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OCT 17 2016

CLERK U.S. BANKRUPTCY COURT
Central District of California
BY FIRST DEPUTY CLERK

NOT FOR PUBLICATION

**UNITED STATES BANKRUPTCY COURT
CENTRAL DISTRICT OF CALIFORNIA
NORTHERN DIVISION**

In re:) ARDEN ROSE,)) Debtor.) _____) JERRY NAMBA,) CHAPTER 7 TRUSTEE,)) Plaintiff,) v.) ARDEN ROSE,)) Defendant.) _____)	Case. No. 9:15-bk-10116-PC Adversary No. 9:15-ap-01040-PC Chapter 7 MEMORANDUM REGARDING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT Date: October 13, 2016 Time: 10:00 a.m. Place: United States Bankruptcy Court Courtroom # 201 1415 State Street Santa Barbara, CA 93101
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At the above captioned date and time, the court considered Plaintiff's Motion for Summary Judgment ("Motion") filed by Plaintiff, Jerry Namba, Chapter 7 Trustee ("Namba"). Having considered the Motion, the response of Defendant, Arden Rose ("Rose") in opposition thereto, the reply, the summary judgment evidence,¹ and argument of the parties, the court will

¹ The court overrules Namba's Evidentiary Objections to Defendant's Opposition to Motion for Summary Judgment. In determining admissibility for summary judgment purposes, it is the

1 grant the Motion in part, and deny the Motion, in part, based on the following findings made
2 pursuant to F.R.Civ.P. 56,² as incorporated into FRBP 7056.

3 I. STATEMENT OF FACTS

4 On January 23, 2015, Rose filed a voluntary petition under chapter 7 of the Bankruptcy
5 Code. Namba was appointed as trustee. In her petition, Rose stated under penalty of perjury that
6 she owned assets on the petition date with an estimated value of between “\$0 to \$50,000.” Rose
7 did not thereafter file schedules or statements in the case. Rose did not testify under oath at the
8 initial creditors’ meeting on March 2, 2015, and has declined to submit to an examination under
9 oath at any continued meeting of creditors regarding her assets, liabilities, and financial
10 condition. In the course of discharging his duties as trustee under § 704, Namba ultimately filed
11 schedules and statements on March 27, 2015. Rose has not sought to correct, amend or
12 supplement the schedules or statements since March 27, 2015. On April 15, 2015, Namba filed
13 and served a Notification of Asset Case. On April 16, 2016, the clerk served notice of the
14 deadline of July 20, 2015, to file proofs of claim in the case.

15 On May 1, 2015, Namba timely filed a Complaint Seeking Denial of Debtor’s Discharge
16 Pursuant to § 727 (“Complaint”) objecting to Rose’s discharge under §§ 727(a)(2), 727(a)(3),
17 727(a)(4), 727(a)(5), 727(a)(6) and 727(a)(11). Rose filed an answer to the Complaint on June
18

19 contents of the evidence rather than its form that must be considered. Fraser v. Goodale, 342
20 F.3d 1032, 1036-37 (9th Cir. 2003). If the contents of the evidence could be presented in an
21 admissible form at trial, those contents may be considered on summary judgment. Id.
22 Furthermore, the fact that a statement may be irrelevant has no bearing on a motion for summary
23 judgment. A bankruptcy court grants summary judgment only when there exists no genuine
24 issue of material fact. Because it does not rely on irrelevant facts to do so, relevance objections
25 are redundant. Burch v. Regents of the Univ. of Cal., 433 F.Supp.2d 1110, 1119 (E.D. Cal.
2006). The “court’s consideration of unauthenticated evidence in conjunction with a motion for
summary judgment is harmless error when a competent witness with personal knowledge could
have authenticated the document.” Id. at 1120.

26 ² Unless otherwise indicated, all “Code,” “chapter” and “section” references are to the
27 Bankruptcy Code, 11 U.S.C. §§ 101-1330. “Rule” references are to the Federal Rules of
28 Bankruptcy Procedure (“FRBP”), which make applicable certain Federal Rules of Civil
Procedure (“F.R.Civ.P.”). “LBR” references are to the Local Bankruptcy Rules of the United
States Bankruptcy Court for the Central District of California (“LBR”).

1 12, 2015. Namba filed the Motion on September 1, 2016. Rose filed a written response in
2 opposition to the Motion on September 22, 2016,³ to which Namba replied on September 29,
3 2016. After a hearing on October 13, 2016, the matter was taken under submission.

4 II. CONCLUSIONS OF LAW

5 This court has jurisdiction over this adversary proceeding pursuant to 28 U.S.C. §§
6 157(b) and 1334(b). This matter is a core proceeding under 28 U.S.C. § 157(b)(2)(A), (J) and
7 (O). Venue is appropriate in this court. 28 U.S.C. § 1409(a).

8 A. Standard for Motion for Summary Judgment

9 Rule 56(a) authorizes a party to “move for summary judgment, identifying each claim or
10 defense – or the part of each claim or defense – on which summary judgment is sought.”

11 F.R.Civ.P. 56(a). Summary judgment must be granted “if the movant shows that there is no
12 genuine dispute as to any material fact and the movant is entitled to judgment as a matter of
13 law.” Id. In determining whether a genuine factual issue exists, “a trial judge must bear in mind
14 the actual quantum and quality of proof necessary to support liability” Anderson v. Liberty
15 Lobby, Inc., 477 U.S. 242, 254 (1986). “[T]he judge’s function is not himself to weigh the
16 evidence and determine the truth of the matter but to determine whether there is a genuine issue
17 for trial If the evidence is merely colorable, or is not significantly probative, . . . summary
18 judgment may be granted. Id. at 249–250. However, the court’s function on a motion for
19 summary judgment is “issue-finding, not issue-resolution.” U.S. v. One Tintoretto Painting
20 Entitled “The Holy Catholic Family With Saint Catherine and Honored Donor,” 691 F.2d 603,
21 606 (2d Cir. 1982).

22 Rule 56 does not permit “trial on affidavits. Credibility determinations, the weighing of
23 the evidence, and the drawing of legitimate inferences from the facts are [fact finder] functions . .
24 . . .” Anderson, 477 U.S. at 255. Rule 56(c), which identifies the procedures the court and parties
25 must follow in conjunction with motions for summary judgment, states:

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28 ³ Rose’s opposition was amended on October 5, 2016.

1 (1) **Supporting Factual Positions.** A party asserting that a fact cannot be or is
2 genuinely disputed must support the assertion by:

3 (A) citing to particular parts of materials in the record, including
4 depositions, documents, electronically stored information,
5 affidavits or declarations, stipulations (including those made for
6 purposes of the motion only), admissions, interrogatory answers,
7 or other materials; or

8 (B) showing that the materials cited do not establish the absence or
9 presence of a genuine dispute, or that an adverse party cannot
10 produce admissible evidence to support the fact.

11 (2) **Objection That a Fact Is Not Supported by Admissible Evidence.** A party
12 may object that the material cited to support or dispute a fact cannot be presented
13 in a form that would be admissible in evidence.

14 (3) **Materials Not Cited.** The court need consider only the cited materials, but it
15 may consider other materials in the record.

16 (4) **Affidavits or Declarations.** An affidavit or declaration used to support or
17 oppose a motion must be made on personal knowledge, set out facts that would be
18 admissible in evidence, and show that the affiant or declarant is competent to
19 testify on the matters stated.

20 F.R.Civ.P. 56(c). The court may grant summary judgment “[i]f a party fails to properly support
21 an assertion of fact or fails to properly address another party’s assertion of fact as required by
22 Rule 56(c).” See F.R.Civ.P. 56(e)(3).

23 The moving party has the burden of establishing the absence of a genuine issue of
24 material fact. Celotex v. Catrett, 477 U.S. 317, 323 (1986). “Once the moving party carries its
25 initial burden, the adverse party ‘may not rest upon the mere allegations or denials of the adverse
26 party’s pleading,’ but must provide affidavits or other sources of evidence that ‘set forth specific
27 facts showing that there is a genuine issue for trial.’ ” Devereaux v. Abbey, 263 F.3d 1070, 1076
28 (9th Cir. 2001) (quoting former F.R.Civ.P. 56(e)); see Celotex, 477 U.S. at 323-24.

When the nonmoving party has the burden of proof at trial, the moving party need only
point out “that there is an absence of evidence to support the nonmoving party’s case.” Celotex,
477 U.S. at 325; see Fairbank v. Wunderman Cato Johnson, 212 F.3d 528, 532 (9th Cir. 2000)
(stating that the Celotex showing can be made by “pointing out through argument-the absence of

1 evidence to support plaintiff’s claim”). If the nonmoving party fails to establish a triable issue
2 “on an essential element of her case with respect to which she has the burden of proof,” the
3 moving party is entitled to judgment as a matter of law. Celotex, 477 U.S. at 323.

4 “If the court does not grant all the relief requested by the motion, it may enter an order
5 stating that any material fact – including an item of damages or other relief – that is not
6 genuinely in dispute and treating the fact as established in the case.” F.R.Civ.P. 56(g).

7 Furthermore, the court may, after notice and a reasonable opportunity to respond, grant summary
8 judgment on its own after identifying for the parties material facts that may not be genuinely in
9 dispute. F.R.Civ.P. 56(f)(3).

10 B. First Claim for Relief – Concealment of Assets

11 Section 727(a)(2)(A) prevents the court from granting a discharge to a debtor who, “with
12 the intent to hinder, delay or defraud a creditor or an officer of the estate charged with custody of
13 property under [title 11], has transferred, removed, destroyed, mutilated, or concealed, or has
14 permitted to be transferred, removed, destroyed, mutilated, or concealed –

- 15 (A) Property of the debtor, within one year before the date of the filing of the petition; or
16 (B) Property of the estate, after the filing of the petition.

17 11 U.S.C. § 727(a)(2). To deny discharge under § 727(a)(2)(A), the plaintiff must establish by a
18 preponderance of the evidence: (1) a disposition of property (i.e., transfer or concealment); (2)
19 with subjective intent to hinder, delay or defraud a creditor; and (3) it must occur within one year
20 prior to filing bankruptcy. See In re Wills, 243 B.R. 58, 65 (9th Cir. BAP 1999). “A debtor’s
21 intent need not be fraudulent.” In re Retz, 606 F.3d 1189, 1200 (9th Cir. 2010). “Because the
22 language of the statute is in the disjunctive it is sufficient if the debtor’s intent is to hinder or
23 delay a creditor. Id. The standard for denial of discharge under § 727(a)(2)(B) is the same as §
24 727(a)(2)(A), but the disposition must be of estate property occurring after the petition date. See
25 11 U.S.C. § 727(a)(2)(B).

26 Section 521 of the Bankruptcy Code requires the debtor to file a schedule of assets and
27 liabilities, a schedule of current income and current expenditures, and a statement of the debtor’s
28 financial affairs. 11 U.S.C. § 521(a)(1)(B)(i)-(iii). Section 521 further requires a debtor to

1 “cooperate with the trustee as necessary to enable the trustee to perform the trustee’s duties”
2 under the Code. 11 U.S.C. § 521(a)(3). A debtor must also “appear and submit to examination
3 under oath at the meeting of creditors.” 11 U.S.C. § 343. A debtor’s duty to file complete and
4 accurate schedules and statements is absolute. See Cusano v. Klein, 264 F.3d 936, 946 (9th Cir.
5 2001); In re Mohring, 142 B.R. 389, 394 (Bankr. E.D. Cal. 1992), aff’d, 153 B.R. 601 (9th Cir.
6 BAP 1993), aff’d, 24 F.3d 247 (9th Cir. 1994). Full and comprehensive disclosure is critical to
7 the integrity of the bankruptcy process. See, e.g., Heitkamp v. Whitehead (In re Whitehead), 278
8 B.R. 589, 594 (Bankr. M.D. Fla. 2002) (stating that “[t]he veracity of the debtor’s Statement is
9 absolutely essential to the successful administration of the Bankruptcy Code”). Bankruptcy
10 documents, including the petition, schedules and statements, are signed under penalty of perjury
11 and debtors are presumed to have read the documents before signing them. See Carpenter v.
12 Fanaras (In re Fanaras), 263 B.R. 655, 667 (Bankr. D. Mass. 2001). Whether or not the
13 documents are prepared by an attorney, debtors bear an independent responsibility for the
14 accuracy of the information contained therein. See In re Pettey, 288 B.R. 14, 21 (Bankr. D.
15 Mass. 2003) (stating that the “[d]ebtor bore an independent responsibility for the accuracy of his
16 schedules and matrix”); Palmer v. Downey (In re Downey), 242 B.R. 5, 15 (Bankr. D. Idaho
17 1999) (stating that “attorney error does not absolve a debtor, who signs the petition and
18 schedules under penalty of perjury, from the duty to ensure the information is accurate and
19 complete to the best of his knowledge”).

20 On January 23, 2015, Rose filed her voluntary petition in this case, but did not file
21 schedules or statements disclosing under penalty of perjury the identity, location and value of the
22 assets that she owned on the petition date. Seven days later, on January 30, 2015, the State of
23 California Department of Health Care Services (“CDHS”), which had been investigating Rose
24 for alleged welfare fraud, obtained a search warrant to search Rose’s residence and other
25 properties. During its execution of the search warrant, CDHS located (1) Safe Deposit Box Nos.
26 1801, 1504 and 1605 at Montecito Bank & Trust, Montecito, California; (2) a checking account
27 at Montecito Bank & Trust, Montecito, California; (3) an IRA in Rose’s name at Fidelity
28 Investments with a balance of \$35,733.31; and (4) 16 paintings in the possession of Rose’s

1 attorney, Philip Moncharsh (“Moncharsh”) held pursuant to an Agreement for Loan and Use of
2 Artwork dated November 21, 2014. Safe Deposit Box No. 1605 contained \$92,735 in cash, 44
3 one-ounce gold coins, \$8,800 in American Express traveler’s checks, and seven American Eagle
4 silver coins. CDHS also recovered a letter signed by Moncharsh dated December 23, 2014,
5 stating that the contents of Safe Deposit Box Nos 1801, 1504 and 1605, as well as any funds in
6 the checking account at Montecito Bank & Trust “are the property of Ms. Arden Rose, and are to
7 be released upon her request.”⁴ On June 25, 2015, Rose plead guilty to welfare fraud and a
8 felony count of making a false statement to obtain Medi-Cal benefits in connection with her
9 concealment of such assets.⁵

10 The contents of Safe Deposit Box Nos. 1801, 1504 and 1605 at Montecito Bank & Trust,
11 the checking account at Montecito Bank & Trust, the IRA in Rose’s name at Fidelity
12 Investments, and the 16 paintings owned by Rose in the possession of Moncharsh (collectively,
13 the “Subject Property”) was property of the debtor on the petition date. Rose did not file
14 schedules with the court disclosing under penalty of perjury the existence, location and value of
15 the Subject Property nor has Rose sought to amend the schedules filed by Namba to properly
16 disclose the existence, location and value of such property. Rose has failed or refused to submit
17 to examination under oath at a meeting of creditors regarding the Subject Property. Rose has
18 shirked her statutory responsibility to provide the trustee, creditors and the court with an accurate
19 and comprehensive accounting of her financial condition on the date of bankruptcy. The
20 creditors’ meeting in this case has been continued 15 times because Rose has declined to submit
21 to an examination under oath, and it has yet to be concluded.

22 Rose’s actions constitute a concealment of the Subject Property within the scope of §
23 727(a)(2)(A). Rose concealed the transfer of the Subject Property to Moncharsh, and her
24 concealment of the assets transferred to Moncharsh occurred within one year before the date of
25 the filing of the bankruptcy petition.

27 ⁴ Motion, Chevalier Dec., Ex. D.

28 ⁵ Id., Chevalier Dec., ¶ 12

1 After the petition date, Rose concealed from Namba the following property of the estate:
2 (1) Check # 0506 from Legal Aid Foundation of Santa Barbara County in the amount of \$11,665
3 dated February 17, 2015, which was received and endorsed by Rose; and (2) Rose's claim under
4 Policy No. 13367233-01, issued by Federal Insurance Company effective August 21, 2014, for
5 damages sustained on February 24, 2015, to undisclosed property owned by Rose on the petition
6 date valued in excess of \$1,436,000 (collectively, "Estate Property").

7 The only remaining question is whether Rose transferred or concealed the Subject
8 Property and Estate Property with the subjective intent to hinder, delay or defraud one or more of
9 her creditors. Because a debtor rarely admits to such a transfer, the evidence of intent "must of
10 necessity consist of inferences drawn from the circumstances surrounding the transaction and the
11 relationship and interests of the parties." Neumeyer v. Crown Funding Corp., 56 Cal.App.3d
12 178, 183 (1976); see Beverly, 374 B.R. at 235 ("Since direct evidence of intent to hinder, delay
13 or defraud is uncommon, the determination typically is made inferentially from circumstances
14 consistent with the requisite intent."). California's Uniform Fraudulent Transfer Act ("UFTA")
15 identifies 11 non-exclusive factors, or "badges of fraud," that may be applied by a court to divine
16 fraudulent intent:

- 17 1. Whether the transfer or obligation was to an insider.
- 18 2. Whether the debtor retained possession or control of the property
transferred after the transfer.
- 19 3. Whether the transfer or obligation was disclosed or concealed.
- 20 4. Whether before the transfer was made or obligation was incurred, the
debtor had been sued or threatened with suit.
- 21 5. Whether the transfer was of substantially all the debtor's assets.
- 22 6. Whether the debtor absconded.
- 23 7. Whether the debtor removed or concealed assets.
- 24 8. Whether the value of the consideration received by the debtor was
reasonably equivalent to the value of the asset transferred or the amount of the
obligation incurred.
- 25 9. Whether the debtor was insolvent or became insolvent shortly after the
transfer was made or the obligation was incurred.
- 26 10. Whether the transfer occurred shortly before or shortly after a substantial
debt was incurred.
- 27 11. Whether the debtor transferred essential assets of the business to a
lienholder who then transferred the assets to an insider of the debtor.
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1 Cal. Civ. Code § 3439.04(b); see Retz, 606 F.3d at 1200 (“In examining the circumstances of a
2 transfer under § 727(a)(2), certain ‘badges of fraud’ may support a finding of fraudulent
3 intent.”).

4 Six of the 11 badges of fraud apply to Rose’s transfer and concealment of the Subject
5 Property. First, there was a close relationship between Moncharsh and Rose because Moncharsh
6 was Rose’s lawyer. Second, Rose retained control over the Subject Property after it was
7 transferred. Third, Rose did not disclose the transfer of the Subject Property. Fourth, Rose’s
8 transfer of the Subject Property occurred shortly before trial of a hotly contested unlawful
9 detainer action which, in turn, prompted the filing of the bankruptcy case. Fifth, Rose removed
10 and concealed the assets. Sixth, according to the contract between the Rose and Moncharsh,
11 Rose received no consideration for allowing the paintings to be displayed at Moncharsh’s office.
12 Indeed, the letter from Moncharsh shows that, although the safe deposit boxes were in
13 Moncharsh’s name, the contents were “the property of Ms. Arden Rose.”⁶

14 Rose has repeatedly failed or refused to file either her own schedules or amendments to
15 Namba’s schedules, to submit to examination under oath at a creditors’ meeting, and to provide
16 the Namba, the creditors and the court with an accurate and comprehensive accounting of her
17 assets, liabilities, and financial condition. At the hearing, Rose stated that she filed her
18 bankruptcy petition on the advice of counsel to stay pending litigation in state court. Rose stated
19 that the petition was completed by her attorney. She questioned the authenticity of her signature
20 on the petition, but admits signing the petition in her opposition.⁷ Rose denies that she
21 transferred or concealed the property to hinder, delay or defraud creditors, reasoning that she had
22 no intention to file bankruptcy when she transferred the paintings and placed the items in the safe
23 deposit boxes.⁸ Rose also contends that she placed the assets in the safe deposit boxes on advice
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26 ⁶ Motion, at Ex. D.

27 ⁷ Amendment to Debtor’s Opposition to Motion for Summary Judgment (“Opposition”), at 3:11-
13.

28 ⁸ Id. at 20:16-23.

1 of counsel.⁹ However, Rose's unsigned opposition is not supported by a declaration or other
2 evidence that raises a genuine issue of material fact either as to an advice of counsel defense or
3 with respect to Namba's evidence in support of his claims under § 727(a)(2).¹⁰

4 Based on the foregoing, the court finds that Rose's concealment of the Subject Property
5 and Estate Property was made with the subjective intent to hinder, delay or defraud creditors in
6 violation of § 727(a)(2)(A) & (B), respectively.

7 C. Namba's Remaining Claims for Relief.

8 Regarding Namba's Second, Third, Fourth and Fifth Claims for Relief, the court will
9 deny the Motion without prejudice finding that Namba has failed to produce evidence as to each
10 element of his claims under §§ 727(a)(3), 727(a)(4), 727(a)(5) and 727(a)(6), and therefore, a
11 genuine issue of material fact exists as to each such claim. Furthermore, the court denies the
12 Motion as to Namba's Sixth Claim for Relief under § 727(a)(11) because FRBP 5009(b) permits
13 the clerk of the court to simply close the case without a discharge if a debtor fails to timely file
14 the statement required by FRBP 1007(b)(7).

15 CONCLUSION

16 For the reasons stated, the Motion filed by Namba will be granted as to Namba's First
17 Claim for Relief under § 727(a)(2), and denied without prejudice as to the remaining claims set
18 forth in Namba's Complaint.

19 A separate order will be entered consistent with this memorandum.

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24 Date: October 17, 2016



25 Peter H. Carroll
United States Bankruptcy Judge

26 ⁹ Id. at 20:16-19.

27 ¹⁰ Rose's Opposition is supported by Rose's declarations purporting to authenticate Exhibits 1, 2,
28 3 & 4 and the declaration of Wilene Gilbert which does not contain facts sufficient to raise a
genuine issue of material fact as to Namba's claims under § 727(a)(2).