

FEB 16 2011

SUSAN M SPRAYL, CLERK
U.S. BKCY. APP. PANEL
OF THE NINTH CIRCUIT

ORDERED PUBLISHED

**UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT**

6	In re:)	BAP No.	EC 10-1102-ZJuMk
)		
7	THEODORE E. HONKANEN AND)	Bk. No.	08-26680
	MARCELLA J. HONKANEN,)		
8)	Adv. No.	08-02469
	Debtors.)		
9)		
)		
10	_____)		
	MARCELLA J. HONKANEN,)		
11)		
	Appellant,)		
12)		
	v.)	OPINION	
13)		
	J.MICHAEL HOPPER, in his)		
14	capacity as Chapter 7 Trustee)		
	for SUSAN J. ARCHER,)		
15	Respondant.)		
16	_____)		

Argued and Submitted on November 18, 2010
at Sacramento, California

Filed - February 16, 2011

Appeal from the United States Bankruptcy Court
for the Eastern District of California

Honorable Michael S. McManus, Bankruptcy Judge, Presiding.

Appearances: Gregory Joseph Hughes, Esquire appeared for
appellant Marcella J. Honkanen.
J. Russell Cunningham appeared for appellee J.
Michael Hopper.

Before: ZIVE,¹ JURY, and MARKELL, Bankruptcy Judges.

¹ Hon. Gregg W. Zive, United States Bankruptcy Judge for
the District of Nevada, sitting by designation.

1 ZIVE, Bankruptcy Judge:
2

3 **OVERVIEW**

4 Marcella Honkanen ("Honkanen") appeals a memorandum decision
5 holding her liable for fraud while acting in a fiduciary capacity
6 under 11 U.S.C. § 523(a)(4).² Honkanen raises three issues on
7 appeal: 1) whether the bankruptcy court erred in determining that
8 the "fiduciary capacity" requirement of 11 U.S.C. § 523(a)(4) was
9 satisfied, 2) whether the bankruptcy court erred in determining
10 that the requirements for application of the doctrine of issue
11 preclusion were satisfied, and 3) whether Appellee J. Michael
12 Hopper ("Hopper") carried his burden of proving that Honkanen
13 committed fraud. We conclude the fiduciary capacity requirement
14 of § 523(a)(4) was not satisfied. Further, we decide that issue
15 preclusion was not properly applied because fraud was not
16 necessarily decided in the state court action and, therefore,
17 Hopper did not prove Honkanen committed fraud. We REVERSE the
18 bankruptcy court's decision.

19 **FACTS**

20 Honkanen filed a Chapter 7 bankruptcy petition May 21, 2008,
21 in the Eastern District of California. Creditor Susan Archer
22 ("Archer") commenced an adversary proceeding on August 22, 2008,
23 to determine the dischargeability of a state court judgment
24 rendered in her favor and against Honkanen after a jury trial.

25
26 ² Unless otherwise indicated, all chapter, section, and
27 rule references are to the Bankruptcy Code, 11 U.S.C. §§ 101-
28 1532, and to the Federal Rules of Bankruptcy Procedure, Rules
1001-9037.

1 The complaint alleged a claim for relief solely under
2 § 523(a)(4). As the basis for her dischargeability claim, Archer
3 relied upon the doctrine of issue preclusion, or collateral
4 estoppel, predicated upon a state court jury verdict. Archer
5 contended the California state court jury found Honkanen had
6 intentionally breached her fiduciary duty to Archer by making
7 misrepresentations and concealing information while acting in a
8 fiduciary capacity.

9 Honkanen had acted as Archer's real estate broker in a
10 transaction in which Archer attempted to purchase real property
11 from a third party. After the transaction was not consummated,
12 Archer sued Honkanen in state court accusing Honkanen of
13 performing her real estate licensee duties negligently and of
14 intentionally breaching her fiduciary duty to Archer. The
15 alleged breach consisted of Honkanen making intentional
16 misrepresentations to Archer concerning the real estate purchase
17 agreement and the insufficiency of Archer's performance, in
18 addition to failing to disclose the deficiency in Archer's
19 performance.

20 In the state court suit, Archer also accused Honkanen of
21 breaching her fiduciary duty of loyalty to Archer, the buyer, by
22 acting in the interest of the seller rather than in Archer's
23 interest. Archer asserted Honkanen had falsely informed the
24 seller that Archer could not satisfy the financing requirements
25 for the purchase and that Archer was in breach of the sale
26 agreement. While the jury instructions did not include an
27 instruction about any intentional tort committed by Honkanen
28 against Archer, the jury awarded Archer damages in the amount of

1 \$356,000 for negligent and intentional breach of Honkanen's
2 fiduciary duty to Archer.

3 In her answer to the nondischargeability complaint, Honkanen
4 admitted she was a real estate broker licensed by the state of
5 California, that she served as the real estate agent and broker
6 for Archer as the buyer in the transaction, that the jury found
7 Honkanen breached her fiduciary duty to Archer, that her breach
8 was both negligent and intentional, and that her breach was a
9 substantial factor in causing harm to Archer in the amount of
10 \$356,000. Honkanen denied, however, that the jury verdict was
11 nondischargeable under § 523(a)(4).

12 At trial, Archer's Chapter 7 trustee, Hopper, intervened as
13 the plaintiff because he had succeeded to Archer's claim against
14 Honkanen.³ The only evidence admitted at trial was the original
15 state court complaint, the state court judgment, and the state
16 court jury instructions. The bankruptcy court rendered its
17 memorandum decision on September 3, 2009. It held that the
18 issues raised in the state court action were actually litigated
19 and necessarily decided when the state court jury returned a
20 verdict of intentional breach of fiduciary duty, that the
21 requirements of § 523(a)(4) were met, and that the state court
22 judgment was nondischargeable.

23 The bankruptcy court found the state court had previously
24 determined that Honkanen owed Archer a fiduciary duty, that the
25 Ninth Circuit in Bugna v. McArthur (In re Bugna), 33 F.3d 1054,
26 1057 (9th Cir. 1994), held that a real estate agent was a

27
28 ³ On May 5, 2009, Archer also filed for Chapter 7 relief.

1 fiduciary within the narrow meaning of § 523(a)(4), that Archer's
2 intentional breach of that duty injured the plaintiff and that
3 the resulting damages were therefore nondischargeable.

4 The bankruptcy court's judgment was entered on March 26,
5 2010. Honkanen filed her notice of appeal March 24, 2010. The
6 premature notice of appeal is deemed to have been filed on the
7 same day as the entry of judgment, pursuant to Fed. R. Bankr.
8 P. 8002(a).

9 JURISDICTION

10 The bankruptcy court had jurisdiction pursuant to 28 U.S.C.
11 § 1334(b) over this core proceeding under 28 U.S.C.
12 § 157(b)(2)(I). We have jurisdiction under 28 U.S.C. § 158(b).

13 STANDARD OF REVIEW

14 The court of appeals and the bankruptcy appellate panel
15 ("BAP") review a bankruptcy court's findings of fact under the
16 clearly erroneous standard and its conclusions of law de novo.
17 Canatella v. Towers (In re Alcala), 918 F.2d 99, 103 (9th Cir.
18 1990) (citing Bank of Honolulu v. Anderson (In re Anderson), 833
19 F.2d 834, 836 (9th Cir. 1987)); Fed. R. Bankr. P. 8013.
20 Decisions on issue preclusion are reviewed de novo. Littlejohn
21 v. United States, 321 F.3d 915, 919 (9th Cir. 2003). The issue
22 of dischargeability of a debt is a mixed question of fact and law
23 that is reviewed de novo. Miller v. United States, 363 F.3d 999,
24 1004 (9th Cir. 2004) (citing Diamond v. Kolcum (In re Diamond),
25 285 F.3d 822, 826 (9th Cir. 2002)).

1 DISCUSSION

2 **A. The Bankruptcy Court Erred When it Determined that**
3 **§ 523(a)(4)'s Fiduciary Capacity Requirement Had Been Met.**

4 Section 523(a)(4) excepts from discharge debts that arise
5 from "fraud or defalcation while acting in a fiduciary
6 capacity" To prevail on a nondischargeability claim
7 under § 523(a)(4) the plaintiff must prove not only the debtor's
8 fraud or defalcation, but also that the debtor was acting in a
9 fiduciary capacity when the debtor committed the fraud or
10 defalcation. See In re Teichman, 774 F.2d 1395, 1398 (9th Cir.
11 1985); and In re Bugna, 33 F.3d at 1057.

12 The broad definition of fiduciary under nonbankruptcy law -
13 a relationship involving trust, confidence, and good faith - is
14 inapplicable in the dischargeability context. Cal-Micro, Inc. v.
15 Cantrell (In re Cantrell), 329 F.3d 1119, 1125 (9th Cir. 2003);⁴
16 Lewis v. Short (In re Short), 818 F.2d 693, 695 (9th Cir. 1987);
17 Ragsdale v. Haller, 780 F.2d 794, 796 (9th Cir. 1986); Woosley v.
18 Edwards (In re Woosley), 117 B.R. 524, 529 (9th Cir. BAP 1990).
19 For purposes of § 523(a)(4), the Ninth Circuit has adopted a
20 narrow definition of "fiduciary."⁵ To fit within § 523(a)(4),

21 _____
22 ⁴ Neither party cited to Cantrell in the underlying action
23 in the bankruptcy court.

24 ⁵ A narrow definition of "fiduciary" is consistent with the
25 policy of construing the exceptions to discharge in § 523
26 strictly against the objecting creditor and liberally in favor of
27 the debtor. See Follett Higher Education Group, Inc. v. Berman
28 (In re Berman), 2011 WL 181482, at *2 (7th Cir. Jan 21, 2011); In
re Crosswhite, 148 F.3d 879, 881 (7th Cir. 1998). In Davis v.
Aetna Acceptance Co., 293 U.S. 328, 333-34 (1934), the Supreme
Court stated that the reference to "fiduciary capacity" in the
nondischargeability exceptions was "strict and narrow." See also
Cantrell, 329 F.3d at 1125.

1 the fiduciary relationship must be one arising from an express⁶
2 or technical⁷ trust that was imposed before, and without
3 reference to, the wrongdoing that caused the debt as opposed to a
4 trust ex maleficio, constructively imposed because of the act of
5 wrongdoing from which the debt arose. Ragsdale, 780 F.2d at 796;
6 Cantrell, 329 F.3d at 1125 (citing Lewis v. Scott (In re Lewis),
7 97 F.3d 1182, 1185 (9th Cir. 1996)).

8 While the scope of the term "fiduciary capacity" is a
9 question of federal law, the Ninth Circuit has considered state
10 law to ascertain whether the requisite trust relationship exists.
11 Ragsdale, 780 F.2d at 796; In re Cantrell, 329 F.3d at 1125; and
12 In re Woosley, 117 B.R. at 529. For a trust relationship under
13 § 523(a)(4) to be established, the applicable state law must
14 clearly define fiduciary duties and identify trust property. See
15 Runnion v. Pedrazzini (In re Pedrazzini), 644 F.2d 756, 759 (9th
16 Cir. 1981). Trusts arising as remedial devices to breaches of
17 implied or express contracts - such as resulting or constructive
18 trusts - are excluded, while statutory trusts that bear the

21 ⁶ Under California law an express trust requires five
22 elements: 1) present intent to create a trust, 2) trustee,
23 3) trust property, 4) a proper legal purpose, and 5) a
24 beneficiary. Cal. Prob. Code §§ 15201-15205; Keitel v. Heubel,
126 Cal. Rptr. 763, 773 (Cal. Ct. App. 2002).

25 ⁷ A technical trust under California law is described as
26 "those arising from the relation of attorney, executor, or
27 guardian, and not to debts due by a bankrupt in the character of
28 an agent, factor, commission merchant, and the like." Royal
Indemnity Co. v. Sherman, 269 P.2d 1056, 1057 (Cal. Ct. App.
1954); Young v. Clark, 93 P. 1056, 1057 (Cal. Ct. App. 1907). A
technical trust is not one implied by contract. Young, 93 P. at
1057.

1 hallmarks of an express trust are not.⁸ Id.; 4 Collier on
2 Bankruptcy 523.10[1][d] (Alan N. Resnick & Henry J. Sommer eds.,
3 16th ed. 2010). The mere fact that state law puts two parties in
4 a fiduciary-like relationship does not necessarily mean it is a
5 fiduciary relationship within 11 U.S.C. § 523(a)(4). See
6 generally Pedrazzini, 644 F.2d at 759.

7 The Ninth Circuit Bankruptcy Appellate Panel has opined in
8 three § 523(a)(4) cases involving a real estate licensee:
9 Woosley, 117 B.R. 524, Evans v. Pollard (In re Evans), 161 B.R.
10 474 (9th Cir. BAP 1993), and Rettig v. Peters (In re Peters), 191
11 B.R. 411 (9th Cir. BAP 1996).

12 In Woosley and Peters, 117 B.R. at 529; 191 B.R. at 419, the
13 BAP reasoned that debtor's real estate license carried with it
14 fiduciary obligations to his principals under California law when
15 carrying out licensed activities. The BAP held that the
16 fiduciary obligations accompanying a real estate licensee's
17 licensed activities are within the purview of "fiduciary
18 capacity" required by § 523(a)(4).

19 The BAP distinguished Woosley in Evans, 161 B.R. at 478.
20 That panel questioned whether a real estate broker's general
21 fiduciary obligations of undivided service and loyalty in the
22 absence of an identifiable trust res are sufficient to establish
23 fiduciary capacity for purposes of § 523(a)(4). It held that
24 general fiduciary obligations are not sufficient to fulfill the
25

26 ⁸ A trust may be created by statute, but even if a trust is
27 created by statute, the trust must arise before the act of
28 wrongdoing and not as a result of it. Pedrazzini, 644 F.2d at
758.

1 fiduciary capacity requirement of § 523(a)(4) in the absence of
2 an express, technical or statutory trust, and an identifiable
3 trust res. Id.⁹

4 The Peters court quoted from Woosley without conducting any
5 further analysis of the § 523(a)(4) fiduciary capacity
6 requirement. While citing Evans, it did not note the opposite
7 holdings of those two cases. If there was a trust in Peters, it
8 was ex maleficio.

9 In a case involving a § 523(a)(4) action against a real
10 estate licensee, Bugna v. McArthur (In re Bugna), supra, the
11 Ninth Circuit did not independently analyze the definition of
12 fiduciary capacity required by § 523(a)(4), but instead merely
13 relied upon the language in Woosley and Ragsdale for its finding
14 that a fiduciary relationship existed when the debtor was both a
15 real estate broker and a partner. 33 F.3d 1054, 1057 (9th Cir.
16 1994).

17
18 ⁹ The BAP cites a California statute in Evans, Cal. Bus. &
19 Prof. Code § 10145, that was not cited in Woosley. Section 10145
20 requires real estate agents who accept funds on behalf of someone
21 else to deposit all of those funds, not immediately placed in a
22 neutral escrow account, into a client trust account maintained by
the broker. The statute requires all funds to be maintained by

23 In Evans the BAP speculated that what the Woosley court
24 meant, in the absence of any analysis as to whether a trust res
25 existed, was that the funds placed with the broker and the
investment itself constituted a trust res sufficient to support
26 fiduciary capacity under § 523(a)(4). Evans, 161 B.R. at 478.
The Woosley court did not cite Cal. Bus. & Prof. Code § 10145.
27 Of course there were no funds to be deposited or maintained in
either Woosley or in the instant matter, again demonstrating
28 there was no trust in Woosley, nor in this case, because of the
absence of trust res.

1 Here, the bankruptcy court relied in great part on the Ninth
2 Circuit's analysis of § 523(a)(4) in Bugna to find that the
3 fiduciary capacity requirement of § 523(a)(4) was satisfied by
4 the real estate broker relationship between Honkanen (as broker)
5 and Archer (as client).

6 Neither Bugna nor Woosley identified the "trust" required by
7 § 523(a)(4). The trust subsumed within the fiduciary capacity
8 requirement of § 523(a)(4) was not closely considered in either
9 of those two cases; whereas in other cases applying § 523(a)(4)
10 it was at the heart of the § 523(a)(4) analysis. See e.g.
11 Pedrazzini, 664 F.2d 756 (where the court found § 523(a)(4) did
12 not apply because there was no trust res); Cantrell, 329 F.3d 119
13 (where the court found § 523(a)(4) did not apply because
14 California law did not make corporate officers or directors
15 trustees of corporate assets); Ragsdale, 780 F.2d 794 (where the
16 court found the fiduciary requirement of § 523(a)(4) was
17 satisfied because under California law partners were trustees of
18 partnership assets as a matter of statute).

19 Neither the Ninth Circuit nor the BAP supply any reasoning
20 for not considering, in addition to fiduciary obligations,
21 whether an express, technical, or statutory trust existed.

22 In Cantrell, the Ninth Circuit decided an issue of first
23 impression and interpreted California corporate law to conclude
24 that while officers and directors of a corporation are imbued
25 with the fiduciary duties of an agent and certain duties of a
26 trustee, they are not trustees with respect to corporate assets
27 and, therefore, are not fiduciaries within the meaning of
28 § 523(a)(4). 329 F.3d at 1127. In Cantrell, Cal-Micro, the

1 plaintiff, contended that under California law a corporate
2 officer is a statutory trustee with respect to corporate assets,
3 but the court rejected that contention because the cases relied
4 upon by Cal-Micro merely held that officers owe fiduciary duties
5 in their capacity as agents of a corporation -- but failed to
6 hold that officers are trustees of an express, technical or
7 statutory trust with respect to corporate assets. 329 F.3d at
8 1126. The Circuit relied on the reasoning of the California
9 Supreme Court in Bainbridge v. Stoner, 106 P. 2d 423 (Cal. 1940),
10 which held, "[A] director of a corporation acts in a fiduciary
11 capacity, and the law does not allow him to secure any personal
12 advantage as against the corporation or its stockholders.
13 However, strictly speaking, the relationship is not one of trust,
14 but of agency" Cantrell, 329 F.3d at 1126 (quoting
15 Bainbridge, 106 P. at 426).

16 Following a long line of Ninth Circuit authority, Cantrell
17 set forth the requirements for § 523(a)(4) which we are unable to
18 reconcile with Bugna. We have tried to harmonize, to the extent
19 possible, the inconsistencies between Bugna and Cantrell. We
20 acknowledge that Cantrell is inconsistent, and perhaps
21 irreconcilable, with Bugna. That conflict, however, is not
22 within our jurisdiction to address, and we defer to the Ninth
23 Circuit Court of Appeals in resolution of that conflict. Faced
24 with two conflicting Court of Appeals decisions, Cantrell
25 controls in this case because it is the most-recent and, in our
26 view, the better-reasoned of the two decisions. Any remaining
27 inconsistency will have to be resolved by the Ninth Circuit.

28 Based on the requirements set forth in Cantrell, a

1 California real estate licensee does not meet the fiduciary
2 capacity requirement of § 523(a)(4) solely based on his or her
3 status as a real estate licensee. General fiduciary obligations
4 are not sufficient to fulfill the fiduciary capacity requirement
5 in the absence of a statutory, express, or technical trust.

6 Honkanen never held any property in trust for Archer. While
7 she did represent Archer in a real estate transaction that was
8 ultimately not consummated, and while the jury found her to have
9 negligently and intentionally breached her fiduciary duty to
10 Archer, Honkanen did not hold any property in trust. In the
11 absence of a trust res, a fundamental requirement to form a
12 trust, there was no express, technical or statutory trust formed
13 between Honkanen and Archer. Thus, consistent with the reasoning
14 and holding of Cantrell, Honkanen was not acting in a fiduciary
15 capacity as required by § 523(a)(4). Accordingly, the Archer
16 state court judgment against Honkanen is dischargeable.

17 We acknowledge that our holding is at odds with older BAP
18 cases. See e.g. Woosley, 117 B.R. at 529 (holding that fiduciary
19 duties imposed on a real estate licensee by California law
20 necessarily qualify such licensees as fiduciaries within the
21 meaning of § 523(a)(4)); accord, Peters, 191 B.R. at 419.
22 However, cases which have been overruled, actually or
23 effectively, by subsequent decisions of the Ninth Circuit Court
24 of Appeals or the United States Supreme Court do not bind us.
25 9th Cir. BAP Rule 8013-1(c)(1) (2010); see People's Capital and
26 Leasing Corp. v. Big3D, Inc. (In re Big3D, Inc.), 438 B.R. 214,
27 226 (9th Cir. BAP 2010). The Ninth Circuit employs a similar
28 rule in deciding whether it is bound by its prior published

1 decisions. See Phelps v. Alemeida, 569 F.3d 1120, 1133 (9th Cir.
2 2009) (holding that a three-judge panel of the Court of Appeals
3 is not bound by prior Court of Appeals decision on point when the
4 theory or reasoning of the prior decision has been so undermined
5 by subsequent Supreme Court authority that the prior decision and
6 the Supreme Court authority are irreconcilable); Miller v.
7 Gammie, 335 F.3d 889, 900 (9th Cir. 2003) (en banc) (same).

8 In this instance, the theory underlying Woosley and Peters -
9 that all California real estate brokers qualify as fiduciaries
10 under § 523(a)(4) - is irreconcilable with Cantrell.

11 Accordingly, Cantrell's holding and analysis take away whatever
12 binding quality Woosley and Peters possessed and require us to
13 find that in the absence of an express, technical, or statutory
14 trust and a clear identifiable trust res the fiduciary capacity
15 requirement of § 523(a)(4) is not satisfied.

16 **B. The Bankruptcy Court Erred When it Held that Honkanen was**
17 **Collaterally Estopped from Relitigating the Issue of Fraud**
under § 523(a)(4)

18 The issues of whether Hopper carried his burden of proving
19 fraud, and whether the bankruptcy court erred in determining that
20 the requirements of issue preclusion were satisfied, are
21 interrelated because there was no evidence proffered of
22 fraudulent conduct other than the judgment and the state court
23 complaint. If the doctrine of issue preclusion is inapplicable,
24 it follows that Hopper failed to prove fraud.

25 **1. Issue Preclusion**

26 The doctrine of issue preclusion applies in dischargeability
27 proceedings. Grogan v. Garner, 498 U.S. 279, 284-85 (1991).
28 Issue preclusion, or collateral estoppel, bars a party from

1 relitigating any issue necessarily included in a prior, final
2 judgment. Malkoskie v. Option One Mortgage Corp., 115 Cal. Rptr.
3 3d 821, 825 n.4 (Cal. Ct. App. 2010) (citing Rice v. Crow, 97
4 Cal. Rptr. 2d 110, 116-17 (Cal. Ct. App. 2000)). The party
5 asserting the doctrine has the burden of proving that all of the
6 threshold requirements have been met. Kelly v. Okoye (In re
7 Kelly), 182 B.R. 255, 258 (9th Cir. BAP 1995), aff'd, 100 F.3d
8 110 (9th Cir. 1996). To meet this burden, the moving party must
9 have pinpointed the exact issues litigated in the prior action
10 and introduced a record revealing the controlling facts. Kelly,
11 182 B.R. at 258. Reasonable doubts about what was decided in the
12 prior action should be resolved against the party seeking to
13 assert preclusion. Id.

14 In determining the preclusive effect of a state court
15 judgment, federal courts must, as a matter of full faith and
16 credit, apply that state's collateral estoppel principles.
17 28 U.S.C. § 1738; Kelly, 182 B.R. at 258 (citing Grogan, 498 U.S.
18 at 284). "[A] bankruptcy court could properly give collateral
19 estoppel effect to those elements of the claim that are identical
20 to the elements required for discharge and which were actually
21 litigated and determined in the prior action." Grogan, 498 U.S.
22 at 284.

23 Under California law, generally, five requirements must be
24 met for prior judgments to be given collateral estoppel effect:¹⁰
25 1) the issue sought to be precluded from relitigation must be

26
27 ¹⁰ These requirements have been combined by some courts but
28 the essential elements remain the same. See e.g. Rice, 97 Cal.
Rptr. 2d at 117.

1 identical to that decided in the former proceeding; 2) the issue
2 must have been actually litigated in the former proceeding; 3) it
3 must have been necessarily decided in the former proceeding;
4 4) the decision in the former proceeding must be final and on the
5 merits; and 5) the party against whom preclusion is being sought
6 must be the same as the party to the former proceeding. Kelly,
7 182 B.R. at 258.

8 **2. Fraud under § 523(a)(4)**

9 "Fraud" under § 523(a)(4) means actual fraud. Roussos v.
10 Michaelides (In re Roussos), 251 B.R. 86, 91 (9th Cir. 2000)
11 (citing Bugna, 33 F.3d at 1057). Actual fraud involves conscious
12 misrepresentation, or concealment, or non-disclosure of a
13 material fact which induces the innocent party to enter into a
14 contract. Cal. Civ. Code § 1572; Odorizzi v. Bloomfield School
15 Dist., 54 Cal. Rptr. 533, 538 (Cal. Ct. App. 1966). To prove
16 actual fraud the plaintiff must prove: 1) defendant made a
17 misrepresentation, concealment, or non-disclosure of a material
18 fact; 2) defendant had knowledge that what he was saying was
19 false; 3) defendant intended to induce plaintiff's reliance;
20 4) plaintiff justifiably relied; and 5) plaintiff suffered damage
21 as a result. Id.

22 The court in Jorgensen v. Beach 'N' Bay Realty, Inc., 177
23 Cal. Rptr. 882, 885 (Cal. Ct. App. 1981), reasoned that where
24 evidence tended to show that the defendant real estate agent knew
25 certain material facts, that the defendant failed to disclose
26 those facts to plaintiff, and that the defendant intentionally
27 mislead plaintiff as to those facts; that evidence would support
28 a jury verdict on the theories of fraud, intentional and/or

1 negligent misrepresentation, and/or breach of fiduciary duty.
2 The Jorgensen court stated that those theories interrelate in
3 that identical acts may constitute more than one tort. Jorgensen
4 reasoned that where a confidential relationship unquestionably
5 exists, proof that the agent was knowingly making false or
6 misleading statements as to material facts, or deliberately
7 concealing them, or negligently making such misrepresentations
8 satisfies major elements of each of these causes of action. Id.

9 The bankruptcy court found that Archer had alleged in her
10 dischargeability complaint, which mirrored her state court
11 complaint, all of the "elements" necessary to prove actual
12 fraud.¹¹ The bankruptcy court found that Archer proved all of
13 these allegations in state court, as established by the jury's
14 verdict,¹² and that Honkanen was accordingly precluded from
15

16
17 ¹¹ The bankruptcy court found that the complaint alleges that
18 the "defendant assured [Archer] that her tender of performance
19 was adequate." "Plaintiff was advised by defendant . . . that
20 her tender of these items satisfied her requirements under the
21 contract." "Said representation was intentionally false."
22 Memorandum Decision P. 4 ¶ 26 (citing Plaintiff's Complaint ¶ 7).
23 "Defendant . . . intentionally concealed the seller's objections
24 from plaintiff, denying her the opportunity to cure the
25 defaults." Id. at P. 5 ¶ 5 (citing Plaintiff's Complaint ¶ 8).
26 "Such statements . . . were made with the intent to induce the
27 plaintiff to breach the 2004 contracts and induce seller to
28 cancel the contacts, all to plaintiff's direct detriment." Id.
at P. 5 ¶ 8 (citing Plaintiff's Complaint ¶ 10). The bankruptcy
court also correctly found that the complaint refers to harm
sustained by Archer in the amount of \$356,000, resulting from the
defendant's actions. Id. at P. 5 ¶ 11 (citing Plaintiff's
Complaint ¶ 15).

¹² As discussed above, the state court jury found that
Honkanen intentionally and negligently breached her fiduciary
duty to Archer.

1 relitigating these issues.

2 Honkanen argues that issue preclusion should not apply in
3 this case because the cause of action "fraud" was not
4 (1) identical to that decided in the former proceeding, (2) was
5 not litigated, and (3) was not necessarily decided in the state
6 court proceedings.¹³ While a bankruptcy court can properly give
7 preclusive effect to those elements of a claim that are identical
8 to the elements required for another cause of action which were
9 actually litigated and determined in the prior action, that was
10 not the case here. See Grogan, 498 U.S. at 284; see also,
11 Malkoskie v. Option One Mortgage Corp., 115 Cal. Rptr. at 824-25.

12 Because the jury may have found an intentional breach of
13 fiduciary duty based on Honkanen's breach of her duty of loyalty,
14 and not based on her intentional misrepresentations, we cannot
15 say all of the elements of actual fraud are identical to those
16 found in the state court proceeding. As we stated earlier, all
17 doubts about what was decided in the state court action are to be
18 construed against the party seeking preclusion. Here, Hopper did
19 not meet his burden of proving that the elements of fraud were
20 actually litigated because he did not introduce any record that
21 would reveal controlling facts about what was actually litigated
22 in the state court. He could have introduced a transcript into
23 evidence, but he did not. Pleadings are not evidence of what the
24 jury actually decided. Therefore, this court cannot speculate as
25 to what was actually litigated or necessarily decided at the

26 _____

27 ¹³ Appellant has not raised any issue with the fourth and
28 fifth elements of issue preclusion and therefore those elements
are not discussed here.

1 state court, and issue preclusion does not apply.

2 **CONCLUSION**

3 Honkanen did not hold any property in "trust" for Archer's
4 benefit and, therefore, the fiduciary capacity requirement of
5 § 523(a)(4) was not proven. Further, the bankruptcy court
6 erroneously found fraud based on its application of issue
7 preclusion. Hopper did not meet his burden of proving that all
8 of the elements of issue preclusion were met, and therefore, the
9 doctrine does not apply. The bankruptcy court's judgment is
10 REVERSED.