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U.S. BKCY. APP. PANEL
OF THE NINTH CIRCUIT

NOT FOR PUBLICATION

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UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT

In re:)	BAP No. NC-12-1085-PaMkH
)	
JOSHUA P. PAGNINI and)	Bankr. No. 10-70394
TENEIL A. PAGNINI,)	
)	Adv. Proc. No. 10-4393
Debtors.)	
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ANTIOCH COMMUNITY FEDERAL CREDIT)	
UNION.)	
)	
Appellant,)	
)	
v.)	M E M O R A N D U M ¹
)	
JOSHUA P. PAGNINI;)	
TENEIL A. PAGNINI,)	
)	
Appellees.)	
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Argued and Submitted on October 18, 2012,
at San Francisco, California

Filed - November 13, 2012

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

Honorable Edward Jellen, Bankruptcy Judge, Presiding²

Appearances: Laurel Adams argued for appellant Antioch Federal
Credit Union; Ronald B. Bass argued for appellees
Joshua P. Pagnini and Teneil A. Pagnini.

Before: PAPPAS, MARKELL and HOLLOWELL, Bankruptcy Judges.

¹ 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.

² Judge Jellen retired from service after entering the
judgment and order at issue in this appeal.

1 Appellant Antioch Community Federal Credit Union ("Antioch")
2 appeals the decision of the bankruptcy court denying its request
3 for a declaration that a debt owed to Antioch by chapter 7³
4 debtors Joshua P. Pagnini ("Pagnini") and Teneil A. Pagnini
5 (together, "Debtors") was excepted from discharge under
6 § 523(a)(2)(A).⁴ We AFFIRM.

7 **FACTS**

8 This dispute concerns an alleged oral misrepresentation made
9 by Pagnini to Antioch in connection with the refinancing of a loan
10 secured by a 2006 Bentley automobile. Unless otherwise noted, the
11 facts are not disputed.

12 Loan History

13 Pagnini is CEO of Pagnini, Inc., and is involved in the
14 environmental erosion control and construction site recycling
15 business. He also buys and sells vintage cars. Antioch financed
16 a number of Pagnini's vehicle purchases.

17 At a date not in the record, Pagnini borrowed funds from
18 Antioch to acquire a 1940 Cadillac LaSalle ("Loan 13"). Pagnini

19

20

21 ³ Unless otherwise indicated, all chapter, section and rule
22 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532, and
23 The Federal Rules of Bankruptcy Procedure, Rules 1001-9037.
24 The Federal Rules of Civil Procedure are referred to as Civil
25 Rules.

26

27 ⁴ The bankruptcy court also concluded that Antioch had not
28 shown it was entitled to an exception to discharge under
§ 523(a)(2)(B). And, on its own initiative "in the interest of a
complete record," the court also found that the elements for an
exception to discharge under § 523(a)(6) had not been established.
Decision at 8-10. Antioch has not appealed those rulings, and we
do not consider them, although we are skeptical about the
propriety of the bankruptcy court, without request by the
creditor, of offering an advisory opinion concerning an exception
to discharge.

1 granted Antioch a security interest in the La Salle. The amount
2 of the loan is not disclosed in the record.

3 In August 2004, Pagnini borrowed \$27,000 from Antioch to
4 purchase a 1950 Ford ("Loan 14"). The loan was secured by the
5 Ford.

6 In March 2006, Pagnini borrowed \$178,990 from Antioch to
7 acquire a 2006 Bentley ("Loan 21"). The loan was secured by the
8 Bentley.

9 In February 2008, Pagnini refinanced the balances due on
10 Loans 13 and 14 with a new loan for \$35,154 ("Loan 15"); no new
11 funds were advanced in this loan. The loan was secured by both
12 the LaSalle and Ford.

13 On February 9, 2009, with the permission of Antioch, Pagnini
14 sold the Bentley for \$75,000. The sale proceeds were paid to
15 Antioch directly and applied to Loan 21. Pagnini then refinanced
16 the balance due on Loan 21 with a new loan in the amount of
17 \$67,732 ("Loan 43"); this loan did not include any new funds.
18 Loan 43 was secured by the Ford, which Antioch released as the
19 collateral on Loan 15. The value of the Ford, based on an
20 appraisal submitted as part of the application to refinance
21 Loan 21, was \$38,200, meaning that approximately half the balance
22 due on Loan 43 was unsecured.

23 Anna Tellez ("Tellez"), chief executive officer of Antioch,
24 would later testify regarding the loan committee's deliberations
25 in approving Loan 43:

26 What I recommended to the board was that we accept the
27 . . . \$75,000, and that we would rewrite the loan. He
28 had one loan outstanding that had two pieces of
security, two cars that were collateralized, secured on
that loan. And so that we could use the other as

1 security, as partial security on the difference, the
2 deficit balance of the \$75,000 – between the \$75,000 and
3 the \$149,000 that he owed. And then the rest would be
4 unsecured. And we would do it as a blended rate. When
it was taken to the board, the board approved it, but
they approved it with a cosigner[.]

5 Trial Tr. 70:1-13, November 13, 2011.

6 It was also undisputed that the 1950 Ford had been largely
7 disassembled at the time it was offered to collateralize Loan 15
8 in 2008 and Loan 43 in 2009. According to Pagnini's testimony at
9 trial, the disassembled Ford was also missing the engine, radiator
10 and transmission, which he had sold.

11 Pagnini submitted an appraisal report concerning the Ford as
12 part of the application to refinance Loan 21. The appraiser
13 testified at trial that, in preparing this report, he did not
14 physically examine the Ford, but instead simply asked Pagnini
15 questions about the car on the phone. Pagnini told the appraiser
16 that the Ford was in the same condition that it had been the last
17 time the appraiser physically examined it in 2004. The appraiser
18 was therefore unaware that the Ford was disassembled with three
19 key component parts missing. He testified that if he had known
20 that the Ford was in that condition, he would not have provided an
21 appraisal report valuing the Ford at \$38,200.

22 At some date not disclosed in the record, Pagnini defaulted
23 on Loan 43.

24 The Adversary Proceeding

25 Debtors filed a chapter 7 petition on September 10, 2010.
26 Debtors listed Antioch on Schedule D as a secured creditor owed
27 \$400,000 for "multiple loans on various vehicles."
28

1 Antioch filed an adversary complaint against Debtors⁵ on
2 December 14, 2010. It alleged that Pagnini had obtained Loan 43
3 from Antioch by false pretenses and fraud by providing a false
4 appraisal, and by failing to advise Antioch that the Ford, the
5 security offered for the refinance loan, was disassembled. These
6 acts and omissions, according to Antioch, rendered the debt
7 excepted from discharge under § 523(a)(2)(A). Debtors filed an
8 answer generally denying the allegations of the complaint.
9 However, Debtors admitted that the appraisal did not state that
10 the Ford had been disassembled.

11 A trial in the adversary proceeding was conducted by the
12 bankruptcy court on November 30, 2011. The court heard testimony
13 from Ed Archer (the appraiser who prepared the appraisal report on
14 the Ford), Pagnini, and Tellez. After closing statements, the
15 bankruptcy court took the issues under submission.

16 The bankruptcy court entered a decision on December 14, 2011
17 (the "Decision"). In it, the court examined each of the five
18 elements that a creditor must establish for an exception to
19 discharge under § 523(a)(2)(A): (1) the debtor must make a
20 misrepresentation, (2) with knowledge of its falsity, (3) with the
21 intention and purpose of deceiving the creditor, (4) that the
22 creditor relied on the representation, and (5) the creditor
23 sustained damage as the proximate result thereof. See
24 In re Britton, 950 F.2d 602, 604 (9th Cir. 1991). The bankruptcy
25 court found that the first four elements had been established by
26 Antioch. Neither party in this appeal has challenged the court's

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28 ⁵ The parties would later stipulate to dismiss Teneil A.
Pagnini as a defendant in this adversary proceeding.

1 rulings as to those four elements.

2 However, the bankruptcy court found that "the weight of the
3 evidence did not show that Antioch suffered any damage as a
4 proximate result of Paganini's concealment of the condition of the
5 Ford. The fifth element of § 523(a)(2)(A) is therefore not
6 satisfied." Decision at 7. The court reasoned that, applying
7 Ninth Circuit case law, in order to show that Antioch's damages
8 were proximately caused by Pagnini's fraud, Antioch must prove
9 that it had valuable collection remedies at the time the subject
10 loan was made, and that such remedies were lost as a result of the
11 transaction. The bankruptcy court found that the only valuable
12 collection remedy Antioch gave up in the subject transaction was
13 its right to repossess and sell the Bentley. Tellez testified
14 that if it had known of the actual condition of the Ford, Antioch
15 would not have refinanced the Bentley loan, would not have allowed
16 Pagnini to sell the Bentley, and would instead have repossessed
17 the Bentley and sold it for more than \$75,000. Decision at 7-8.
18 The court found, however, that Antioch had failed to prove
19 damages, because it did not offer any credible evidence to show
20 that it could have received more than \$75,000 had it repossessed
21 and sold the Bentley. Decision at 8.

22 The bankruptcy court entered a judgment dismissing Antioch's
23 complaint on December 14, 2011. Antioch filed a motion to alter
24 or amend judgment under Civil Rule 59(e) on December 27, 2011. In
25 the motion, Antioch argued that the judgment was against the
26 weight of evidence because Tellez testified without contradiction
27 that Antioch had been damaged by the fraud committed by Pagnini,
28 and that Antioch had been deprived of valuable collection remedies

1 at the time of the loan renewal.

2 At a hearing on January 20, 2012, the bankruptcy court
3 announced on the record that the motion would be denied, and that
4 it would issue a written decision. The court entered its
5 Decision: Motion to Alter or Amend Judgment on January 24, 2012
6 ("Decision II"). In it, the bankruptcy court observed that
7 Antioch had identified only one valuable collection right it
8 allegedly lost as a result of the loan refinance, its right to
9 repossess the Bentley, but Antioch had not shown how it would have
10 benefitted by doing so as compared to allowing Pagnini to sell the
11 Bentley for \$75,000. Decision II at 2. The court rejected
12 Antioch's argument that it could have foregone repossession and
13 simply relied on Pagnini's incentive to repay the loan because it
14 was contrary to the trial testimony and purely conjectural.
15 Finally, the court found that Antioch's new argument that it would
16 have charged a higher interest rate on Loan 43 if it had known the
17 true value of the Ford lacked merit because it was simply not a
18 collection right. The court found Antioch's other arguments
19 equally unpersuasive. The court entered an order denying
20 Antioch's Civil Rule 59(e) motion on January 24, 2012.

21 Antioch filed a timely appeal on February 7, 2012.

22 **JURISDICTION**

23 The bankruptcy court had jurisdiction under 28 U.S.C. §§ 1334
24 and 157(b)(2)(I). We have jurisdiction under 28 U.S.C. § 158.

25 **ISSUE**

26 Whether the bankruptcy court clearly erred in determining
27 that Antioch did not prove that Pagnini's alleged fraud was the
28 proximate cause of any damages as required under § 523(a)(2)(A).

1 elements by a preponderance of the evidence. Grogan v. Garner,
2 498 U.S. 279 (1991); Gill v. Stern (In re Stern), 345 F.3d 1036,
3 1043 (9th Cir. 2003).

4 In its analysis, the bankruptcy court correctly identified
5 the In re Britton elements and ruled that Antioch had adequately
6 established the first four. These rulings have not been appealed
7 to this Panel and we do not review them.

8 However, the bankruptcy court decided that Antioch had not
9 established the fifth element because the evidence did not show
10 that Antioch suffered any damage as a proximate result of
11 Pagnini's concealment of the true, disassembled condition of the
12 Ford. In making this decision, the bankruptcy court relied on the
13 Ninth Circuit's holding in Stevens v. Nw. Nat'l Ins. Co.
14 (In re Siriani), 967 F.2d 302 (9th Cir. 1992).

15 In In re Siriani, a creditor, Springbrook Lenders, lent money
16 to a partnership owned in part by the debtors (including Bruce
17 Siriani) to finance acquisition of an apartment building by the
18 partnership. To obtain the loan, the debtors were required to
19 provide a bond. The bonding company, Northwestern, required the
20 debtors to execute an indemnity agreement. The indemnity
21 agreement, inter alia, granted the bonding company a power of
22 attorney to perfect a security interest. When the loan came up
23 for refinancing, the loan company required renewal of the bond.
24 The debtors submitted false financial documents to Northwestern,
25 upon which the bonding company relied in renewing the bond.

26 The loan went into default, a claim was made on the bond, and
27 the debtors failed to provide funds to cover that claim. However,
28 Northwestern had not acted promptly to perfect its security

1 interest in the debtors' assets, and when an involuntary
2 bankruptcy was filed against them, Northwestern was prevented from
3 doing so. Northwestern filed an adversary proceeding in the
4 bankruptcy court against the debtors, alleging that their
5 indemnity obligation for amounts Northwestern had paid to honor
6 the bond was a nondischargeable debt under § 523(a)(2)(B).⁶

7 The bankruptcy court in In re Siriani disagreed with
8 Northwestern, holding that the bonding company was required to
9 show that it had valuable collection remedies that had become
10 worthless as a result of the debtors' fraud. On appeal, the Ninth
11 Circuit stated:

12 We agree with the bankruptcy court that Northwestern had
13 to show that the fraud proximately caused its loss by
14 adducing evidence that it relied on the financial
15 statements, that it had valuable collection remedies at
16 the time of renewal, and that such remedies lost value
17 during the renewal period.

18 Two years after In re Siriani, this Panel faced a similar
19 fact pattern and applied the In re Siriani rule. Cho Hung Bank v.
20 Kim (In re Kim), 163 B.R. 157 (9th Cir. BAP 1994). In In re Kim,
21 the debtors obtained a \$110,000 loan to purchase a parcel of real
22 estate that was being foreclosed. They purchased the foreclosed
23 property, and then resold it to the debtors' sister and
24 brother-in-law for \$190,000. But instead of paying off the
25 initial loan, the debtors sought a loan renewal from the bank (in
26 the process, failing to inform the bank that the real property had

26 ⁶ Elsewhere in its decision, the Ninth Circuit notes that
27 §523(a)(2)(A) and (a)(2)(B) are substantially similar, and that a
28 bankruptcy court may apply the analysis regarding proximate cause
to claims arising under either subsection of § 523(a)(2).
In re Siriani, 967 F.2d at 304.

1 been sold), so they could use the funds from the sale to purchase
2 a liquor store. When that business failed, and the debtors filed
3 for bankruptcy, the bank's only valuable collection remedy that it
4 might have exercised if it had discovered the fraud was to file a
5 lawsuit in state court. However, the bank argued that remedy had
6 declined in value with the filing of the bankruptcy case.

7 In connection with the bank's action against the debtors for
8 a fraud exception to discharge, the Panel concluded that in order
9 to prove the fifth element, proximate cause, that,

10 if the creditor demonstrates that it had valuable
11 collection remedies at the time of the extension or
12 renewal, that it did not exercise in reliance on the
13 debtor's misrepresentation and that those remedies lost
value during the renewal or extension period, the
creditor has shown proximate damage to the extent that
those remedies lost value.

14 In In re Siriani, the creditor had a valuable collection
15 remedy at the time of refinancing, the power to perfect its
16 security interest, that declined in value when the bankruptcy
17 filing prevented it from perfecting that interest. In In re Kim,
18 the creditor had the power to sue the debtors in state court when
19 the bank renewed the loan, but that power declined in value when
20 the debtors filed the bankruptcy petition. Both these powers were
21 "valuable collection remedies" that could have significantly
22 reduced the creditors' loss. However, in this case, Antioch's
23 sole collection remedy impacted by Pagnini's failure to reveal the
24 true condition of the Ford when he refinanced Loan 21 was the
25 creditor's potential right to repossess and sell the Bentley. The
26 bankruptcy court found that Antioch had presented no evidence to
27 show that, had it exercised that remedy, its eventual loss on the
28 loan would have been reduced.

1 Indeed, to the contrary, the court had heard Tellez testify
2 about that very point:

3 BENABOU [Counsel for Pagnini]: Ms. Tellez, so you
4 indicated that you would have tried to have sold the
5 Bentley if Mr. Pagnini couldn't have – you could have or
6 you may have been able to sell it for more than \$75,000,
7 is that what your testimony is?

8 TELLEZ: Yes.

9 BENABOU: But you don't know that, do you?

10 TELLEZ: No, I don't. To say, honest – truthfully, no, I
11 do not know that I can.

12 Trial Tr. 135:10-17, November 30, 2010. As can be seen, Tellez
13 seemingly admitted that Antioch's one valuable collection right
14 lost via the refinance transaction, the right to repossess and
15 sell the Bentley, was not necessarily "valuable" at all. She
16 could not say that by exercising that power, even if Antioch had
17 been aware of Pagnini's misrepresentation, the results for Antioch
18 would have in any way changed. Moreover, Pagnini testified
19 without contradiction that Antioch's repossession of the Bentley
20 would not have affected his ability to repay the unsecured portion
21 of the loan. Thus, the bankruptcy court had multiple plausible
22 views of the evidence, two from the same party, and its choice
23 among them cannot be clear error. United States v. Elliott,
24 322 F.3d 710, 714 (9th Cir. 2003). The deference owed to the
25 bankruptcy court on this choice is heightened because it is based
26 on the credibility of live witnesses. Rule 8013.

27 Antioch has argued, both in the bankruptcy court and this
28 appeal, that the bankruptcy court should have considered the
actual damages it suffered resulting from Pagnini's
misrepresentation. As discussed above, though, this argument is

1 simply inconsistent with the required analysis in Ninth Circuit
2 case law regarding the fifth element, proximate cause. Even so,
3 the bankruptcy court examined those arguments, and found that
4 Antioch had not shown it suffered any actual damages resulting
5 from the misrepresentation.

6 Antioch argued that the blended interest rate on the
7 refinanced loan it made to Pagnini would have been higher if it
8 had known that the Ford was disassembled. The bankruptcy court
9 did not clearly err in finding that a changed interest rate was
10 not a valuable collection remedy it lost for purposes of
11 § 523(a)(2)(A). Appellant argued that following the refinancing,
12 it received \$13,441 less from Pagnini in the payment schedule for
13 Loan 43 than it would have under the old payment schedule on
14 Loan 21. Again, the court ruled this was not a collection remedy.
15 Additionally, the court noted that the evidence produced by
16 Pagnini was that he could not have paid the additional \$13,441.
17 Antioch argued that it lost money on the sale of the Bentley –
18 again, not a collection remedy. The court also had evidence from
19 Antioch that it approved the sale of the Bentley for \$75,000
20 because it knew that this was the best offer that it would
21 receive.

22 Finally, Tellez testified that a typical debtor is more
23 likely to repay a secured loan than an unsecured loan. When it
24 released the Bentley for sale, Antioch argued, Pagnini was less
25 motivated to pay the remaining balance, and this caused Antioch
26 damages. Again this contention does not go to collection
27 remedies. It is also inconsistent with the testimony of Pagnini
28 that he was actively trying to sell the Bentley and keep the Ford.

1 For all these reasons, in light of the deferential standard
2 we apply to the bankruptcy court's findings regarding the
3 proximate cause element of § 523(a)(2)(A), together with the
4 heightened deference we give the court's decisions based on
5 testimonial evidence, we conclude that the bankruptcy court did
6 not clearly err in determining that Antioch did not prove it was
7 entitled to an exception to discharge.

8 **CONCLUSION**

9 We AFFIRM the judgment of the bankruptcy court.

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