own accord is strong evidence that there was no fraudulent intent in the omission." *Brown*, 108 F.3d at 1295. Without a finding of fraudulent intent, Cobra's § 727(a)(4) claim must therefore fail.

D. Cobra's § 727(a)(5) claim

Section 727(a)(5) provides in pertinent part:

> (a) The court shall grant the debtor a discharge, unless–
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> . . . .
>
> (5) the debtor has failed to explain satisfactorily, before determination of denial of discharge under this paragraph, any loss of assets or deficiency of assets to meet the debtor's liabilities . . . .

§ 727(a)(5). Cobra's § 727(a)(5) complaint is based on the missing assets from its purchase of Debtor's business assets. Cobra postulates the bankruptcy court

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[8] *Id.* at 9, *in* Appellant's App. at 260.

erred when it ruled against its § 727(a)(5) claim because the court stated in its Opinion that "Cobra failed to show fraudulent intent."[9] Cobra maintains that § 727(a)(5) does not require fraudulent intent. We agree with Cobra that a showing of fraudulent intent is not necessary to a § 727(a)(5) claim. *Prairie Prod. Credit Ass'n v. Suttles (In re Suttles)*, 819 F.2d 764, 766 (7th Cir. 1987) (citing 6 *Collier on Bankruptcy*, ¶ 727.08 (Lawrence P. King ed., 1986)). However, the bankruptcy court also found that "Cobra failed to show a loss of assets and [Debtor] addressed and explained each and every loss or deficiency of assets in question. There is no claim under this section."[10] Thus, regardless of whether the bankruptcy court mistakenly believed fraudulent intent was necessary, it found that Cobra could not otherwise prevail on its § 727(a)(5) claim.

The missing sales assets are the heart of this adversary proceeding. During the long period of time that passed between the Appraisal, which was done in January, and the closing of the sale, which occurred in August, Debtor was not in physical possession of the assets. The assets were located in a storage yard and building in Rock Springs, Wyoming, owned by Jim Rasmussen ("Rasmussen"). The testimony at trial was that the storage yard and building were not the most secure of places. The building had a broken garage door and an ineffective lock. Debtor testified he had not been to the storage yard since February 2004. Testimony also showed that persons other than Debtor had access to the storage yard and building, and additionally, that there were frequent break-ins by persons cutting through the fence. At some point after the Appraisal, but prior to closing the Contract, Cobra or Adams paid the monthly rent on the storage facility in

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9 *Id.* at 10, *in* Appellant's App. at 261.

10 *Id.* at 10, *in* Appellant's App. at 261.

order to prevent Rasmussen from putting a lien on the sale assets.[11] The storage yard was so accessible, in fact, that shortly after the Appraisal, Cobra's employees entered the yard to take a light tower, one of the assets it had not yet purchased.

Debtor came forward with evidence that any loss of assets was not the result of any action on his part. The bankruptcy court's refusal to deny Debtor a discharge under § 727(a)(5) must stand because Cobra did not meet its burden of showing that Debtor was responsible for any loss of assets.

E. Cobra's § 523(a)(2)(A) claim

Section 523(a)(2)(A) provides in pertinent part:

> (a) A discharge under section 727 . . . does not discharge an individual debtor from any debt–
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> . . . .
>
> (2) for money, property, services, or an extension, renewal, or refinancing of credit, to the extent obtained by–
>
> (A) false pretenses, a false representation, or actual fraud, other than a statement respecting the debtor's or an insider's financial condition . . . .

§ 523(a)(2)(A). "[E]xceptions to discharge are to be narrowly construed, and because of the fresh start objectives of bankruptcy, doubt is to be resolved in the debtor's favor." *Bellco First Fed. Credit Union v. Kaspar* (*In re Kaspar*), 125 F.3d 1358, 1361 (10th Cir. 1997). As pointed out by Cobra, in connection with exceptions to dischargeability under § 523, the Tenth Circuit has stated that requisite intent may be inferred from a sufficiently reckless disregard of the accuracy of the facts. *Driggs v. Black (In re Black)*, 787 F.2d 503, 506 (10th Cir. 1986); *Cent. Nat'l Bank & Trust Co. v. Liming (In re Liming)*, 797 F.2d 895, 897 (10th Cir. 1986).

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[11] Debtor had not paid the rent due the storage yard owner since July 2003.

In this case, Cobra argues Debtor made false representations when he executed the Contract and Bill of Sale because Debtor should have known he could not deliver all of the listed assets to Cobra. Cobra contends that as a result of Debtor's reckless disregard for the truth, its unsecured nonpriority claim for $24,000 representing the missing and damaged assets should be excepted from discharge pursuant to § 523(a)(2)(A). At trial, Debtor admitted he read the documents he signed and knew they contained seller's warranties, but that he had never inspected the assets against the list himself. However, given the overall facts and context surrounding the transaction, we do not believe Debtor's acts are "sufficiently reckless" to infer the requisite fraudulent intent and warrant excepting Cobra's debt from discharge.

First, Cobra had the Appraisal prepared by a person of its choosing. Adams and Appraiser were present for the inspection of the property when the Appraisal was prepared; Debtor was not. Second, it was also Cobra that had the Contract and the Bill of Sale prepared. The lists of assets in the Contract and Bill of Sale were the same as the list in the Appraisal, notwithstanding that more than six months had elapsed between the time the inspection and Appraisal were done and the time the parties closed on the Contract. Additionally, the closing was conducted in Casper, while the assets were located in Rock Springs. As pointed out by the bankruptcy court, "The [D]ebtor did not make any pre-closing assertions as to the condition of the assets or the extent of the assets. The court believes [Debtor] signed the documents presented to him by Cobra in a simple attempt to get the business assets sold and pay down his IRS debt."[12] Cobra's reliance on Debtor's execution of the documents as so-called "false representations" hardly seems justifiable since it was Cobra that had the documents prepared. And again, Cobra has not produced sufficient evidence of

[12] *Opinion* at 11, in Appellant's App. at 262.

fraudulent intent. Therefore, the bankruptcy court correctly refused to except Cobra's debt from discharge under § 523(a)(2).

V. CONCLUSION

The bankruptcy court did not err in rejecting Cobra's claims for denial of discharge under § 727(a)(2)(A), (3), (4), or (5). Nor did it err in rejecting Cobra's claim for exception to discharge under § 523(a)(2)(A). Therefore, the judgment of the bankruptcy court will be affirmed.