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NOT FOR PUBLICATION

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

UNITED STATES BANKRUPTCY APPELLATE PANEL  
OF THE NINTH CIRCUIT

1 In re: ) BAP No. CC-12-1143-TaMkH  
2 JAMES F. BISHAY, )  
3 Debtor. ) Bk. No. 8:08-bk-11374-ES  
4 ) Adv. No. 8:10-ap-01142-ES  
5 JAMES F. BISHAY, )  
6 Appellant, )  
7 v. ) M E M O R A N D U M<sup>1</sup>  
8 RICHARD A. MARSHACK; )  
9 JP MORGAN CHASE, )  
10 Appellees. )  
11 )  
12 )  
13 )

Argued and Submitted on September 21, 2012  
at Pasadena, California

Filed - October 24, 2012

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

Honorable Erithe A. Smith, Bankruptcy Judge, Presiding

Appearances: Alan Leigh Armstrong for Appellant James F.  
Bishay; Donald W. Sieveke for Appellee Richard A.  
Marshack

Before: TAYLOR,<sup>2</sup> MARKELL, and HOLLOWELL, Bankruptcy Judges.

<sup>1</sup> This disposition is not appropriate for publication. Although it may be cited for whatever persuasive value it may have (see Fed. R. App. P. 32.1), it has no precedential value. See 9th Cir. BAP Rule 8013-1.

<sup>2</sup> Hon. Laura S. Taylor, Bankruptcy Judge Southern District of California, sitting by designation.

1 The appellant, Joseph Bishay, is the beneficiary of a trust  
2 deed recorded against the debtor's real property. He appeals  
3 from the bankruptcy court's judgment after trial determining that  
4 his trust deed was junior to another subsequently recorded trust  
5 deed. The bankruptcy court based its decision first on the  
6 finding that there was a contractual agreement to subordinate.  
7 The bankruptcy court reached this determination notwithstanding  
8 that a written subordination agreement was never introduced into  
9 evidence. The bankruptcy court, alternatively, based its ruling  
10 on an oral determination that equitable subrogation applied.<sup>3</sup>  
11 The appellant only raised issues relating to the contractual  
12 subordination determination in his statement of issues on appeal  
13 and in his opening brief. He discussed equitable subrogation  
14 only in his reply brief.

15 After a careful consideration of the parties' briefs and  
16 oral argument, review of the record provided, and independent  
17 analysis and application of the law, we hold that the appellant  
18 waived his right to dispute that equitable subrogation applied  
19 when he failed to raise this issue at any point on appeal prior  
20 to his reply, and, thus, we affirm on this basis. We further

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21  
22 <sup>3</sup> In the record, the parties use both the term "equitable  
23 subordination" and the term "equitable subrogation." Equitable  
24 subordination in the bankruptcy context refers to 11 U.S.C.  
25 § 510(c). It requires misconduct and subordination as a result  
26 thereof. <sup>4</sup> Collier on Bankruptcy ¶ 510.05[2], p. 510-18 (Alan N.  
27 Resnick & Henry J. Sommer, eds., 16th ed. 2012). The record  
28 evidences that the parties here reference the state law theory of  
equitable subrogation involving effective subordination where,  
under certain circumstances, a lender pays an existing  
lienholder's claim and assumes (is subrogated to) the senior  
lender's priority. Miller & Starr, California Real Estate Third  
Edition, § 11:115, p. 11-355. The Panel will utilize the term  
"equitable subrogation" herein and will not reference "equitable  
subordination."

1 affirm on the grounds that the bankruptcy court correctly found  
2 that an actual agreement to subordinate existed, that it bound  
3 appellant, and that it was unnecessary for the bankruptcy court  
4 to determine the complete terms of the subordination agreement in  
5 connection with its ruling.

6 **FACTS**

7 On February 10, 2006, debtor James F. Bishay (the "Debtor")  
8 purchased a house in Huntington Beach, California (the  
9 "Property") and acquired title as his sole and separate property.  
10 On February 14, 2006, his wife, Deborah Westfield, also known as  
11 Deborah Bishay, quitclaimed her interest in the Property to the  
12 Debtor. On this same date, Citimortgage recorded a trust deed  
13 against the Property securing an obligation in the original  
14 principal amount of \$1,000,000. Thereafter, on April 5, 2006,  
15 Citibank recorded a second trust deed securing an obligation in  
16 the original principal amount of \$169,990.

17 On December 27, 2006, for no consideration, the Debtor  
18 transferred the Property to the Bishay Irrevocable Trust,  
19 James F. Bishay as Trustee (the "Bishay Trust"). On February 15,  
20 2007, the Debtor, in his capacity as trustee of the Bishay Trust,  
21 executed and delivered a note in the original principal amount of  
22 \$320,000 in favor of his brother and appellant, Joseph Bishay  
23 ("Joseph"<sup>4</sup>) and The Rock of Ages, a suspended California  
24 corporation owned or controlled by Joseph (the "Bishay Note").

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25  
26 <sup>4</sup> For the purposes of clarity and simplicity, the  
27 appellant will hereinafter be referred to as "Joseph." We intend  
28 no disrespect by this informality, but hope to avoid the  
confusion that could result from having both a debtor and a  
defendant with the last name Bishay and first names beginning  
with a "J".

1 Joseph and Rock of Ages recorded a trust deed (the "Bishay Trust  
2 Deed") securing the Bishay Note on March 16, 2007. The Bishay  
3 Trust Deed, thus, was subordinate to both the Citibank and  
4 Citimortgage trust deeds, and Joseph knew this was the case.

5 On November 6, 2007, and again for no consideration, the  
6 Bishay Trust transferred the Property to the Alpha and Omega  
7 Irrevocable Trust, Deborah Westfield as Trustee. On February 4,  
8 2008, the Debtor's mother, Marsil Bishay, now acting as trustee  
9 of the Alpha and Omega Irrevocable Trust ("Alpha & Omega Trust"),  
10 borrowed \$1,260,000 from Washington Mutual Bank ("WaMu") and used  
11 the proceeds in significant part to repay the Citibank and  
12 Citimortgage loans. On April 1, 2008, WaMu recorded a deed of  
13 trust (the "WaMu Trust Deed") securing the note evidencing this  
14 loan. There is no dispute that the parties to this transaction  
15 intended that the WaMu Trust Deed create a first priority lien  
16 against the Property.

17 On March 22, 2008, the Debtor filed his petition and  
18 initiated this chapter 7 bankruptcy.

19 On September 1, 2008, Richard A. Marshack, the chapter 7  
20 trustee ("Trustee"), filed adversary proceeding 8:08-ap-01338 ES  
21 seeking to avoid the transfers of the Property to the Bishay  
22 Trust and to the Alpha & Omega Trust as fraudulent conveyances.  
23 The Trustee obtained a judgment avoiding these transfers and  
24 preserving the transferred asset for the benefit of the estate on  
25 April 19, 2010.

26 The Trustee initiated the subject adversary proceeding on  
27 March 19, 2010. The original complaint is not part of the record  
28 on appeal, but we have taken judicial notice of the bankruptcy

1 court docket and various documents filed through the electronic  
2 docketing system. See O'Rourke v. Seaboard Sur. Co. (In re E.R.  
3 Fegert, Inc.), 887 F.2d 955, 957-58 (9th Cir. 1989); Atwood v.  
4 Chase Manhattan Mortg. Co. (In re Atwood), 293 B.R. 227, 233 n.9  
5 (9th Cir. BAP 2003). The docket in this proceeding evidences  
6 that the Trustee originally named only WaMu and Marsil Bishay as  
7 trustee of the Alpha & Omega Trust as defendants, but also  
8 included 10 Doe defendants. Thereafter, he added JP Morgan Chase  
9 Bank, National Association, successor in interest to WaMu  
10 ("Chase"), California Reconveyance Company ("Cal Recon"), as the  
11 Trustee named in the WaMu Trust Deed, The Rock of Ages, and  
12 Joseph as defendants in place of Does 1 through 4.

13 The bankruptcy court eventually entered a summary judgment  
14 order adverse to Marsil Bishay as Trustee of the Alpha & Omega  
15 Trust and determined that she had no interest in the Property.  
16 The Trustee obtained a default judgment resolving the claims  
17 against The Rock of Ages and entered into a settlement agreement  
18 with Chase. The resolution of the Chase claims also resolved all  
19 claims against Cal Recon, as Cal Recon was sued only as the  
20 trustee under the WaMu Trust Deed.

21 Thus, as of the trial date, the only unresolved issues  
22 pertained to Joseph's claim based on the alleged priority of the  
23 Bishay Trust Deed.<sup>5</sup> Originally, the Trustee also objected to  
24 Joseph's claim, but the Trustee abandoned this issue before

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25  
26 <sup>5</sup> The priority dispute was not directly discussed in any  
27 pleading, but the parties clearly contemplated this as an issue  
28 in a Pre-Trial Order, and it apparently arose from the  
generalized request in the amended complaint that the bankruptcy  
court determine the respective interests of the parties in and to  
the Property.

1 trial.

2 Prior to the trial, the Trustee and Joseph entered into a  
3 Pre-Trial Order and agreed, among other things, on the following  
4 facts:

5 18. Joseph Bishay testified in his  
6 deposition that on an unknown date, he  
7 subordinated his trust deed to the Washington  
8 Mutual Deed of trust. The subordination  
9 agreement was not recorded and has not been  
10 found.

11 . . .

12 21. Joseph Bishay has testified that he  
13 understood that his deed of trust was in  
14 second position, behind the new deed of trust  
15 obtained by Marsil Bishay, in favor of  
16 Washington Mutual.

17 22. Prior to the recordation of his deed of  
18 trust, Joseph Bishay understood that Marsil  
19 Bishay intended to obtain a loan against [the  
20 Property], and that such deed of trust would  
21 be in first position.

22 23. Marsil Bishay negotiated and obtained  
23 the subordination of Joseph Bishay's deed of  
24 trust to the new deed of trust issued to WAMU  
25 against the [Property].

26 Pre-Trial Order, Dkt. 62, at 4.

27 The Pre-Trial Order also included a judicial requirement  
28 that the parties provide direct testimony (exclusive of adverse  
or rebuttal testimony) only by declaration. Finally, the Pre-  
Trial Order established the witnesses to be called at trial and  
the exhibits to be introduced at trial. Joseph's exhibits were  
the Bishay Trust Deed, the WaMu Trust Deed, and an equity  
purchase agreement dated March 8, 2007. The Trustee submitted a  
trial brief; Joseph did not. Neither party submitted declaratory  
evidence.

The bankruptcy court held the trial on February 21, 2012.  
At trial, the Trustee rested after introducing the Bishay Trust

1 Deed and the WaMu Trust Deed into evidence. Joseph's counsel,  
2 after attempting to call Joseph as a witness, acknowledged that  
3 he was bound by the Pre-Trial Order and could not introduce  
4 testimonial evidence at trial. Consequently, Joseph never  
5 testified. Joseph's counsel also did not seek to admit any  
6 documentary evidence. The Trustee then relied on the agreed  
7 facts of the Pre-Trial Order and requested judgment in his favor.

8 The Trustee argued two alternative theories - first, that  
9 the Bishay Trust Deed was subordinate to the WaMu Trust Deed  
10 because Joseph contractually agreed to subordinate the Bishay  
11 Trust Deed, and, second, that the doctrine of equitable  
12 subrogation operated to grant seniority to the WaMu Trust Deed.  
13 In opposition, counsel for Joseph offered a limited argument that  
14 the terms of the subordination agreement were unknown and that  
15 WaMu was negligent.

16 The bankruptcy court recited the admitted facts in the Pre-  
17 Trial Order and made an oral finding that the admitted facts  
18 provided adequate evidence of intent to subordinate and that, as  
19 Joseph advanced no new evidence, a judgment finding that the WaMu  
20 Trust Deed had priority over the Bishay Trust Deed was  
21 appropriate. The bankruptcy court stated that:

22 . . . under the admitted facts and given that  
23 there is no counter evidence, either  
24 factually or legally, then this Court feels  
25 comfortable in making a finding consistent  
26 with the trial briefs submitted that there  
27 was a subordination agreement that was in  
effect at the time the Washington Mutual loan  
was made and that the intent was that the  
Washington Mutual loan would, in fact, be  
senior to the [Bishay Trust Deed].

28 Trial Tr. (Feb. 21, 2012) at 10:14-21.

1 The bankruptcy court also made an alternative oral finding  
2 that:

3 the Plaintiff has also presented evidence  
4 sufficient to support a finding [] that the  
5 doctrine of equitable subordination should  
6 apply as well. So, judgment will be in favor  
7 of the Plaintiff.

8 Id. at 13:3-6.

9 Finally, the bankruptcy court stated its ultimate finding  
10 that, "under either theory, the Court finds in favor of the  
11 Plaintiff, Richard Marshack that there was a subordination  
12 agreement." Id. at 12:20-22.

13 On March 2, 2012, the bankruptcy court entered a separate  
14 written Judgment After Trial which stated:

15 After considering the evidence and hearing  
16 argument, and for the reasons set forth in  
17 the Court's oral findings, IT IS HEREBY  
18 ADJUDGED: 1) Judgment in favor of the  
19 Plaintiff and against Defendant JOSEPH  
20 BISHAY. 2) The [Bishay Trust Deed] is hereby  
21 declared fully subordinate to the [WaMu Trust  
22 Deed].

23 Judgment After Trial, Dkt. 86, at 2:2-14.

24 Joseph timely appealed the bankruptcy court's Judgment After  
25 Trial and identified only one issue: "Did the bankruptcy court  
26 err in deciding that the [Bishay Trust Deed] was fully  
27 subordinate to the [WaMu Trust Deed] based on a Subordination  
28 Agreement that has not been found, without making a finding as to  
the wording or contents of that subordination agreement?"

Appellant's Statement of Issue on Appeal (April 2, 2012) at 2.

As the Trustee points out in his opening brief, Joseph failed to  
raise, as an issue on appeal, the bankruptcy court's alternative  
finding that the Bishay Trust Deed was subordinate to the WaMu



1 Trust Deed based on the doctrine of equitable subrogation.  
2 Joseph first addressed the equitable subrogation issue in his  
3 reply brief.

#### 4 **JURISDICTION**

5 The bankruptcy court had jurisdiction under 28 U.S.C.  
6 §§ 1334 and 157(b)(2)(K). Judgment was entered on the issue of  
7 the full subordination of the Bishay Trust Deed to the WaMu  
8 Trust Deed. The judgment is final because the judgment fully and  
9 finally disposed of the priority dispute, the only dispute then  
10 remaining in this adversary proceeding. See Kashani v. Fulton  
11 (In re Kashani), 190 B.R. 875, 882 (9th Cir. BAP 1995). Because  
12 the judgment underlying Joseph's appeal is final, we have  
13 jurisdiction pursuant to 28 U.S.C. § 158.

#### 14 **ISSUES**

15 A. Whether Joseph waived his right to appeal the  
16 bankruptcy court's application of equitable subrogation.

17 B. Whether the bankruptcy court erred, as a matter of law,  
18 by finding subordination without first determining all the terms  
19 and conditions of subordination.

20 C. Whether the bankruptcy court erred, as a matter of  
21 fact, by finding the Bishay Trust Deed fully subordinate to the  
22 WaMu Trust Deed.

#### 23 **STANDARD OF REVIEW**

24 We review "the bankruptcy court's conclusions of law de novo  
25 and factual findings for clear error." Clear Channel Outdoor,  
26 Inc. v. Knupfer (In re PW, LLC), 391 B.R. 25, 32 (9th Cir. BAP  
27 2008)(citations omitted). A factual determination is clearly  
28 erroneous if the appellate court, after reviewing the record, has

1 a definite and firm conviction that a mistake has been committed.  
2 Anderson v. Bessemer City, 470 U.S. 564, 573 (1985).

3 We review a bankruptcy court's interpretation of California  
4 law de novo in order to determine if it correctly applied the  
5 substantive law. Kipperman v. Proulx (In re Burns), 291 B.R.  
6 846, 849 (9th Cir. BAP 2003); Astaire v. Best Film & Video Corp.,  
7 116 F.3d 1297, 1300 (9th Cir. 1997)(issues of state law are  
8 reviewed de novo). Mixed questions of law and fact are also  
9 reviewed de novo. Murray v. Bammer (In re Bammer), 131 F.3d 788,  
10 792 (9th Cir. 1997). "A mixed question of law and fact occurs  
11 when the historical facts are established; the rule of law is  
12 undisputed . . . and the issue is whether the facts satisfy the  
13 legal rule." Id.

#### 14 DISCUSSION

##### 15 **A. Joseph Waived His Right To Appeal The Bankruptcy Court's 16 Determination Based On Equitable Subrogation.**

##### 17 **1. The Judgment Based On Equitable Subrogation Was Final.**

18 Joseph argues that he was not obligated to appeal from the  
19 bankruptcy court's determination that the theory of equitable  
20 subrogation resulted in a loss of the priority of his trust deed.  
21 He argues, thus, that he did not waive his right to appeal this  
22 determination. He bases his argument on the fact that the post  
23 trial judgment "does not mention equitable subrogation."  
24 Appellant's Reply Brief (June 21, 2012) at 1. He apparently  
25 claims that because the written Judgment After Trial did not  
26 expressly state that subordination was granted alternatively on  
27 the theory of equitable subrogation, that a judgment was not  
28 rendered on that theory.

1 In the absence of an order allowing an interlocutory appeal,  
2 an appellant may only appeal to a Bankruptcy Appellate Panel from  
3 final judgments, orders, or decrees of a bankruptcy judge.

4 28 U.S.C. § 158(a). To become final, the decision, order, or  
5 decree must end the litigation or dispose of complete claims of  
6 relief. In re Kashani, 190 B.R. at 882. The Ninth Circuit takes  
7 a flexible approach to determining the finality of a judgment or  
8 order such that even a minute order can be a final, appealable  
9 order if it: "fully adjudicates the issues and clearly evidences  
10 the court's intent that the order be the court's final act."

11 Key Bar Invs. v. Cahn (In re Cahn), 188 B.R. 627, 629 (9th Cir.  
12 BAP 1995). A court's intent is evidenced by: "a clear and  
13 unequivocal manifestation by the trial court of its belief that  
14 the decision made, so far as it is concerned, is the end of the  
15 case." Brown v. Wilshire Credit Corp. (In re Brown), 484 F.3d  
16 1116, 1122 (9th Cir. 2007) (citation omitted). This flexible  
17 approach is intended to ensure that a case does not make "two  
18 complete trips through the appellate process." Lewis v. Law  
19 Offices of Nicholas A. Franke (In re Lewis), 113 F.3d 1040, 1043  
20 (9th Cir. 1997).

21 Here, the bankruptcy court's written Judgment After Trial  
22 does not specifically delineate the individual legal theories on  
23 which it is based. However, the judgment does incorporate by  
24 express reference, the "reasons set forth in the Court's oral  
25 findings." Judgment After Trial at 2:2-3. The use of the plural  
26 "reasons" indicates more than one basis for the judgment. The  
27 trial transcript evidences that those reasons specifically  
28 included the bankruptcy court's oral finding that "the doctrine

1 of equitable subordination should apply as well." Trial Tr. at  
2 13:5. Indeed, the bankruptcy court made this particular  
3 alternative finding "to make a complete record in the event there  
4 is an appeal." Id. at 11:1-2. Therefore, the oral findings  
5 clearly evidence the bankruptcy court's intent to grant final  
6 judgment in favor of the Trustee on the alternative basis of  
7 equitable subrogation.

8 Joseph's anti-finality argument is not only inconsistent  
9 with the record, it is also inconsistent with his position on  
10 appeal. The Judgment After Trial did not delineate any specific  
11 theory on which relief was granted. Notwithstanding this  
12 silence, Joseph chose to appeal based on the assumption that the  
13 judgment involved a contractual determination. Nothing in the  
14 express language of the Judgment After Trial itself, however,  
15 supports the assertion that this basis for relief was the sole  
16 basis for relief or even a basis for relief. The Judgment After  
17 Trial was equally non-specific and silent as to the contract  
18 based subordination claim.

19 For these reasons, we conclude that the bankruptcy court  
20 granted a final judgment in favor of the Trustee on the  
21 alternative theory of equitable subrogation.

22 **2. Joseph Failed To Timely and Appropriately Raise The**  
23 **Equitable Subrogation Issue On Appeal.**

24 An appellant is required to serve and file a statement of  
25 issues on appeal. Fed. R. Bankr. P. 8006. Issues not included  
26 in the statement of issues may be deemed waived. Woods v. Pine  
27 Mountain, Ltd. (In re Pine Mountain, Ltd.), 80 B.R. 171, 173  
28 (9th Cir. BAP 1987) (holding that appellant waived the issue of

1 bankruptcy court's refusal to consider parol evidence when the  
2 issue was not included in the statement of issues). An appellant  
3 must also raise and argue an issue in its opening brief or the  
4 issue will be waived. Seven Words LLC v. Network Solutions,  
5 260 F.3d 1089, 1097 (9th Cir. 2001); see also McLain v. Calderon,  
6 134 F.3d 1383, 1384 n.2 (9th Cir. 1998) (issue mentioned in  
7 statement of issues, but not discussed in brief is considered  
8 waived). Further, an argument waived by the failure to raise it  
9 in an appellant's opening brief cannot be raised for the first  
10 time in the appellant's reply brief. Alaska Ctr. For Env't v.  
11 United States Forest Serv., 189 F.3d 851, 858 n.4 (9th Cir.  
12 1999).

13 Here, Joseph's statement of issues does not mention  
14 equitable subrogation. The only issue raised is, "Did the  
15 bankruptcy court err in deciding that the [Bishay Trust Deed] was  
16 fully subordinate to the [WaMu Trust Deed] based on a  
17 Subordination Agreement that has not been found, without making a  
18 finding as to the wording or contents of that subordination  
19 agreement?" Appellant's Statement of Issue on Appeal at 2.  
20 Correspondingly, Joseph's opening brief discusses the same single  
21 issue, slightly re-phrased as, "The Subordination Agreement has  
22 not been found. Was it error to make that decision without  
23 determining the wording of that subordination agreement?"  
24 Appellant's Opening Brief (May 21, 2012) at 1. Again, no mention  
25 is made of equitable subrogation.

26 The Trustee raised this omission in his brief. Thus,  
27 Joseph, in his reply brief, eventually contended that the  
28 bankruptcy court erred in granting judgment on a theory of

1 equitable subrogation because the elements of equitable  
2 subrogation were not met. Because Joseph raises this issue for  
3 the first time in his reply brief, he waived his right to appeal  
4 the bankruptcy court's judgment based on this alternative theory.  
5 For this reason alone, the trial court's judgment must stand.

6 **B. The Bankruptcy Court Did Not Err, As A Matter Of Law, By**  
7 **Finding Subordination Without First Determining All The**  
8 **Terms And Conditions Of Subordination.**

9 Joseph contends that the subordination agreement at issue  
10 cannot be located and, therefore, that its terms are unknown.  
11 Joseph then argues that when the terms of a subordination  
12 agreement are not known, the subordination agreement is void.

13 In support of this position, Joseph briefly identifies cases  
14 that he alleges require contractual certainty in the  
15 subordination agreement context. This case law, however, is  
16 either distinguishable or declarative of a non-controversial rule  
17 of law that is consistent with the bankruptcy court's legal  
18 determinations.

19 Joseph cites to Resolution Trust Corp v. BVS Dev., Inc.,  
20 42 F.3d 1206 (9th Cir. 1994) for its statement that "the law is  
21 well settled that rights under an agreement of subordination  
22 extend to and are limited strictly by the express terms and  
23 conditions of the agreement." Id. at 1214. This point is well  
24 taken, but Joseph fails to even suggest how his admitted  
25 agreement to subordinate is in any way less than an agreement to  
26 full subordination to the WaMu Trust Deed.

27 Similarly, Joseph cites to Weddington Prods., Inc. v. Flick,  
28 60 Cal.App.4th 793 (1998) (citing White Point Co. v. Herrington,  
268 Cal.App.2d 458 (1968)) and Roffinella v. Sherinian,

1 179 Cal.App.3d 230, 239 (1986) to make the point that  
2 subordination provisions found to be uncertain, indefinite, and  
3 incapable of ascertainment by reference to an objective standard,  
4 have been deemed void for the uncertainty of a material  
5 provision. Id. at 817.<sup>6</sup> But again, Joseph fails to identify any  
6 point of uncertainty related to his agreement to subordinate,  
7 much less a material one.

8 Lastly, Joseph relies on Krasley v. Superior Court,  
9 101 Cal.App.3d 425, 430 (1980) to suggest that when a  
10 subordination agreement is uncertain, trade usage and custom  
11 cannot be used to fill the gaps. The facts of Krasley, however,  
12 are far from the facts here. The trade usage discussion arose in  
13 another context and pertained to the court's determination that a  
14 document entitled a "counter counter offer" could not be treated  
15 as an acceptance of a prior offer. Id. The subordination  
16 discussion in Krasley related to an alternative basis for  
17 concluding that a contract did not arise. The Krasley court  
18 found that inclusion of the term "Seller to subordinate to a  
19 Construction Loan . . ." was not sufficiently specific to bind  
20 the elderly and ill sellers who responded only with a counter  
21 offer. Id. Joseph, in contrast, knew the loan as to which his  
22 subordination agreement applied.

23 In summary, Joseph's cases all concern the contractual  
24 requirement of certainty, in some cases in the subordination  
25 agreement setting. These rules generally apply to deny

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26  
27 <sup>6</sup> Neither Weddington Prods. nor White Pointe Co. are  
28 directly applicable on the facts. They both refer to  
subordination agreement cases, but do not analyze the  
enforceability of a subordination clause.

1 enforcement of a subordination agreement where a party agreed to  
2 subordinate in the future to an unknown amount of additional  
3 security and where material deal terms of that future loan are  
4 unknown. The certainty requirements then operate to limit the  
5 scope of an otherwise open ended agreement to only the amount  
6 that was within the subordinating parties' objective intent at  
7 the time of contracting. Here, Joseph never states that his  
8 objective intent was anything other than full subordination.

9 Under California law, contract formation requires mutual  
10 consent of the parties. Cal. Civ. Code § 1561; 1 Witkin Summary  
11 of California Law (10th ed. 2005) Contracts, § 116 p. 155. Such  
12 mutual consent may be determined based on the reasonable meaning  
13 of the words and actions of the parties. Weddington Prods.,  
14 60 Cal.App.4th at 811. The contract's terms must be certain in  
15 material respects, but the existence of minor areas of  
16 disagreement will not render the contract void and entirely  
17 unenforceable. Id. at 811-12. Consistent with the general  
18 requirements of California law in the area of contracts, a  
19 subordination agreement must be interpreted to enforce the  
20 objective intent of the parties. Bratcher v. Buckner,  
21 90 Cal.App.4th 1177, 1186 (2001).

22 Courts are cautious when asked to enforce agreements to  
23 subordinate to uncertain and future financing of unknown terms.  
24 See Roskamp Manley Assocs., Inc. v. Davin Dev. & Inv. Corp.,  
25 184 Cal.App.3d 513 (1986). A subordination agreement,  
26 notwithstanding, may be enforceable even in the absence of  
27 absolute certainty as to all contract terms. In Resolution Trust  
28 Corp., the subordinating party was a seller who took back a loan



1 and security from the buyer and also agreed to subordinate to  
2 future construction financing. 42 F.3d at 1210. The Resolution  
3 Trust Corp. court found the underlying subordination agreement  
4 enforceable despite some lack of certainty as to terms of this  
5 financing at the time of subordination. Id. at 1214. See also  
6 Int'l Mortg. Bank v. Eaton, 39 Cal.App. 39 (1918) (holding that  
7 an executed agreement to subordinate was enforceable where there  
8 was no specification of interest rate, subordinated amount, or  
9 use of the future senior loan proceeds.) In Krasley, in  
10 contrast, the court found no contract and no subordination  
11 agreement where the agreement was entirely open-ended.  
12 101 Cal.App.3d at 431. In short, there are situations where the  
13 law will not enforce a subordination agreement because the terms  
14 are so uncertain that the court cannot find a meeting of the  
15 minds. California law, however, does not require 100% certainty.

16 Joseph's situation is not analogous to the Krasley facts.  
17 The bankruptcy court determined as a factual matter that Joseph's  
18 testimony evidenced an objective intent to subordinate the Bishay  
19 Trust Deed to the WaMu Trust Deed. It is clear that Joseph knew  
20 that the WaMu loan would be used to repay existing loans secured  
21 by already senior trust deeds. Thus, this determination leaves  
22 no real ambiguity regarding its scope.

23 And, perhaps more importantly, Joseph never specifies any  
24 unknown feature of this subordination. Having conceded that he  
25 subordinated his trust deed, the burden shifted to Joseph to  
26 specify any area where he did not agree to subordination and  
27 where, as a result, subordination cannot be required. He could  
28 not remain silent and prevail.

1           Therefore, the bankruptcy court did not err in finding that  
2 Joseph subordinated the Bishay Trust Deed to the WaMu Trust Deed  
3 even though he alleges that unspecified terms of the  
4 subordination agreement remain unclear. Enough is known to make  
5 clear that subordination occurred, and there is no evidence of a  
6 material term in dispute.

7 **C.    The Bankruptcy Court Did Not Err, As A Matter Of Fact, By**  
8 **Finding The Bishay Trust Deed Fully Subordinate To The WaMu**  
9 **Trust Deed.**

10          The Pre-Trial Order describes the relevant trial issues of  
11 fact as:

12                 3.    Whether Joseph Bishay has agreed that  
13                 his deed of trust is subordinate to that of  
14                 the Washington Mutual Bank deed of trust.

15                 4.    Whether Joseph Bishay agreed to  
16                 subordinate his deed of trust to the  
17                 Washington Mutual Deed of trust obtained by  
18                 Marsil Bishay against the Subject Property.

19 Pre-Trial Order at 6.

20          It also contained stipulated facts that evidence an  
21 agreement to subordinate. Admitted facts which are agreed upon  
22 in a pre-trial order give rise to an inference that must be  
23 rebutted by opposing evidence. Harding v. Hall (In re Hall),  
24 2006 WL 6810950, \*2 (9th Cir. BAP Aug. 14, 2006); see also  
25 Jaurequi v. City of Glendale, 852 F.2d 1128 (9th Cir. 1988)  
26 (recognizing that facts admitted by the defendant in a pre-trial  
27 order established plaintiff's prima facie case which gave rise to  
28 a presumption requiring evidentiary rebuttal). Joseph fails to  
identify any alleged limitation as to the extent of his admitted  
agreement to subordinate. Thus, the bankruptcy court did not err  
in finding that Joseph entirely subordinated the Bishay Trust  
Deed based on the admitted facts in the Pre-Trial Order.

1 On appeal, Joseph does not directly contest any of the  
2 bankruptcy court's findings of fact. Indeed, as they are based  
3 on his stipulations in the Pre-Trial Order, it is difficult to  
4 see how he could do so. As the Trustee correctly points out,  
5 however, Joseph's statement of the issue on appeal can be  
6 interpreted in a number of ways, and Joseph may argue that the  
7 bankruptcy court erred in finding that he fully rather than  
8 partially subordinated.

9 In particular situations, where a subordination agreement  
10 relates to an unknown future indebtedness, the subordinating  
11 party may be held to have only partially subordinated to the  
12 amount that was within its objective intent at the time of  
13 contracting. See generally Wells Fargo Bank v. Neilsen,  
14 178 Cal.App.4th 602, 615-17 (2009) (limiting subordination amount  
15 to that which was within the objective intent of the  
16 subordinating lender in a "circuitry of liens" context). Here,  
17 however, there is no ambiguity in the evidence; the bankruptcy  
18 court relied on Joseph's own testimony and agreement in its  
19 determination that Joseph subordinated the Bishay Trust Deed and  
20 was in second position behind the entirety of the WaMu Trust  
21 Deed.

22 This ultimate fact is evidenced by Joseph's admitted  
23 testimony that: ". . . he subordinated his trust deed to the  
24 Washington Mutual Deed of trust," (Pre-Trial Order at 4:11-12)  
25 and that: "he understood that his deed of trust was in second  
26 position behind the new deed of trust obtained by Marsil Bishay  
27 in favor of Washington Mutual." Pre-Trial Order at 4:18-20.  
28 Thus, the bankruptcy court correctly found that subordination

1 occurred.

2       It is also clear on this record that Joseph knew in  
3 connection with this general agreement to subordinate that his  
4 mother would use the WaMu Loan proceeds to pay off existing  
5 senior liens and that WaMu would, thus, enjoy the same priority  
6 over his lien that was enjoyed by the prior senior lenders.  
7 Joseph offers no counter evidence. Therefore, the record  
8 supports the bankruptcy court's determination that Joseph  
9 objectively intended to fully subordinate. Again, Joseph  
10 advances no evidence to the contrary.

11                                       **CONCLUSION**

12       For the reasons stated above, we AFFIRM the judgment of the  
13 bankruptcy court.  
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