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

NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT

5	In re:)	BAP No. CC-11-1565-DMkKi
)	
6	JOSEPH H. PARKS and)	Bk. No. 08-13792-ES
	TIFFANY M. PARKS,)	
7)	Adv. No. 08-1404-ES
	Debtors.)	
8	_____)	
)	
9	JOSEPH H. PARKS,)	
)	
10	Appellant,)	
)	
11	v.)	MEMORANDUM¹
)	
12	ANGELUS BLOCK CO., INC.,)	
)	
13	Appellee.)	
14	_____)	

Argued and Submitted on July 19, 2012
at Pasadena, California

Filed - August 7, 2012

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

Honorable Erithe A. Smith, Bankruptcy Judge, Presiding

Appearances: Kevin E. Monson, Esq. argued for Appellant Joseph H. Parks; and Jon D. Cantor, Esq. of Dykema Gossett, LLP argued for Appellee Angelus Block Co., Inc.

Before: DUNN, MARKELL, and KIRSCHER, 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.

1 The debtor/defendant/appellant Joseph H. Parks ("Debtor")
2 appeals the bankruptcy court's judgment under § 523(a)(2)(A),
3 excepting his debt to Angelus Block Co., Inc. ("Angelus") from
4 his discharge.² We AFFIRM.

5 Factual Background

6 From 2004 through 2008, the Debtor did business under the
7 name Pool Construction Services ("PCS"). The Debtor performed
8 construction services, including the construction of concrete
9 block walls for residential projects. As the operator of a small
10 business, the Debtor periodically experienced difficulties with
11 cash flow that he compensated for by working with customers who
12 would pay the costs of materials "up front" and deduct those
13 costs from the Debtor's billings.

14 Angelus is a supplier of concrete blocks and related
15 materials to the construction industry.

16 Beginning in late 2005, Dennis Reiger ("Reiger") hired the
17 Debtor to work on various projects Reiger was developing,
18 including building concrete block walls for single family
19 residential projects in Salton City, California (the "Salton City
20 Project"). The Debtor's work on the Salton City Project
21 encompassed building concrete block walls on more than 40
22 residential properties. On or about December 16, 2005, the
23 Debtor requested Angelus to supply concrete blocks and related
24 materials for the Salton City Project. From 2006 through 2008,
25

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

1 the Debtor completed about 95% of his scope of work for the
2 Salton City Project.

3 Larry Lang ("Lang") operates under the name "Lang
4 Construction" as a general contractor. Reiger sold Lang several
5 vacant lots in Salton City, California. These lots were in the
6 same development as the Salton City Project. Lang was looking to
7 hire a subcontractor to build concrete block walls on his vacant
8 lots, and Reiger referred the Debtor to him.

9 The Debtor was contacted by Lang in the summer of 2006 with
10 a proposal that the Debtor build concrete block walls for Lang on
11 his Salton City lots. As the various lots were in the same
12 development as the Salton City Project, Lang specified that the
13 Debtor should build the same type of walls for him that he was
14 constructing for Reiger, so that the houses built on Lang's lots
15 would blend in with the houses being constructed by Reiger.

16 In addition to the walls the Debtor was building for Reiger
17 on the Salton City Project, the Debtor constructed concrete block
18 walls for Lang at five building lots: 1556 N. Marina Drive (the
19 first Lang lot developed), 1527 Valient, 2340 Falcon, 2344 Falcon
20 and 2366 Falcon. The Debtor completed a Job Information Sheet,
21 faxed to him by Angelus, for the Lang lot at 1556 N. Marina Drive
22 but did not complete Job Information Sheets for any of the other
23 lots on which the Debtor built concrete block walls for Lang.
24 The four Lang lots, other than 1556 N. Marina Drive, hereafter
25 are referred to as the "Lang Lots."

26 When Angelus delivered concrete blocks and other material to
27 the Debtor in the Salton City area, the Debtor or his employee
28 would meet the Angelus delivery truck and show the driver the

1 lot(s) at which the blocks and material were to be delivered and
2 used. The Angelus employee then would unload the materials by
3 forklift and deposit them on the subject lot(s). According to
4 the Debtor, each such lot "was clearly identified by street and
5 lot numbers."

6 During the period that Angelus was doing business with the
7 Debtor, it was the customary practice of Angelus to obtain
8 required information for the California preliminary lien notice
9 ("California Preliminary Lien Notices") from its customers on a
10 Job Information Sheet for each location to which Angelus products
11 would be delivered. The required information included the
12 identity of the owner of the project, the project address, the
13 general contractor and any construction lender. Until the
14 required information was obtained, material would not be
15 delivered to the job site.

16 Reiger terminated the Debtor's services in January 2007 for
17 reasons not specified in the record. On or about January 9,
18 2007, the Debtor failed to pay for some of the concrete blocks
19 and related material he had ordered from Angelus. At the time
20 Reiger terminated him, the Debtor owed Angelus approximately
21 \$60,000. The Debtor stated that the total amount for materials
22 purchased from Angelus for the Lang Lots was approximately
23 \$15,500.

24 On or about February 7, 2007, Angelus caused mechanic's
25 liens to be recorded with respect to various properties to which
26 its products had been delivered at the Debtor's request and
27 subsequently filed complaints to foreclose its mechanic's liens
28 ("Mechanic's Lien Litigation"). During the Mechanic's Lien

1 Litigation, Angelus allegedly learned for the first time that
2 concrete blocks and other materials that it understood had been
3 delivered to Reiger projects in the Salton City area in fact had
4 been delivered for walls to be constructed on the Lang Lots.
5 Angelus accordingly was unable to recover for products delivered
6 to the Lang Lots through the Mechanic's Lien Litigation.

7 The Debtor filed his chapter 7 bankruptcy petition on
8 July 1, 2008. Thereafter, Angelus filed a timely adversary
9 proceeding complaint ("Adversary Proceeding") to except the
10 Debtor's debt to Angelus from discharge under § 523(a)(2)(A),
11 (a)(4), and (a)(6). However, by the time of trial, Angelus only
12 was pursuing its claim for relief under § 523(a)(2)(A) and a
13 claim for attorney's fees.

14 The Adversary Proceeding was tried (the "Trial") before the
15 bankruptcy court on January 24-25, 2011, with direct testimony
16 presented by declarations and live testimony on cross-
17 examination. Angelus argued and presented evidence to the effect
18 that the Debtor knew that unless Angelus received proper
19 information to complete the California Preliminary Lien Notices,
20 it would not be able to pursue the owner of subject property(ies)
21 for payment in the event that payment was not received from the
22 Debtor. The Debtor admitted that he never informed Angelus who
23 the owner of the Lang Lots was when he began to construct the
24 concrete block walls on the Lang Lots using Angelus products.
25 The Debtor also admitted that he was paid by Lang for the Angelus
26 products he ordered and installed on the Lang Lots, but he did
27 not pay Angelus for those materials. Angelus presented evidence
28 that it suffered damages totaling \$68,490.42 resulting from

1 Debtor's failure to disclose his use of Angelus products on the
2 Lang Lots.

3 The Debtor presented a multi-prong defense to Angelus'
4 claims. First, the Debtor testified that his agreement with
5 Reiger was to the effect that when Angelus invoiced the Debtor
6 for products used for the Salton City Project, Reiger paid for
7 the products and deducted the payments to Angelus from the
8 Debtor's invoices for the Salton City Project. When Lang
9 contacted the Debtor to perform similar work on Lang's lots in
10 the Salton City area, the Debtor testified that he approached
11 Reiger and explained that he did not have the financial resources
12 to cover the costs of products to be installed on Lang's lots.
13 The Debtor further testified that he and Reiger agreed that the
14 amount that would be due to the Debtor from Reiger for his labor
15 on the Salton City Project would be sufficient to cover the cost
16 of products for Lang's lots, and that Reiger would pay for the
17 Angelus products used on Lang's lots, deducting the cost from the
18 Debtor's invoices for the Salton City Project.

19 Reiger testified that no such agreement existed. Lang
20 testified that he was not aware of any such agreement. Angelus
21 also submitted declarations from two of its employees, its Credit
22 Manager and its accounts receivable manager, denying that they
23 ever were informed of such an agreement.

24 The Debtor also argued and testified that he or his employee
25 always directed the Angelus employee delivering products to place
26 them on the specific lot(s) where they were going to be
27 installed. Since each lot was clearly identified by street and
28 lot number, any failure by Angelus to obtain necessary

1 information for California Preliminary Lien Notices was its own
2 fault and was not the result of any intentional failure to
3 provide information by the Debtor.

4 Angelus countered with evidence that the Debtor provided
5 information to complete California Preliminary Lien Notices for
6 82 separate lots in the Salton City Project and 1556 N. Marina
7 Drive but did not provide such information for the four Lang
8 Lots.

9 Finally, the Debtor testified that he was owed approximately
10 \$60,000 by Reiger for the Salton City Project when he was
11 terminated that was not paid to him. The Debtor further
12 testified that he had no money to obtain legal assistance to
13 collect from Reiger and did not pursue collection. The amount
14 owed to him by Reiger would have been enough to pay Angelus in
15 full.

16 However, on cross-examination, the Debtor admitted that when
17 he prepared and filed his bankruptcy schedules, he did not list
18 any account receivable as owing from Reiger to him or PCS on his
19 Schedule B.

20 The Debtor also argued that Angelus was paid for its
21 products installed on the Lang Lots by Reiger. It was only after
22 the Mechanic's Lien Litigation was initiated that payments for
23 the products installed on the Lang Lots were backed out by
24 Angelus as an accounting matter.

25 At the conclusion of the Trial, the bankruptcy court set a
26 briefing schedule for post-trial memoranda. Both Angelus and the
27 Debtor filed post-trial briefs, and Angelus filed a reply brief
28 to the Debtor's post-trial brief.

1 On June 10, 2011, the bankruptcy court announced its
2 findings and conclusions orally, finding in favor of Angelus on
3 its claim to except its debt from the Debtor's discharge under
4 § 523(a)(2)(A). Following the announcement of the bankruptcy
5 court's oral findings of fact and conclusions of law, the Debtor
6 requested that the bankruptcy court make additional specified
7 fact findings. The bankruptcy court denied the Debtor's request
8 for additional fact findings by order entered on July 19, 2011.

9 Judgment was entered in favor of Angelus on July 19, 2011,
10 determining that the Debtor's debt to Angelus was excepted from
11 his discharge and that the amount of damages was \$63,870.87. The
12 Debtor timely appealed, in light of the bankruptcy court's order
13 extending the deadline to file a Notice of Appeal to October 14,
14 2011.

15 Jurisdiction

16 The bankruptcy court had jurisdiction under 28 U.S.C.
17 §§ 1334 and 157(b)(2)(I). We have jurisdiction under 28 U.S.C.
18 § 158.

19 Issues

20 1. Whether the Debtor can be subject to an exception to
21 discharge in this case for failures to disclose information where
22 there was no evidence of any affirmative misrepresentation by
23 Debtor, and there was evidence that Angelus was paid for its
24 products used on the Lang Lots.³

26
27 ³ This issue encompasses issues 1 through 4 and 6, as stated
28 in Appellant's Opening Brief at pp. 1-2. Each of said issues, as
stated by Debtor, is essentially a variation on the same theme,
as discussed infra.

1 reject proposed findings of fact is reviewed for abuse of
2 discretion. Cont'l Connector Corp. v. Houston Fearless Corp.,
3 350 F.2d 183 (9th Cir. 1965).

4 We apply a two-part test to determine objectively whether
5 the bankruptcy court abused its discretion. United States v.
6 Hinkson, 585 F.3d 1247, 1261-62 (9th Cir. 2009) (en banc).

7 First, we "determine de novo whether the bankruptcy court
8 identified the correct legal rule to apply to the relief
9 requested." Id. Second, we examine the bankruptcy court's
10 factual findings under the clearly erroneous standard. Id. at
11 1262 & n.20. We must affirm the bankruptcy court's fact findings
12 unless those findings are "(1) 'illogical,' (2) 'implausible,' or
13 (3) without 'support in inferences that may be drawn from the
14 facts in the record.'" Id.

15 We may affirm on any basis supported by the record. Shanks
16 v. Dressel, 540 F.3d 1082, 1086 (9th Cir. 2008).

17 Discussion

18 A. Generally Applicable Standards in a § 523(a)(2)(A) Case.

19 Section 523(a)(2)(A) provides that, "a discharge under . . .
20 this title does not discharge an individual debtor from any debt
21 - (2) for money, property, services, or an extension, renewal, or
22 refinancing of credit, to the extent obtained by - (A) false
23 pretenses, a false representation, or actual fraud," To
24 prevail on a § 523(a)(2)(A) claim, a creditor must establish five
25 elements: "(1) misrepresentation, fraudulent omission or
26 deceptive conduct by the debtor; (2) knowledge of the falsity or
27 deceptiveness of his statement or conduct; (3) an intent to
28 deceive; (4) justifiable reliance by the creditor on the debtor's

1 statement or conduct; and (5) damage to the creditor proximately
2 caused by its reliance on the debtor's statement or conduct.'" Oney v. Weinberg (In re Weinberg), 410 B.R. 19, 35 (9th Cir. BAP
3 2009) (quoting Turtle Rock Meadows Homeowners Ass'n v. Slyman
4 (In re Slyman), 234 F.3d 1081, 1085 (9th Cir. 2000)). The
5 creditor bears the burden of proof to establish each of those
6 five elements by a preponderance of the evidence. In re Slyman,
7 234 F.3d at 1085.

8
9 The exceptions to discharge in bankruptcy are interpreted
10 narrowly in favor of the debtor. See, e.g., Bernard v. Sheaffer
11 (In re Bernard), 96 F.3d 1279, 1281 (9th Cir. 1996). The
12 relatively lenient burden of proof standard compared to the
13 consistent admonition to interpret the standards for exceptions
14 to discharge narrowly in the debtor's favor creates a tension
15 that informs bankruptcy court decision making in § 523 cases.

16 B. The Impact of Nondisclosure in the Absence of Affirmative
17 Misrepresentations.

18 The Ninth Circuit has concluded that the nondisclosure of
19 material information in the context of a business transaction
20 will support an exception to discharge claim under
21 § 523(a)(2)(A), analogizing such a situation to securities fraud.
22 See Apte v. Japra (In re Apte), 96 F.3d 1319, 1323 (9th Cir.
23 1996).

24 In this case, Angelus alleged that the Debtor ordered
25 Angelus products for installation on the Lang Lots, but the
26 Debtor did not advise Angelus that its products in fact were
27 being used on the Lang Lots and left Angelus with the impression
28 that they were being used for lots in Reiger's Salton City

1 Project. Angelus further contended that the Debtor's failure to
2 disclose his use of Angelus products on the Lang Lots resulted in
3 damages to Angelus based on its reliance that its products were
4 being directed to and for use on Reiger lots and consequent
5 inability to file lien notices to protect its interests with
6 respect to the Lang Lots.

7 The bankruptcy court found that the Debtor knew that he was
8 giving the impression through nondisclosure that Angelus products
9 were being delivered for installation on Reiger lots when he knew
10 that the products were actually being used on the Lang Lots. The
11 bankruptcy court further found that leaving that false impression
12 was consistent with the Debtor's strategy to have Reiger pay for
13 the Angelus products installed on the Lang Lots. However, the
14 bankruptcy court also found that there was no agreement between
15 Reiger and the Debtor for Reiger to pay for the Angelus products
16 used on the Lang Lots.

17 The Debtor asserts the following arguments in support of his
18 position that the bankruptcy court erred in its findings. We
19 deal with each argument in turn.

- 20 1. Debtor disclosed the installation of Angelus products
21 on the Lang Lots.

22 The Debtor argues there was no "fraud by concealment" in
23 that the Debtor presented uncontradicted evidence that the Debtor
24 (or Debtor's employee) pointed out to the Angelus employee
25 delivering its products the particular lots on which its products
26 were to be installed, including the Lang Lots. The short answer
27 to Debtor's argument is that evidence is not inconsistent with
28 the bankruptcy court's finding that the Debtor knowingly failed

1 to disclose that the owner of the Lang Lots was Lang, rather than
2 Reiger.

3 2. The Debtor had a duty to disclose facts material to his
4 transactions with Angelus.

5 The Debtor argues that he had no legal duty to disclose
6 further information to Angelus in this case. That is contrary to
7 applicable Ninth Circuit law. As stated in In re Apte:

8 In determining the duty to disclose in the context of
9 fraud under 11 U.S.C. § 523(a)(2)(A), we look to the
10 common law concept of fraud at the time such language
11 was added to the statute. [Field v. Mans, 516 U.S. 59,
12 69-70 (1995).] The Supreme Court in Field looked to the
Restatement (Second) of Torts (1976) as "the most
widely accepted distillation of the common law of
torts" at the relevant time. Id. We do the same.
Section 551 of that treatise provides:

13 (1) One who fails to disclose to another a fact that he
14 knows may justifiably induce the other to act or
15 refrain from acting in a business transaction is
16 subject to the same liability to the other as though he
17 had represented the nonexistence of the matter that he
18 has failed to disclose, if, but only if, he is under a
19 duty to the other to exercise reasonable care to
20 disclose the matter in question.

21 (2) One party to a business transaction is under a duty
22 to exercise reasonable care to disclose to the other
23 before the transaction is consummated,

24 . . .

25 (e) facts basic to the transaction, if he knows that the
26 other is about to enter into it under a mistake as to
27 them, and that the other, because of the relationship
28 between them, the customs of the trade or other
objective circumstances, would reasonably expect a
disclosure of those facts.

96 F.3d at 1324 (quoting Restatement (Second) of Torts § 551
(1976) (emphasis added)). See, e.g., Barnes v. Belice
(In re Belice), 461 B.R. 564, 580 (9th Cir. BAP 2011).

Based on that standard, the bankruptcy court did not err in
determining that the Debtor owed a duty to Angelus to disclose

1 facts material to the business transactions between them,
2 including the fact that Lang owned the Lang Lots. This is an
3 issue of federal law, and the Debtor's citation to a California
4 law source (Witkin, Summary of California Law (10th ed. 2005)
5 Torts, § 796 at 1151) is inapposite.

6 3. There is a legal connection between Debtor's
7 nondisclosures and Angelus' damages.

8 The Debtor argues that the bankruptcy court erred in
9 determining there was proximate causation between the Debtor's
10 failures to disclose and the inability to serve timely proper
11 California Preliminary Lien Notices because:

12 1) [Angelus] knew the exact address of each of the Lang
13 properties where the building materials were delivered
14 (by [Angelus]); 2) [Angelus] had the absolute and
15 unfettered ability to refuse delivery of the materials
16 until it had information sufficient to prepare and
17 serve preliminary lien notices; 3) upon delivery of
18 materials by a materialman, the materialman assumes and
19 bears the legal burden to seek out all information
20 necessary to prepare and serve preliminary notices; and
21 4) [Angelus] failed to serve preliminary lien notices
22 for the Reiger properties known to [Angelus].

23 Appellant's Opening Brief at 16. Again, the Debtor's argument is
24 inconsistent with controlling Ninth Circuit authority, cited by
25 the Debtor. See, e.g., In re Apte, 96 F.3d at 1323
26 ("[N]egligence in failing to discover a misrepresentation is not
27 a defense to fraud.").

28 Under the circumstances of this case, involving
primarily a failure to disclose, positive proof of
reliance is not a prerequisite to recovery. All that
is necessary is that the facts withheld be material in
the sense that a reasonable investor might have
considered them important in the making of this
decision. This obligation to disclose and this
withholding of a material fact establish the requisite
element of causation in fact.

Id. (citing Affiliated Ute Citizens v. United States, 406 U.S.

1 128, 153-54 (1972); Titan Group, Inc. v. Faggen, 513 F.2d 234,
2 239 (2d Cir. 1975)).

3 The bankruptcy court did not err in determining that there
4 was a causative link between Debtor's nondisclosure of material
5 facts and Angelus' damages in the context of this case. The
6 Debtor's citation to California state law authorities in this
7 case, interpreting and applying federal law, is unavailing.

8 4. Angelus ultimately was not paid for its products
9 delivered for installation on the Lang Lots.

10 The Debtor argues that Angelus' own accounting records
11 showed that its invoices for products used on the Lang Lots were
12 paid. The bankruptcy court found that this was "technically
13 true," but further found that payments by Reiger had been
14 improperly applied at Debtor's direction to pay Angelus invoices
15 for products delivered to the Lang Lots. These findings are
16 consistent with the bankruptcy court's finding that no agreement
17 existed between the Debtor and Reiger for Reiger to pay for
18 Angelus products installed on Lang's lots. Based on the record
19 before us, we cannot conclude that the bankruptcy court clearly
20 erred in these findings.

21 5. The bankruptcy court did not clearly err in discounting
22 the Debtor's evidence that he honestly believed that
23 Angelus products installed on the Lang Lots would be
paid for by Reiger.

24 The Debtor argues from his testimony that he honestly
25 believed that there was an agreement between himself and Reiger
26 that Reiger would pay for any Angelus products installed on
27 Lang's lots, there was no fraud, and the bankruptcy court erred
28 in finding that the Debtor's failures to disclose were

1 fraudulent.

2 The Debtor testified that he had an agreement with Reiger
3 that Reiger would pay for the Angelus products used on Lang's
4 lots, and Reiger would deduct any such payments from the amounts
5 owed to the Debtor for labor on the Salton City Project. Reiger
6 testified there was no such agreement; Lang testified that he was
7 not aware of any such agreement; and two Angelus employees, its
8 Credit Manager and its accounts receivable manager, testified
9 that they never were informed of such an agreement.

10 In light of that conflicting evidence, the bankruptcy court
11 "ultimately found [the Debtor's] testimony on this point
12 unpersuasive," i.e., not credible.

13 As noted above, the bankruptcy court's credibility
14 determinations, at the trial level, are entitled to substantial
15 deference. "Where there are two permissible views of the
16 evidence, the fact finder's choice between them cannot be clearly
17 erroneous." Anderson v. City of Bessemer City, N.C., 470 U.S. at
18 574. We cannot conclude that the bankruptcy court clearly erred
19 in discounting the Debtor's "honest belief" in the face of
20 contrary testimony from Reiger, Lang and Angelus' employees.

21 C. Evidentiary Issues Concerning the Declaration of Vedrana
22 Spasojevic.

23 The Debtor argues that the bankruptcy court erred in
24 sustaining Angelus' objections to admission of certain portions
25 of the Declaration of Vedrana Spasojevic, an employee of Reiger,
26 as not based on her personal knowledge or as inadmissible
27 hearsay.

28 As noted above, we review the bankruptcy court's evidentiary

1 rulings for abuse of discretion. Latman v. Burdette, 366 F.3d
2 774, 786 (9th Cir. 2004). "To reverse on the basis of an
3 erroneous evidentiary ruling, we must conclude not only that the
4 bankruptcy court abused its discretion, but also that the error
5 was prejudicial." Johnson v. Neilson (In re Slatkin), 525 F.3d
6 805, 811 (9th Cir. 2008) (emphasis added).

7 The bankruptcy court struck the following statements from
8 Ms. Spasojevic's declaration:

9 Paragraph 5, beginning at line three ("First
10 Statement"): "it appeared to me that [Debtor] was
11 passing to ERA the amounts owed to Angelus for block
being used by [Debtor] at his other projects." [lack of
personal knowledge]

12 Paragraph 5, beginning at line six ("Second
13 Statement"): "I would then receive instructions from
Roberto to go ahead and pay the amount requested by
14 Angelus." [hearsay]

15 Paragraph 6, beginning at line three ("Third
16 Statement"): "but he would instruct me to pay it if
17 there is still money left over of the amounts owed to
[Debtor] or, at later times, he would tell me not to
pay it, but after speaking with [Debtor] he would tell
me to go ahead and pay it." [hearsay]

18 FRE 602, Lack of Person Knowledge, provides in relevant
19 part: "A witness may not testify to a matter unless evidence is
20 introduced sufficient to support a finding that the witness has
21 personal knowledge of the matter." FRE 801 defines "hearsay,"
22 and FRE 802, Hearsay Rule, provides in relevant part: "Hearsay is
23 not admissible except as provided by these rules"

24 The Debtor argues that the foundation for the First
25 Statement was appropriately laid earlier in Ms. Spasojevic's
26 declaration when she stated that among her job duties were "the
27 review, payment, and paperwork for the materials used" at the
28 Salton City Project. In light of her performance of those

1 duties, the Debtor argues that Ms. Spasojevic had sufficient
2 personal knowledge to recognize when the Debtor was requesting
3 payment for materials used beyond the materials required for the
4 Salton City Project.

5 Angelus counters that there is no statement in
6 Ms. Spasojevic's declaration indicating that she knew what
7 quantities of concrete blocks and other materials were used on
8 individual lots. She further does not state what knowledge she
9 had, if any, regarding other projects on which the Debtor may
10 have been working.

11 Frankly, the question as to whether the First Statement was
12 properly excluded under FRE 602 is close. However, the relevance
13 of the First Statement in the circumstances of this case is
14 limited. The First Statement does not support the Debtor's
15 defense that he had an agreement with Reiger for Reiger to pay
16 for Angelus products installed on the Lang Lots. It does provide
17 further support for the proposition that some Reiger payments
18 were applied at Debtor's direction to pay Angelus invoices for
19 products delivered to the Lang Lots. But, in that sense, it is
20 cumulative of other evidence, including Paragraph 7 in
21 Ms. Spasojevic's declaration, from which the bankruptcy court
22 found as much.

23 Accordingly, even if the bankruptcy court erred in excluding
24 the First Statement, the exclusion ultimately did not prejudice
25 the Debtor and was no more than harmless error.

26 As to the Second and Third Statements, the Debtor argues
27 that they reflected instructions Ms. Spasojevic was given and
28 were introduced not to prove the truth of the facts asserted, but

1 rather to prove that Ms. Spasojevic was told the instructions.
2 The Debtor further argues that the Second and Third Statements
3 were introduced to show Ms. Spasojevic's state of mind when she
4 was paying invoices presented by the Debtor. Finally, the Debtor
5 argues that the Second and Third Statements provide evidence
6 inconsistent with Reiger's testimony that he never knowingly
7 authorized payment for Angelus products used on the Lang Lots.

8 Considering each of the subject statements, the Second
9 Statement describes communications not with Reiger but with a
10 third person employed by Reiger, i.e., double hearsay. It does
11 not fit within any of the specific exceptions to hearsay
12 exclusion set forth in FRE 803. It further does not satisfy the
13 foundation requirements of the residual hearsay exception in
14 FRE 807 because it does not tend to establish material facts and
15 is not particularly probative. It is Reiger's state of mind that
16 is relevant, not Ms. Spasojevic's.

17 The Third Statement does relate to communications between
18 Ms. Spasojevic and Reiger, but it also does not fall within any
19 of the specific exceptions to hearsay exclusion in FRE 803.
20 Again, Ms. Spasojevic's state of mind, as opposed to Reiger's,
21 simply is not relevant.

22 On the other hand, the Third Statement does tend to
23 establish that, on occasion, when questions arose in
24 Ms. Spasojevic's mind as to the appropriateness of making
25 payments to the Debtor when he requested advances or when she
26 noticed discrepancies in his billings, Reiger would authorize
27 some payments, at times, only after speaking with the Debtor.
28 However, such evidence is not probative with respect to the

1 Debtor's claimed defense that Reiger had an express agreement
2 with the Debtor to pay for Angelus products used on Lang's lots
3 and deduct such payments from the Debtor's labor billings. It
4 likewise is not particularly probative as inconsistent with
5 Reiger's statement that he never knowingly paid for Angelus
6 products installed on the Lang Lots.

7 We ultimately conclude that the bankruptcy court did not
8 abuse its discretion in excluding the Second and Third Statements
9 as inadmissible hearsay.

10 D. Proposed Additional Fact Findings.

11 The Debtor argues that the bankruptcy court's oral findings
12 and conclusions were inadequate to provide a "clear
13 understanding" of the basis for its decision in this case, and
14 the bankruptcy court further erred in refusing to consider the
15 additional findings of fact proposed by the Debtor.

16 As to the first point, it is clear to us from review of the
17 transcript of the bankruptcy court's oral findings and
18 conclusions that the bankruptcy court cited and clearly
19 understood the applicable legal standards. It also is clear to
20 us that in applying the applicable legal standards based on the
21 evidence before it, the bankruptcy court found that the Debtor
22 knowingly failed to disclose information material to some of his
23 business transactions with Angelus, with the intent to leave a
24 false impression on which Angelus justifiably relied, proximately
25 causing damages to Angelus. The Debtor has not appealed the
26 amount of damages found by the bankruptcy court. Accordingly, we
27 conclude that the bankruptcy court's oral findings and
28 conclusions were adequate to provide an explanation for its

1 decision, and were supported by evidence in the Trial record.
2 The Debtor's argument lacks merit.

3 As to the second point, as correctly pointed out by the
4 Debtor, a trial court does have a "duty to carefully consider,
5 weigh and determine the accuracy of . . . proposed findings, and
6 whether they are supported by the evidence in the record"
7 Cont'l Connector Corp. v. Houston Fearless Corp., 350 F.2d at
8 187.

9 After the bankruptcy court had announced its oral findings
10 and conclusions, it authorized the parties to submit further
11 proposed findings and conclusions consistent with its oral
12 ruling. Subsequently, the Debtor submitted thirty-five detailed
13 proposed additional findings.

14 The bankruptcy court ultimately declined to adopt the
15 Debtor's additional proposed fact findings, but the Debtor is
16 simply wrong in asserting that the bankruptcy court refused to
17 consider them.

18 In its Order Denying Request to Adopt Additional Findings of
19 Fact ("Proposed Fact Findings Order"), the bankruptcy court
20 explicitly declined to adopt the Debtor's additional proposed
21 fact findings "as unnecessary." The bankruptcy court necessarily
22 reviewed and considered the Debtor's proposed additional fact
23 findings in arriving at that conclusion. The bankruptcy court
24 then went on to state in the Proposed Fact Findings Order that,

25 The Court did not, as represented in the Request,
26 invite the parties to submit "additional" findings;
27 rather the Court, at the June 10, 2011 oral ruling
28 hearing, advised the parties that they could submit
written findings and conclusions that reflected the
court's oral findings and conclusions as stated on the
record. (emphasis in original).

1 Based on the record before us, we perceive no abuse of discretion
2 in the bankruptcy court's decision not to adopt the Debtor's
3 proposed additional fact findings in these circumstances.

4 Conclusion

5 For the foregoing reasons, we AFFIRM.
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