NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL FOR THE FIRST CIRCUIT

BAP No. NH 07-010

Bankruptcy Case No. 05-15295-MWV
Adversary Proceeding No. 06-01183-MWV

HOWARD J. WUNDERLICH,
Debtor.

HOWARD J. WUNDERLICH,
Appellant,

v.

JAMES MORAN,
Appellee.

Appeal from the United States Bankruptcy Court
for the District of New Hampshire
(Hon. Mark W. Vaughn, U.S. Bankruptcy Judge)

Before
Lamoutte, Votolato, and de Jesus,
United States Bankruptcy Appellate Panel Judges.

Arthur O. Gormley, III, Esq., on brief for Appellant.

James Moran, *pro se*, on brief for Appellee.

November 14, 2007

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de Jesús, U.S. Bankruptcy Appellate Panel Judge.

Howard J. Wunderlich ("Wunderlich") appeals from the bankruptcy court's ("the Court") partial final judgment granting James Moran's ("Moran") complaint objecting to his discharge, pursuant to 11 U.S.C. § 727(a)(2)(A). The Court adjudicated the main dispute without a trial: "whether [Wunderlich] concealed a second mortgage and receipt of $30,000,[1] and if so, whether such a concealment was done with the prohibited intent." Wunderlich now claims the Court committed three errors. First, it concluded there was concealment based on facts not plead in Count I. Second, it determined that Wunderlich's failure to disclose the second mortgage in his schedules and Statement of Financial Affairs could be considered a concealment even though the mortgage was recorded, and its details were revealed during the meeting of creditors. Third, the Court disregarded Wunderlich's excuses for his non-disclosure, and drew negative inferences to establish the prohibited intent. After review, we conclude the Court did not commit these errors.

FACTS[2]

A. Background

Wunderlich is an attorney who practiced bankruptcy law in New York for eighteen years. Moran sued him in the state court in 2003 for legal malpractice related to a Chapter 11 bankruptcy case involving a company owned by Moran. That court entered a judgment by default, awarding Moran $348,266.39 in September of 2004. Moran immediately attempted to

[1] Appellant claims he received $29,984.37 and Appellee claims it was $30,000.00. We follow the Court's lead, and, "for the sake of simplicity," use $30,000.

[2] We draw our recitation of the facts that are not in dispute from the bankruptcy court's Memorandum Opinion filed on January 26, 2007. Any additional facts are taken from documents in the two appendices filed by the Appellant, some of which are not renumbered.

collect the judgment by placing a freeze on Wunderlich's bank account. On October of 2005, the parties agreed that Wunderlich would pay Moran $10,000 towards the judgment in exchange for withdrawing the freeze placed on the bank account. Wunderlich also agreed to act in good faith in trying to resolve the matter, submit to a deposition, and "not to encumber or transfer assets" for one year.

On June 15, 2003, Wunderlich conveyed a mortgage on his Merrimack, New Hampshire property (the "property") to Digital Federal Credit Union ("DFCU"). In early 2005, while still owing some $70,000 on account of the first mortgage, he conveyed a second mortgage on the property to DFCU for the principal sum of $30,000, receiving most of the proceeds on March 28, 2005.[3] This mortgage was recorded on April 22, 2005.

On October 14, 2005, Wunderlich sought bankruptcy protection by filing a *pro se* skeletal Chapter 7 voluntary petition. Seventeen days later he filed his schedules and Statement of Financial Affairs. In Schedule D, Wunderlich disclosed one mortgage on the property for $99,000 in favor of DFCU given on June 15, 2003. He also listed a single secured claim for $99,000 on the property in Schedule A, and stated he owed $99,000 to DFCU in his Statement of Financial Affairs. When questioned by Moran's attorney during the § 341 meeting of creditors, Wunderlich acknowledged he had in fact given two mortgages on the property to DFCU, and received $30,000 shortly after he conveyed the second one. The Trustee then suggested he amend his schedules and Statement of Financial Affairs, which he did in August of 2006, after Moran filed the instant adversary proceeding.

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[3] According to Wunderlich, he used the proceeds to pay some bills and generally to support himself. However, the record shows he shredded most of his financial documents and could only account for the use of $16,000. Appellant's App. at 73-74, 80.

B. The Complaint and Motion for Summary Judgment

Moran filed the complaint *pro se* objecting to Wunderlich's discharge based on several counts. Count I, filed pursuant to 11 U.S.C. § 727(a)(2)(A), begins with pleadings revealing much of the background narrated above. There, Moran describes the act of concealment as Wunderlich's willful refusal to be deposed, prompting the state court to find him in contempt. Count IV involved giving a false oath under 11 U.S.C. § 727(a)(4)(A). It is followed by pleadings reciting the inconsistencies between the facts surrounding the second mortgage and Wunderlich's statements under oath contained in his schedules and Statement of Financial Affairs.

Moran's motion for summary judgment requests a denial of Wunderlich's discharge pursuant to 11 U.S.C. § 727(a)(2)(A), among others. It is supported by excerpts from the meeting of creditors and a Rule 2004 examination, some letters and other documents, plus his affidavit.

Wunderlich's opposition to the motion contains his affidavit and other documents. In his affidavit, Wunderlich states, *inter alia*, (1) at the time of the lawsuit filed in the state court and onward, he suffered from a painful knee, back and pulmonary conditions, and depression; (2) he "probably over-medicated [himself] with pain prescriptions such as Vicodin and Darvocet. . ., [a]t times taking three or more Vicodin a day"; (3) the Moran law suit caused him great stress; (4) these conditions and the stress affected his ability to work in 2004, but he was able to practice law in 2005; (5) he "hastily filed a skeletal Chapter 7 Petition . . . before the changes in the Bankruptcy law" and seventeen days later, filed his schedules; (6) he admits not listing or scheduling the second mortgage in favor of DFCU, but states that due to stress and over-

medication he was not able to "carefully review my Petition before I signed it"; and (7) when questioned, he disclosed the details of the two mortgages at the § 341 meeting of creditors.

C. The Decision Below

After oral argument, the Court granted Moran's motion based on Count I. The Court opined Moran "must prove by a preponderance of the evidence that (1) [Wunderlich] transferred, removed or concealed (2) his property (3) within one year from the petition date (4) with the intent to hinder, delay or defraud a creditor."[4] Since the parties did not dispute the first three requirements, the Court limited the controversy to the fourth factor: "whether [Wunderlich] concealed the second mortgage and his receipt of the $30,000, and, if so, whether such concealment was done with the prohibited intent." The Court discarded Wunderlich's arguments based on admissible evidence of record. It then reviewed the admissible evidence and concluded that it did "not believe that [Wunderlich]–a bankruptcy attorney–forgot or inadvertently overlooked the fact that only months before he had received a cash infusion of $30,000, all the while acutely aware that at least one of his creditors, [Moran] was keen on getting paid. If this is not the case, [Wunderlich] has presented no evidence indicating otherwise." Not satisfied, Wunderlich filed this timely appeal.

[4] Groman v. Watman (In re Watman), 301 F.3d 3, 7 (1st Cir. 2002).

APPELLATE JURISDICTION

The Court's judgment is final, subject to our review under 28 U.S.C. §§ 158(a)(1) and 158(b).[5]

STANDARD OF REVIEW

We apply an abuse of discretion standard in reviewing the bankruptcy court's finding that Wunderlich's affidavit contained evidence that would be inadmissible at trial and therefore should be disregarded for summary judgment purposes. Vazquez v. Lopez-Rosario, 134 F.3d 28, 33 (1st Cir. 1998) (quoting General Elec. Co. v. Joiner, 522 U.S. 136 (1997), and Nieves-Villanueva v. Soto-Rivera, 133 F.3d 92, 97-98 (1st Cir. 1997)) . "'An abuse of discretion occurs when a material factor deserving significant weight is ignored, when an improper factor is relied upon, or when all proper and no improper factors are assessed, but the court makes a serious mistake in weighing them.'" Latin Am. Music Co. v. The Archdiocese of San Juan of the Roman Catholic & Apostolic Church, 499 F.3d 32 (1st Cir. 2007) (citations omitted).

Once we determine the evidence that can properly be considered, then the Panel reviews the Court's decision to grant summary judgment *de novo*. Vazquez, 134 F.3d at 33.[6] The

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[5] Two separate "orders" were docketed on January 26, 2007: (1) one granted a partial summary judgment denying Wunderlich's discharge based on the complaint's Count I, and (2) the other one certified that the partial summary judgment based on the complaint's Count I was a final order pursuant to Federal Rule of Civil Procedure 54(b). This second order complies with Fed. R. Bankr. P. 7054 that applies Fed. R. Civ. P. 54 (a) - (c) to the proceeding, enabling our review. Darr v. Muratore, 8 F.3d 854, 862 (1st Cir. 1993).

[6] "In bankruptcy, summary judgment is governed in the first instance by Bankruptcy Rule 7056. By its express terms, the rule incorporates into bankruptcy practice the standards of Rule 56 of the Federal Rules of Civil Procedure. The jurisprudence of Rule 56 teaches that we must review orders granting summary judgment *de novo*. This standard of review is not diluted when, as now, the underlying proceeding originates in the bankruptcy court." Desmond v. Varrasso (In re Varrasso), 37 F.3d 760, 762-63 (1st Cir. 1994) (citations omitted); Santana Olmo v. Quinones Rivera (In re Quinones Rivera), 184 B.R. 178, 184 (D.P.R. 1995).

de novo standard requires that we reexamine "'the entire record in the light most hospitable to the party opposing summary judgment, indulging all reasonable inferences in that party's favor.'" Mesnick v. General Elec. Co., 950 F.2d 816, 822 (1st Cir. 1991) (citations omitted). We must also uphold the decision's factual findings unless these are clearly erroneous, and conduct "an independent, *de novo* review of all conclusions of law and the legal significance accorded to the facts." United States v. Scharrer, 229 B.R. 210, 211 (M.D. Fla. 1999) (citations omitted).

DISCUSSION

We begin our scrutiny by summarizing the legal principles governing motions for summary judgment taken from Desmond v. Varrasso (In re Varrasso), 37 F.3d 760, 763-64 (1st Cir. 1994).[7]

> It is apodictic that summary judgment should be bestowed only when no genuine issue of material fact exists and the movant has successfully demonstrated an entitlement to judgment as a matter of law. As to issues in which the movant, at trial, would be obliged to carry the burden of proof, he initially must proffer materials of evidentiary or quasi-evidentiary quality--say, affidavits or depositions--that support his position. When the summary record is complete, all reasonable inferences from the facts must be drawn in the manner most favorable to the nonmovant. This means, of course, that summary judgment is inappropriate if inferences are necessary for the judgment and those inferences are not mandated by the record.
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> [T]he absence of a dispute over material facts is a necessary condition for granting summary judgment, but it is not a sufficient condition. The moving party must also show that he is entitled to judgment as a matter of law. Undisputed facts do not always point unerringly to a single, inevitable conclusion. And when facts though, undisputed, are capable of supporting conflicting yet plausible inferences-inferences that are capable of leading the factfinder to different outcomes in a litigated matter depending upon which of them the factfinder draws - then the choice between those inferences is not for the court on summary judgment.

[7] See also Rosen v. Bezner, 996 F.2d 1527, 1530 (3d Cir. 1993); Medina-Munoz v. R.J. Reynolds Tobacco Co., 896 F.2d 5, 8-9 (1st Cir. 1990); Quinones Rivera, 184 B.R. at 184-85.

Id. (citations omitted). With these principles in mind, we now examine the specific errors raised by Wunderlich on appeal.

He begins by asserting the Court granted Moran's motion based on flawed pleadings. Wunderlich argues that the concealment alleged in Count I consists of his failure to appear for taking of a deposition served under subpoena issued by the state court. He asserts that Count I makes no reference to his concealment of the second mortgage and its proceeds. Hence, he contends the Court's dismissal based on events not pled in Count I deprived him of the opportunity of submitting evidence to dispute the concealment. Wunderlich also argues Moran's affidavit in support of his motion for summary judgment does not mention fraudulent intent.

An argument similar to the error of flawed pleadings was raised and disposed of in Razzaboni v. Schifano (In re Schifano), 378 F.3d 60, 65 n.2 (1st Cir. 2004). There, the court mentioned that both parties addressed the allegations in their respective motions for summary judgment that were not alleged in the complaint. Relying on Fed. R. Civ. P. 15(b), made applicable to bankruptcy proceedings under Fed. R. Bankr. P. 7015, that court ruled, "'[w]hen issues not raised by pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings.'" Id. The transcript of the October 3, 2006 oral argument before the Court shows the parties addressed the non-disclosure of the second mortgage, its proceeds and fraudulent intent with reference to Count I. Appellant's Amended App. at 8-9, 14-15. Furthermore, a court may construe a *pro se* complaint and a motion for summary judgment liberally. See Ahmed v. Rosenblatt, 118 F.3d 886, 890 (1st Cir. 1997); see also Raineri v. United States, 233 F.3d 96, 97 (1st Cir. 2000). Thus, we conclude the Court could refer to the underlying allegations concerning Wunderlich's intent to conceal the

second mortgage and its proceeds when denying the discharge on Count I, even though these allegations were predicated with reference to another count of the amended complaint.

We have found no evidence on record showing Wunderlich raised these two flaws when the Court considered the underlying allegations involved in Count I during the October 3rd hearing, or at any other time. He does not now assert that we should consider these errors as exceptions to the "raise - or - waive rule". Therefore, Wunderlich did not preserve these arguments, thereby forfeiting his right to bring these to our attention on appeal. B & T Masonry Const. Co., Inc. v. Public Ser. Mut. Ins. Co., 382 F.3d 36, 40-41 (1st Cir. 2004); see also United States v. JG-24, Inc., 478 F.3d 28, 32 (1st Cir. 2007).

Wunderlich next argues the Court erred in defining his actions as a concealment as the second mortgage "was recorded in the public registry . . . [and] . . . debtor revealed the second mortgage at the creditors meeting" held sixty one days after the filing date.

We agree with the Court's conclusion that recordation of the second mortgage did not absolve Wunderlich of the duty to truthfully disclose this transaction in his schedules. We acknowledge that most cases cited by the Court involve debtors who transfer their titles to real properties while secretly retaining beneficial interests not disclosed in schedules. While the facts in those cases are different from the ones at hand, the decisions do not disturb the precept that a debtor must produce accurate and correct information of his financial transactions throughout the bankruptcy process. Browning Mfg. v. Mims (In re Coastal Plains, Inc.), 179 F.3d 197, 207 (5th Cir. 1999). The duty of providing accurate and complete disclosure of financial transactions in all documents a debtor files is the linchpin of a reorganization or liquidation in bankruptcy, and a prerequisite for granting a discharge. Id.; see also Boroff v. Tully (In re Tully), 818 F.2d 106,

110-11 (1st Cir. 1987). It cannot be circumvented by a disclosure of a debtor's financial transaction provided in a public record, prompted by a bank's efforts to record its mortgage lien. Sherman v. Third Nat'l Bank, 67 F.3d 1348, 1354 (8th Cir. 1995). We are, therefore, not persuaded by Wunderlich's attempts to distinguish these cases.

Our review shows Wunderlich did not divulge the details of the second mortgage in favor of DFCU and receipt of its proceeds as soon as the meeting of creditors commenced. Neither did he volunteer the information during this meeting. Wunderlich disclosed the details of the second mortgage in his answers to questions posed by Moran's counsel during the course of the meeting. Appellant's App. at 119-122. Wunderlich has not challenged the Court's finding that, once the details of the second mortgage and its proceeds were divulged, he did not amend his schedules promptly. The limited record he produced on appeal prevents us from reviewing this finding. Hence, the Court did not err when it determined the transfer of the second mortgage was not revealed in Wunderlich's schedules and Statement of Financial Affairs.

Wunderlich next argues the Court erred when concluding the inaccuracies in his schedules and the Statement of Financial Affairs were an intentional attempt to place estate assets beyond the reach of his creditors. Accordingly, he asserts the Court's ruling is wrong, as it evaluated his intention by making unfavorable inferences gleaned from documents on record. Thus, Wunderlich urges us to vacate the Court's ruling and remand the matter for trial.

The record shows the Court approached the challenge of evaluating fraudulent intent by first determining what evidence it could properly consider. Citing Marrama,[8] the Court accorded

[8] Marrama v. Citizens Bank of Mass. (In re Marrama), 445 F.3d 518, 522 (1st Cir. 2006) (quoting Medina Munoz v. R.J. Reynolds Tobacco Co., 896 F.2d 5, 8 (1st Cir. 1990)).

little weight to Wunderlich's sworn statements that offered an explanation for his concealment. It viewed these statements as "'conclusory allegations, improbable inferences, and unsupported speculation'" that could not defeat a well pled motion for summary judgment. Appellant's Amended App. at 6.

We commence by recalling that "[t]o successfully oppose a properly supported motion for summary judgment, the non-moving party must demonstrate *specific* facts which establish a genuine issue for trial. Vague and conclusory statements in an affidavit do not meet the specificity requirement of Federal Rule 56." Posadas de Puerto Rico, Inc. v. Radin, 856 F.2d 399, 401 (1st Cir. 1988) (citations omitted). "The object of this provision [Rule 56(e)] is not to replace conclusory allegations of the complaint . . . with conclusory allegations of an affidavit." Lujan v. National Wildlife Fed'n, 497 U.S. 871, 888 (1990). "Fed. R. Civ. P. 56(e) requires nonmovants to submit evidence that would be admissible at trial to oppose properly supported motions for summary judgment." FDIC v. Roldán Fonseca, 795 F.2d 1102, 1110 (1st Cir. 1986) (citations omitted). Thus, "[e]vidence that is inadmissible at trial . . . may not be considered on summary judgment." Vazquez, 134 F.3d at 33 (citations omitted).

Wunderlich did not produce any medical record, his physician's statement, or any medical prescription, to bolster his exculpatory statements that his medical conditions in all likelihood clouded his ability to provide accurate information. Wunderlich stated under oath that "he **probably** over - medicated" and "did not carefully review [the] **petition**" due to **probable** over - medication and stress. (emphasis added). One statement only refers to the petition, and cannot absolve Wunderlich's breach of a debtor's paramount duty to provide accurate

information in all bankruptcy filings. Both statements are vague and speculative.[9] Thus, the Court could correctly surmise that the admissibility of Wunderlich's statements could be challenged and excluded during a trial.[10] Therefore, we find that Court did not abuse its discretion when it disregarded these objectionable statements, as "[s]ummary judgment may be warranted even as to such elusive elements as a defendant's motive or intent where 'the non-moving party rests merely upon conclusory allegations, improbable inferences, and unsupported speculation.'" Santiago v. Canon U.S.A., Inc., 138 F.3d 1, 5 (1st Cir. 1998) (citations omitted).

From the undisputed facts, the Court recapitulated the following evidence to see if Moran met his initial burden of proving fraudulent intent.

> In September 2004, the Plaintiff won an approximately $350,000 judgment against the Defendant, after which the Plaintiff immediately began to seek payment. In October 2004, the parties executed an agreement whereby the Defendant, for consideration, agreed not to transfer or encumber his assets. A few months later, in March 2005, the Defendant transferred a mortgage, further encumbering the Merrimack property and removing equity from the property. In October 2005, the Defendant filed his bankruptcy petition and schedules in which he repeatedly listed a single mortgage with DFCU in the amount of $99,000. He even listed the exact date on which that mortgage was given, June 15, 2003. In order to report a total of $99,000, he had to add his first mortgage of approximately $70,000 with the second mortgage of approximately $30,000.

Amended App. at 6. This account of the circumstances surrounding the inaccurate disclosures, led the Court to the only plausible conclusion:

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[9] "Affidavits that contain nothing more than conclusory allegations or speculation are not sufficient to overcome a properly supported summary judgment motion." Moore's Federal Practice - Civil § 56.14[d].

[10] "The admissibility of lay opinion testimony pursuant to Rule 701 is committed to the sound discretion of the trial judge, and the trial judge's admission of such testimony will not be overturned unless it constitutes a clear abuse of discretion." United States v. Vega-Figueroa, 234 F.3d 744, 755 (1st Cir. 2000).

> [l]isting the exact date of the first mortgage and adding the two mortgages together indicated the Defendant completed his petition with deliberation and the intent to at least hinder the Plaintiff. The Court does not believe the Defendant-- a bankruptcy attorney-- forgot or inadvertently overlooked the fact that only months before he had received a cash infusion of $30,000, all the while acutely aware that at least one of his creditors, the Plaintiff, was keen on getting paid. If this is not the case, the Defendant has presented no evidence indicating otherwise.

Id.

On review the Panel must determine whether the Court could make these inferences at the summary judgment stage, where all reasonable inferences must be drawn in favor of Wunderlich. We are guided in this inquiry by case law addressing the issue of intent. These cases acknowledge that "a debtor rarely gives direct evidence of fraudulent intent,"[11] so that the courts can examine circumstantial evidence produced by the parties in their attempt to meet their respective burdens of proof. Here, Wunderlich chose to meet his burden by resting "merely upon conclusory allegations, improbable inferences, and unsupported speculation." Varrasso, 37 F.3d at 764-65. Having failed to establish any genuine issue of material fact, the Court was free to review the undisputed facts and make reasonable inferences on the elusive concept of Wunderlich's fraudulent intent. The objective indicia of fraudulent intent[12] reviewed by the Court shows: (1) Wunderlich was an experienced bankruptcy attorney; (2) he was facing an order of contempt and vigorous collection efforts stemming from a $350,000 judgment, when he chose to reorganize his finances by voluntarily seeking bankruptcy protection; (3) he filed documents in bankruptcy containing inaccurate information concerning the conveyance of a second mortgage on the property and receipt of its proceeds; (4) this inaccurate information concealed an

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[11] In re Marrama, 445 F.3d at 522.

[12] In re Watman, 301 F.3d at 8.

improvement in his financial position; (5) his actions diminished the equity in his most significant asset and cash available to pay his debts to the detriment of his creditors; (6) he engaged in a pattern of not divulging the existence of the second mortgage and receipt of its proceeds when completing two schedules and the Statement of Financial Affairs; and (7) he did not correct the inaccuracies at the first possible moment. In our view, these badges of fraud establish his intent beyond hope of contradiction. Hence, the Court correctly reached the only plausible conclusion derived from the uncontested facts of record: Wunderlich deliberately intended to hinder at least Moran by inaccurately completing documents filed in his bankruptcy case. See Blanchard v. Peerless Ins. Co., 958 F.2d 483, 488 (1st Cir. 1992) (summary judgment is precluded "unless no reasonable trier of fact could draw any other inference from the 'totality of circumstances' revealed by the undisputed evidence"). Forgetfulness or inadvertence on Wunderlich's part cannot reasonably explain his actions in this case. Thus, we agree that Moran met his burden of proving all four elements needed to deny Wunderlich's discharge for concealment pursuant to § 727(a)(2)(A). Hayes v. Rhode Island Depositors Economic Protection Corp.(In re Hayes), 229 B.R. 253, 259 (B.A.P. 1st Cir. 1999).

CONCLUSION

For reasons explained above, the Panel **AFFIRMS** the Court's ruling that Wunderlich forfeited his right to a discharge pursuant to 11 U.S.C. § 727(a)(2)(A), without taxing any costs.