

1 alleged to be a core proceeding under 28 U.S.C. § 157(b)(2)(A)
2 & (I).

3 DISCUSSION

4 Prior to filing this case Christina Rojas (Debtor) operated
5 two primary businesses as d.b.a.'s. From 1993 through 2007 she
6 operated a tour company called Aventura Artistica. From 2001
7 through 2007 she ran an art gallery called Sealight Gallery.
8 On August 30, 2007 she filed the petition beginning this case.
9 From 2004 through 2007, the years focused on by the United States
10 Trustee (Plaintiff), Debtor ran the businesses and, it appears,
11 also her personal finances through from four to seven bank
12 accounts. The activity of the accounts forms the basis of
13 Plaintiff's motion.

14 Before the Court is Plaintiff's renewed request for summary
15 judgment under Bankruptcy Code sections 727(a)(3) and 727(a)(5).
16 The Court denied the prior motion because, the reams of paper
17 notwithstanding, Plaintiff had not provided competent evidence to
18 support its prima facie case under either section. The Court
19 explained that based upon the case law it was not enough to
20 simply attach the documents - Plaintiff had to provide testimony
21 of a forensic accountant or other qualified witness establishing
22 one of the following: With respect to (a)(3)

23 "I [the accountant] have reviewed the books and
24 records Debtor has provided, and they are inadequate in
25 the following particulars, or I could not reasonably
26 reconstruct the Debtor's financial activities for a
reasonable period of time because the following kinds
of records are missing that would normally be kept by
somebody doing that kind of business. That's what

1 Wright talked about... The Juzwiak case ... had two
2 expert accountants. I don't have any of that."
(Transcript at 17:7-17);

3 or, with respect to (a) (5)

4 "The core premise is that a certain amount of assets
5 existed at a certain point in time. I counted up the
6 deposits, and I counted up the cash advances, and those
7 totals equal the following numbers, and, therefore ...
8 "I've got competent evidence establishing that number,
9 that may be sufficient in and of itself." (Transcript
10 at 18:4-20).

11 The Court went on to explain that until such a prima facie
12 case was established, the Debtor had no obligation to do more
13 than simply deny Plaintiff's assertions. Transcript at 18:22-
14 19:5.

15 The Court has reviewed the voluminous papers submitted in
16 support of this renewed motion and finds that they suffer the
17 same infirmity - Plaintiff simply has not provided competent
18 evidence to support its prima face case under either section
19 727(a) (3) or (a) (5).

20 **Section 727(a) (3)**

21 Section 727(a) of the Bankruptcy Code provides that a debtor
22 is entitled to discharge unless one of eight conditions is met.
23 Section 727(a) (3) provides that the court shall grant the
24 debtor's discharge unless:

25 the debtor has concealed, destroyed, mutilated,
26 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 the
circumstances of the case.

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1 The Ninth Circuit recently explained:

2 We have stated that the purpose of § 727(a)(3) is
3 to make discharge dependent on the debtor's true
4 presentation of his financial affairs. The disclosure
5 requirement removes the risk to creditors of "the
6 withholding or concealment of assets by the bankrupt
7 under cover of a chaotic or incomplete set of books or
8 records." The statute does not require absolute
9 completeness in making or keeping records. Rather, the
10 debtor must "present sufficient written evidence which
11 will enable his creditors reasonably to ascertain his
12 present financial condition and to follow his business
13 transactions for a reasonable period in the past."
14 This exception to dischargeability, however, "should be
15 strictly construed in order to serve the Bankruptcy
16 Act's purpose of giving debtors a fresh start."

17 A creditor states a prima facie case under §
18 727(a)(3) by showing "(1) that the debtor failed to
19 maintain and preserve adequate records, and (2) that
20 such failure makes it impossible to ascertain the
21 debtor's financial condition and material business
22 transactions.'" After showing inadequate or
23 nonexistent records, "the burden of proof then shifts
24 to the debtor to justify the inadequacy or nonexistence
25 of the records."

26 In re Caneva, 550 F.3d 755, 761 (9th Cir. 2008) (citations
omitted).

This is Plaintiff's motion for summary judgment. Thus, the
first step is to determine whether Plaintiff has established a
prima facie case by demonstrating that (1) that the debtor failed
to maintain and preserve adequate records, and (2) that such
failure makes it impossible to ascertain the debtor's financial
condition and material business transactions.

Plaintiff has obviously spent a great deal of time
organizing the numerous documents the Debtor and Debtor's banks
have provided. Plaintiff has also apparently explained to Debtor
that it is unable to figure out Debtor's business dealings from

1 her records. However, as the Court explained at the hearing
2 on the prior motion, that is not sufficient. Plaintiff has not
3 provided the Court with any competent evidence that Debtor's
4 records are inadequate or that her financial condition is
5 impossible to ascertain.

6 In the cases cited by Plaintiff, evidence on these points
7 was provided. In Caneva the debtor admitted that he kept no
8 records. 550 F.3d at 759. In Matter of Juzwiak, the plaintiff
9 provided two expert accountants who, after reviewing the debtor's
10 records, declared that debtor's records were incomplete compared
11 with those maintained by similar clients. 89 F.3d 424, 429 (7th
12 Cir. 1996).

13 In contrast, in In re Wright, the court ruled that the
14 complaining party (OCI) failed to satisfy its burden because it
15 provided no evidence that debtor's records were insufficient:

16 In the instant case ... OCI offered no testimony by a
17 qualified expert accountant or any other witness
18 regarding what it found in the Debtors' file cabinets
19 or other records, and offered no expert testimony by
20 qualified experts in the fields of real estate
21 transactions, sales of insurance agencies, accounting,
22 or any other field of expertise upon which the Court
23 could make a finding that the Debtors' records of the
24 S4I transaction, real estate transfers, or other
25 business transactions were not adequate. The record
26 includes numerous deeds, trust indentures, settlement
statements, income statements and bank statements. OCI
argues that additional buy-sell agreements, records of
credits, valuations and other documentation should
exist, but it offered no expert testimony in support of
its argument or specifying what documents and records
would be considered adequate.

OCI did not even offer testimony from a representative
or employee of OCI asserting that the Debtors' records
of their financial condition and business dealings are

1 not adequate. OCI argues in its brief that the Debtors
2 failed to keep and preserve records and documentation
3 of their real estate transactions and transfer of
4 Wright Insurance to S4I, but attorney argument is not
5 evidence. Given OCI's burden of proof and strict
6 construction of § 727(a) against the objecting party,
7 any inference by the Court regarding the adequacy of
8 the Debtors' books and records, in the absence of
9 qualified testimony, would be inappropriate, improper
10 and inconsistent with the assigned burden of proof.

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12 Based upon the Debtors' voluminous business records,
13 and OCI's failure to offer testimony by expert
14 witnesses as was offered in Juzwiak, the Court
15 concludes that OCI failed to satisfy the first Cox
16 requirement that the Debtors failed to maintain and
17 preserve adequate business records. Given that failure
18 it is not necessary to consider the second Cox factor-
19 whether such failure makes it impossible to ascertain
20 the Debtors' financial condition and material business
21 transactions, and the burden of proof does not shift to
22 the Wrights to justify the inadequacy or nonexistence
23 of the records.

24 364 B.R. 51, 68-69 (Bankr.D.Mont. 2007).

25 The Court has reviewed the record and finds neither
26 competent evidence that Debtor's records are insufficient nor
that the state of Debtor's records "makes it impossible to
ascertain the debtor's financial condition and material business
transactions." The motion is based upon the stipulated facts and
the stipulated exhibits. However, there is no testimony, expert
or otherwise, tying the exhibits to Plaintiff's burden under
§ 727(a) (3).

Plaintiff did propound Requests for Admission including that
Debtor failed to maintain records. However, Debtor denied them.
As the Court explained at the prior hearing, until Plaintiff

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1 establishes its prima facie case, that is all Debtor is required
2 to do to avoid summary judgment.

3 Plaintiff is correct that, had it made its prima facie case,
4 the Debtor would have to justify her failure to keep records and
5 provide evidence (as opposed to promising it at trial). However,
6 since Plaintiff has not met its burden, there is no need for
7 Debtor to establish that her failure, if any, to keep records was
8 justified at this point. When and if Plaintiff does support its
9 case, then Debtor will have to provide evidence to the contrary -
10 perhaps by supporting her argument that she justifiably relied on
11 outside professionals to maintain her records and obtaining their
12 testimony as to the records they kept. The Court will then have
13 to determine whether this is reasonable under the circumstances.
14 See In re Cox, 41 F.3d 1294 (9th Cir. 1994).

15 In the meantime, Plaintiff's motion for summary judgment
16 with respect to § 727(a)(3) is denied.

17 **Section 727(a)(5)**

18 Section 727(a)(5) will cost a debtor his or her discharge if
19 the court finds "the debtor has failed to explain satisfactorily,
20 before determination of denial of discharge under this paragraph,
21 any loss of assets or deficiency of assets to meet the debtor's
22 liabilities." Plaintiff recognizes that in order to make its
23 prima facie case it bears the burden of proving that (1) Debtor
24 owned identifiable assets at a time not too remote from the
25 petition date; (2) that Debtor did not own them on the petition
26 date; (3) that the schedules and statements do not provide an

1 adequate explanation for the disposition of the assets; and
2 (4) the creditor requested explanation from the debtor about the
3 missing assets. See e.g., Wright, 364 B.R. at 79.

4 As with the claim under § 727(a)(3), Plaintiff's prima facie
5 case lacks evidentiary support. In an effort to make its prima
6 facie case in this second motion for summary judgment Plaintiff
7 provides the declaration of a paralegal specialist, Shannon
8 Vencill, who declares that for the year 2004 she reviewed
9 Debtor's bank statements and "created a summary chart for
10 deposits made into the Debtor's four (4) known bank accounts
11 active for the year 2004." The chart was appended to a letter
12 from Plaintiff to the Debtor which was submitted as Stipulated
13 Exhibit 11. It indicated that the deposits into the four (4)
14 accounts totaled \$883,635.61 for 2004. Stipulated Exhibit 11
15 contained similarly created charts for the years 2005 and 2006
16 each showing considerable deposits into the various accounts.

17 The deposits alone, however, do not establish what the Court
18 asked for at the prior hearing - evidence that "a certain amount
19 of assets existed at a certain point in time." Looking solely at
20 the deposits, without evidence of the source or of withdrawals,
21 does not give the Court an identifiable asset for which the
22 Debtor would be required to account. As Debtor points out in her
23 opposition, a deposit is simply a transaction - it is not
24 necessarily a net gain of assets to the Debtor. It appears
25 undisputed that many, if not most, of the deposits identified by

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1 Plaintiff were simply transfers from one of Debtor's accounts to
2 another.

3 If Plaintiff wants to rely on the accounts and their
4 contents to support its § 727(a)(5) claim it will have to provide
5 evidence that (1) on a date certain, not too remote from the
6 petition date, Debtor's accounts had balances of \$X; (2) that as
7 of the petition date, the accounts had balances of less than \$X;
8 (3) that the schedules and statements do not provide an adequate
9 explanation for the disposition of the assets; and (4) Plaintiff
10 requested explanation from the Debtor about the missing assets.
11 See Wright, 364 B.R. at 79.

12 In its reply, Plaintiff argues that the fact that Debtor had
13 any deposits in her various accounts is at odds with her
14 statement of financial affairs, in which she disclosed no gross
15 income. That may well be. However, Plaintiff has moved for
16 summary judgment under sections 727(a)(3) and (5), not (a)(4).
17 The same is true of Plaintiff's argument that Debtor failed to
18 disclose her receipt of cash advances in her statement of
19 financial affairs.

20 Ms. Vencill also declared that based upon her review of
21 Debtor's bank statements, cash withdrawals were made from the
22 Debtor's accounts of \$128,195.54 in 2006 and \$ 66,734.59 in 2005.
23 The cash withdrawals are similarly insufficient on their own to
24 establish a prima facie case under section 727(a)(5). The cash
25 withdrawals between Debtor and her various accounts does not give
26 the Court evidence of any particular asset or any pot of money

1 that existed at any particular time to which the Court could
2 point and expect the Debtor to account for. This is not a
3 situation where a debtor received a chunk of money from an
4 outside source prepetition and was unable to account for it as
5 of the petition date. Rather, this Debtor was operating two
6 d.b.a.'s, and apparently made numerous transfers between them and
7 herself. Her accounting and business practices may or may not
8 have been appropriate. As far as the record before the Court
9 stands, though, Plaintiff has not established its prima facie
10 case under section 727(a)(3) or (a)(5), so Debtor need justify
11 nothing at this point to avoid summary judgment. The Debtor has
12 denied that she had such cash prior to the petition, though at
13 this stage she did not even have to do that to defeat Plaintiff's
14 motion for summary judgment.

15 At the same time that Plaintiff has failed to make a prima
16 facie case under either subpart (a)(3) or (a)(5) of section 727,
17 the motion filed by Plaintiff seems to attempt to conflate some
18 sort of discovery sanctions with the summary judgment process.
19 Plaintiff reviewed the history of its oral requests at the
20 meetings of creditors, and of its written requests made by
21 letters from Plaintiff's counsel, including Plaintiff's requests
22 for explanations. Ultimately, Plaintiff did serve formal
23 discovery on Defendant in the form of requests for admission,
24 followed by corresponding interrogatories.

25 Having recited the foregoing history of requests for
26 information, Plaintiff then embarks on pages of argument in

1 subparts B and C of the motion about the inadequacy of
2 Defendant's responses to the informal requests and the one round
3 of formal discovery requests. Subpart B begins by stating
4 "Debtor's response to the UST's requests for information and
5 documents has been inadequate and extremely late." Subpart C
6 begins by asserting that "Debtor's response to the UST's requests
7 is inadequate." Yet, at no time in these proceedings has
8 Plaintiff sought any sort of discovery sanctions under the
9 Federal Rules of Bankruptcy Procedure for the claimed
10 inadequacies of Defendant's responses. Nor does Plaintiff
11 explain how those claimed but undetermined inadequacies somehow
12 provide the elements of Plaintiff's claims under § 727(a)(3)
13 and/or (a)(5).

14 Plaintiff also attacks the financial statements for 2005 and
15 2006 that Defendant ultimately produced. It seems uncontroverted
16 that those documents were created some time in 2007. The
17 Plaintiff then argues "the Debtor should have maintained books
18 and records at the time the businesses were in operation - not
19 create records post-petition." Plaintiff has a subpart in its
20 motion which states "2005 Financial Statements and 2006 Financial
21 Statements Were Created Post-Petition and Are Unreliable".
22 Whether the statements are unreliable depends on the quality and
23 integrity of the source documents. The time of their creation
24 may raise a flag, but in itself does not render them unreliable
25 without review of the materials on which they were based.
26 Curiously, in the same subpart, Plaintiff offers illustrations of

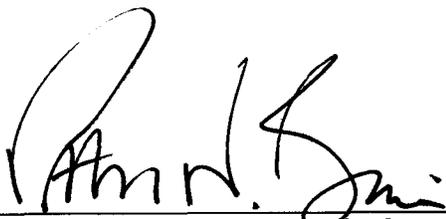
1 Defendant's inability to explain specific transactions, but does
2 not show how they establish the asserted unreliability of the
3 financial statements themselves, which were prepared by the
4 Defendant's accountant.

5 **CONCLUSION**

6 For the reasons set forth above, Plaintiff's renewed motion
7 for summary judgment is denied. The Court will conduct a status
8 conference for purposes of setting trial dates in this matter on
9 February 14, 2011 at 2 p.m. in Department Four.

10 IT IS SO ORDERED.

11 DATED: JAN -3 2011

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14 PETER W. BOWIE, Chief Judge
15 United States Bankruptcy Court
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