NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL FOR THE FIRST CIRCUIT

BAP NO. NH 11-026

Bankruptcy Case No. 10-10088-JMD
Adversary Proceeding No. 10-01071-JBH

SEAN T. DONAHUE, JR., and
SANDRA M. DONAHUE,
Debtors.

WILLIAM K. HARRINGTON, U.S. Trustee,
Plaintiff-Appellee,

v.

SEAN T. DONAHUE, JR., and
SANDRA M. DONAHUE,
Defendants-Appellants.

Appeal from the United States Bankruptcy Court
for the District of New Hampshire
(Hon. James B. Haines, Jr., U.S. Bankruptcy Judge)

Before
Feeney, Tester, and Hoffman,
United States Bankruptcy Appellate Panel Judges.

Richard C. Mooney, Esq., on brief for Appellants.

Ramona D. Elliott, Esq., P. Matthew Sutko, Esq., Geraldine Karonis, Esq., and Ann Marie Dirsa, Esq., on brief for Appellee.

December 20, 2011

Feeney, U.S. Bankruptcy Appellate Panel Judge.

The debtors, Sean T. Donahue, Jr. ("Mr. Donahue") and Sandra M. Donahue ("Mrs. Donahue") (collectively "the Donahues"), appeal from the bankruptcy court order ("the Order") granting the motion of the United States Trustee ("the UST") for partial summary judgment ("the Summary Judgment Motion") on his complaint seeking a denial of the Donahues' discharge pursuant to § 727(a)(4)(A).[1] For the reasons set forth below, the Order is **AFFIRMED.**

BACKGROUND

I. Pre-Petition Events

The Donahues are the chapter 7 debtors who jointly owned several businesses, including a limited liability company, HCF of NH, LLC ("HCF"), a real estate investment and management business, which was their primary source of income. Mrs. Donahue performed bookkeeping services for their various businesses.

The Donahues also owned numerous pieces of real estate, including residential rental property located on Eagles Nest Road, Warren, New Hampshire ("the Eagles Nest Road Property"), which they owned jointly in fee simple. On July 17, 2008, they entered into a "Standard Real Estate Rental Agreement" ("the Rental Agreement") with Tanya McKeage, Ricky McKeage, and Roland Gervais (collectively "the McKeages"), whereby they rented the Eagles Nest Road Property to the McKeages for twelve months, for the sum of $1,375.00 per month. On the same date, the Donahues and the McKeages also executed an Option to Purchase ("the Option"), pursuant to which, the Donahues granted to the McKeages a twelve-month,

[1] Unless otherwise indicated, the terms "Bankruptcy Code," "section" and "§" refer to Title 11 of the United States Code, 11 U.S.C. §§ 101, et seq., as amended by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, 119 Stat. 37.

"exclusive [right] to purchase the subject property" for the sum of $225,000.00. The terms of the Option indicated that the McKeages paid the Donahues a nonrefundable fee of $5,000.00 for this right and would receive a monthly rental credit of $100.00 toward the purchase price of the Eagles Nest Road Property for each rental payment received by the first of the month.

The McKeages exercised the Option within the specified period and, accordingly, the Donahues transferred the Eagles Nest Road Property to them by Quitclaim Deed dated February 19, 2009. Although the Eagles Nest Road Property was subject to two prior mortgages, those mortgages did not appear on the Settlement Statement executed by the parties on the date of the transfer. The Settlement Statement indicated that the McKeages paid the Donahues $40,000.00 toward the purchase at closing, plus $3,430.00 in settlement charges. The Donahues took back a note in the amount of $179,400.00 ("the Note"), with interest at the rate of 7.5 percent per year, secured by a mortgage on the Eagles Nest Road Property ("the Mortgage"). The Note was payable by the McKeages to the Donahues in monthly installments of $1,254.39, with the entire balance of principal and accrued interest due and payable on March 1, 2012.

II. Post-Petition Events

On January 13, 2010, Mr. and Mrs. Donahue filed a joint Petition for chapter 7 relief. They both signed the Petition, Statement of Financial Affairs, and Schedules, declaring under the penalty of perjury that the information contained therein was true and accurate. Together, they also signed a Declaration Concerning Debtor's Schedules, similarly declaring under the penalty of perjury that they had read their Schedules and Statistical Summary of Schedules, and that both were true and accurate to the best of their knowledge, information, and belief.

Although they had sold the Eagles Nest Road Property eleven months earlier, the Donahues indicated on their Schedule A, "Real Property," that they owned it in fee simple, subject to a secured claim in the amount of $220,945.00, and valued it at $127,600.00.[2] On their Schedule B, "Personal Property," the Donahues listed neither their interest in the Note, nor the Mortgage. On Schedule I, "Current Income of Individual Debtor(s)," the Donahues reported that they were both self-employed, with no monthly income from wages, salary, or commissions. The only monthly income which they reported on Schedule I was the sum of $450.00 from alimony, maintenance, or support, and another $2,200.00 from "foster care."

In their Statement of Financial Affairs, in response to question 1, "Income from employment or operation of business," the Donahues indicated negative income in the amount of $24,000.00 from "Rental Business" for 2009, and negative income in the amount of $35,047.00 from "Rental Business" for 2008. In their response to question 1, the Donahues made no reference to the rent payments they received from the McKeages during 2009, or to the proceeds of the sale of the Eagles Nest Road Property. In fact, the only positive income they reported on the Statement of Financial Affairs was the sum of $10,300.00 from "Respite/Foster Care Stipend." In their response to question 10, "Other transfers," the Donahues failed to disclose the transfer of the Eagles Nest Road Property to the McKeages.

Brian F. Tierney ("Mr. Tierney"), a bankruptcy analyst for the Office of the United States Trustee for the District of New Hampshire, performed a review of the Donahues' bankruptcy

[2] On their Schedule A, the Donahues actually listed a total of thirteen properties – six of them owned jointly, five of them owned by Mr. Donahue, individually, and two owned by Mrs. Donahue, individually.

case. Mr. Tierney's affidavit filed in support of the Summary Judgment Motion[3] underlying this appeal reveals that in the course of his review, he conducted an online search of the records of the Grafton County [New Hampshire] Registry of Deeds, and discovered that the Donahues no longer owned the Eagles Nest Road Property. In the affidavit, Mr. Tierney avers that he forwarded this information to Victor Dahar, the chapter 7 trustee ("Mr. Dahar"), the day before the Donahues' § 341 meeting of creditors.

The Donahues appeared at their § 341 meeting, represented by counsel. The transcript of their § 341 meeting testimony reflects that they each vowed, under oath, to tell the truth. They also stated, under oath, that they had a chance to review their petition before signing it, and that the information contained therein was true and accurate. The transcript further reflects that when Mr. Dahar questioned the Donahues about the status of the Eagles Nest Road Property, Mr. Donahue testified as follows:

> Q. Warren, New Hampshire. Now, this one here it says it's worth $119,750.00 with a $220,945.00 mortgage on it. What's the story on that one?
>
> A. There's a first and a second, approximately equal.
>
> Q. Who has the first?
>
> A. That is Bank of America.
>
> Q. All right. Who has the second?
>
> A. Beneficial.
>
> Q. All right.

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[3] See discussion regarding Summary Judgment Motion and Mr. Tierney's affidavit at pages 10-11, *infra*.

A. Currently occupied. It's delinquent about the same as the others, and the bank has made demands, and it's not going to be worth saving.

Mrs. Donahue was silent during the foregoing questioning, and neither corrected nor disputed her husband's testimony. In response to further questioning about the Eagles Nest Road Property, and in particular, its encumbrances, Mr. Donahue again testified as follows:

Q. [I]s that the one where . . . you took back a mortgage . . . ?

A. Yes. That's the property.

Q. Well, it says here the first and second held [sic] by somebody else . . . who's got the first mortgage?

A. Bank of America.

Q. And who's got the second mortgage?

A. Beneficial.

Q. Is there a third mortgage on this property?

A. Well, we did owner financing to the people that are in it now.

Q. All right. So what you're saying then is there's another tier of mortgages on top of this. You sold it with the mortgages or what?

A. Yes.

Q. And you took back a mortgage owner financing of - - how much of a mortgage did you take back?

A. 175.

Mr. Donahue further testified that he had not paid the first or second mortgage with the payments he had received from the McKeages. Mrs. Donahue added that the McKeages were behind in their mortgage payments. Specifically, Mr. Donahue testified as follows in response to the line of questioning on this topic:

Q: Well, have they been paying you?

A. Yes

. . .

MRS. DONAHUE: The last two months they haven't.

A. Well, they are delinquent right now.

Q [ ] But if they've been paying you, what monthly payment have they been giving you?

A. $1,254.00.

. . .

Q. And then you turned around and didn't make the first or second mortgage payment; is that it or what?

A. That's correct.

Q. And they're aware of this?

A. No.

Q. And you say you're going to let this property go? What's going to happen? Is this going to go to foreclosure or not?

A. [ ] it appears that it's unable to be saved, yes.

Q. Well, if it goes, what happens to the people that think that they've got a property is what I'm trying to get at?

A. I don't know.

In response to cross-examination by Mr. Tierney regarding the details of the purchase and sale transaction relating to the Eagles Nest Road Property, Mr. Donahue testified as follows:

Q. What was the down payment these folks provided you to acquire the property?

A. There was an initial $5,000.00 down payment made for the option to purchase because they had started out as a lease option to buy, and then they gave an additional $40,000.00 down for the transaction that took place in February of ’09.

Q. And at what point did you tell them there were existing mortgages on the property . . . .

A. Prior to the transaction in February of ’09.

MRS. DONAHUE: They have an insurance binder listed with our first . . . . We told them they had to list our first mortgage company.

Q. Was there a title company involved in the sale?

A. No.

Q. Was there an attorney involved in the preparation of the mortgage and the deed?

A. No.

. . .

Q. So they owe you $175,000.00 - -

. . .

A. Yeah.

Q. That is not listed in the petition . . . . Why?

A. I’m not sure. This is our first experience with this. So it might have been just an oversight.
. . .

Q. And you list that you own the property. Is there anyone else that’s aware of this; law enforcement, attorneys, private attorneys?

A. No.

. . .

Q. [W]hat did you do with the, approximately, $45,000.00 they gave you in February of ’09?

A. We used it to make improvements to a damaged property in Vermont.

Q. And was there a reason you did not disclose them in the petition, in some category? Was there anytime like it's a lease or the mortgage or that you owe them money? Was there a - - did you intentionally leave them off the bankruptcy petition so they didn't get notice of this?

A. Yes.

Within a week of their § 341 meeting, the Donahues filed a "Notice of Amendment to Chapter 7 Bankruptcy." In the notice, they indicated that they were adding the following information to their original Statement of Financial Affairs:

> Sold 43 Eagles Nest Road Warren, New Hampshire to Tanya McKeage, Ricky McKeage and Roland Gervais on 02/19/09 for $225,000.00 taking back a seller financing of $179,400.00.

They also indicated that they were amending Schedule A by deleting the Eagles Nest Road Property, and amending Schedule B by adding an account receivable in the amount of $179,400.00, representing the amount due from the McKeages on the Note. Lastly, they indicated that they were amending Schedule F to add the McKeages' contingent claim in the amount of $40,000.00, representing their down payment on the Eagles Nest Road Property. The Donahues explained in the notice that the Eagles Nest Road Property "was inadvertently entered on those [S]chedules at the time of filing."

Thereafter, the UST commenced an adversary proceeding with a seven-count complaint ("the Complaint") objecting to the Donahues' discharge pursuant to § 727(a)(4), based on their representations in their Schedules, Statement of Financial Affairs, and § 341 meeting testimony. Specifically, in the Complaint he alleged that the Donahues "knowingly, fraudulently, and/or with reckless indifference to the truth": 1) failed to accurately represent their income in response to Question 1 and 2 on their original Statement of Financial Affairs by omitting, *inter alia*, the

proceeds from the sale of the Eagles Nest Road Property (Count I); 2) failed to disclose the transfer of the Eagles Nest Road Property in response to Question 10 in their original Statement of Financial Affairs (Count II); 3) falsely reported on their original Schedule A that they jointly owned the Eagles Nest Road Property in fee simple on the petition date (Count III); 4) failed to disclose the Note and Mortgage (Count IV); 5) failed to disclose an alleged unsecured, nonpriority claim of the McKeages on their original Schedule F in the amount of their down payment on the Property (Count V); 6) failed to disclose on their Schedule I income from, *inter alia*, HCF and the $1,254.39 monthly payments from the McKeages pursuant to the Note (Count VI); and 7) falsely implied in their testimony at their § 341 meeting that they still owned the Eagles Nest Road Property by stating that it was "not worth saving" (Count VII).

The Donahues filed an answer to the Complaint and an amended answer. The amended answer presented no affirmative or special defenses, but rather, contained a wholesale denial of all of the material allegations of the Complaint (namely, paragraphs 68 through 111).

The UST filed the Summary Judgment Motion on all Counts of the Complaint, except V (relating to the unsecured claim of the McKeages) and VII (relating to their § 341 meeting testimony). In support of the Summary Judgment Motion, he filed a memorandum of law, statement of material facts, and separate affidavits from Mr. Tierney and the UST's counsel, in

compliance with LBR[4] 7056-1.[5] The UST appended over 100 pages of exhibits to the Summary Judgment Motion, including, *inter alia,* copies of relevant portions of the transcript of the Donahues' § 341 meeting; certified copies of the Donahues' bankruptcy Schedules and chapter 7 Petition; a copy of the Rental Agreement; a copy of the McKeages' option to purchase; a copy of

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[4] The preface to the Local Rules for the United States Bankruptcy Court for the District of New Hampshire provides, in pertinent part, that said Rules "shall be cited as 'LBR.'" Accordingly, "LBR," as used herein, refers to those Rules.

[5] LBR 7056-1 provides, in pertinent part:

(a) Moving Party.
(1) Supporting Documents Required. With each motion for summary judgment filed under Bankruptcy Rule 7056, the moving party shall serve and file the following:
(A) A separate supporting memorandum of law.
(B) A separate statement of material facts as to which the moving party contends there is no genuine issue and that entitles the moving party to judgment as a matter of law and that also includes:
(i) A description of the parties.
(ii) All facts supporting venue and jurisdiction in this Court.
(C) Any affidavits and other materials referred to in Federal Rule of Civil Procedure 56(e).
(2) Form -- Statement of Facts. The separate statement of facts shall consist of short numbered paragraphs, including within each paragraph specific references to the affidavits, parts of the record and other supporting materials relied upon to support the facts set forth in that paragraph. Failure to submit such a statement constitutes grounds for denial of the motion
. . .
(b) Opposing Party.
(1) Supporting Documents Required. With each objection to a motion for summary judgment filed under Bankruptcy Rule 7056, the opposing party shall serve and file the following:
(A) A separate supporting memorandum of law.
(B) A separate, concise response to the movant's statement of facts that shall contain:
(i) A response to each numbered paragraph in the moving party's statement, including, in the case of any disagreement, specific reference to the affidavits, parts of the record and other supporting materials relied upon.
(ii) A statement, consisting of short numbered paragraphs, of any additional facts that required the denial of summary judgment, including references to the affidavits, parts of the record and other supporting materials relied upon.
. . .
(2) Effect. All material facts set forth in the statement required of the moving party will be deemed to be admitted unless controverted by the statement of the opposing party.
. . .
LBR 7056-1.

the Quitclaim Deed to the Eagles Nest Road Property from the Donahues to the McKeages; and copies of the Note and Mortgage. In his affidavit, Mr. Tierney averred, in pertinent part:

> I learned that [the Donahues] transferred [the Eagles Nest Road Property] . . . to [the McKeages] . . . on or about February 19, 2009, which transfer was recorded at Book 3584, Page 934.
> . . .
> On June 4, 2010, I was present at a meeting with the [Donahues] and their bankruptcy counsel at the Office of the [UST]. At that meeting, Mr. Donahue stated that, although the Eagles Nest Road Property was subject to mortgages at the time of the sale of the [p]roperty to the McKeages, he did not notify the mortgage holders of the sale of the [p]roperty prior to closing.

The Donahues filed an objection to the Summary Judgment Motion ("Objection"), together with numerous exhibits and the Donahues' affidavit. They neglected to file, however, a supporting memorandum of law or a statement of material disputed facts in response to the UST's statement of facts, as required by LBR 7056-1. They based their Objection on the premise that "the law is whether the Debtors filed their [S]chedules with intentional or reckless indifference to the truth." In their Objection, they specifically argued that they had disclosed on their Statement of Financial Affairs that they were "shareholders of 3 corporate entities, HCF [ ], SD Retail Operating, LLC and Popcorn and a Movie,"[6] and that their income was distinguishable from "the gross receipts from these corporations." Under this theory, they argued that they were not required to disclose the gross receipts of these corporations on their Statement of Financial Affairs.

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[6] In fact, the Donahues indicated in response to question 21(a) on their Statement of Financial Affairs that they each owned a one-half interest in an unnamed partnership, and in response to question 21(b), they further indicated that they were each a "member/partner" of an unnamed corporation. Accordingly, it is impossible to ascertain from their responses on their Statement of Financial Affairs the precise nature of these entities and the Donahues' respective interests therein. The tax returns for these entities, which are part of the record on appeal, indicate, however, that they are domestic general partnerships.

The Donahues also denied that they failed to disclose the sale of the Eagles Nest Road Property and challenged the UST's contention that Mr. Dahar had only learned of the sale just prior to the § 341 meeting. They defended their purported disclosure of the sale of the Eagles Nest Road Property with many excuses, but largely on six grounds (although their argument was not structured in this manner). First, they argued that "on January 15, 2010, immediately after filing, debtor's [sic] counsel sent to Mr. Dahar tax returns and appraisals." Accompanying the appraisals were "summary pages," describing the Eagles Nest Road Property as "financed to the current tenants." Second, they contended that when Mr. Dahar sent them "follow-up questions" after receiving the tax returns and appraisals, they replied by sending him "a typed sheet listing 11 properties," containing implicit references to the true status of ownership of the Eagles Nest Road Property. In particular, they claimed that on that list, the Eagles Nest Road Property appeared as line item #5, with a corresponding reference to a "monthly mortgage amount: $." The Donahues argued in their Objection that "the references to a mortgage amount, in juxtaposition to the other properties that reference 'Monthly Rental Amount' indicate[d] status of the Eagles Nest Road as a sold [p]roperty." Third, they contended that they "assumed" that HCF was the seller of the Eagles Nest Road Property, based on information from their accountant. Fourth, they argued that since the sale transaction was "in the ordinary course of their business," they were not required to disclose it in their Statement of Financial Affairs, in any event. Fifth, they asserted that they supplied a copy of the Rental Agreement to Mr. Dahar, as well as the Note and Mortgage, in their February 16, 2010 response to his request. Lastly, they argued that when it appeared that Mr. Donahue responded, "Yes," to Mr. Tierney's inquiry,"[D]id you

intentionally leave them off the bankruptcy petition . . . ," he was actually responding to an earlier "embedded" question.

In the Objection, the Donahues also defended their failure to name the McKeages as creditors (based on their $40,000.00 down payment) by denying that they owed the McKeages anything, notwithstanding their amendment of Schedule F to include them. They specifically argued that they "did not believe when they filed the bankruptcy, nor do they believe now, that [the McKeages] have any claim against them." Further, they argued that because "[a]ll payments from [the McKeages] for [the] Eagles Nest [Road Property] went into the [HCF] account," it was unnecessary to disclose such payments.

The Donahues did not address in the Objection why they indicated on Schedule A that they owned the Eagles Nest Road Property when, in fact, neither they, nor HCF, nor any other entity affiliated with them, owned it at all. They were also silent about their failure to disclose the Note as property of the estate.

The UST filed a "Reply Memorandum in Support of Plaintiff's Motion for Partial Summary Judgment on Counts I, II, III, IV and VI of the Complaint" on December 20, 2010 ("the Reply"). The following argument is at the core of the Reply: "Nowhere in their papers do the Defendants dispute or even acknowledge the fact that they falsely stated on Schedule A that they still owned the Eagles Nest Road Property in fee simple on the Petition Date." In the Reply, the UST also complained that the exhibits which the Donahues submitted with their affidavit were not authenticated and were therefore inadmissible. He further argued that the Donahues' failure to file a statement of material facts in dispute meant that "all of the facts set forth in [his] statement of undisputed facts must be deemed admitted pursuant to [LBR 7056-1(b)]."

The bankruptcy court conducted a hearing on the Summary Judgment Motion on January 20, 2011. At the commencement of the hearing, the bankruptcy judge asked the parties to highlight their arguments. Counsel for the UST replied:

> It's the [UST's] position that a *prima facie* case has been made out for a denial of discharge, which would shift the burden to the defendants to show that they didn't commit false oaths and accounts; and based on the papers filed to date, we would argue that that burden hasn't been met; and we'd further argue that the facts supporting the summary judgment must be determined to - - to have been agreed upon, as they haven't been disputed as required under the Local Rule.

The Donahues' counsel countered: "The debtors have pled sufficient facts in their affidavit, as well as the attachments to the . . . objections to the motion to defeat any summary judgment." He explained that he was unaware of the local requirement for a separate statement of disputed material facts and added:

> If the Court feels that that would be helpful I would be happy to do that today. *We certainly laid out every fact and every exhibit that we intend to rely upon to defeat that motion for summary judgment*; but this local rule, I guess, requiring a statement of material facts I guess would give the court a better road map.
>
> . . . .
>
> I believe that the debtor has sufficiently refuted at least on summary judgment that there was no intentional or reckless indifference to not include these things in their filings.

(emphasis supplied). The bankruptcy judge denied the request to file a late statement of material facts from the bench, ruling as follows:

> [T]here hasn't been any motion made before today's date for submission of the summary judgment matter to further supplement [sic], so I'm taking it as it stands right today . . . [W]e have the same practice [for a statement of facts] in Maine, and it shouldn't be a surprise . . . . I think I can comb the record effectively to determine the motion on the papers as they exist.

The bankruptcy judge took the matter under advisement, indicating that he would announce his decision at a telephonic hearing. He also inquired if the UST would insist on

proceeding to trial on the remaining counts if summary judgment were granted on Counts I, II, III, IV and VI. Counsel for the UST responded in the negative, as a ruling on one count would effectively moot the others. Thereafter, the court conducted a telephonic hearing, at which it granted summary judgment specifically on Count III, as well as the other Counts, generally, and denied the Donahues their discharge pursuant to § 727(a)(4)(A), based on their false oath or account on Schedule A. He specifically ruled as follows:

> [Counts I, II, III, IV, and VI] seek relief which is redundant in character . . . . I've concluded that based on the status of the record and the absence of appropriate contravention of material facts by the debtors - - and, indeed, I don't think they're probably capable of appropriate contravention of the material facts - - that judgment denying discharge will enter for the [UST].
>
> [T]he clearest of the Counts is Count III, which includes the failure to actually [sic] report property held by the debtors at bankruptcy, more specifically the Eagles Nest [Road P]roperty which, notwithstanding its prior conveyance to the McKeages prior to bankruptcy was listed [on Schedule A] as being jointly owned by the debtors. And it was stated by the debtors in response to [Mr. Dahar's] questioning that it was not worth saving. That misrepresentation certainly - - and the material facts underlying the request for summary judgment on Count III - - satisfied the elements of § 727(a)(4)(A), knowingly and fraudulently, in connection with the case, made a false oath or account regarding material matter.
>
> The response, first of all, is not sufficient contravention under the Rule; and secondly, provides a lot of excuses, but the debtors are required to be punctilious and complete in their representation of their affairs. There is absolutely no (unclear) for burying a disclosure outside of the schedules in a way that requires the [UST] or other parties in interest to engage in extensive investigation to ascertain what the real state of affairs is.
>
> The Donahues have not come forth with evidence to rebut or contravene the material facts that favor entry of judgment in the [UST's] favor. So judgment is granted to the [UST], denying discharge on Count III, but also generally on the other Counts largely for the lack of effective contravention of the material facts.
>
> I think that - - and I want to check with the [UST] on this - - given the redundant character [sic] relief claimed in the Count - - in the various Counts, are you satisfied that final judgment can enter denying discharge from this ruling today?

MS. DIRSA [UST's counsel]: Yes, Your Honor.

The same day, the court entered its "Final Order," ruling as follows: "For the reasons set forth on the record in the course of hearings conducted on March 10, 2011 it is ORDERED that final judgment denying the debtors their [c]hapter 7 discharge is entered."

This appeal followed. In their Statement of Issues and their Brief, the Donahues essentially raise two issues: 1) whether the court erred in denying their oral application to file a late statement of material facts in dispute in compliance with LBR 7056-1(b)(2); and 2) whether the court erred as a matter of law in granting the summary judgment motion.

JURISDICTION

Before addressing the merits of an appeal, the Panel must determine whether it has jurisdiction, even if the litigants do not raise the issue. Aja v. Emigrant Funding Corp. (In re Aja), 442 B.R. 857, 860 (B.A.P. 1st Cir. 2011). The Panel has jurisdiction to hear appeals from: (1) final judgments, orders and decrees; or (2) with leave of court, from certain interlocutory orders. Id. (citations omitted). "The Panel has repeatedly ruled that a judgment denying discharge under § 727 is a final order." Gagne v. Fessenden (In re Gagne), 394 B.R. 219, 224 (B.A.P. 1st Cir. 2008) (citing Fagnant v. Cohen Steel Supply, Inc. (In re Fagnant), 337 B.R. 729 (B.A.P. 1st Cir. 2006)) (citations omitted). An order granting summary judgment is also a final order for purposes of appeal "where no counts against any defendants remain." Correia v. Deutsche Bank Nat'l Trust Co. (In re Correia), 452 B.R. 319, 322 (B.A.P. 1st Cir. 2011).

While this matter originated in the bankruptcy court as a summary judgment motion on fewer than all of the counts, the bankruptcy judge concluded that the remaining Counts sought relief which was "redundant in character" - - namely, denial of the Donahues' discharge. Thus,

the Order, granting summary judgment and denying the Donahues' their discharge, ended the litigation on the merits and is, therefore, a final order. Accordingly, the Panel has jurisdiction to review the Order.

STANDARD OF REVIEW

A bankruptcy court's findings of fact are reviewed for clear error and its conclusions of law are reviewed *de novo*. See Lessard v. Wilton-Lyndeborough Coop. School Dist., 592 F.3d 267, 269 (1st Cir. 2010). "A finding is clearly erroneous when after careful review, the reviewing court is left with the definite impression that a mistake has been made." Riley v. National Lumber Co. (In re Reale), 584 F.3d 27, 30 (1st Cir. 2009). *De novo* review means that "the appellate court is not bound by the bankruptcy court's view of the law." Kagan v. Stubbe (In re El San Juan Hotel Corp.), 239 B.R. 635, 645 (B.A.P. 1st Cir. 1999), aff'd, 230 F.3d 1347 (1st Cir. 2000). The First Circuit applies a *de novo* standard of review to orders granting summary judgment. Desmond v. Varrasso (In re Varrasso), 37 F.3d 760, 763 (1st Cir. 1994) (specifically applying *de novo* standard of review to order granting summary judgment denying discharge under § 727(a)(4)(A)); see also Backlund v. Stanley-Snow (In re Stanley-Snow), 405 B.R. 11, 17 (B.A.P. 1st Cir. 2009) (indicating that the Panel applies the *de novo* standard of review to bankruptcy court orders granting summary judgment).

POSITIONS OF THE PARTIES

On appeal, the Donahues' argument is essentially two-fold: 1) the court abused its discretion when it denied in open court their belated request to file a statement of material facts in dispute and treated the UST's summary judgment motion as unopposed; and 2) they raised a genuine issue of material fact - - namely, that they lacked the requisite intent to defraud for a

denial of discharge under § 727(a)(4)(A) - - which should have precluded the entry of summary judgment. As evidence of their lack of fraudulent intent, they point to their having provided over 1,000 pages of documents to Mr. Dahar upon request, including information which they claim revealed the transfer of the Eagles Nest Road Property. They also assert that they did not profit from their misrepresentation and, therefore, fraudulent intent is absent. Lastly, they argue that the errors and omissions in their filings were the product of their attorney's carelessness and their own neglect, rather than an intent to defraud.

The UST counters that: 1) the bankruptcy court did not treat the Summary Judgment Motion as unopposed but, instead, considered the merits of the Objection and found it insufficient; and 2) well-settled case law in the First Circuit does not require a party in interest to hunt through records to uncover the true state of the Donahues' financial affairs.

We first address whether the bankruptcy court erred when it denied the Donahues' request to supplement their Objection, and also whether the bankruptcy court actually treated the Summary Judgment Motion as unopposed. We then proceed to the central question of whether the bankruptcy court erred in granting summary judgment denying the Donahues' discharge.

DISCUSSION

I. The Denial of the Request to File a Late Statement of Facts

The Donahues' argument that the bankruptcy court erred when it denied their request to file a late statement of material facts in dispute is inextricably intertwined with their assertion that the bankruptcy court improperly treated the Summary Judgment Motion as unopposed. In support of their contention that the bankruptcy court should have granted their oral request to file a late statement of material facts, the Donahues cite the following proposition from Mendez v.

Banco Popular de Puerto Rico, 900 F.2d 4, 7 (1st Cir. 1990): "The mere fact that plaintiff failed to file a timely opposition does not mean that defendant's Rule 56 motion should be granted." (citations omitted). However, in that case, the First Circuit goes on further to state:

> [T]he district court is not obliged to consider appellant's untimely opposition in applying the Rule 56 standard . . . . Were the rule otherwise, enlargements of time would be an idle ceremony, and the lawyers, not the judge, would be running the docket.

Id. (internal citations omitted). In upholding the trial court's refusal to consider a "belated submission of an opposition to [a] Rule 56 motion," the First Circuit held in Mendez that "in the absence of a manifest abuse of discretion," reviewing courts should not interfere with a trial court's "reasoned refusal" to grant an enlargement of time. Furthermore, in Mendez, the First Circuit treated the request to file a late response to a motion for summary judgment as a request for "enlargement of time," not as a request to allow an amendment as characterized by the Donahues. Thus, the Donahues' reference in their Brief to Fed. R. Civ. P. 15 governing amendments, and their corresponding reliance on the liberal standard allowing amendments, is misplaced.

Here, the Donahues offered no justification at the hearing on the Summary Judgment Motion to support their oral request to supplement their Objection with a statement of material facts. Furthermore, the statement of material facts was not their only omission. They had also failed to file a memorandum of law in support of their opposition as required by LBR 7056-1(b)(1)(A). The Donahues' only proffered excuse for not complying with the local rules, both in the proceedings below, and at oral argument in this appeal, was that their lawyer was unfamiliar with them. It also appears that the bankruptcy judge made a determination that the record was sufficient to enable him to make a determination of the Summary Judgment Motion on its merits,

even in the absence of an opposing statement of facts. We conclude, in light of the foregoing, that the bankruptcy judge did not abuse his discretion in declining to allow the Donahues to file a late statement of material facts in dispute.

The Donahues' argument that the bankruptcy court, having declined to allow a late submission, then treated their Objection as a nullity, is without support in the record. Indeed, the bankruptcy judge indicated that he would not treat the motion as unopposed, although LBR 7056-1(a)(2) authorized him to do so. See LBR 7056-1(a)(2). Instead, he indicated that he would "comb the record" in order to "determine the motion on the papers as they exist." Having concluded that the Donahues' assertion that the bankruptcy judge treated the Summary Judgment Motion as unopposed is without merit, we turn, then, to the substance of the Donahues' Objection.

II. The Standards and their Application

A. The Summary Judgment Standard

"In bankruptcy, summary judgment is governed in the first instance by Bankruptcy Rule 7056." In re Varrasso, 37 F.3d at 762. "By its express terms, the rule incorporates into bankruptcy practice the standards of Rule 56 of the Federal Rules of Civil Procedure." Id.; see also Fed. R. Bankr. P. 7056; Fed. R. Civ. P. 56.[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." In re Varrasso, 37 F.3d at 763 (citing Fed. R. Civ. P. 56(c)). "As to issues on which the nonmovant has the burden of proof, the

[7] Fed. R. Civ. P. 56(a) provides, in pertinent part, that "[t]he court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. The court shall state on the record the reason for granting or denying the motion."

movant need do no more than aver an absence of evidence to support the nonmoving party's case." Id. at 763, n.1 (citation omitted). "The burden of production then shifts to the nonmovant, who, to avoid summary judgment, must establish the existence of at least one question of fact that is both genuine and material." Id. (internal quotations and citations omitted). The "mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48 (1986) (emphasis in the original).

B. The Denial of Discharge Under § 727(a)(4)(A)

Section 727(a) provides for the grant of a debtor's discharge. See 11 U.S.C. § 727(a). The entitlement to a discharge is construed "liberally in favor of the debtor." Boroff v. Tully (In re Tully), 818 F.2d 106, 110 (1st Cir. 1987); see also Xerox Fin. Servs. Life Ins. Co. v. Sterman (In re Sterman), 244 B.R. 499, 503 (D. Mass. 1999). Although there is a "preference for discharges, there are limitations on a debtor's 'right' to a discharge." In re Sterman, 244 B.R. at 503 (citations omitted). Section 727(a) prescribes when a court may properly deny a debtor a discharge. 11 U.S.C. § 727(a); see also In re Tully, 818 F.2d at 110. Section 727(a)(4)(A) controls this appeal, and provides that "[t]he court shall grant the debtor a discharge, unless . . . the debtor knowingly and fraudulently, in or in connection with the case . . . made a false oath or account . . . ." 11 U.S.C. § 727(a)(4)(A).

The purpose of § 727(a)(4)(A) is "to make certain that those who seek the shelter of the [B]ankruptcy [C]ode do not play fast and loose with their assets or with the reality of their affairs." In re Tully, 818 F.2d at 110 (internal citations and quotations omitted). The statute is

"designed to insure that complete, truthful, and reliable information is put forward at the outset of the proceedings, so that decisions can be made by the parties in interest based on fact rather than fiction." Id.

"To deny a discharge under § 727(a)(4)(A), the Court must find that the debtor (1) knowingly and fraudulently, (2) made a false oath in or in connection with a case, (3) relating to a material fact." Perry v. Warner (In re Warner), 247 B.R. 24, 26 (B.A.P. 1st Cir. 2000) (citations omitted). "[T]he burden of persuasion rests with the party opposing the discharge." In re Sterman, 244 B.R. at 504 (citations omitted). "The objecting party must prove each element of its objection to a discharge by a preponderance of the evidence." Id. (citations omitted). Thus, in order to prevail under § 727(a)(4)(A), the UST must establish by a preponderance of the evidence that: 1) the Donahues made a false oath; 2) knowingly and fraudulently; 3) relating to a material fact.

(1) False Oath

"A debtor's Schedules and Statement of Financial Affairs are the equivalent of a verification under oath." In re Warner, 247 B.R. at 26 (citations omitted). The Panel has previously ruled that when a debtor omits a transaction from his Statement of Financial of Affairs, he has made a false oath. Smith v. Grondin (In re Grondin), 232 B.R. 274, 276 (B.A.P. 1st Cir. 1999). Misstatements in a debtor's Schedules and/or in the debtor's sworn testimony at the § 341 meeting also qualify as false oaths within the purview of § 727(a)(4)(A). Malicki v. Bernstein (In re Bernstein), 447 B.R. 684, 702 (Bankr. D. Conn. 2011) (citations omitted).

Here, it is undisputed that the Donahues did not own the Eagles Nest Road Property when they reported that they owned it in fee simple on their Schedule A. Thus, the requirement for an oath that is false is easily met.

(2) Material

"Courts have acknowledged that the threshold to materiality is fairly low." Lussier v. Sullivan (In re Sullivan), 455 B.R. 829, 839 (B.A.P. 1st Cir. 2011) (internal quotation and citation omitted). "Valuation is not really the point." In re Tully, 818 F.2d at 111 n.4 ; see also Cadle Co. v. Pratt (In re Pratt), 411 F.3d 561, 566 (5th Cir. 2005) (citations omitted); Beaubouef v. Beaubouef (In re Beaubouef), 966 F.2d 174, 178 (5th Cir. 1992). The subject matter of a false oath is "material," and thus sufficient to bar discharge, if it "bears a relationship to the bankrupt's business transactions or estate, or concerns the discovery of assets, business dealings, or *the existence and disposition of his property."* In re Tully, 818 F.2d at 111 (emphasis added) (citations omitted); see also In re Sterman, 244 B.R. at 511. Accordingly, bankruptcy courts have held that "any omission of income from a debtor's statements is material." Benchmark Bank v. Crumley (In re Crumley), 428 B.R. 349, 358-60 (Bankr. N.D. Tex. 2010). The well-established policy supporting these holdings is that the "successful functioning of the [Bankruptcy Code] hinges both upon the bankrupt's veracity and his willingness to make a full disclosure." In re Tully, 818 F.2d at 110 (citing In re Mascolo, 505 F.2d 274, 276 (1st Cir. 1974)); see also Diorio v. Kreisler-Borg Constr. Co., 407 F.2d 1330, 1331 (2d Cir. 1969). In light of the foregoing authority, the Donahues' failure to disclose the transfer of an interest in real property constitutes a "material false oath," insofar as it relates directly to their estate, and the existence and disposition

of their assets. The sole – and most disputed – issue that remains is whether the Donahues' misstatement on Schedule A was knowing and fraudulent.

(3) Knowingly and Fraudulently

A false statement is knowingly and fraudulently made if the debtor "knows the truth and nonetheless willfully and intentionally swears to what is false." In re Sullivan, 455 B.R. at 837 (citations and quotations omitted). Because a debtor is unlikely to admit directly that his intent was improper, courts may look to circumstantial evidence and draw inferences from a course of conduct to establish that a debtor acted with fraudulent intent. Annino, Draper & Moore, P.C. v. Lang (In re Lang), 246 B.R. 463, 468 (Bankr. D. Mass. 2000), aff'd, 256 B.R. 539 (B.A.P. 1st Cir. 2000).

"Deliberate omissions by the debtor" satisfy the requirement for a "knowing" misrepresentation. Keefe v. Rudolph (In re Rudolph), 233 Fed. App'x 885, 889 (11th Cir. 2007) (holding that creditor failed to show fraud where debtor satisfactorily explained the omissions and amended petition to remedy them). This Panel has ruled that "[f]or purposes of § 727(a)(4)(A), a debtor's reckless indifference to the truth [is] treated as the functional equivalent of fraud." Smith v. Grondin (In re Grondin), 232 B.R. 274, 277-78 (B.A.P. 1st Cir. 1999) (citations omitted). Numerous other courts have ruled similarly. For example, the United States Bankruptcy Appellate Panel for the Eighth Circuit has held that "statements made with reckless indifference to the truth are regarded as intentionally false." Korte v. United States (In re Korte), 262 B.R. 464, 474 (B.A.P. 8th Cir. 2001) (citation omitted); see also Vasiliades v. Dwyer, No. 05-10479, 2006 WL 1494081, at *4 n.15 (D. Mass. June 23, 2006) ("reckless disregard of both the serious nature of the information sought [in the debtor's Schedules and Statement of

Financial Affairs] and the necessary attention to detail and accuracy in answering may rise to the level of the fraudulent intent necessary to bar a discharge") (citation omitted); Mosley v. Sims (In re Sims), 148 B.R. 553, 557 (Bankr. E.D. Ark. 1992) ("the Bankruptcy Code requires more than a 'glance over' in reporting assets and transactions").

Based on the foregoing principles, courts have found fraudulent intent within the meaning of § 727(a)(4)(A) and have denied discharge when considering circumstances nearly identical to those presented in the case at bar. For example, in First Nat'l Bank of Mason City, Iowa v. Cook (In re Cook), 40 B.R. 903 (Bankr. N.D. Iowa 1984), the bankruptcy court held that the debtor's failure to list on his Statement of Financial Affairs a real estate transfer which occurred one month before filing and for which he had received $500.00, coupled with his "cavalier casual attitude toward the importance of an accurate, complete and honest answer on question 12(b) [on his Statement of Financial Affairs] equates to knowingly and fraudulently making a false oath on a material matter." Id. at 907–908 (citing Guardian Indus. Prods., Inc. of Mass. v. Diodati (In re Diodati), 9 B.R. 804, 809 (Bankr. D. Mass. 1981). Accordingly, the court withheld discharge. Id.

Here, as in In re Cook, the Donahues failed to report a pre-petition transfer of real estate. At the very least, the record amply supports a conclusion that the Donahues acted with reckless indifference as to the accuracy of their disclosures on Schedule A. The Donahues are not unsophisticated in financial affairs. Mrs. Donahue was the bookkeeper for the family's businesses, and Mr. Donahue, himself, was an entrepreneur. They owned a total of thirteen properties, either jointly or individually, and at least three businesses. Thus, it is reasonable to conclude that they knew, or had reason to know, the true state of ownership of the Eagles Nest Road Property when they completed Schedule A. Furthermore, the Donahues did not disclose the

omitted sale until pressed under examination at the § 341 meeting, suggesting that they had no intent to disclose the transaction unless and until compelled to do so.

While the Donahues argue that their misstatement on Schedule A was not made with the intent to deceive, the record reveals a "series or pattern" of misstatements and omissions in their bankruptcy submissions and in their § 341 meeting testimony which belies this assertion. JRC Lumber Corp. v. Corona (In re Corona), No. 08-1712, 2010 WL 1382122, at *9 (D.N.J. Apr. 5, 2010). Although "all that is required for a denial of discharge is a single false oath or account," here, there are numerous, accumulated false statements: the Donahues omitted the prior encumbrances from the closing statement; misrepresented on Schedule A that they owned the Eagles Nest Road Property; failed to report both the rental income and the sale proceeds from the Eagles Nest Road Property; failed to disclose the existence of the Note; and then testified at their § 341 meeting with a striking lack of candor. See In re Grondin, 232 B.R. at 277. Specifically, they testified that the Eagles Nest Road Property was "not worth saving" - - suggesting that it was theirs to save. Counsel for the Donahues even acknowledged at oral argument that their bankruptcy filings contained at least five omissions or inaccuracies. The sheer volume of misstatements indicates that the Donahues' misstatement on Schedule A was not the result of excusable inadvertence, "but rather the type of extreme carelessness or reckless indifference that equates to fraud and a bar to discharge." In re Corona, 2010 WL 1382122, at *9.

We are mindful of the need for caution when granting summary judgment on issues involving intent. See In re Varrasso, 37 F.3d at 764. Here, however, the record is devoid of any circumstances which would mitigate against the Donahues' cumulative falsehoods and demonstrate that there is a genuine issue of material fact as to their intent. The Donahues' mere

denials are insufficient to rebut overwhelming evidence of fraudulent intent. Although the Donahues argue on appeal that they submitted to Mr. Dahar over 1,000 pages of documents containing proof that they no longer owned the Eagles Nest Road Property, the First Circuit has already unequivocally rejected such an argument in Tully:

> A petitioner cannot omit items from his schedules, force the trustee and the creditors, at their peril, to guess that he has done so - and hold them to a mythical requirement that they search through a paperwork jungle in the hope of finding an overlooked needle in a documentary haystack.

In re Tully, 818 F.2d at 111. In Tully, the First Circuit also rejected efforts, like the Donahues', to blame counsel for misstatements on a debtor's schedules:

> Nor can an attorney's willingness to bear the burden of reproach provide blanket immunity to a debtor; it is well settled that reliance upon advice of counsel is, in this context, no defense where it should have been evident to the debtor that the assets ought to [or ought not to] be listed in the schedules. A debtor cannot, merely by playing ostrich and burying his head deeply enough in the sand, disclaim all responsibility for statements which he has made under oath.

Id. (citations omitted). Even the Donahues' subsequent amendments did not cure the fraud of their initial omission on Schedule A. See Distributor Corp. of New England v. Zicaro (In re Zicaro), No. 08-04062, 2009 WL 1795302, at *3 (Bankr. D. Mass. June 22, 2009); Nesse v. Garcia (In re Garcia), No. 09-11129, 2010 WL 2545706, at *2 (Bankr. D. Md. June 18, 2010).

We rule that the bankruptcy court below correctly determined that the UST proved all of the elements of a claim under § 727(a)(4)(A) and, further, that the Donahues' submissions failed to demonstrate a genuine issue as to a material fact.

CONCLUSION

Based on the foregoing, the Panel **AFFIRMS** the Order of the bankruptcy court granting summary judgment.