APPENDIX

A. Memorandum Opinion of the United States Court of Appeals for the Ninth Circuit, filed November 29, 2019.

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APPENDIX – PART A

786 Fed. Appx. 688, 2019 U.S. App. LEXIS 35715

Notice: Please refer to Federal Rules of Appellate Procedure 32.1 governing the citation to unpublished opinions.

United States Court of Appeals for the Ninth Circuit

In re: GERSON IRVING FOX, Debtor

GERSON IRVING FOX, Appellant,

v.

ELISSA MILLER, Chapter 7 Trustee, Appellee.

No. 18-56182

Argued: November 8, 2019
Filed: November 29, 2019

Before: SCHROEDER and FRIEDLAND, Circuit Judges, and SILVER**, District Judge.

** The Honorable Roslyn O. Silver, United States District Judge for the District of Arizona, sitting by designation.

[*688] MEMORANDUM*

Gerson Irving Fox appeals the district court's order affirming the bankruptcy court's grant of summary judgment in favor of Elissa Miller, the trustee in Fox's Chapter 7 bankruptcy case. The bankruptcy court denied Fox discharge of his debt pursuant to 11 U.S.C. § 727(a)(3) upon finding that he had failed to produce adequate records from which the trustee could ascertain his financial condition. We have jurisdiction under 28 U.S.C. § 158(d)(1). We affirm.

The bankruptcy court determined there was no genuine dispute of material fact that Fox had failed to maintain and preserve adequate records such that it was impossible to determine Fox's financial condition. The bankruptcy court also concluded [**2] Fox was unable to justify his failure to maintain records. Thus, the bankruptcy court denied Fox discharge pursuant to 11 U.S.C. § 727(a)(3). Reviewing the matter de novo, and viewing the evidence in the light most favorable to Fox, we conclude the bankruptcy court was correct. *In re Caneva*, 550 F.3d 755, 760 (9th Cir. 2008) (setting forth standard of review).

Fox is an attorney, a Certified Public Accountant, and operated a successful business for decades. Fox also had extensive and complicated financial investments. Given his sophistication and financial history, Fox should have been able to produce [*689] more fulsome financial records than what he provided the trustee. *See id.* at 762 (noting that a "sophisticated" debtor can be expected to maintain records). Fox, however, does not dispute that he was unable to pro-

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* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

duce recent tax returns, statements for several investment accounts, documents related to two trusts, and documents related to various investments Fox entered into with a former business partner. Without these documents, it was impossible for the trustee to determine Fox's "financial condition and material business transactions."[1] *Id.* at 761 (quoting *In re Cox*, 41 F.3d 1294, 1296 (9th Cir. 1994)).

Having failed to produce adequate records, Fox bore the burden "to justify the inadequacy or nonexistence of the records." [**3] *Id.* (quoting *In re Cox*, 41 F.3d at 1296). The relevant inquiry is "whether others in like circumstances would ordinarily keep" better records than what Fox was able to provide. *In re Cox*, 41 F.3d at 1299 (quoting *Matter of Russo*, 3 B.R. 28, 34 (Bankr. E.D.N.Y. 1980)). Fox argues he was unable to produce the records of the investments handled by his former business partner because that business partner defrauded Fox and never provided Fox with any relevant records. But even if that is true, many of the documents Fox failed to produce had no connection to his former business partner. Thus, the fact that Fox's former business partner might have withheld certain categories of records from Fox does not excuse Fox's failure to maintain records across the board.

Fox also argues his age and a variety of physical ailments justified the lack of records. But Fox's counsel specifically disclaimed this justification before the bankruptcy court. And Fox does not explain why his

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[1] Fox lacks support for his assertion that the trustee had an obligation to try to obtain the records from other sources and, in any event, there is no evidence that the trustee could have found all the necessary records from other sources.

age and physical ailments rendered him unable to file tax returns or maintain sufficient records to allow the trustee to assess his financial condition. Other individuals in similar circumstances would have far more records than what Fox maintained.

AFFIRMED.

App. 5

APPENDIX - PART B

589 B.R. 659, 2018 U.S. Dist. LEXIS 130969

United States District Court for the Central District of California

GERSON IRVING FOX, Appellant,

v.

ELISSA MILLER, in her capacity as Chapter 7 trustee, Appellee.

Case No. CV 17-8302-R

Decided/Filed: August 1, 2018

Opinion by: MANUEL L. REAL, United States District Judge.

[*661] ORDER DENYING APPEAL

This matter comes before the Court on appeal from the United States Bankruptcy Court for the Central District of California. Appellant filed his opening brief on February 26, 2018. (Dkt. 11). This Court took the matter under submission on April 12, 2018.

On September 17, 2015, Appellant filed for chapter 7 bankruptcy. On April 10, 2017, Appellee filed the First Amended Complaint, which states two claims alleging that Appellant's discharge should be denied under 11 U.S.C. § 727(a)(3). Appellee moved for summary judgment on the second claim. On November 1, 2017, the bankruptcy court granted the

motion and entered judgment in favor of Appellee. The bankruptcy court held that (1) there was no genuine dispute of material fact that Appellant [**2] failed to keep or preserve records from which the trustee could ascertain Appellant's financial condition, as required by § 727(a)(3), and (2) there was no genuine dispute of material fact that Appellant's failure to keep books and records was not justified.

Appellant appeals the bankruptcy court's November 1, 2017, Order granting summary judgment. This Court has jurisdiction over the appeal under 28 U.S.C. § 158. The issues on appeal are:

> 1. Do triable issues of material fact exist as to whether Appellant failed to keep or preserve books and records as required by 11 U.S.C. § 727(a)(3)?
>
> 2. Do triable issues of material fact exist as to whether Appellant's conduct was justified under the circumstances of the case?

"We review the bankruptcy court's grant of summary judgment de novo, and must [*662] view the evidence in the light most favorable to the nonmoving party and determine whether there are any genuine issues of material fact and whether the bankruptcy court correctly applied the substantive law." *In re Caneva*, 550 F.3d 755, 760 (9th Cir. 2008). A material fact is one that, "under the governing substantive law...could affect the outcome of the case." *Id.* A genuine issue of material fact exists when "the evidence is such that a reasonable jury could return a verdict for the nonmoving [**3] party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986). The party moving for summary judgment must initially

identify the evidence which it believes demonstrates that there is no genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986). Once the moving party meets its burden, the nonmoving party must "set out specific facts showing a genuine issue for trial." *In re Caneva*, 550 F.3d at 761.

Facts

Appellant was a Certified Public Accountant for a few years in the 1950s. He also attended law school but did not graduate. Appellant was admitted to the California State Bar in 1958. In 1956, Appellant co-founded the business Barry's Jewelers. Appellant managed the business until 1989. He sold his interest in the business in or around 1995. After this, but before petitioning for bankruptcy, Appellant invested in over thirty-five real properties through numerous single purpose entities.

On September 17, 2015, Appellant filed a voluntary petition for chapter 7 bankruptcy. During the initial meeting of the creditors, Appellant acknowledged that he had not filed tax returns since 2012, stating "that just didn't seem to be a top priority." When asked where Appellant keeps his legal papers he responded, "I don't." When asked who would have possession of legal documents, such as old tax returns, [**4] Appellant stated, "[d]uring all the litigation I gave whatever documents I had to the different attorneys." When asked about a $175,000 debt owed to Charlotte Burch-Leeds, he simply stated that "[s]he lent me some money to pay for some legal fees." When asked questions regarding the Bearbiz Irrevocable Trust ("Bearbiz"), he stated that he "thinks [Bearbiz] was some trust [he] used to own,"

but did not know what happened to the assets in Bearbiz. When asked "who would have the documents necessary to prepare 2013 and 2014 taxes for you?" Appellant stated, "I don't think anybody has." When asked what Appellant would have done with documents necessary to prepare 2013 and 2014 taxes, Appellant responded, "I have no idea."

At the end of the meeting, Appellee's counsel gave Appellant's counsel a list of document requests (the "341(a) Requests").[1] In response, Appellant produced [*663] a banker's box containing approximately 3,000 pages of documents (the "Produced Documents"). After reviewing the Produced Documents, Appellee concluded that Appellant did not respond to a number of document requests. At the second meet-

[1] Appellee requested the following categories of documents: (1) January 2013 through current bank records for all accounts held by Defendant individually, jointly with his wife, and for all LLC/Inc.'s that Defendants holds/held interest in; (2) asset list for the Gerson and Gertrude Fox Family Trust (the "Fox Family Trust") for 2012-2015; (3) a copy of the Bearbiz Irrevocable Trust, as listed on Defendant's 2012 tax return; (4) a copy of all amendments to the Bearbiz Irrevocable Trust; (5) bank records for Bearbiz from 2012-2015; (6) documents indicating the settlors of Bearbiz, beneficiaries of Bearbiz, trustee(s) of Bearbiz, and all assets held by Bearbiz trust; (7) all of Defendant's K-1s from 2012 through 2015; (8) 2012-2015 statements of account, dividend history, and documents related to the sale, liquidation, holding, etc., from the following entities listed on Appellant's 2012 tax return: Legg Mason, RBC Dominion, Wells Fargo, Charles Schwab; (9) 2012-2015 K-1s, 2012-2015 tax returns, 2012-2013 bank records, asset list, formation documents, filings with secretary of state, documents related to the sale, liquidation, foreclosure, and/or assignment of Defendant's interest, and historical through current officer, director, and shareholder lists for the various "Fox Entities" listed on Appellant's 2012 tax return.

ing of the creditors, Appellant's counsel acknowledged, "I get that you haven't received [**5] everything. He just doesn't have anything else to give."

The Produced Documents are all of the documents in Appellant's possession, custody, or control that are responsive to the 341(a) Requests. The Produced Documents did not include a single document related to Bearbiz, including documents related to any loans or investments by Bearbiz. The Produced Documents did not include an asset list for the Fox Family Trust for any year between 2012 and Petition Date. The Produced Documents did not contain a single K-1 issued to Defendant in the year of 2013, 2014 or 2015. The Produced Documents did not include a single K-1 from Bearbiz for any tax year. The Produced Documents did not include a single document related to Appellant's Charles Schwab account. The Produced Documents included only one document related to Appellant's Legg Mason account, a 2012 1099-B. The Produced Documents included only one document related to Appellant's RBC Dominion account, a 2012 1099-DIV for RBC Wealth Management. The Produced Documents did not include any documents related to the investment interest expenses that Appellant claimed on his 2012 tax return. The Produced Documents did not include any documents [**6] related to Appellant's 2013, 2014, and/or 2015 tax returns. As for Appellant's debt to Burch-Leeds, the Produced Documents included only a copy of a promissory note between Appellant and Burch-Leeds.

Appellant's 2012 tax return disclosed passive income or loss from twenty-eight different entities, including $181,656.00 of income from Bearbiz, ordinary dividends from Charles Schwab, Legg Mason, RBC

Dominion, and Wells Fargo, and income or loss from three rental properties. It disclosed $267,322.00 in net investment income and an $184,791.00 investment interest expense deduction. The tax return also claimed an investment interest expense of approximately $7,000.00 associated with Burch-Leeds.

Disputed Facts

Appellant is the settlor of Bearbiz and he transferred assets to Bearbiz in April 2011. Because Bearbiz is an intentionally deficient grantor trust, Appellant is liable for any taxable event associated with Bearbiz. In 2011, Bearbiz obtained a loan "for investment purposes" and claimed approximately $63,000.00 in investment interest expenses, $59,000.00 of which carried over to Appellant's 2012 tax return. According to Appellant's 2011 and 2012 tax returns, Bearbiz made nearly $1,000,000.00 [**7] in profit in less than two years.

Appellant disputes Uncontroverted Fact ("UF") 6, "[Appellant] is a CPA/accountant." However, Appellant's Opening Brief states that he "became a Certified Public Account in California in the 1950s...[and he] practice[ed] accountancy on a limited basis for a few years." Br. at 10. There is no genuine dispute that appellant is an accountant.

Appellant disputes UF 9, "[Appellant] is a sophisticated and educated business person." First, it is undisputed that Appellant is educated. Not only was he an accountant, [*664] he attended law school and was admitted to the California State Bar in 1958. "Instead of pursuing a career in accounting or law, [Appellant]...co-founded a jewelry company called Barry's Jewelers" in 1956. Br. at 11. "The business was very successful, [Appellant] relinquished man-

agement responsibility in 1989, and in or around 1995 [Appellant] sold his interest in Barry's Jewelers." *Id.* Appellant also states that he was an "eminently successful businessman." Excerpts of Record ("ER") at 246. After selling his interest in Barry's Jewelers, Appellant invested in multiple properties. There is no genuine dispute that Appellant is a sophisticated and educated [**8] business person.

Appellant disputes UF 29, "The Trustee and her counsel reviewed the Produced Documents and determined that a substantial number of 341(a) Requests were not responded to," on the basis that this is not an asserted fact but a legal conclusion. This is a properly asserted fact, and there is no genuine dispute here—Appellant did not dispute any of the facts regarding the documents that he turned over. At the second meeting of the creditors, his counsel acknowledged that the production was missing various categories of documents. Moreover, Appellant concedes that he has not responded to a substantial number of 341(a) Requests. Appellant states, "I acknowledge that I have been unable to provide the Trustee with many of the documents she requests, but I did provide what I had.... I am certain that I have lost track and recollection of many documents I once had." ER 260-261. There is no genuine dispute that the Produced Documents did not respond to a substantial number of 341(a) Requests.

Appellant disputes UF 75, "Based upon [Appellant's] failure to keep, maintain, and/or preserve adequate books and records, it is impossible for [Appellee] to accurately ascertain [Appellant's] [**9] financial condition or business transactions based upon the documents he kept, preserved and produced to [Appellee]." Appellant also disputes UF 76, "Due to

[Appellant] being a sophisticated businessman, lawyer, and accountant, Defendant's failure to keep, maintain and/or preserve adequate books and records is not justified under all of the circumstances of this case." These are precisely the issues on appeal and will be addressed in the discussion.

Discussion

Title 11 of the United States Code, § 727(a)(3), provides that "[t]he Court shall grant the debtor a discharge, unless — the debtor has...failed to keep or preserve any recorded information, including books, documents, records, and papers, from which the debtor's financial condition or business transactions might be ascertained, unless such act or failure to act was justified under all of the circumstances of the case." 11 U.S.C. § 727(a)(3).

To state a prima facie case under § 727(a)(3), a plaintiff must show "(1) that the debtor failed to maintain and preserve adequate records, and (2) that such failure makes it impossible to ascertain the debtor's financial condition and material business transactions." *In re Cox*, 41 F.3d 1294, 1296 (9th Cir. 1994). "[A] Court does not examine intent in determining whether a debtor has preserved adequate books [**10] and records of his financial affairs. Rather, the Court must determine whether creditors could ascertain the debtor's financial condition and material business transactions from the record the [debtor] presents." *In re Schreiter*, 2007 Bankr. LEXIS 2094, 2007 WL 1772176, at *3 (D. Ariz. June 19, 2007).

In this case, it is undisputed that Appellant failed to keep and maintain records of his financial affairs. Appellant devotes significant space in his

brief discussing [*665] the documents that he did turn over—some 3,000 pages responsive to the 341(a) Requests. However, the issue in this case has nothing to do with the *volume* of documents that Appellant kept, preserved, and produced. The issue here is about the *substance* of the Produced Documents and whether Appellee could ascertain Appellant's financial condition based on those documents. *See In re Caneva*, 550 F.3d at 761. There is no genuine dispute of fact that Appellee could not.

First, Appellant failed to file tax returns in 2013 and 2014, and he also failed to maintain the documents necessary for filing a tax return in 2013, 2014, and 2015. "Tax returns are quintessential items in a personal bankruptcy. It is not difficult to discern how a tax return would provide a creditor or a trustee with important financial information about a debtor: it provides [**11] substantial personal financial information such as income, expenses, and stock transactions...it is immaterial whether [Appellant] failed to file these returns intentionally. [Appellant's] failure to file tax returns provides another basis for denying [Appellant's] discharge under section 727(a)(3) because it prevents creditors and trustees from obtaining important financial information." *In re Gartner*, 326 B.R. 357, 377 (Bankr. S.D. Tex. 2005).

In this case, Appellant has not filed a tax return since 2012. This 2012 tax return disclosed substantial information about Appellant's finances—it showed passive income or loss from twenty-eight different entities, income from Bearbiz, income or loss from rental properties, and dividends from Charles Schwab, Legg Mason, RBC Dominion, and Wells Fargo. Without tax returns from 2013 or 2014, Ap-

pellant cannot provide Appellee with important information necessary to determine his financial status. Courts have denied a discharge under § 727(a)(3) based solely on a debtor's failure to file tax returns or keep the documents that would allow the trustee to reconstruct his financial status. *See In re Weisenfeld*, 2011 Bankr. LEXIS 1021, at *13 (Bankr. S.D. Fla. Mar. 18, 2011).

Appellant also failed to keep or preserve documents related to Bearbiz, the Fox Entities, his Charles Schwab, RBC Dominion, and Legg Mason [**12] accounts, and his debt to Burch-Leeds. "[W]hen a debtor owns and controls numerous business entities and engages in substantial financial transactions, the complete absence of recorded information related to those entities and transaction establishes a prima facie violation of 11 U.S.C. § 727(a)(3)." *In re Caneva*, 550 F.3d at 762.

Here, it is undisputed that Appellant is the settlor of Bearbiz and transferred assets to Bearbiz. It is also undisputed that Appellant failed to keep, maintain, or produce a single document related to Bearbiz. With regard to the Fox Entities, it is undisputed that Appellant failed to preserve bank records, asset lists, or tax returns for the Fox Entities, as well as documents related to the sale, liquidation, foreclosure, and assignment of Appellant's interest in any of the Fox Entities. It is undisputed that the only documents Appellant kept related to his RBC Dominion and Legg Mason accounts were a 2012 1099-B for each account, and he did not keep any documents related to the Charles Schwab account. Last, it is undisputed that Appellant owes a debt to Charlotte Burch-Leeds arising from a loan she gave him for "legal fees." It is undisputed that the only document

Appellant kept in relation to this debt [**13] was a two-page promissory note. It is also undisputed that Defendant's 2012 tax return claims an investment interest expense of approximately $7,000 associated with Burch-Leeds, which implies that Appellant held some property for [*666] investment in connection with this debt. *See* 26 U.S.C. § 163(d)(3)(A) ("The term 'investment interest' means any interest allowable as a deduction under this chapter...which is paid or accrued on indebtedness properly allocable to property held for investment."). Appellant's undisputed failure to keep or preserve documents related to these entities and transactions is sufficient to establish a prima facie violation of § 727(a)(3). *In re Caneva*, 550 F.3d at 762; *see also In re Cox*, 904 F.2d 1399, 1401 (9th Cir. 1990) ("Creditors are not required to risk the withholding or concealment of assets by the bankrupt under cover of a chaotic or incomplete set of books or records."); *In re Brandenfels*, 2015 Bankr. LEXIS 3410, at *17 (B.A.P. 9th Cir. Oct. 7, 2015) ("It is not enough for [a debtor] to provide records about her overall financial situation; she must also provide records adequate to allow creditors to trace all of her transactions.").

The mere fact that Appellant produced a substantial quantity of documents does not automatically generate a genuine dispute of material fact as to whether the documents are adequate to determine his financial condition [**14] notwithstanding his admission that he has no business records for numerous entities and transactions. *In re Caneva*, 550 F.3d at 761. As stated in *Caneva*, a debtor has an "affirmative duty" to "keep and preserve business records that will enable his creditors to accurately ascertain his financial condition and business transac-

tions." *Id.* at 762. In this case, Appellant does not dispute Appellee's statements that he failed to keep and preserve various business records that were necessary to determine his financial condition and business transactions. Appellant also does not present evidence demonstrating a triable issue of material fact as to whether Appellee could ascertain his financial condition based on the Produced Documents. Therefore, there is no genuine dispute of material fact that Appellant failed to maintain and preserve adequate books and records as required by § 727(a)(3).

"If a creditor establishes a prima facie violation of § 727(a)(3), a debtor may show that he is nonetheless entitled to discharge by establishing that his failure to keep or preserve records was justified under the circumstances of his case." *In re Caneva*, 550 F.3d at 763. To determine whether a debtor's failure to keep books and records was justified, "the Court must determine whether a reasonable [**15] person would have acted similarly, taking into consideration education, experience, and sophistication; the volume or complexity of the debtor's business; the amount of credit extended to the debtor or his business; and any other circumstances that should be fairly considered. A sophisticated business person is generally held to a high standard in record keeping." *In re Schreiter*, 2007 Bankr. LEXIS 2094, 2007 WL 1772176, at *3.

In this case, there is no genuine dispute that Appellant has worn many professional hats—he has been a lawyer, an accountant, and a sophisticated businessman. It is undisputed that he was a Certified Public Accountant and admitted to the California State Bar. It is undisputed that he cofounded and operated a business, Barry's Jewelers, for almost for-

ty years. It is also undisputed that Appellant has invested in several real properties through numerous single purpose entities. These facts, taken together, show that Appellant is indisputably a sophisticated business person and subject to a higher standard of record keeping. *Id.* A professional such as Appellant could reasonably be expected to keep books and records of his financial transactions. *See* [*667] *Meridian Bank v. Alten*, 958 F.2d 1226, 1231-32 (3d Cir. 1992) ("As an experienced attorney, [the debtor] is not an unsophisticated wage [**16] earner. He is a knowledgeable and professional person who knew the value of maintaining adequate records."). The fact that he no longer practices law or accountancy, sold his interest in his business, and was defrauded in the past does not suddenly render him unsophisticated. The question here is whether a *reasonable* person with Appellant's education, experience, and sophistication would have kept adequate books and records. Based on the record, there is no genuine dispute of material fact that a reasonable person with Appellant's education, experience, and sophistication would have kept adequate books and records.

Appellant offers no genuine justification for his failure to maintain adequate books and records. On summary judgment, Appellant stated that he "provided [Appellee] with what he had, and it has not resulted in any real prejudice to [Appellee]." ER 247. Whether or not Appellant's failure resulted in any "real prejudice" to Appellee (which the Court will probably never know, since Appellant's records do not paint a complete picture of his financial condition), he must still justify the failure in order to obtain a discharge under § 727(a)(3). *In re Caneva*, 550 F.3d at 763. In this case, Appellant suggests that his

[**17] failure to maintain adequate records was related to his age and failing health, however he cannot exempt himself from this duty by blandly asserting the status of an elderly person in poor health. *See In re Losinski*, 80 B.R. 464, 474 (Bankr. D. Minn. 1987); *see also FTC v. Publ'g Clearing House*, 104 F.3d 1168, 1172 (9th Cir. 1997) ("A conclusory, self-serving affidavit, lacking detailed facts and any supporting evidence, is insufficient to create a genuine issue of material fact. The same can be said regarding conclusory, self-serving statements in appellate briefs."). Appellant must present evidence demonstrating that there is a triable issue of material fact as to whether his failure to maintain adequate records was justified under the circumstances. Appellant presents no such evidence, and as such, no triable issue of material fact exists. *In re Oracle Corp. Sec. Litig.*, 627 F.3d 376, 377 (9th Cir. 2010) ("Where the non-moving party bears the burden of proof at trial, the moving party need only prove that there is an absence of evidence to support the non-moving party's case.").

Based on the evidence in the record, there is no genuine issue of material fact that Appellant failed to maintain adequate books and records as required by § 727(a)(3). There is also no genuine dispute of material fact that Appellant's failure [**18] to maintain adequate books and records was not justified. Accordingly, Appellee is entitled to judgment as a matter of law. The bankruptcy court's judgment is affirmed.

IT IS HEREBY ORDERED that Appellant's appeal is DENIED. (Dkt. 11).

Dated: August 1, 2018.

/s/ Manuel L. Real
MANUEL L. REAL
UNITED STATES DISTRICT JUDGE

APPENDIX - PART C

United States Bankruptcy Court
Central District of California
Los Angeles Division

In re: GERSON IRVING FOX, Debtor

ELISSA MILLER, solely in her capacity as the Chapter 7 Trustee, Plaintiff

v.

GERSON IRVING FOX, Defendants.

Case No. 2:15-bk-24399-BB
Chapter 7
Adv. No. 2:16-ap-01235-BB

Argued: October 31, 2017
Filed: November 1, 2017

Before: BLUEBOND, United States Bankruptcy Court Judge.

SUMMARY JUDGMENT

The motion for summary judgment filed by Plaintiff Elissa D. Miller Chapter 7 trustee ("Plaintiff") for the bankruptcy estate of Gerson I. Fox ("Defendant") came on for regularly hearing on October 31, 2017 at 2:00 p.m. in the United States Bankruptcy Court for the Central District of California, the Honorable Sheri Bluebond, United States Bankruptcy Court Judge presiding. Ryan D. O'Dea of Shul-

man Hodges & Bastian LLP appeared on behalf of the Plaintiff and moving party. Irving Gross appeared on behalf of Defendant and responding party.

The Court, having fully considered the parties' pleadings and the evidence therein, and having entertained oral argument, and good cause appearing therefor,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Plaintiff's motion for summary judgment is GRANTED and judgment is hereby entered in favor of Plaintiff as to her second claim for relief contained within the operative complaint pursuant to 11 U.S.C. § 727(a)(3) for his unjustified failure to keep and/or preserve adequate books and records. The trustee on the record at the time of hearing on the motion for summary judgment agreed to voluntarily dismiss any other remaining claims.

Dated: November 1, 2017.

/s/ Sheri Bluebond

SHERI BLUEBOND

UNITED STATES BANKRUPTCY JUDGE

APPENDIX - PART D

United States Bankruptcy Court
Central District of California
Los Angeles Division

In re: GERSON IRVING FOX, Debtor

ELISSA MILLER, solely in her capacity as the Chapter 7 Trustee, Plaintiff

v.

GERSON IRVING FOX, Defendants.

Case No. 2:15-bk-24399-BB
Chapter 7
Adv. No. 2:16-ap-01235-BB

Before: BLUEBOND, United States Bankruptcy Court Judge.

DECLARATION OF GERSON FOX IN OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT, OR IN THE ALTERNATIVE, PARTIAL SUMMARY JUDGMENT

I, Gerson Fox, hereby declare,

1. I am the Chapter 7 debtor in this case, having commenced this case by filing a voluntary petition under Chapter 7 of the Bankruptcy Code on September 17, 2015 ("Petition Date").

2. I am ninety (90) years old. On the Petition Date I was eighty-eight (88) years old and in ill health; my health has only deteriorated since then. Since my heart attack in 2004, I have had a series of mini-strokes. I have also have had cardiovascular disease for years, a pacemaker inserted, as well as severe diabetes mellitus and sleep apnea. I have been in and out of the hospital for the last several years. A copy of a January 17, 2017 letter from my cardiologist, Dr. Harold Karpman, explaining my physical condition is marked as Exhibit "A" and is attached hereto and incorporated herein by reference.

3. I currently live with my wife, Gertrude Fox, in a house which is her separate property. I am bedridden and unable to walk, and my vision and hearing are also impaired. I have several caregivers who along with my wife take care of me on a full-time basis.

4. I became licensed as a Certified Public Accountant in the 1950's. I practiced accounting on a limited basis for a few years to support my family while I was in law school, which I never finished, but have not practiced accounting in almost 60 years. Similarly, although I was admitted to the California State Bar in 1958, other than doing some legal work for a very short period of time after I passed the bar, I never practiced law. I did not pursue continuing coursework in law or in accounting after 1958. In short, I have not engaged in the legal profession or accounting profession in almost 60 years.

5. Instead of pursuing a career in law or accounting, I pursued other business interests. Specifically, in 1956 I co-founded a jewelry company

called Barry's Jewelers. Barry's Jewelers utilized the services of employees and outside professionals to provide accounting and legal services. In approximately 1995, I sold my interest in Barry's Jewelers and effectively retired.

6. In the 1970s, I had the misfortune of meeting Michael Kamen ("Kamen"). Barry's Jewelers leased space in one of Kamen's buildings. Over the years, the landlord/tenant relationship between Kamen and I turned into a friendship. After I retired from Barry's Jewelers and ceased active operations of any kind, Kamen approached me and asked me to invest in various real estate projects with which he was connected or would locate in the future, and I agreed. Although I had some real estate investments at the time, I had nowhere near the knowledge or expertise Kamen appeared to have in successfully operating a full-scale commercial real estate investment business; that is, one that included sourcing, financing, leasing, developing, selling, trading and maintaining commercial real estate properties. For that reason, and in light of the close relationship Kamen and I had developed over several decades, I trusted and relied on Kamen to act fairly and honestly in our business investments. I should also note that my co-founder of Barry's Jewelers and partner for over half a century, David Blum, and I did everything on a handshake. Most of my communications and discussions with Kamen regarding our investments were oral; we were good friends, and so we would meet or Kamen would call me to discuss financial needs. Kamen did not provide me with financials or accountings for the various investments but would advise me (he or Rick Barreca) when funds were needed and/or how much was necessary. When

profits were received, Kamen would advise me and send me a check or advise me that he needs to use the funds for other purposes relating to our investments. Again, based on my age and course of conduct with my friends, I believed and relied on Kamen's representations without extensive documents supporting each investment. Then, as my health began to deteriorate over the years, I really had no choice but to rely on Kamen more and more. Most of the transactions occurred through Kamen's operating company, MIKA (and the multiple entities that operated under the MIKA umbrella, such as MIKA Realty, MIKA Management and others).

7. That trust, as I came to realize and as the Court knows, was terribly misplaced. As a result, I was robbed blind over the next several years by Kamen and his cronies. Through the efforts and assistance of my son, Ted Fox, and certain professionals, I began to uncover Kamen's fraud in 2011. Unfortunately, it turned out to be too little too late.

8. My investigations revealed that while Kamen would advise me that I was investing in certain projects, he utilized funds which I provided to MIKA to invest in other transactions in which I was not even an interested party and which were not disclosed to me. Among other things, I found that Kamen had used capital that I provided to make distributions to himself, he improperly co-mingled funds between entities in which I was an investor and entities in which I had no interest, and he failed to pay such critical bills as the mortgage, property taxes and insurance.

9. I also learned that Kamen would use income and proceeds from investments that I was a

part of to fund his other ventures, to my exclusion, while failing to pay ordinary expenses on self-sustaining properties. When bills were not paid and loans would go into foreclosure, Kamen would utilize his employees and associates to contact the lenders and acquire the secured debt at a discount since the loan was no longer performing. Once acquired, the new "creditor" would continue with foreclosure proceedings to unfairly obtain the property at a discount, and in the process would also sue me for any deficiency.

10. As I began to learn about defaulted loans and foreclosures, I began learning that Kamen and Rick Barreca would routinely forge my name to personal guaranties of debts. As a result, when loans went into default, I would be contacted and sued by the lenders on account of my alleged personal guaranties, which I never executed or authorized to be executed.

11. Prior to Kamen's bankruptcy filing, which is pending before this Court, I retained counsel to assist with the investigation and action. Mr. David Frank who was managing the properties in 2011 caused certain of the entities to commence Chapter 11 bankruptcy proceedings to preserve their value and avoid further dissipation by Kamen and his agents and representatives.

12. In connection with all of the foregoing bankruptcy cases, due to a management dispute with Kamen, this Court ordered the appointment of a Chapter 11 trustee. In each such case, Howard Ehrenberg was appointed as the trustee over the various entities. Although Mr. Ehrenberg has been a trustee of those entities for many years, to date, I

have received no accounting or financial information from Mr. Ehrenberg or his agents or representatives with respect to such properties and cases. I understand that Mr. Ehrenberg is a partner at Sulmeyer Kupetz with Ms. Miller, my Chapter 7 trustee. I do not know what Mr. Ehrenberg provided to the Trustee, but I do know that he did not provide the LLC financials to me. As a result, I am not in possession of such documents and could not have provided them to the Trustee. As I explain below, I provided to the Trustee all of the documents I had or was able to obtain from others, such as my tax preparer and certain attorneys. I could not provide documents I did not have.

13. During the pendency of the LLC bankruptcy cases, an entity known as "Fallen Star", obtained a charging order as to virtually all of my LLC interests. Through the assistance of Judge Manuel Real, United States District Court Judge, an auction was scheduled for the sale of such interests, wherein Fallen Star sought to foreclose on such interests. Ultimate Action, LLC, a company in which my son, Ted Fox, holds an interest, bid millions of dollars and acquired all such interests. No portion of those funds came from me, my assets or my estate, as the Trustee has previously acknowledged.

14. For many years, I have not received any salary or compensation from work. Although I had some other income producing investments with my former partner in Barry's Jewelers, David Blum, my income was largely derived from real estate investments with Kamen. After the LLC bankruptcies and Kamen bankruptcy, such income effectively disappeared or was swallowed by losses and lawsuits resulting from Kamen's activities. Between lack of

meaningful income and my continuing poor health, I was unable to have all my tax returns prepared. In addition, because of my sizeable losses I would owe no taxes.

15. By mid-2015, Gertrude and I had lost most everything that we had built up over decades, and on September 17, 2015, I filed for personal bankruptcy.

16. I acknowledge that I have been unable to provide the Trustee with many of the documents she requested, but I did provide what I had. As I explained above, in the first instance I never received from Kamen all of the documentation relating to the investments that, in retrospect, he should have provided to me. However, to the extent the Trustee is seeking such documents, I am confident she can obtain them from either or both Mr. Ehrenberg, the trustee for the portfolio of entities, and/or Mr. Richard Laski, the trustee in Kamen's bankruptcy case.

17. As I also explained at my 341a meeting of creditors, between having provided documents over the years to various attorneys, my tax preparer and probably others who I don't actually recall, I am certain that I have lost track and recollection of many documents I once had.

18. Given my circumstances, I provided the Trustee with all the documents I could locate. Specifically, I obtained documents from my tax preparer and from former attorneys, and I also had in my home a file containing documents. I provided the Trustee with all of those documents and did not withhold anything. Any suggestion that I was not cooperating with the Trustee is simply not true.

What I provided to the Trustee was the best I could do at the time and under the circumstances.

I declare under penalty of perjury under the laws of the United States of America that the foregoing facts are true and correct, known to me personally, and to which I would so testify if called upon to do so.

Executed this 10th day of October 2017, at Beverly Hills, California.

/s/ Gerson Fox
GERSON FOX

Exhibit "A"

January 17, 2017

Re: Gerson Fox

To Whom It May Concern:

I am a specialist in cardiovascular disease and internal medicine. I graduated from medical school in 1954 and have practiced full-time since completing my post-graduate training in 1958. I am an affiliated attending physician at the Cedars Sinai Medical Center in Los Angeles, California.

I have served as Mr. Gerson Fox's cardiologist and primary care physician for over twenty years and have interacted with his other physicians. Mr. Gerson Fox is about ten days shy of his 90th birthday.

Mr. Fox suffers from a number of debilitating physical ailments including but not limited to cardiovascular disease, strokes, severe diabetes mellitus, sleep apnea, obesity, along with impaired hearing, vision and mobility issues. Mr. Fox has been in and out of the hospital for the last several years, and has been bed-ridden since February 2016.

I have been told he is a defendant in several lawsuits and is pursuing his rights in others. Mr. Fox has chronic cardiovascular disease which has resulted in the insertion of a pacemaker and has had numerous trans-ischemic attacks. Mr. Fox is not ambulatory. It is my strongest recommendation that he not be exposed to any arduous activity or stressful

situation that may cause an unnatural elevation of his blood pressure which could result in permanently disabling or fatal consequences. Any information that is desired should be limited and obtained via written submission. The harassing and invasive nature of legal proceedings, including depositions, with argumentative lawyers must be avoided.

Mr. Fox is fragile and his emotional state affects his blood pressure, which must be carefully monitored. These are strict guidelines that must be abided by to protect Mr. Fox's health and preserve his rights.

To the extend this letter requires the substance of a declaration under California law I declare under penalty of perjury under the Laws of the State of California the foregoing is true and correct, and within my personal knowledge, and if called upon as my witness could and would confidently testify to the matters stated herein.

This statement (and declaration) is executed on this 17th day of January 2017 at Beverly Hills, California.

Very Truly Yours,

/s/ Harold L. Karpman, M.D.

HAROLD L. KARPMAN, M.D.