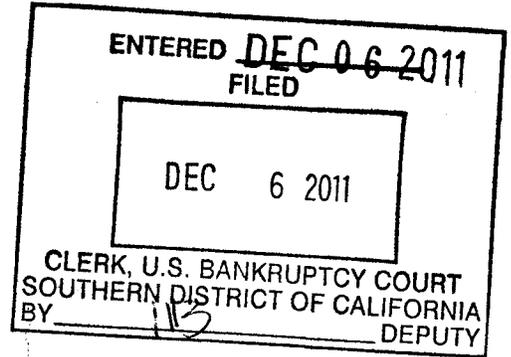


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WRITTEN DECISION – NOT FOR PUBLICATION



UNITED STATES BANKRUPTCY COURT  
SOUTHERN DISTRICT OF CALIFORNIA

In re: ) BANKRUPTCY NO: 11-03565-MM7  
)  
RONALD LYNN SPILSBURY and STACEY ) CHAPTER: 7  
LYNNE PITTMAN, )  
) ADV. NO. 11-90170-MM  
Debtors, )  
) MEMORANDUM DECISION RE MOTION  
FOR SUMMARY JUDGMENT  
\_\_\_\_\_)  
MIKLOS OSZ, )  
) DATE: November 17, 2011  
Plaintiff, ) TIME: 3:00 p.m.  
) CRTRM: 1  
v. )  
) JUDGE: Margaret M. Mann  
RONALD LYNN SPILSBURY and STACEY )  
LYNNE PITTMAN, )  
)  
Defendants. )  
\_\_\_\_\_)

1 Plaintiff Miklos Osz ("Osz") filed an adversary complaint on March 25, 2011 against Ronald  
2 Lynn Spilsbury and Stacey Lynne Pittman ("Debtors") alleging two claims. First, Osz sought to have  
3 his \$77,280.60 debt based upon a state court default judgment excepted from discharge under 11  
4 U.S.C. § 524(a)(2)(a), claiming it was incurred as a result of false pretenses and false representations  
5 by the Debtors. Second, Osz sought to deny the Debtors their discharge under 11 U.S.C. §§ 727(c), (d)  
6 and (e) for making false oaths and accounts in this bankruptcy case. Osz' motion for summary  
7 judgment ("Motion") concerns only the second cause of action.  
8

9 Having considered Osz' and the Debtors' properly admitted evidence in connection with this  
10 Motion, the Court declines to grant summary judgment under 11 U.S.C. § 727(a)(2) because the  
11 material facts as to the Debtors' intent are disputed.

12 **I. FACTUAL BACKGROUND**  
13

14 On May 1, 2008, Osz began his employment as Senior Vice President of Clinical Operations of  
15 ClinAssure, Inc. ("ClinAssure"). The Debtors were the CEO, CFO and co-founders of ClinAssure,  
16 which is now only a business name for the Debtors. ClinAssure was to pay Osz \$7,500, less certain  
17 deductions, every two weeks for his wages. In October 2008, Osz and ClinAssure agreed in writing to  
18 defer payment of Osz' remaining 2008 wages of \$77,280.60 until April or June 2009. Osz' regular  
19 biweekly payments were to resume January 2009.  
20

21 Osz was terminated in February 2009 due to a reduction in workforce and was not paid his  
22 deferred wages. Osz sued ClinAssure and the Debtors for fraud and breach of contract and obtained a  
23 default judgment on February 3, 2010 from the Orange County Superior Court on unidentified theories  
24 relating to the \$77,280.60 of deferred wages.  
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1 To satisfy the judgment, Osz levied a \$15,000 account receivable owed to the Debtors by  
2 Allergan, Inc. in February 2011 precipitating the Debtors' bankruptcy filing. Osz then filed this  
3 adversary complaint on March 25, 2011 and this Motion followed seven months later.

4 **II. ANALYSIS**

5  
6 For Osz to be entitled to summary judgment on his claims under 11 U.S.C. § 727, he must  
7 demonstrate that "there is no genuine dispute as to any material fact" and that he "is entitled to  
8 judgment as a matter of law." Fed. R. Civ. P. 56(a) (applicable in adversary proceedings per Fed. R.  
9 Bankr. P. 7056). Osz bears the burden of persuasion at trial and must establish that each essential  
10 element of his claim is undisputed to prevail on his Motion. *See Celotex Corp. v. Catrett*, 477 U.S.  
11 317, 323 (1986). In evaluating his Motion, the Court is "required to view all facts and draw all  
12 reasonable inferences in favor of the nonmoving party. . .;" here, the Debtors. *Brosseau v. Haugen*, 543  
13 U.S. 194, 195 n.2 (2004).

14  
15 Not only are all inferences to be drawn in favor of the Debtors, the Court also undertakes its  
16 review of the Motion cognizant that the underlying purpose of the bankruptcy code is to grant the  
17 debtor a "fresh start." *In re Retz*, 606 F.3d 1189, 1197 (9th Cir. 2010) (quoting *Bernard v. Sheaffer (In*  
18 *re Bernard)*, 96 F.3d 1279, 1281 (9th Cir. 1996)). To that end, the Ninth Circuit has cautioned that  
19 "courts should construe § 727 liberally in favor of debtors and strictly against parties objecting to  
20 discharge." *Id.* Section 727(a)(2) prohibits the Court from granting the debtor a discharge if "the  
21 debtor, with intent to hinder, delay, or defraud a creditor or an officer of the estate charged with  
22 custody of property under this title, has transferred, removed, destroyed, mutilated, or concealed, or  
23 has permitted to be transferred, removed, destroyed, mutilated, or concealed property of the debtor,  
24 within one year before the date of the filing of the petition."  
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1 Applying these standards to his 11 U.S.C. § 727 claim, Osz must demonstrate that there are no  
2 genuine disputes to the following material facts: (1) The Debtors made "a disposition of property,  
3 such as transfer or concealment," with (2) "a subjective intent . . . to hinder, delay or defraud a  
4 creditor through the act [of] disposing of the property." *In re Retz*, 606 F.3d at 1200 (quoting *Hughes*  
5 *v. Lawson (In re Lawson)*, 122 F.3d 1237, 1240 (9th Cir. 1997)). Osz points to certain assets that he  
6 claims were insufficiently disclosed in the Debtors' Schedules of Assets and Liabilities and Statement  
7 of Financial Affairs (collectively "schedules") and also to a discovery battle between the parties that he  
8 claims is definitive proof of fraudulent intent.  
9

10 A failure to list valuable assets is a classic reason why debtors may be denied the discharge of  
11 their debts under 11 U.S.C. § 727(a)(2). *In re Searles*, 317 B.R. 368, 377-79 (B.A.P. 9th Cir. 2004),  
12 *aff'd* 212 Fed.Appx. 589 (9th Cir. 2006). Osz avows various items were missing from the Debtors'  
13 schedules including a \$3,000 account receivable from Allergan, Inc., a Citibank checking account, and  
14 an assortment of domestic items such as a hot tub, an electric scooter, washer/dryer, patio furniture and  
15 a television, some of which were found in a storage unit. Osz also asserts the Debtors underestimated  
16 the value of the items in their storage unit by scheduling the value as \$2,000, which he claims is  
17 demonstrated by the Debtors' later purchase of these items from the Trustee for \$11,500.  
18

19 While what was in or out of the schedules is not disputable, Osz must also demonstrate the  
20 facts are not disputed for the second required component of 11 U.S.C. § 727(a)(2); *i.e.* the Debtors'  
21 intent to hinder, delay or defraud creditors. This element requires Osz to prove the Debtors' "actual,  
22 rather than constructive, intent" to delay, hinder or defraud creditors. *Retz*, 606 F.3d at 1197 (quoting  
23 *In re Khalil*, 379 B.R. 163, 172 (B.A.P. 9th Cir. 2007)); *In re Adeeb*, 787 F.2d 1339, 1343 (9th Cir.  
24 1986); *In re Beauchamp*, 236 B.R. 727, 733-34 (B.A.P. 9th Cir. 1999). "Intent to hinder, delay, or  
25 defraud may be inferred from [both] circumstantial evidence," *In re Hansen*, 368 B.R. 868, 876  
26 (B.A.P. 9th Cir. 2007), and "course of conduct." *In re Beverly*, 374 B.R. 221, 243 (B.A.P. 9th Cir.  
27  
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1 2007) (debtor's fraudulent intent in transferring his interest in \$1 million of nonexempt funds to his ex-  
2 wife, in exchange for exempt assets could be inferred).

3 However, "(s)ummary judgment is ordinarily not appropriate in a § 727 action where there is an  
4 issue of intent." *In re Wills*, 243 B.R. 58, 65 (B.A.P. 9th Cir. 1999). In *Wills*, like here, the debtors  
5 admitted they did not disclose certain transfers of property. The issue before the court was solely  
6 whether the debtors had the requisite fraudulent intent. Because the *Wills* debtors presented evidence  
7 that they had followed the advice of a tax accountant in making their disclosures, the debtors' intent  
8 was disputed and summary judgment was not appropriate. *Id.*

9  
10 The Debtors here have presented evidence as to each of the assets at issue explaining why they  
11 did not list the assets at issue. These explanations, each analyzed below, provide potential benign  
12 rather than fraudulent reasons for the non-disclosures in the Debtors' schedules, and render the intent  
13 issue disputes.

#### 14 Account Receivable

15 The Debtors contest Osz' allegations with evidence that the Account Receivable was billed  
16 after the petition date of March 4, 2011. There is a triable issue of fact on this asset, since the  
17 bankruptcy schedules are prepared as of the petition date.

#### 18 Citibank Account

19  
20 The Debtors presented evidence that the Citibank account ending 6862 was closed one year  
21 prior to filing for bankruptcy despite Osz producing a bank statement showing a zero balance within  
22 one year of filing bankruptcy. Docket 12-6. The statement itself reflects that although account activity  
23 occurred during the year before the petition, that activity looks to be the result of a bank clerical error.  
24 Service charges for the months of May and June, 2010 were imposed by the bank but then credited  
25 back to the account in July, 2010. Triable issues of fact exist on whether not listing this asset was a  
26 material omission undertaken with wrongful intent.  
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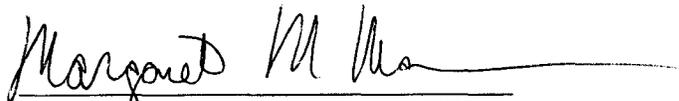
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2 Items in Storage

3 Osz contends the Debtors listed the value of the storage unit items in their schedules at \$2,000,  
4 when these items were later sold to the Trustee for \$11,500. This contention is inaccurate. This  
5 Court's settlement approval order reflects that the Debtors paid the Trustee \$11,500 to purchase much  
6 more than just the contents of their storage unit. The Debtors also purchased from the Trustee any  
7 non-exempt equity in a 2001 Mercedes S430, two 2008 and 2002 Harley Davidson motorcycles, a  
8 2004 Triumph, a 951 Daytona, and other office equipment for the \$11,500 payment. Osz did not  
9 object to the settlement and the Court will not reconsider it further.  
10

11 **III. Conclusion**

12  
13 Even without drawing all inferences in their favor, the Court finds the Debtors have presented  
14 sufficient evidence to establish genuine factual disputes as to whether material assets were concealed,  
15 as well as whether they acted with fraudulent intent. The Court also rejects Osz' suggestion that the  
16 discovery dispute is somehow determinative of fraudulent intent. Accordingly, Osz' motion for  
17 summary judgment is denied. This Memorandum Decision constitutes this Court's findings of fact and  
18 conclusions of law as required by Bankruptcy Rule 7052. Counsel for the Debtors is directed to  
19 submit an order denying the Motion.  
20

21  
22  
23 Dated: December 6, 2011

24   
25 MARGARET M. MANN, JUDGE  
26 United States Bankruptcy Court  
27  
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