



1
2
3
4
5
6
7
8 **UNITED STATES BANKRUPTCY COURT**
9 **CENTRAL DISTRICT OF CALIFORNIA**
10 **LOS ANGELES DIVISION**

11 In re:
12 JOHN MARSHALL,
13
14 Debtor,
15
16
17 RANDY SIMON,
18 v. Plaintiff,
19 JOHN MARSHALL,
20 Defendant.

CHAPTER 7
Case No. 2:14-BK-16539-TD
Adv No: 2:14-ap-01462-NB
**MEMORANDUM DECISION AFTER TRIAL:
NO DENIAL OF DISCHARGE UNDER 11
U.S.C. § 727(a)(4) OR (5)**
Trial Dates: May 24, 25, 27, 2016
Time: 10:00 a.m., 9:00 a.m.
Courtroom: 1545

21
22 For the reasons set forth below, and in oral findings of fact and conclusions of law
23 on the record at a post-trial hearing on July 27, 2016, judgment will be issued in favor of
24 the defendant on all claims under 11 U.S.C. § 727.¹ By way of background: the issues

25
26 ¹ For brevity, filed documents are referred to by Trial Exhibit number and/or docket number, and generally
27 a short title, rather than their full title (“adv. dkt. ___” for documents filed in this Adversary Proceeding, or
28 “case dkt. ___” for documents filed in the bankruptcy case itself). Unless the context suggests otherwise,
references to a “chapter” or “section” (“§”) refer to the United States Bankruptcy Code, 11 U.S.C. § 101 et
seq. (the “Bankruptcy Code”), a “Rule” means one of the Federal Rules of Bankruptcy Procedure, Federal
Rules of Civil Procedure, or other federal or local rule, and other terms have the meanings provided in the
Bankruptcy Code, the Rules, and the parties’ briefs.

1 were narrowed as reflected in an order partially granting the defendant's motion for
2 summary judgment (adv. dkt. 116) and in the pretrial order (adv. dkt. 204); a bifurcated
3 trial was held on the dates referenced in the caption regarding the § 727 claims; and at
4 the post-trial hearing the parties and this Bankruptcy Court agreed that there is no just
5 reason for delay in entering a final judgment as to the § 727 claims (leaving for another
6 day any litigation regarding the claims under 11 U.S.C. § 523, which could be mooted
7 depending on the ultimate outcome of the § 727 claims after exhaustion of anticipated
8 appeals).

9 **I. LEGAL STANDARDS**

10 False oath or account: "The court shall grant the debtor a discharge, unless ...
11 the debtor knowingly and fraudulently, in or in connection with the case[,] made a false
12 oath or account." 11 U.S.C. § 727(a)(4)(A). "A false statement or an omission in the
13 debtor's bankruptcy schedules or statement of financial affairs can constitute a false
14 oath." *In re Retz*, 606 F.3d 1189, 1196 (9th Cir. 2010) (citations and internal quotation
15 marks omitted). "The fundamental purpose of § 727(a)(4)(A) is to insure that the trustee
16 and creditors have accurate information without having to conduct costly investigations."
17 *Id.* at 1196-97.

18 "To prevail on this claim, a plaintiff must show, by a preponderance of the
19 evidence, that: (1) the debtor made a false oath in connection with the case; (2) the oath
20 related to a material fact; (3) the oath was made knowingly; and (4) the oath was made
21 fraudulently. *Id.* A finding of fraudulent intent is a finding of fact reviewed for clear
22 error." *Id.* These elements are reviewed below.

23 Material: "A fact is material if it bears a relationship to the debtor's business
24 transactions or estate, or concerns the discovery of assets, business dealings, or the
25 existence and disposition of the debtor's property." *Id.* (internal quotation marks
26 omitted).

27 Knowing: "A debtor acts knowingly if he or she acts deliberately and
28 consciously." *Id.* (internal quotation marks omitted).

1 Fraudulent: "To demonstrate fraudulent intent, [the objecting party bears] the
2 burden of showing that: (1) [the debtor] made the representations [e.g., a false
3 statement or omission in bankruptcy schedules]; (2) ... at the time he knew they were
4 false; [and] (3) ... he made them with the intention and purpose of deceiving the
5 creditors." *Id.* at 1198-99. Intent is usually proven by circumstantial evidence or by
6 inferences drawn from the debtor's conduct. *Id.* "Reckless indifference or disregard for
7 the truth may be circumstantial evidence of intent, but is not sufficient, alone, to
8 constitute fraudulent intent." *Id.* at 1199. In *Retz*, fraudulent intent was established by
9 showing "a pattern of falsity, his reckless indifference to and disregard of the truth." *Id.*
10 at 1198.

11 Advice of counsel: "Generally, a debtor who acts in reliance on the advice of his
12 attorney lacks the intent required to deny him a discharge of his debts." *Id.* "However,
13 the debtor's reliance must be in good faith. The advice of counsel is not a defense
14 when the erroneous information should have been evident to the debtor. A debtor
15 cannot, merely by playing ostrich and burying his head deeply enough in the sand,
16 disclaim all responsibility for statements which he has made under oath." *Id.*

17 Failure to explain loss or deficiency of assets: "The court shall grant the debtor a
18 discharge, unless ... the debtor has failed to explain satisfactorily, before determination
19 of denial of discharge under this paragraph, any loss of assets or deficiency of assets to
20 meet the debtor's liabilities." 11 U.S.C. § 727(a)(5). "Under § 727(a)(5) an objecting
21 party bears the initial burden of proof and must demonstrate: (1) debtor at one time, not
22 too remote from the bankruptcy petition date, owned identifiable assets; (2) on the date
23 the bankruptcy petition was filed or order of relief granted, the debtor no longer owned
24 the assets; and (3) the bankruptcy pleadings or statement of affairs do not reflect an
25 adequate explanation for the disposition of the assets." *Retz*, 606 F.3d at 1205.

26 **II. JURISDICTION AND AUTHORITY**

27 This Bankruptcy Court has jurisdiction under 28 U.S.C. § 1334 because this
28 nondischargeability action arises under section 727 of the Bankruptcy Code (11 U.S.C.),

1 and alternatively because it arises in this bankruptcy case, or alternatively because it is
2 related to this bankruptcy case. In addition, this court has the authority to enter a final
3 judgment in this adversary proceeding. See 28 U.S.C. § 158(b)(2)(J); *and see generally*
4 *Stern v. Marshall*, 131 S. Ct. 2594 (2011); *In re AWTR Liquidation, Inc.*, 547 B.R. 831
5 (Bankr. C.D. Cal. 2016) (discussing *Stern*); *In re Deitz*, 469 B.R. 11 (9th Cir. BAP 2012)
6 (ability to enter final judgment in nondischargeability actions, and if anything denial of
7 discharge actions are more "core" because they do not involve nonbankruptcy claims).
8 In addition, although Mr. Simon's counsel purported to reserve this issue after trial, at an
9 early hearing on July 7, 2015 they did not dispute that this court could issue a final
10 judgment, and this court finds and concludes that this was sufficient consent, and that
11 they should not be permitted to change their consent now that it is they (rather than Mr.
12 Marshall) who would like a second bite at the apple. See *Wellness Intern. Network, Ltd.*
13 *v. Sharif*, 135 S.Ct. 1932 (2015); *In re Pringle*, 495 B.R. 447 (9th Cir. BAP 2013).

14 **III. DISCUSSION**

15 **A. The Ferrari**

16 The plaintiff, Mr. Randy Simon, claims that the defendant/debtor, Mr. John
17 Marshall, "knowingly and fraudulently" made a "false oath or account" (11 U.S.C.
18 § 727(a)(4)(A)) by not listing a valuable Ferrari on his bankruptcy schedules. Mr.
19 Marshall counters that he had neither legal title nor equitable ownership at all relevant
20 times, and instead he believed that the Ferrari belonged either (1) to his daughter Ms.
21 Stephanie Marshall or (2) to the plaintiff, Mr. Randy Simon. Mr. Simon points to the sale
22 documents that he and his daughter signed, allegedly in 2009 (Trial Ex. B), and the
23 State Court's conclusions in March of 2014 "that the Ferrari was [] transferred to
24 Stephanie Marshall" (Trial Ex. 35 [dkt. 136, Ex. 2, at PDF p. 23]), and that Mr. Simon "is
25 entitled to possession of the Ferrari" (*id.*).

26 Mr. Marshall also asserts as a defense that he relied on the advice of counsel.
27 According to his own testimony and that of his attorney, Richard H. Gibson, Esq., Mr.
28 Marshall was advised not to list the Ferrari as his asset because his position was that it

1 was not in fact his asset, and he did not want to make any contrary legal admission.
2 (Mr. Gibson has since acknowledged that the better approach would have been to
3 provide more complete disclosure, such as by listing the Ferrari as a disputed potential
4 asset on bankruptcy schedule B, but he reiterates that his advice was not to list it so as
5 not to admit ownership, and that there was no intent to make any false oath or account.)

6 Mr. Simon alleges, as additional evidence of an intent to hide the Ferrari, that Mr.
7 Marshall did not disclose it to the chapter 7 trustee until after negotiations with Mr.
8 Simon had broken down. According to Mr. Simon, Mr. Marshall admitted (in at least
9 one meeting and on the telephone) that if the two of them reached a settlement then Mr.
10 Marshall would orchestrate the dismissal of the bankruptcy case before he had to
11 disclose the Ferrari (or other assets) to the trustee or creditors. Mr. Simon asserts that,
12 in furtherance of this scheme, Mr. Marshall intentionally failed to attend his initial
13 meeting of creditors – *i.e.*, both to set up a likely dismissal of his bankruptcy case if he
14 elected to miss his continued meeting of creditors, and meanwhile to evade having to
15 testify about issues such as the Ferrari. Mr. Simon asserts that negotiations broke
16 down on May 22, 2014, and only then did Mr. Marshall write to the chapter 7 trustee
17 regarding the Ferrari (see Trial Ex. 14 & Trial Ex. F, dated May 22, 2014).

18 There was conflicting evidence on most of the above issues at trial. Although Mr.
19 Marshall no doubt wished to minimize the chances that the chapter 7 trustee would
20 consider the claim to the Ferrari to be a very valuable asset, for two reasons this
21 Bankruptcy Court is unable to find that he "knowingly and fraudulently" was making a
22 "false oath or account."

23 First, although the Ferrari itself is not listed on bankruptcy schedule "B," the
24 fraudulent transfer action involving the Ferrari is disclosed on Mr. Marshall's original
25 statement of financial affairs ("SOFA") as a pending "Fraudulent Trans[fer]" action. Trial
26 Ex. 6 [case dkt. 27], item 4.a. See *a/so* Trial Ex. 15 (explanation of which actions
27 involved the Ferrari, in letter from Mr. Gibson to chapter 7 trustee). The SOFA was filed
28 on April 18, 2014, long before the negotiations broke down. True, this was not as

1 prominent a disclosure as he should have made, but it would be an exceptionally poor
2 way of attempting to hide this asset, and that strongly suggests that he had no such
3 intent.²

4 Second, although Mr. Marshall's testimony at trial was not entirely credible, and
5 other testimony shows that he regularly attempts to obfuscate his finances, it is also
6 unrealistic to surmise that he was "knowingly and fraudulently" attempting to hide the
7 Ferrari because that would suppose that he was, as Mr. Gibson put it, both cunning and
8 stupid at the same time (*i.e.*, being cunning enough to come up with elaborate schemes
9 to hide any interest in the Ferrari, but being stupid enough not realizing that those
10 schemes would be transparent and unsuccessful in the face of the disclosure on the
11 SOFA). The most relevant testimony can be summarized as follows.

12 Mr. Simon's investigator, Mr. Scott Ross (who posed as a prospective purchaser
13 of the Ferrari) testified that Mr. Marshall held himself out as its real owner and described
14 the documents transferring legal title to Ms. Stephanie Marshall as a "poor man's trust."
15 Transcript, adv. dkt. 221, p.12:7-11; *see also* p.15:18-19, p.18:16-19. This is supported
16 by the testimony of Ms. Angela Berry, who had a personal relationship with Mr. Marshall
17 and loaned him some funds. Ms. Berry testified to Mr. Marshall boasting about using
18 complex schemes to reduce his taxes and obscure ownership of assets, and being
19 "very proud of the fact that his finances were so convoluted that nobody, except for
20 himself and Stephanie, would exactly know what was going on." Transcript, adv. dkt.
21 220, p.20:10-13.

22 Mr. Marshall's testimony on these issues was somewhat evasive, and to the
23 extent he denied making statements of the type ascribed to him by Mr. Ross or Ms.
24

25 ² At the hearing on July 27, 2016 the undersigned Bankruptcy Judge erroneously attributed this early
26 disclosure to a letter to the chapter 7 trustee. In fact, that letter (Trial Ex. 14) was dated after negotiations
27 broke down (according to Mr. Simon, and this Bankruptcy Court finds his testimony about that date
28 credible). Instead, the early disclosure was in the original SOFA (Trial Ex. 6), which was filed on April 18,
2014, well before negotiations broke down. That SOFA listed nonbankruptcy actions, including a
"Fraudulent Trans[fer]" action, and it is undisputed that Mr. Simon alleged in those nonbankruptcy actions
that Mr. Marshall was the true owner of the Ferrari. See Trial Ex. 14 & 15 (explanation of the nature of
each action, in letters from Mr. Gibson to the chapter 7 trustee).

1 Berry he was not credible. But nor was Mr. Ross entirely credible to the extent that he
2 suggested that Mr. Marshall flatly admitted to full ownership of the Ferrari (and Mr.
3 Ross's credibility was undermined by his refusal to acknowledge that, obviously, he had
4 a motive to find evidence favoring the person who hired him, Mr. Simon). Transcript,
5 adv. dkt. 221, p.18. Rather, this Bankruptcy Court is persuaded by Mr. Marshall's
6 explanation that he might have said that he could drive the Ferrari until he dies because
7 he knew that his daughter would let him use the Ferrari. Transcript, adv. dkt. 221,
8 p.78:8-15. Similarly, although Mr. Marshall did not admit it, he no doubt also expected
9 that his daughter would let him sell the Ferrari and distribute the proceeds to himself or
10 to her based on whatever suited his purposes at the time.

11 In other words, Mr. Marshall had a colorable basis to assert that he did not
12 actually own the Ferrari, having transferred title to his daughter as a "poor man's trust."
13 True, that might be an avoidable fraudulent transfer, but Mr. Marshall did disclose the
14 pending fraudulent transfer action by Mr. Simon. Mr. Marshall was not obligated to
15 concede on his bankruptcy schedules that he actually owned the Ferrari.

16 Likewise, this Bankruptcy Court is persuaded that, as long as negotiations with
17 Mr. Simon continued, Mr. Marshall sought to minimize any disclosures that would
18 suggest to the chapter 7 trustee that there were valuable assets. But this Bankruptcy
19 Court also finds credible the testimony of Mr. Gibson that he and Mr. Marshall did not
20 contemplate actually being able to orchestrate the dismissal of the bankruptcy case
21 without disclosing the Ferrari. Rather, Mr. Gibson fully expected the chapter 7 trustee to
22 investigate the fraudulent transfer action (and other potential assets), and not simply
23 move for dismissal due to any non-appearance by Mr. Marshall at the meeting at
24 creditors. This court takes judicial notice that chapter 7 trustees before this court are
25 loath to dismiss cases that involve potential assets such as what the SOFA discloses
26 without further investigation. At best Mr. Gibson (and, through him, Mr. Marshall) hoped
27 to persuade the chapter 7 trustee to settle at a substantial discount because any claim

28 //

1 to the Ferrari was "problematic." That is a far cry for hiding the existence of the Ferrari
2 altogether.

3 In sum, Mr. Marshall disclosed the fraudulent transfer claim involving the Ferrari in
4 his original SOFA, and that by itself is enough that this Bankruptcy Court cannot find
5 that he "knowingly and fraudulently" made a "false oath or account" by not also
6 disclosing the potential interest in the Ferrari in his other bankruptcy papers. The other
7 evidence reinforces that Mr. Marshall certainly attempted to minimize whatever potential
8 claim his bankruptcy estate might have to ownership of the Ferrari, but that is very
9 different from "knowingly and fraudulently" making a "false oath or account."
10 Alternatively, even if the issue were more doubtful (which it is not), Mr. Marshall
11 presented credible evidence that he relied on advice of counsel, and Mr. Simon has not
12 shown that such reliance lacked good faith. For all of these reasons, Mr. Simon has not
13 established a claim under section 727(a)(4)(A) with respect to the Ferrari.

14 Likewise, to the extent that Mr. Simon asserts a claim under section 727(a)(5)
15 (failure to explain satisfactorily a loss or deficiency of assets), he has not shown that Mr.
16 Marshall failed to make such an explanation. To the contrary, Mr. Marshall provided
17 considerable explanation to the chapter 7 trustee (including in detailed letters, Trial
18 Ex. 14 & 15), as well as to Mr. Simon.

19 **B. The Exorcist Royalties**

20 Mr. Simon claims that Mr. Marshall "knowingly and fraudulently" made a "false
21 oath or account" by not listing as part of his income any royalties from the film "The
22 Exorcist." Those royalties were owned by Location Creations, Inc. ("Location
23 Creations"), but that entity was wholly owned and solely controlled by Mr. Marshall
24 (Pretrial Order, adv. dkt. 204, p. 4:6-8).

25 The original SOFA did not list any businesses (Trial Ex. 6 [case dkt. 27], item 18)
26 but also did not have the box for "none" checked; and item 19 (location of books,
27 records and financial statements) lists "Location Creation, Location Cameras, & John
28 Marshall Ent." Although the amended SOFA does disclose Location Creations (Trial

1 Ex. 13 [case dkt. 44], item 18), it is listed with the dates "1986 – 2004," implying that it
2 was defunct after 2004, and no royalties were disclosed as income in SOFA item 2
3 (Trial Ex. 6 & 13 [case dkt. 27 & 44], item 2).

4 As with the Ferrari, the royalties were eventually disclosed to the chapter 7 trustee
5 more explicitly, in correspondence, but as with the amended SOFA this only occurred
6 after negotiations with Mr. Simon had broken down. See Trial Ex. 13 (dated May 23,
7 2014) and Trial Ex. 15 (dated May 30, 2014). Mr. Simon argues that this is support for
8 his theory that Mr. Marshall was knowingly and fraudulently hiding the royalties from the
9 chapter 7 trustee until he knew whether he could cut a deal with Mr. Simon.

10 Mr. Marshall's excuse for his lack of disclosure is that his father, Noel Marshall,
11 had been adamant that the royalties not go to him, and instead should go to Ms.
12 Stephanie Marshall. He – *i.e.*, Mr. John Marshall, the son/debtor/defendant – claims
13 that he had always treated the royalties as belonging to his daughter, and he habitually
14 forwarded them to her. See, *e.g.*, adv. dkt. 223, p. 232:6-14. He also repeats his
15 advice of counsel defense. In addition, as with the Ferrari, the original SOFA (Trial
16 Ex. 6 [case dkt. 44], item 4.a.) discloses the State Court litigation in which Mr. Simon
17 asserted that the royalties actually belonged to Mr. Marshall. See *id.* and Trial Ex. 15
18 (explanation of which actions involved the Exorcist royalties, in letter from Mr. Gibson to
19 chapter 7 trustee).

20 In sum, once again, Mr. John Marshall's lack of disclosure of this potential asset
21 on his bankruptcy schedule "B" or in his SOFA items 2 and 18 is problematic, but again
22 he disclosed the litigation in which this property was at issue in his SOFA (Trial Ex. 6
23 [case dkt. 27], item 4.a., filed on April 18, 2014). So if he was trying to hide the
24 existence of those royalties he chose an exceptionally poor way to do so, and that
25 strongly suggests that he had no such intent. In addition, although Mr. Marshall no
26 doubt was attempting not to draw any attention to this potentially substantial income
27 stream, that is a far cry from "knowingly and fraudulently" attempting to hide the
28 royalties. In addition, Mr. Marshall again established a credible defense of advice of

1 counsel, and Mr. Simon did not establish a lack of good faith reliance on that advice.
2 Mr. Simon's claims under section 727 therefore fail as to the Exorcist royalties.

3 **C. Claims of Stephanie Marshall and Barbara Price**

4 On May 22, 2014, Mr. Marshall filed amended bankruptcy schedules (Trial Ex.
5 10-13 [case dkt. 41-43]). On his amended schedule F, Mr. Marshall listed Barbara Price
6 as a creditor with a claim in the amount of \$7,500,000.00, and Stephanie Marshall as a
7 creditor with a claim in the amount of \$450,000.00 (Trial Ex. 10 [case dkt. 41], p.8).
8 Barbara Price had been listed as a creditor in the original schedule F, but with a claim in
9 the amount of \$2,500,000.00, while Stephanie Marshall was not listed at all (Trial Ex. 7
10 [case dkt. 29], p.6). Mr. Simon alleges that these claims were intentionally overstated
11 (especially after his negotiations with Mr. Marshall broke down) – so overstated, in fact,
12 that they are grounds to deny Mr. Marshall a discharge under section 727.

13 In support of these claims Mr. Simon's counsel has provided a thorough analysis
14 or accounting involving the claim of Ms. Stephanie Marshall, in Trial Exhibit 144. No
15 expert testimony was offered to support this analysis, but to the extent it points out
16 mathematical facts this court is prepared to consider it as evidence whether Mr.
17 Marshall knowingly and fraudulently made a false oath or account in (allegedly) grossly
18 overstating her claim. Nevertheless, the analysis falls short.

19 Certainly it is possible to calculate that Ms. Stephanie Marshall's (possible) claim
20 appears to have been greatly overstated; but there is no evidence that Mr. Marshall
21 engaged in anything like such extensive analysis when he was completing his
22 schedules. In transactions between family members and friends it is not uncommon for
23 accounting to be sloppy and make very rough estimates. Moreover, Mr. Simon has not
24 shown that Mr. Marshall expected any substantial distributions out of his chapter 7
25 bankruptcy estate, which made it less important (in Mr. Marshall's mind) to be entirely
26 accurate. In other words, the potential claim might have been vastly overstated, but that
27 does not establish that Mr. Marshall "knowingly and fraudulently" made a "false oath or
28 account." Nor has Mr. Simon established a failure to explain satisfactorily any loss or

1 deficiency of assets. The section 727 claims must be denied with respect to the claims
2 of Ms. Stephanie Marshall or Mr. Barbara Price.

3 **IV. CONCLUSION**

4 A separate judgment will enter in favor of the defendant (debtor) Mr. John
5 Marshall on all claims under 11 U.S.C. § 727. As agreed by the parties, and as found
6 and concluded by this court on the record at the post-trial hearing, there is no just
7 reason for delay in entering a final judgment as to the § 727 claims, so that will be a
8 final judgment pursuant to Rule 54 (Fed. R. Civ. P.) (incorporated by Rule 7054, Fed. R.
9 Bankr. P.).

10 ###

11
12
13
14
15
16
17
18
19
20
21
22
23
24 Date: October 13, 2016



Neil W. Bason
United States Bankruptcy Judge