UNITED STATES BANKRUPTCY APPELLATE PANEL
FOR THE FIRST CIRCUIT

NO. MB 98-022

Bankruptcy Case No. 96-12276-WCH
Adversary Proceeding No. 96-1350-WCH

FRANK SCHIFANO,
Debtor.

ALFREDO RAZZABONI and
HENRY RAZZABONI,
Appellants,
v.
FRANK SCHIFANO,
Appellee.

Appeal from the United States Bankruptcy Court
for the District of Massachusetts
(Hon. William C. Hillman, U.S. Bankruptcy Judge)

Before
LAMOUTTE, DE JESÚS and VAUGHN,
U.S. Bankruptcy Appellate Panel Judges

John F. Drew, Esq., Wilner Borgella, Esq. and
Lane, Altman & Owens LLP,
on brief for Appellants.

Jordan L. Shapiro and Shapiro & Shapiro,
on brief for Appellee.

September 26, 2003

LAMOUTTE, U.S. Bankruptcy Appellate Panel Judge.

The issue before this Bankruptcy Appellate Panel (the "Panel") is whether the bankruptcy court erred in granting summary judgment for the debtor, Frank Schifano (the "debtor") and thereby denying the objection to discharge filed by Alfred and Henry Razzaboni (the "Razzabonis"). For the reasons stated below, we affirm.

I. Jurisdiction and Standard of Review

The Panel has jurisdiction over this appeal pursuant to 28 U.S.C. § 158(a) and (b). A bankruptcy court's order granting a motion for summary judgment is a final order which may be appealed pursuant to 28 U.S.C. § 158(a), (c)(1). Weiss v. Blue Cross/Blue Shield of Del. (In re Head Injury Recovery Ctr. at Newark, L.P.), 206 B.R. 622, 623 (B.A.P. 1st Cir. 1997).

The bankruptcy court's decision to grant summary judgment is reviewed *de novo*. McCrory v. Spigel (In re Spigel), 260 F.3d 27, 31 (1st Cir. 2001); Baybank v. Vermont Nat'l Bank, 118 F.3d 30, 32 (1st Cir. 1997). The bankruptcy court's determination that there are no issues of material fact in dispute is a legal conclusion subject to *de novo* review. Campana v. Pilavis (In re Pilavis), 244 B.R. 173, 174 (B.A.P. 1st Cir. 2000). When reviewing summary judgment orders, the record must be construed in the light most favorable to the non-moving party, and all reasonable inferences must be resolved in that party's favor. Gosselin v. Webb, 242 F.3d 412, 414 (1st Cir. 2001), citing Landrau-Romero v. Banco Popular de Puerto Rico, 212 F.3d 607, 611 (1st Cir. 2000); see also Pilavis, 244 B.R. at 174-75.

II. Factual Background

The debtor is in the construction business. The Razzabonis were clients of the debtor and his company, Frank Schifano Building and Design Corporation (the "Schifano Corporation"). The Razzabonis contracted with the debtor and his company for a construction project, were unsatisfied with the results, and took legal action in the courts of the Commonwealth of Massachusetts. The Razzabonis obtained a default judgment against the debtor and the Schifano Corporation in the amount of $200,000 on January 5, 1995, and thereafter attempted to collect their judgment. There was a supplementary process action in the state court, and the debtor began making payments to the Razzabonis until he filed his bankruptcy petition.

The Schifano Corporation was dissolved in 1993, and the Royal Crest Corporation ("Royal Crest"), was formed that same year. The record is not clear,[1] but apparently Royal Crest was transferred between the debtor and his brother, Joseph Schifano ("Joseph" or "Joseph Schifano"), although neither recalls many details or has any records of such transactions. Royal Crest was dissolved in 1995.

In June of 1995, Joseph Schifano created the Northlantic Construction Corporation ("Northlantic") using his own savings. The debtor's wife and brother both testified that Northlantic was created as a result of the debtor's creditor-related problems with Royal Crest. Northtlantic employs the debtor, Joseph Schifano, and Janet Schifano, and engages, for the most part, in small construction projects, such as home renovations. If additional labor or equipment

[1] The debtor says that he formed the corporation Royal Crest in 1993 and was the president. The debtor's brother, Joseph, says that he was the sole shareholder, and that he gave or sold the corporation to the debtor in 1994 because of problems with the debtor's creditors.

is needed, Northlantic employs subcontractors. It functions much in the same manner as Royal Crest.

Since 1987, the debtor and his wife and children have resided at 12 Dapper Darby Drive, Stoneham, Massachusetts (the "Stoneham property"). The Stoneham property was purchased on February 5, 1987, by Massbay Land Management Corporation ("Massbay"). The debtor's father, Rosario Schifano, was the sole shareholder of Massbay and its treasurer; the debtor was the president of Massbay. A promissory note and mortgage were issued to Metropolitan Bank for $193,000, signed by the debtor, individually and as president of Massbay, and by Rosario as treasurer.

In 1990, Massbay borrowed $60,000 from Joseph Pascuccio ("Pascuccio" or "Joseph Pascuccio") of J.P. Construction Company. Pascuccio was a friend of Rosario Schifano. In guarantee of the debt, Pascuccio took a note on the Stoneham property. Thereafter, the bank foreclosed on the first mortgage, and on June 6, 1990, the first promissory note and mortgage on the Stoneham property were assigned to J.P. Construction Company, leaving Pascuccio holding both notes and mortgages on the Stoneham property.

Massbay was dissolved on December 31, 1990. Rosario Schifano died in November, 1993. Upon his death, all of his assets went to his wife, Norma Schifano ("Norma" or "Norma Schifano"), in accordance with his will, although the same has never been probated. Mr. Pascuccio stated that he has received mortgage payments from the debtor, Rosario Schifano, and Norma Schifano. In an April 1988 financial statement, Massbay estimated the value of the Stoneham property to be $500,000. The Razzabonis have an appraisal of the property from April 1997, valuing it at $350,000. The debtor contends the property is worth $285,000.

The debtor testified that in the years preceding his bankruptcy filing he has received over $50,000 from family members, including his parents, brothers and cousins. The debtor considers these amounts to be both gifts and loans. The debtor's mother testified that she has regularly made gifts and loans to the debtor via both checks and cash, but she does not have complete records thereof. The debtor's wife has stated that they receive financial help from family and friends, but she has no idea who they are. The debtor and his wife do not maintain bank accounts because they fear the Internal Revenue Service will levy them.

III. Procedural Background

The procedural background of this case is convoluted by the number of appeals taken on the issue. We summarize the proceedings to place the controversy in perspective.

On January 5, 1995, the Razzabonis obtained a default judgment in the state court against the debtor and the Schifano Corporation as a result of a failed construction job. Thereafter, the Razzabonis attempted to collect their judgment.

The debtor filed a petition for relief under Chapter 7 of the Bankruptcy Code on March 29, 1996. On July 1, 1996, the Razzabonis filed a complaint objecting to discharge, thereby commencing an adversary proceeding, alleging that the debtor made a false oath by failing to list material assets and liabilities, and transferred and concealed property within one year of filing the petition. The debtor moved to dismiss the adversary proceeding on February 28, 1997, alleging improper service of process. The motion to dismiss was denied by the bankruptcy court on April 29, 1997. On August 19, 1997, the debtor answered the complaint, denying the allegations raised therein. The parties conducted discovery for several months and filed a joint pre-trial report on November 18, 1997.

On January 21, 1998, the debtor filed a motion for summary judgment, arguing that there was no transfer or concealment of assets with intent to defraud creditors within one year of filing the petition. The Razzabonis filed an opposition, arguing that there was sufficient evidence to find that the debtor took action which should bar his discharge. The bankruptcy court held a hearing on the summary judgment motion on March 11, 1998, at the conclusion of which it found that the Razzabonis had failed to demonstrate a genuine issue of material fact for trial, and therefore granted the debtor's motion for summary judgment; further, the court sanctioned the Razzabonis under Fed. R. Bankr. P. 9011. The Razzabonis filed a notice of appeal on March 20, 1998, and the case was assigned BAP No. MB 98-22.

Case No. MB 98-22 was argued before and submitted to the Bankruptcy Appellate Panel in July, 1998. Before issuing an opinion, the Bankruptcy Appellate Panel learned that the case may have been settled and, on April 27, 1999, issued an Order for a Limited Remand for a determination of whether the matter had been settled. The Razzabonis appealed said order to the United States Court of Appeals for the First Circuit, where it was assigned case no. 99-9015.

Upon the remand order in BAP No. MB 98-22, the parties engaged in discovery. The debtor moved for summary judgment, and the case was scheduled for trial. On October 19, 1999, the bankruptcy court determined that a settlement had been reached and entered summary judgment for the debtor. The Razzabonis appealed the decision to the Bankruptcy Appellate Panel on October 26, 1999, where it was assigned BAP No. MB 99-094.

On October 29, 1999, the Bankruptcy Appellate Panel issued an order dismissing BAP No. MB 98-22 in light of the bankruptcy court's October 19, 1999 order; judgment was entered and the case was closed. The debtor appealed the Panel's decision to the United States Court of

Appeals for the First Circuit (the "Court of Appeals") on November 24, 1999; however, it was later voluntarily withdrawn.

The parties filed a joint motion for abeyance of appeal no. 99-9015, which was granted by the Court of Appeals on January 21, 2000, pending the Bankruptcy Appellate Panel's resolution of BAP No. MB 99-094.

On March 21, 2000, the Bankruptcy Appellate Panel issued an opinion in BAP No. MB 99-094, again remanding the case for further proceedings under its April 27, 1999 order of remand. The debtor appealed the Bankruptcy Appellate Panel's decision to the First Circuit Court of Appeals, where it was assigned case no. 00-9005; said appeal was subsequently voluntarily withdrawn.

Upon remand for the second time, the bankruptcy court determined on March 12, 2002, that the underlying adversary proceeding was not capable of settlement and, therefore, that its March 1998 summary judgment order for the debtor and against the Razzabonis was a final judgment.

On June 25, 2002, the Razzabonis filed a motion to vacate the October 29, 1999 judgment dismissing BAP No. MB 98-22. The debtor filed a letter assenting to the motion on July 3, 2002. The Panel entered an order on September 3, 2002, denying the parties' requests on the grounds that it had no jurisdiction while the appeal of its October 29, 1999 order was pending in case no. 99-9015 before the Court of Appeals.

The Court of Appeals issued a judgment in case no. 99-9015 on December 11, 2002, stating:

> In view of the Bankruptcy Court's March 12, 2002 determination that the parties did not settle BAP 98-022 and the parties' joint motion for order of remand, we vacate the Bankruptcy Appellate Panel's October 29, 1999 order dismissing appeal 98-022 and remand to the BAP so that the BAP may decide the merits of the appeal number 98-022.

Accordingly, the Razzabonis' appeal of the bankruptcy court's March 1998 decision granting summary judgment for the debtor is now before this panel for a decision on the merits.

IV. Discussion

A. Summary Judgment and the Proceedings Below

The well-known standard provides that summary judgment shall be entered if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits . . . show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c); Fed. R. Bankr. P. 7056; see also Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986); Barbour v. Dynamics Research Corp., 63 F.3d 32, 36-37 (1st Cir. 1995); Mottolo v. Fireman's Fund Ins. Co., 43 F.3d 723, 725 (1st Cir. 1995). "The role of summary judgment is 'to pierce the pleadings and to assess the proof in order to see whether there is a genuine need for trial.'" Cowell v. Hale (In re Hale), 289 B.R. 788, 791 (B.A.P. 1st Cir. 2003), quoting Garside v. Osco Drug, Inc., 895 F.2d 46, 50 (1st Cir. 1990).

"A fact is material when it has the potential to affect the outcome of the suit." Baybank, 118 F.3d at 32-33. "Neither party may rely on conclusory allegations or unsubstantiated denials, but must identify specific facts derived from the pleadings, depositions, answers to

interrogatories, admissions and affidavits to demonstrate either the existence or absence of an issue of fact." Id. at 33.

The rules further provide that when a motion for summary judgment is made and supported, the adverse party may not rest upon mere allegations or denials, but its response must set forth specific facts showing that there is a genuine issue for trial. Fed. R. Civ. P. 56(e); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 256 (1986) (explaining that once the moving party demonstrates the lack of a genuine issue of material fact, the nonmoving party "must set forth specific facts showing that there is a genuine issue for trial.") "In this context, 'genuine' means that the evidence about the fact is such that a reasonable jury could resolve the point in favor of the nonmoving party; 'material' means that the fact is one 'that might affect the outcome of the suit under the governing law.'" United States v. One Parcel of Real Property, 960 F.2d 200, 204 (1st Cir. 1992), quoting Anderson, 477 U.S. 242, 248 (1986).

The movant must initially proffer materials of an evidentiary or quasi-evidentiary nature, such as affidavits or depositions, that support his position on issues to which he must carry the burden of proof at trial. Desmond v. Varrasso (In re Varrasso), 37 F.3d 760, 763 (1st Cir. 1994). Then, "[w]hen the summary judgment record is complete, all reasonable inferences from the facts must be drawn in the manner most favorable to the nonmovant." Id.; Piccicuto v. Dwyer, 39 F.3d 37, 40 (1st Cir. 1994). Although the evidence is to be viewed in the light most favorable to the nommovant, "'as to any essential factual element of its claim on which the nonmovant would bear the burden of proof at trial, its failure to come forward with sufficient evidence to generate a trial worthy issue warrants summary judgment to the moving party.'" Spigel, 260 F.3d at 31, quoting Ralar Distribs., Inc. v. Rubbermaid, Inc., 4 F.3d 62, 67 (1st Cir. 1993); see also Den

Norske Bank AS v. First Nat'l Bank of Boston, 75 F.3d 49, 53 (1st Cir. 1996) (explaining that "[o]nce the moving party makes this showing, the party bearing the ultimate burden of proof cannot rest on mere allegations, but must proffer sufficient competent evidence upon which a rational trier of fact could find in its favor.") (parentheticals omitted); Wymer v. North Am. Specialty Ins. Co., 78 F.3d 752, 754 (1st Cir. 1996).

The Panel has previously stated that "'[t]o succeed [on summary judgment], the moving party must show that there is an absence of evidence to support the nonmoving party's position. Once the moving party has properly supported its motion for summary judgment, the burden shifts to the non-moving party, who may not rest on mere allegations or denials of this pleading, but must set forth specific facts showing there is a genuine issue for trial.'" Weiss, 206 B.R. at 624 (citations and internal quotations omitted).

In considering the debtor's motion for summary judgment, the bankruptcy court had before it the Razzabonis' complaint objecting to the debtor's discharge and the debtor's answer, the debtor's motion for summary judgment and the Razzabonis' opposition thereto, the depositions of the debtor, Janet Schifano, Joseph Schifano and Joseph Pascuccio, and the interrogatory answers of Norma Schifano.

The complaint objecting to discharge filed by the Razzabonis on July 1, 1996, alleged that the debtor should be denied a discharge because:

> 1. The Debtor has made a false oath in connection with this case by failing to list material assets and liabilities on his schedules consisting at least of liability on a promissory note secured by a residence, his interest in such residence, his interest in a testamentary estate and his interest in a construction business;

> 2. The Debtor has within one year before filing his petition in bankruptcy transferred and concealed property, comprised of transfers to and his interest in a construction business, all with intent to hinder, delay and defraud creditors.
>
> 3. On information and belief and pending completion of discovery, the Debtor has made additional transfers with intent to hinder delay and defraud creditors within one year before filing his petition in bankruptcy.

See App. at tab 4.

The debtor's answer denied the allegations of the complaint and argued that the action is frivolous and without basis, and that the action was filed in bad faith with the intent to harass the debtor and his family and cause them to incur additional legal fees, and as a defensive tactic to a pending state court action by the debtor against the Razzabonis. See App. at tab 10.

The debtor's motion for summary judgment argued that:

> 1. The omission of the liability owed to Pascuccio was an inadvertent mistake, not an attempt to conceal, as the mortgages were matters of public record and Pascuccio was notified verbally of the bankruptcy filing. Further, the debtor argues that the law regarding omissions from bankruptcy schedules is concerned about assets, not liabilities.
>
> 2. The failure to probate the will of the debtor's father is irrelevant because the entire estate was left to his wife, the debtor's mother, and the debtor has no interest in it.
>
> 3. The debtor's income varies seasonally and was reported accurately as of the time the schedules were filed.
>
> 4. The debtor was not required to include his wife's income in his individual bankruptcy petition.
>
> 5. Documents have been produced to prove Joseph is the owner of Northlantic; there is no proof the debtor controls or has any interest in the corporation.

6. The amount of the debtor's wife's salary is reasonable and irrelevant to the debtor's bankruptcy case.

7. Debtor has produced the tax returns required, and failure to produce tax returns is not a basis for denying discharge if other records are available to verify income.

8. The claim that the debtor's visits to a certain restaurant on eight dates demonstrates a lavish lifestyle is "preposterous, pathetic and frivolous."

9. The claim that the debtor's wife was evasive and hostile at her deposition is irrelevant and frivolous.

10. The debtor's failure to maintain a checking account is not a basis for denying discharge if his assets and liabilities can be ascertained from other books and records. The debtor has produced all requested documents which were available; the plaintiffs should have sought a court remedy for any documents requested but not produced, or requested them from other sources, including cancelled checks and records of Northlantic.

See App. at tab 11.

The Razzabonis' opposition to the motion for summary judgment argued:

1. There is evidence to support a claim that the debtor violated § 727(a)(2) by hiding his interest in the Stoneham property and Northlantic. The debtor concealed the Stoneham property (a) to conceal assets from his creditors, and (2) to avoid discharging the debt owed to Pascuccio so that he could make a private arrangement enabling him to continue residing in the property. Furthermore, Northlantic was created to avoid the Razzabonis judgment and funnel money to the debtor through his wife's salary. Debtor also used Royal Crest to conceal assets.

2. There is evidence to support a claim that the debtor violated § 727(a)(3) by concealing, destroying, or failing to keep records of his payments to Pascuccio on the Stoneham property, and by withholding records relating to Northlantic and Royal Crest.

3. There is evidence to support a claim that the debtor violated

> § 727(a)(4) by making a false oath regarding his interest in the Stoneham property, his interest in Northlantic, and the assets available for his bankruptcy estate.

See App. at tab 12.

The debtor's deposition was taken on June 28, 1996. The debtor testified that he had produced all the documents he had related to Royal Crest and the Schifano Corporation, but that he did not have any documents related to Northlantic because "I have nothing to do with North Atlantic." See App. at tab 15, page 6. Of the tax returns requested, he only produced the one for 1993 because it was the only one he had. Id. at 7. He testified that he does not own any real estate. Id. at 10. He pays rent in the amount of $2,500 per month to his mother because she owns the property where he lives. Id. at 11. Massbay, which was dissolved in 1990, bought the property in 1985; the bank later assigned the mortgage to J.P. Construction Corp. Id. at 11-13. The debtor testified that he owes $16,500 to Northlantic for a series of loans over seven or eight months. Id. at 20-21.

The Razzabonis have a judgment against the debtor for $210,000, based upon a construction project which was ninety percent completed; the debtor did not make any appearances in that lawsuit because he was "very distraught . . . over the job and losing money on the job." Id. at 23-24.

The debtor testified that he is involved in the day-to-day workings at Northlantic, he helps to run the corporation, and is a signatory on the corporate bank account. Id. at 26-28. He stated that his father owned all of the issued shares of Massbay and he owned none. Id. at 43-46. The debtor testified that he and his wife do not maintain a bank account, and their monthly expenses, including rent, are paid through bank checks or money orders. Id. at 49-51. He stated that

September 1994 was the last time he did any banking on the Royal Crest account, but still had money in the account as of June 1995. Id. at 52-56. The debtor testified that although he had very little income, he was able to pay rent and other expenses because he has borrowed more than $50,000 from his family since 1993. Id. at 59-64. He did not include them in his bankruptcy petition and schedules because he considers loans from family members to be the same as gifts, although they expect to be paid back some time. Id. The debtor started Royal Crest in 1993 and was president of the corporation. Id. at 65.

The deposition of Janet Schifano, the debtor's wife, was taken on July 2, 1996. She testified that her in-laws, Rosario and Norma Schifano, occasionally lived with them at the Stoneham property. See App. at tab 16, page 6. She stated that she pays the household bills together with her husband, but that he takes care of the rent. Id. at 7-8. She testified that she never worked at Massbay nor at the Schifano Corporation; she worked for a short period of time at Royal Crest, and now works for Northlantic as the office manager. Id. at 10-12. She testified that Joseph Schifano runs Northlantic, while the debtor estimates jobs and helps draw up contracts. Id. at 14. She does not recall the details of ownership of Royal Crest, but stated that Joseph Schifano asked the debtor to finish some pending jobs because he was being bothered by creditors, including the Razzabonis, and it was negatively affecting his health. Id. at 16-17. She testified that Joseph wanted a new corporation–Northlantic–in order to start with a clean slate and own everything completely, though he wanted her and the debtor help him run the new corporation. Id. at 15, 18. She stated that she cashes her paycheck and pays all her bills with money orders; she does not maintain a bank account because she is afraid that the IRS may levy it. Id. at pp. 29-32. She testified that her husband has received help from friends and relatives to

subsidize their salaries and pay their bills, but she does not know specifically the identity of these donors. Id. at 39-40.

The deposition of Joseph Schifano, the debtor's brother, was taken on July 2, 1996. Joseph testified that he was a stockholder of Royal Crest but that his brother, the debtor, was not. See App. at tab 19, page 7. Joseph confirmed that at a previous deposition he had stated that he performed the labor at Royal Crest and the debtor took care of financial matters and kept the financial records. Id. at 9-10. Joseph testified that he and the debtor conducted business at Royal Crest together. Id. at 12-13. He further testified that he and the debtor conduct business at Northlantic in much the same manner as they did at Royal Crest. Id. at 14.

As to the creation of Royal Crest, Joseph testified that "we started Royal Crest in '93 and we did a little work here and there. And at about '94, we did a job on Salem Street. After that, I was getting rumors that people were following me, following my brother, the Razzaboni brothers were bothering us and hassling us. So I told my brother, 'Listen, I don't need this. Take it all back, take Royal Crest back.' And I gave him everything back and I opened my own company." Id. at 14-15. However, Joseph does not specifically recall how he "gave" Royal Crest to the debtor, and later clarified that he did not really give it back to debtor because he, Joseph, was the only stockholder. Id. at 15. Joseph later stated that the debtor purchased Royal Crest from him in 1994, but he doesn't remember how much the debtor paid for it. Id. at 21.

Joseph testified that he used his savings to capitalize Northlantic in 1995, but is not sure exactly how much. Id. at 16-20, 33. Joseph then loaned the debtor $16,500 from Northlantic, in small amounts, over time, because the debtor is his brother and needed the money. Id. at 18-19, 34. Northlantic does not own any equipment; Joseph uses his own. Id. at 21-22. Joseph and the

debtor rent a garage from their mother and use her dump truck. Id. Their bookkeeper, the debtor's wife, works out of her home. Id. Joseph testified that the debtor receives a salary of $500 per week and the debtor's wife receives a salary of $800 per week, because they have a family and need it more. Id. at 28. Joseph further testified that if there is enough money, he takes some here and there if he needs something. Id. However, Joseph later clarified "[i]f we don't have work, they don't get paid." Id. at 29.

The deposition of Joseph Pascuccio was taken on July 2, 1996. He testified that he is in the construction business and has a company called J.P. Construction. See App. at tab 19, page 6. Pascuccio met the debtor's father, Rosario Schifano, in 1986 when he went to see a property that Massbay was selling. Id. at 8-9. Pascuccio testified that in 1990 or 1991 he loaned $60,000 to Massbay, and in guarantee of the loan received a second mortgage on the Stoneham property. Id. at 10, 14. Subsequently, he received notice from the bank holding the first mortgage on the property that it was going to foreclose, so he purchased the property and the bank assigned the first mortgage and note to him. Id. at 12, 16. Pascuccio believes that he gave the bank around $197,000 for the first mortgage and note, including legal fees, so that his total investment in the Stoneham property is approximately $257,000. Id. at 17. Pascuccio testified that his arrangement with Massbay is that he pays the taxes and water on the property, and he is supposed to receive ten percent of his investment, approximately $30,000, per year; his accountant calculates what is owed, how payments are applied to principal and interest, and keeps track of the payments. Id. at 18-19. Pascuccio doesn't know from whom he receives payments, but believes he has received them from Rosario Schifano, Norma Schifano, and the debtor. Id. at 20. Pascuccio receives payments throughout the year, but expects to receive the total owed by

August of each year, and states "I foreclose if he don't start to pay up." Id. at 20-21. He does not know what the property is currently worth, but estimates it to be $250,000, $260,000 or $275,000. Id. at 22.

The answers provided by Norma Schifano, the debtor's mother, to the interrogatories posed by the Razzabonis, were signed on December 28, 1997. Norma states that she regularly gives monetary gifts to her son and his family, including the mortgage payment, and that she does not expect repayment. See App. at tab 19. Norma further explained that the debtor occasionally pays her rent on the Stoneham property; and she has provided copies of those checks which she could locate. See id.

The bankruptcy court held a hearing on the debtor's motion for summary judgment and the Razzabonis' objection thereto on March 11, 1998. The bankruptcy judge heard extensive argument from the attorneys for both parties. The debtor's attorney argued in support of his motion for summary judgment that the Razzabonis' had not raised any material facts which would preclude the entry of summary judgment in debtor's favor on the Razzabonis' objection to discharge, addressing in detail the allegations raised by the Razzabonis. The attorney for the Razzabonis countered that once his clients made an accusation of concealment of documents under § 727, then the burden shifts to the debtor/defendant to give a reasonable explanation of why no documents are available. The bankruptcy court pressed the attorney for the Razzabonis for a specific basis in the record to support his arguments that summary judgment should not be entered for the debtor and the objection to discharge should proceed to trial, stating:

> I need a nexus. I need a connection. So far you've given me an inference upon a speculation upon an unproven premise. You haven't given me a fact. I need a fact.

See App. at tab 2, page 23. At the conclusion of the summary judgment hearing, the bankruptcy court reviewed the summary judgment standard, then addressed the issues raised by the parties. The bankruptcy court concluded:

> I believe that the plaintiff's case is utterly without merit to the point that I believe that the filing of the complaint and indeed the response to the motion without reasonable justification and the filing thereof is sanctionable. And so I'm going to do two things today. First of all, the plaintiff's motion for summary judgment was granted. Secondly, I'm directing Mr. Shapiro to file an application for services rendered within thirty days. To the extent that the Court determines that such fees are related to the defense of their adversary proceeding, sanctions will be awarded in the amount of those fees.

See App. at tab 2, pages 37-38.

B. Objection to Discharge

Section 727 of the Bankruptcy Code provides that the Bankruptcy Court must grant a discharge to a chapter 7 debtor unless one or more of the specific grounds for denial of a discharge set forth in subsection (a)(1)-(10) is proven to exist. 6 LAWRENCE P. KING, COLLIER ON BANKRUPTCY ¶ 727.01[1] (15th ed. Rev. 2003). The provisions in the Bankruptcy Code which deny a discharge to a debtor are generally construed liberally in favor of the debtor and strictly against the creditor; the reasons for denial of a discharge must be real and substantial, not technical and conjectural. Id. at ¶ 727.01[4]. At the trial on a complaint objecting to discharge, the plaintiff has the burden of proving the objection. Fed. R. Bankr. P. 4005.

Pursuant to § 727(a)(2), a discharge may be denied based upon the fraudulent transfer or concealment of property. In order to sustain an objection under this provision, the creditor must prove that the act complained of occurred within one year before the date of the filing of the

petition. Id. at ¶ 727.02[2][a]. If the act occurred more than one year before the bankruptcy filing, it may be a basis for objection to discharge if it is a "continuing concealment." Id. at ¶ 727.02[2][b], citing In re Hayes, 229 B.R. 253 (B.A.P. 1st Cir. 1999). However, the "concealment" refers to concealment of a property interest, not concealment of a transfer, and requires proof that the debtor intended with the concealment to hinder, delay or defraud creditors. Id.

Further, the creditor must prove that the act was done with actual intent to hinder, delay or defraud a creditor; absent specific intent to defraud creditors, a discharge should not be denied, and grounds for discharge should be liberally construed in favor of the debtor. COLLIER, ¶ 727.02[3][a] at 727-16, citing Commerce Bank & Trust v. Burgess (In re Burgess), 955 F.2d 134 (1st Cir. 1992).

Additionally, in order to sustain an objection to discharge under § 727(a)(2) , the creditor must prove that the act complained of was that of the debtor or his agent. COLLIER, ¶ 727.02[4] at 727-24. Finally, the creditor must prove that the act consisted of transferring, removing, destroying or concealing any of the debtor's property, or permitting any of these acts to be done. Id. at ¶ 727.02[1]. In order to justify a denial of discharge, it must be shown that there was an actual transfer of valuable property belonging to the debtor which reduced the assets available to creditors and which was made with a fraudulent intent. Id. at ¶ 727.02[5]. Concealment of assets is not limited to physical secretion, but may include placing assets beyond the reach of creditors or withholding knowledge of the assets by failing to divulge information. Id. at ¶ 727.02[6][b].

Pursuant to § 727(a)(3),[2] a debtor's discharge may be denied if the debtor has concealed, destroyed, or failed to keep or preserve any recorded information from which his financial condition or business transactions might be ascertained. The acts or omissions complained of must be that of the debtor or someone for whose conduct he is legally responsible. COLLIER, ¶ 727.03[2] at 727-29. The records do not need to be in any particular form; however, they must be sufficient to enable his creditors to reasonably ascertain his present financial condition and follow his business transactions for a reasonable period of time. Id. at ¶ 727.03[3][a]. The books and records, if required to be kept, are sufficient if they reflect, with a fair degree of accuracy, the debtor's financial condition in a manner appropriate for the debtor's business. Id. at ¶ 727.03[3][b]. The debtor's failure to produce proper records, careless bookkeeping, or even no bookkeeping, may not justify a denial of discharge if the missing information and the debtor's financial condition can be ascertained from the available records or records kept by others. Id. at ¶ 727.03[3][c]. In order to sustain an objection to discharge under § 727(a)(3), the plaintiff's proof should show either a failure by the debtor to keep or preserve any recorded information, or an act of destruction or concealment of any recorded information by the debtor, and, that by the failure or act complained of, it is impossible to ascertain the financial condition and material business transactions of the debtor. Id. at ¶ 727.03[4].

Pursuant to § 727(a)(4), a debtor's discharge may be denied if he knowingly and fraudulently made a false oath in connection with the case. COLLIER, § 727.04[1][a]. A false statement resulting from ignorance or carelessness is not knowing and fraudulent. Id. at

[2] The Panel notes that the Razzabonis did not raise allegations under § 727(a)(3) in their complaint. However, both parties later addressed them in the pre-trial report and at the hearing on summary judgment before the bankruptcy court.

§ 727.04[1][a]. The false statement must relate to a material matter; if it has no effect in the case it is not grounds for denying a discharge. Id. at § 727.04[a][b]; see also Varrasso, 37 F.3d 760, 763. If an item is omitted from the schedules by mistake or upon honest advice of counsel, the debtor's declaration that the schedules are "true and correct" should not be deemed willfully false, and discharge should not be denied. COLLIER, § 727.04[2] at 727-41.

C. The Arguments on Appeals

The parties' arguments on appeal focus on whether the debtor has an interest in the Stoneham property and, if so, whether the debtor concealed it or made false statements about it; whether the debtor concealed an interest in his brother's corporation, Northlantic, or used it to transfer or conceal assets from his own corporation, Royal Crest; and whether the debtor concealed or failed to keep records of monetary gifts and loans received from family and friends. We address each in turn.

D. The Stoneham Property

The Razzabonis argue that the debtor concealed his interest in the Stoneham property, failed to keep records as to the property, and made a false statement as to the property by failing to disclose his liability as a co-guarantor of the mortgage notes on the property. In support of their arguments, the Razzabonis cite to the following facts:

> 1. The debtor was President of Massbay, which purchased the property in 1987.
>
> 2. Massbay's 1985 tax return lists the debtor as owner of 100% of the company's common stock.
>
> 3. The debtor failed to produce Massbay records.

> 4. The debtor and his family have resided in the property since its purchase in 1987.
>
> 5. The debtor claimed a homestead exemption in the property in his bankruptcy schedules, filed property damage insurance claims with respect to the property, and did not claim a tax rental deduction on the property until 1995.
>
> 6. The debtor made some of the mortgage payments on the property and threatened the mortgage holder with bankruptcy protection if he sought to foreclose on the property.
>
> 7. The debtor claims there is no evidence of mortgage payments made in the three years proceeding bankruptcy, nor has he produced any records of property insurance claims filed on the property.
>
> 8. The debtor did not disclose his contingent liability on the property in his bankruptcy schedules.

According to the debtor, he has never had any interest in the Stoneham property. The property has always been titled to Massbay, and Massbay records have not been requested from the debtor or anyone else.

As to these allegations regarding the Stoneham property, the bankruptcy judge found:

> 1. Although the original bankruptcy schedules omitted the contingent liabilities on the two notes, the same were amended, and such omissions were not grounds for finding a violation of § 727.
>
> 2. The debtor's mother's failure to probate her husband's (the debtor's father's) will is irrelevant because there is no evidence that the property was ever transferred to or from the debtor.
>
> 3. The fact that the debtor is living in the property is "one leg towards showing that the debtor is the beneficial owner of that property, but it isn't enough in and of itself."
>
> 4. The making of mortgage payments, even if by the debtor, does not in and of itself "directly or by any reasonable inference" rise to

> an indication that the asset upon which the mortgage payments were being made is an asset of the debtor.

See App. at tab 2, page 34-35.

We have reviewed the record and we conclude that the Razzabonis have not presented sufficient evidence to demonstrate that there is a genuine issue for trial as to the debtor's interest in the Stoneham property. The fact that the debtor was the president of Massbay, which owned the property, does not extend to him an ownership interest. The fact that the debtor was listed as the owner of all of Massbay's common stock on its 1995 corporate tax return has been explained as an accountant's error. As for the debtor's failure to produce Massbay records, there is no indication that he has such records in his possession, nor that he is obligated to keep them. The fact that the debtor and his family live in the property is not conclusive of ownership, nor is the fact that debtor has made some payments on the property, either directly to the mortgage holder or via rent paid to his mother. Finally, the fact that the debtor did not include his liability as a guarantor on the property's mortgages in his bankruptcy schedules was rectified by amending the schedules, and is not a basis for denial of discharge under 11 U.S.C. § 727.

E. Northlantic Corporation

The Razzabonis argue that the debtor concealed his interest in Northlantic and transferred or removed assets from Royal Crest, concealed or failed to keep records of his interest in Northlantic, and has falsely denied his interest in Northlantic. In support of their arguments, the Razzabonis cite to the following facts:

> 1. Joseph Schifano loaned money to the debtor after Northlantic was formed.

> 2. Royal Crest went out of business within the same time period that Northlantic was formed.
>
> 3. The sum of $38,000 was withdrawn from Royal Crest within one year of the creation of Northlantic.
>
> 4. The fact that Northlantic had the same employees, equipment and office space as Royal Crest; business was conducted similarly at Royal Crest and Northlantic; and statements that Northlantic was created in response to debtor's problems with his creditors, all lead to an inference that the debtor had an interest in Northlantic.

According to the debtor, he has no interest in Northlantic Corporation, which was created and capitalized by his brother, Joseph. Although the debtor did receive loans from his brother, they are unrelated to Northlantic and were disclosed on his bankruptcy schedules. Further, the debtor argues that any activities involving Royal Crest were more than one year prior to the bankruptcy filing and are irrelevant to this case.

In addressing the allegations surrounding Northlantic, the bankruptcy court concluded that "the plaintiff contends very strongly that the debtor owns the North Atlantic Corporation. The assertions are made strongly, powerfully, but without basis in any fact whatsoever that has been brought before me in defense of this motion. There is no evidence, and I have reviewed the evidence, that the owner of North Atlantic is anyone other than Joseph." App. at tab 2, pages 35-36.

We have reviewed the record and we conclude that the Razzabonis have not presented sufficient evidence to demonstrate that there is a genuine issue for trial as to the debtor's interest or involvement in Northlantic. The Razzabonis would like us to infer from the facts cited above that the debtor withdrew money from Royal Crest, transferred it to his brother Joseph to create Northlantic, and then received money back from Northlantic, while the brothers continued

operating their construction business under the Northlantic name instead of the Royal Crest name. However, they have not presented evidence in support of those inferences sufficiently specific to warrant a trial on the objection to discharge under § 727.

F. Gifts and Loans

The Razzabonis argue that the debtor concealed or transferred his interest in monetary gifts and/or loans, concealed or failed to keep records of said gifts or loans, and made false statements as to the gifts or loans. Specifically, they note:

> 1. The debtor has borrowed over $50,000 from family members;
>
> 2. The debtor has borrowed money from friends;
>
> 3. The debtor believed that those who loaned him money expected to be paid back;
>
> 4. The debtor's mother gave or loaned him money before and after the bankruptcy petition as filed;
>
> 5. The debtor received a transfer of money from Royal Crest; and
>
> 6. The debtor received a loan from Northlantic.

According to the debtor, the loans and gifts mentioned by the Razzabonis were received more than one year before the filing of the petition and had been spent by the time the bankruptcy petition was filed.

As to these allegations, the bankruptcy court stated "the allegations about the $16,000 loan from Joseph to the debtor–I really don't understand why that comes into the picture at all." The court further noted that the debtor's wife's salary, his failure to file a tax return, his lifestyle, and his failure to maintain a bank account were all irrelevant to the § 727(a) determination before

the court. Finally, the bankruptcy court noted that there is no evidence that records were concealed or that the debtor's claim that they do not even exist is false.

We have reviewed the record and we conclude that the Razzabonis have not presented sufficient evidence to demonstrate that there is a genuine issue for trial as to the debtor's gifts and loans. Even a cursory review of the record shows that the debtor subsists on the handouts and goodwill of his family and friends. The debtor's father owned a construction company which purchased the properties where the debtor, as well as his brother and mother now live. Since their father died, the debtor and his brother, uneducated but skilled in general construction, have had their own companies, through which they earn a modest living. There is no indication from the record that assets have been transferred to or from the debtor in an attempt to defraud creditors, or indeed that they are anything other than the gifts and loans as explained by the debtor and his family.

V. Conclusion

The bankruptcy court stated that "in defense of this motion the plaintiffs make very selective recycles of partial facts and partially true facts which one can track back to the evidence before me and find without substance." App. at tab 2, page 37. We agree. "Creating a genuine issue of material fact requires hard proof rather than spongy rhetoric." Hale, 289 B.R. at 792. A party opposing a motion for summary judgment must present "'definite, competent evidence to rebut the motion.'" Maldonado-Denis, 23 F.3d 576, 581 (1st Cir. 1994) (citation omitted). "Motions for summary judgment must be decided on the record as its stands, not on litigants' visions of what the facts might some day reveal." Id. "'[B]rash conjecture, coupled with earnest hope that something concrete will eventually materialize, is insufficient to block

summary judgment.'" Id. (citation omitted). The Razzabonis have not demonstrated how the record which is before this Panel establishes that their claims objecting to the debtor's discharge are trial worthy.

The debtor met his burden of establishing why summary judgment should be entered in his favor; the Razzabonis did not meet their burden of establishing why it should not. Therefore, the bankruptcy court did not err in granting summary judgment for the debtor. Accordingly, the bankruptcy court's order granting summary judgment for the debtor is AFFIRMED.