

NOT FOR PUBLICATION

FEB 09 2012

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

UNITED STATES BANKRUPTCY APPELLATE PANEL  
OF THE NINTH CIRCUIT

In re:	)	BAP No.	WW-11-1089-PaJuWa
	)		
ERIC W. KAMIEN and TERRY A.	)	Bk. No.	09-19034-SJS
KAMIEN,	)		
	)	Adv. No.	09-01575-SJS
Debtors.	)		
<hr/>			
CAROL ANN PORTER,	)		
	)		
Appellant,	)		
v.	)	<b>MEMORANDUM<sup>1</sup></b>	
	)		
ERIC W. KAMIEN; TERRY A.	)		
KAMIEN,	)		
Appellees.	)		

Submitted without oral argument on February 9, 2012<sup>2</sup>

Filed - February 9, 2012

Appeal from the United States Bankruptcy Court  
for the Western District of Washington

Honorable Samuel J. Steiner, Bankruptcy Judge, Presiding

Appearances: Carol Ann Porter, appellant pro se, on brief  
Richard J. Wotipka of Broadway Law Group on brief  
for appellees Eric W. Kamien and Terry A. Kamien

---

<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> Pursuant to Fed. R. Bankr. P. 8012, the Panel has unanimously determined that oral argument is not necessary in this appeal, in that the facts and legal argument are adequately presented in the briefs and record and the decisional process would not be significantly aided by oral argument.

1 Before: PAPPAS, JURY and WALLACE,<sup>3</sup> Bankruptcy Judges.

2 Appellant Carol Ann Porter ("Porter") appeals the  
3 bankruptcy court's judgment dismissing her complaint to  
4 determine the dischargeability of a debt owed to her by chapter  
5 7<sup>4</sup> debtors Eric and Terry Kamien (the "Kamiens") under  
6 § 523(a)(4). We AFFIRM.

7 **FACTS**<sup>5</sup>

8 Porter and the Kamiens became acquainted in 1998 when  
9 Porter and Eric Kamien both worked for Eagle Hardware Stores.  
10 Lowe's Companies, Inc., purchased Eagle Hardware and the  
11 employment of Porter and Eric was terminated. Porter then began  
12 her own business, Kitchen Arts, LLC. Although Porter argues in  
13 her opening brief that she and Eric were partners in Kitchen  
14 Arts, the bankruptcy court would later find that Eric was a  
15 commissioned employee of Porter. Hr'g Tr. 3:22-23, October 29,  
16  
17  
18

---

19 <sup>3</sup> Hon. Mark. S. Wallace, Bankruptcy Judge for the Central  
20 District of California, sitting by designation.

21 <sup>4</sup> Unless otherwise indicated, all chapter, section and  
22 rule references are to the Bankruptcy Code, 11 U.S.C.  
23 §§ 101-1532, and to the Federal Rules of Bankruptcy Procedure,  
24 Rules 1001-9037. The Federal Rules of Civil Procedure are  
25 referred to as "Civil Rules."

26 <sup>5</sup> As discussed below, Porter provided few documents in her  
27 excerpts, and no citations to the record in her statement of the  
28 case and argument. We have exercised our discretion to review  
the electronic docket from the underlying bankruptcy case, and  
the imaged documents attached thereto. See O'Rourke v. Seaboard  
Sur. Co. (In re E.R. Fegert, Inc.), 887 F.2d 955, 957-58 (9th  
Cir. 1989); Atwood v. Chase Manhattan Mortg. Co. (In re Atwood),  
293 B.R. 227, 233 n.9 (9th Cir. BAP 2003).

1 2010.<sup>6</sup>

2 The parties agree that in March 2002, they discussed a  
3 potential real estate project to develop a parcel of property in  
4 Sammamish, Washington (the "Property"). Porter and the Kamiens,  
5 however, strenuously disagree about the nature of their  
6 discussions. Porter alleges that the Kamiens proposed formation  
7 of a partnership between the Kamiens and Porter, whereby they  
8 would purchase the Property, remodel the home, sell it, and  
9 split the net profit. The Kamiens deny there was ever any  
10 partnership, asserting that they purchased the Property in April  
11 2002 for \$279,000, and that title was placed in the Kamiens'  
12 names as they were the purchasers of the Property.

13 There is also considerable disagreement about who provided  
14 funds for the project and in what amounts. Porter alleges that  
15 she provided \$350,000 for the project, but the Kamiens dispute  
16 that amount. Porter alleges that Eric Kamien signed a  
17 promissory note in her favor for a loan for the initial funds to  
18 use to remodel the Property on July 1, 2002. The note is for  
19 \$70,000 and bears interest at 6 percent interest for one year.  
20 The Kamiens deny that Eric signed that promissory note, have  
21 alleged that the note was forged, and have forwarded the alleged  
22 note to the F.B.I. for investigation.

23 The parties agree that the Kamiens moved into the remodeled  
24

---

25 <sup>6</sup> Despite this allegation of an earlier partnership, in  
26 her Complaint, Porter does not refer to a partnership between  
27 her and Eric at Kitchen Arts. Instead, the Complaint states,  
28 "In or around May 2000, Eric Kamien and Terry Kamien and  
Plaintff became social friends during the time that Mr. Kamien  
was a salesperson, working with Ms. Porter at Kitchen Arts,  
LLC[.]" Compl. at ¶ 5.1.

1 Property in October 2002. Then, on June 1, 2004, the Kamiens  
2 took out a home equity loan against the Property in the amount  
3 of \$90,000. The deed of trust executed to secure the loan  
4 indicates that the Kamiens encumbered the Property in their own  
5 names. There is no mention of a partnership.

6 On April 21, 2005, Porter recorded a claim of lien against  
7 the Property (the "Lien"). The Lien recites,

8 [I]n accordance with a contract with Eric W. Kamien  
9 and Terry A. Kamien, [Porter] furnished purchase  
10 money, labor and materials consisting of building  
11 materials for the rebuilding on the [Property] owned  
12 by Eric W. Kamien and Terry A. Kamien of a total value  
13 of Three Hundred Nineteen Thousand Five Hundred Twenty  
14 Three hundred [sic] dollars, \$319,523.00, of which  
there remains Two Hundred Eighty Seven Thousand [F]ive  
Hundred Twenty Three hundred [sic] dollars,  
\$287,523.00, plus accrued interest . . . and that the  
lienor served his [sic] notice to owner on April 19,  
2005[.]

15 Compl., Exh. C. (emphasis added). As can be seen, the Lien  
16 makes no reference to a partnership, refers to the relationship  
17 of Porter and the Kamiens as a "contract" and twice refers to  
18 the Kamiens as the "owners" of the Property.

19 Porter sued the Kamiens in state court on March 26, 2008.  
20 Porter v. Kamien, case no. 08-2-10187-8SEA (King County Superior  
21 Court). This action was stayed by the bankruptcy filing. In  
22 her state court action, Porter only alleged a breach of  
23 contract, made no claims that the parties were engaged in a  
24 partnership with fiduciary duties, and made no claim for fraud.  
25 Porter filed a First Amended Complaint in the state action on  
26 April 10, 2008. Like the original complaint, it alleged a  
27 breach of contract action, and made no reference to a  
28 partnership or fiduciary duties. On January 6, 2009, Porter

1 filed a Second Amended Complaint, for the first time alleging  
2 the existence of a partnership relationship among the Kamiens  
3 and Porter and that the Kamiens had breached "Partnership  
4 Fiduciary Duties."

5 The Kamiens filed the chapter 7 petition on September 2,  
6 2009. On schedule A, they claimed fee simple ownership of the  
7 Property, which they valued at \$535,000.00. On schedule F, they  
8 listed a disputed claim by Porter for \$350,000 arising out of  
9 the state court lawsuit.

10 On December 7, 2009, acting pro se, Porter commenced the  
11 adversary proceeding giving rise to this appeal. Although not  
12 clearly pled, in the complaint Porter appeared to seek a  
13 judgment declaring that the \$350,000 debt allegedly owed to her  
14 by the Kamiens was excepted from discharge; she also sought  
15 denial of discharge.

16 The Kamiens filed a motion to dismiss the adversary  
17 proceeding under Rule 7012, which incorporates Civil Rule  
18 12(b)(6), on January 8, 2010. They argued that Porter had  
19 failed to allege any facts to support a claim to except the debt  
20 from discharge under § 523, but rather the facts and law pled  
21 showed that she held, at best, a dischargeable breach of  
22 contract claim against the Kamiens.

23 Counsel appeared for Porter, and on February 19, 2010,  
24 responded to the dismissal motion. Porter clarified her  
25 pleadings, arguing that she had adequately pled a  
26 nondischargeability claim under § 523(a)(4) for fraud or  
27 defalcation while acting in a fiduciary capacity. Porter argued  
28 that she and the Kamiens were partners in the project to develop

1 the Property, and that Washington law imposes on partners a  
2 fiduciary relationship. Porter also argued that she had  
3 adequately pled sufficient facts to support a denial of  
4 discharge under § 727(a)(2), (3), (4)(A) and (D), because the  
5 Kamiens had knowingly and fraudulently concealed assets,  
6 partnership agreements, business ownerships and made false oaths  
7 and statements, orally and in writing, in connection with their  
8 bankruptcy case.

9 The Kamiens responded on February 22, 2010, generally  
10 asserting that Porter had never argued in her complaint for  
11 denial of discharge under § 727, but had only objected to  
12 discharge of her debt. Additionally, the Kamiens noted that  
13 they had already been granted a discharge and thus could not be  
14 subjected to a denial of discharge under § 727(a).

15 The bankruptcy court held a hearing on the Kamien's  
16 dismissal motion on February 26, 2010. An order entered on  
17 March 4, 2010, indicates that the court had announced its  
18 findings and conclusions on the record. No transcript of the  
19 motion hearing was provided in the excerpts of record, nor does  
20 one appear in the bankruptcy court's docket. According to the  
21 order of March 4, the court dismissed any § 727(a) claims for  
22 denial of discharge, but denied the motion to dismiss as to any  
23 claims for an exception from discharge under § 523(a)(4).  
24 Porter did not appeal the order granting dismissal of the § 727  
25 claims.

26 The Kamiens filed a counterclaim against Porter on March  
27 12, 2010, in which they sought a declaratory judgment that the  
28 Lien was invalid, and quieting title to the Property in the

1 Kamiens. Porter responded that she would voluntarily release  
2 the Lien. However, she asked the bankruptcy court to enter  
3 various orders encumbering the Property. The Kamiens opposed  
4 Porter's request.

5 Kamiens filed a motion for summary judgment on the  
6 counterclaim. A hearing was held on April 23, 2010. There is  
7 no transcript in the record, but a short minute entry on the  
8 docket indicates that Porter had not yet released the Lien. On  
9 April 29, 2010, the bankruptcy court entered an order granting  
10 summary judgment in favor of the Kamiens, quieting title to the  
11 Property in the Kamiens, and allowing one week for Porter to  
12 release the Lien or the bankruptcy court would void the Lien.  
13 Porter did not appeal the order granting summary judgment.

14 Trial was held on August 16 and 17, 2010, on Porter's  
15 remaining claim for nondischargeability under § 523(a)(4).  
16 Porter and the Kamiens were represented by counsel, and the  
17 bankruptcy court heard testimony from nine witnesses: Porter,  
18 the Kamiens, Bill Rice (a contractor who worked with the parties  
19 on the Property), Rosemary Wardell and Tori Johnson (realtors),  
20 Brian Ahrens (certified appraiser), Rob Floberg and Hanna  
21 McFarlane (expert witnesses on handwriting and forgery).

22 The bankruptcy court orally announced its decision on  
23 October 29, 2010. According to the transcript in the record,  
24 after discussing the facts of the case, the court made the  
25 following determinations:

26 The sole issue before the court is whether there  
27 existed a partnership relationship among the Kamiens  
and Porter. Hr'g Tr. 5:17-6:1, October 29, 2010.

28 In their testimony, neither the Kamiens nor Porter

1 "appeared to me to be credible witnesses. Because of  
2 that, I was forced to follow and rely primarily on the  
paper trail." Hr'g Tr. 6:2-6.

3 "[I]f this was a joint venture, I do not understand  
4 why title was taken only in the name of the Kamiens."  
Hr'g Tr. 6:7-9.

5 Exhibit 13, a letter of April 18, 2005, from Porter to  
6 the Kamiens "demands repayment of the loans made for  
7 the purchase and remodel of the house. The letter  
8 makes no reference to a partnership." Hr'g Tr. 6:10-  
14.

8 Exhibit 14, the Lien, "makes no reference to a  
9 partnership." Hr'g Tr. 6:15-16.

10 Exhibit 34, a memo to a Mr. Treppani at World Savings,  
11 where Ms. Porter "thanks him for helping her friends  
12 with the financing of their home." There is no  
13 mention of a joint venture or partnership or that she  
14 had an interest in the Property. Hr'g Tr. 6:17-21.

15 The bankruptcy court twice refers to the alleged  
16 promissory note attached to the Complaint as a  
17 forgery. Hr'g Tr. 6:22, 7:1. Regardless of the  
18 circumstances surrounding the creation of the  
19 promissory note, the court observed that it makes no  
20 mention of a partnership or joint venture. Hr'g Tr.  
21 7:1-2.

22 The original and First Amended Complaint in the state  
23 court action are captioned "Complaint for Breach of  
24 Contract," and alleges nonrepayment of loans and makes  
25 no reference to a partnership or joint venture. Hr'g  
26 Tr. 7:3-12. It is only with the Second Amended  
27 Complaint that for the first time Porter alleges the  
28 existence of a partnership relationship. The court  
observed that "[t]his [was] done some five or six  
years after the facts." Hr'g Tr. 7:13-16.

The bankruptcy court then concluded:

In summary and in conclusion, based on the paper trail, I conclude there was no partnership. The exhibits I referred to create, in my opinion, a mountain of admissions by Ms. Porter which make it impossible for her to sustain the requisite burden of proof.

It follows from my conclusion that there was no breach of any partnership-related fiduciary duties and, therefore, the judgment must be for the [Kamiens]. Hr'g Tr. 7:17-8:1.

1 On February 11, 2011, the bankruptcy court entered a  
2 judgment dismissing the adversary proceeding with prejudice.<sup>7</sup>  
3 Porter filed a timely appeal on February 25, 2011.

#### 4 JURISDICTION

5 The bankruptcy court had jurisdiction under 28 U.S.C.  
6 §§ 1334 and 157(b)(2)(I) and (J). We have jurisdiction under 28  
7 U.S.C. § 158.

#### 8 ISSUE

9 Whether the bankruptcy court clearly erred in ruling that  
10 Porter failed to prove the existence of a partnership  
11 relationship between Porter and the Kamiens.

#### 12 STANDARD OF REVIEW

13 The existence of a partnership is a question of fact.  
14 Malnar v. Carlson, 910 P.2d 455, 461 (Wash. 1996); Douglas v.  
15 Jepson, 945 P.2d 244, 247 (Wash. Ct. App. 1997) (“Whether a  
16 partnership exist[s] is a question of fact.”); see also  
17 Tsurukawa v. Nikon Precision, Inc. (In re Tsurukawa), 287 B.R.  
18 515, 521 (9th Cir. BAP 2002) (“Whether or not parties have  
19 entered into a partnership relationship rather than some other  
20 form of relationship is a question of fact[.]”).

21 The bankruptcy court’s rulings on questions of fact are  
22 reviewed for clear error. Murray v. Bammer (In re Bammer), 131  
23 F.3d 788, 792 (9th Cir. 1997) (en banc); Oney v. Weinberg (In re  
24 Weinberg), 410 B.R. 19, 27-28 (9th Cir. BAP 2009). “The clear  
25

---

26 <sup>7</sup> The bankruptcy court’s judgment also awarded the Kamiens  
27 \$2,500 for reasonable attorney’s fees incurred in their  
28 successful prosecution of the counterclaim against Porter.  
Porter makes no mention of this award in this appeal.

1 error standard is significantly deferential and is not met  
2 unless the reviewing court is left with a 'definite and firm  
3 conviction that a mistake has been committed.'" Fisher v.  
4 Tucson Unified Sch. Dist., 652 F.3d 1131, 1135 (9th Cir. 2011).

#### 5 **DISCUSSION**

6 Section 523(a)(4) excepts from discharge debts "for fraud  
7 or defalcation while acting in a fiduciary capacity,  
8 embezzlement or larceny." In an action under § 523(a)(4), a  
9 creditor must establish: (1) that an express trust existed  
10 between the debtor and creditor; (2) that the debt was caused by  
11 the debtor's fraud or defalcation; and (3) that the debtor was a  
12 fiduciary to the creditor at the time the debt was created.  
13 Otto v. Niles (In re Niles), 106 F.3d 1456, 1459 (9th Cir.  
14 1997); Nahman v. Jacks (In re Jacks), 266 B.R. 728, 735 (9th  
15 Cir. BAP 2001). The creditor bears the burden of proving the  
16 facts necessary to establish an exception to discharge under  
17 § 523(a) by a preponderance of the evidence. Grogan v. Garner,  
18 498 U.S. 279, 291 (1991); Jett v. Sicroff (In re Sicroff), 401  
19 F.3d 1101, 1106 (9th Cir. 2005).

20 The meaning of fiduciary for purposes of § 523(a)(4) is a  
21 question of federal law. Ragsdale v. Haller, 780 F.2d 794, 796  
22 (9th Cir. 1986). Under federal law, a trust giving rise to the  
23 fiduciary relationship must be imposed prior to any wrongdoing,  
24 and the debtor must have been a trustee prior to and independent  
25 of the wrongdoing itself. Id. While the meaning of fiduciary  
26 is narrowly defined under federal law, "state law is to be  
27 consulted to determine when a trust in this strict sense  
28 exists." Id.

1 The Ninth Circuit has previously reviewed Washington law of  
2 partnerships and determined that a partner is a "trustee over  
3 partnership assets for all purposes" and a "fiduciary within the  
4 narrow meaning of § 523(a)(4)." Lewis v. Short (In re Short),  
5 818 F.2d 693, 695-96 (9th Cir. 1987); Wash. Rev. Code  
6 § 25.05.165(2)<sup>8</sup>.

7 Porter argues that the Kamiens breached their fiduciary

8  
9 <sup>8</sup> The Ninth Circuit in Short based its decision on a  
10 later-repealed statute, Wash. Rev. Code § 25.04.210(1) (1969)  
(repealed 1998):

11 Every partner must account to the partnership for any  
12 benefit, and hold as trustee for it any profits  
13 derived by him without the consent of the other  
14 partners from any transaction connected with the  
15 formation, conduct, or liquidation of the partnership  
16 or from any use by him of its property.

17 (Emphasis added.) The revised statute adopted that year and  
18 still in effect incorporates the older provisions without  
19 substantial change:

20 General standards of partner's conduct . . . . (2) A  
21 partner's duty of loyalty to the partnership and the  
22 other partners is limited to the following:  
23 a) To account to the partnership and hold as trustee  
24 for it any property, profit, or benefit derived by the  
25 partner in the conduct and winding up of the  
26 partnership business or derived from a use by the  
27 partner of partnership property, including the  
28 appropriation of a partnership opportunity[.]  
Rev. Code Wash. § 25.05.165(2)(a) (emphasis added)  
(2011).

The District Court for the Western District of Washington  
recently reviewed the case law and concluded that, based on In  
re Short and Wash. Rev. Code § 25.05.165(2), a partner's "status  
as a fiduciary within the meaning of § 523(a)(4) is definitively  
established by statute and precedent[.]" Errez v. Auburn Ace  
Holdings, LLC (In re Errez), 2010 WL 5185399, at \*2 (W.D. Wash.  
Dec. 16, 2010).

1 duties as partners in the partnership the parties allegedly  
2 created to acquire and develop the Property. Of course, as the  
3 bankruptcy court would hold, if no partnership existed, the  
4 Kamiens were not fiduciaries as to Porter.

5 Whether parties intend to form a partnership under  
6 Washington law is determined by four factors: (1) an express or  
7 implied contract, (2) a common purpose, (3) a community of  
8 interest, and (4) an equal right to a voice, accompanied by an  
9 equal right to control. Paulson v. County of Pierce, 664 P.2d  
10 1202, 1211 (Wash. Ct. App. 1983). Only the first element – that  
11 there was an express or implied contract to form a partnership –  
12 is essential. Id. (citing Carbaneu v. Peterson, 95 P.2d 1043,  
13 1050 (Wash. 1939)).

14 After a two-day trial, where the three principal parties –  
15 the Kamiens and Porter<sup>9</sup> – testified, and over fifty documentary  
16 exhibits were admitted, the bankruptcy court found that there  
17 was no agreement, express or implied, to form a partnership.  
18 The court considered and rejected the testimony of both Porter  
19 and the Kamiens as not credible. We give considerable deference  
20 to a court's findings based on credibility of witnesses. Rule  
21 8013; Anderson v. City of Bessemer City, 470 U.S. 564, 574-75  
22 (1985) ("When findings are based on determinations regarding the  
23 credibility of witnesses, [Fed. R. Civ. P.] 52(a) [from which  
24 Rule 8013 derives] demands even greater deference to the trial  
25 court's findings; for only the trial judge can be aware of the

---

26  
27 <sup>9</sup> There were six other witnesses, but in her brief Porter  
28 makes no reference to their testimony, and does not explain how  
their testimony supports any of her positions.

1 variations in demeanor and tone of voice that bear so heavily on  
2 the listener's understanding of and belief in what is said.").  
3 Anderson is also instructive in this context for its explanation  
4 when an appellate court may disregard a court's credibility  
5 finding.

6 Documents or objective evidence may contradict the  
7 witness' story; or the story itself may be so  
8 internally inconsistent or implausible on its face  
9 that a reasonable factfinder would not credit it.  
Where such factors are present, the court of appeals  
may well find clear error even in a finding  
purportedly based on a credibility determination.

10 Anderson, 470 U.S. at 575. After making its credibility  
11 determination, the bankruptcy court pointed to seven documentary  
12 exhibits that the court found inconsistent with Porter's  
13 testimony. In the court's words, the exhibits created "a  
14 mountain of admissions" by Porter that her relationship to the  
15 Kamiens was that of a creditor to a debtor, not partner. Thus,  
16 the credibility determinations of the bankruptcy court, to which  
17 we must give great deference, were not contradicted by the  
18 documentary evidence. Indeed, the documentary evidence supports  
19 the existence of a creditor-debtor relationship, not a  
20 partnership relationship as alleged by Porter. Based on the  
21 bankruptcy court's credibility determinations as to the oral  
22 testimony given by Porter, together with the documentary proof  
23 showing that a lender-borrower relationship was established by  
24 the parties, as discussed in detail by the bankruptcy court, we  
25 conclude that the bankruptcy court did not clearly err in ruling  
26 that there was no partnership relationship among the Kamiens and  
27 Porter. Consequently, because there was no partnership, Kamiens  
28 breached no fiduciary duties to justify an exception to

1 discharge of the Kamiens' debt to Porter under § 523(a)(4).

2 In this appeal, Porter has not shown that the bankruptcy  
3 court clearly erred. Indeed, Porter's pro se presentation is  
4 ineffective. Her sole argument is that the trial transcripts  
5 support her position that a partnership existed. The problems  
6 with Porter's position are many.

7 First, the informal brief presented by Porter offers only  
8 conclusory suggestions that the actions of the Kamiens and  
9 Porter demonstrated their intent to form a partnership. There  
10 were no references, specifically or even in general, to contract  
11 formation, whether the parties had a common purpose, a community  
12 of interest, or an equal right to a voice in partnership,  
13 accompanied by an equal right to control. The brief presents no  
14 citations to authority to support any of its conclusory  
15 statements. In effect, Porter asks us to trawl through hundreds  
16 of pages of unofficial transcripts to establish her arguments  
17 for her. Neither the Panel nor appellees are obliged to search  
18 an entire record unaided for error. Dela Rosa v. Scottsdale  
19 Mem. Health Sys, Inc., 136 F.3d 1241 (9th Cir. 1998); Syncom  
20 Cap. Corp. v. Wade, 924 F.2d 167, 169 (9th Cir. 1991).

21 Second, Porter was ordered by the Panel on three occasions  
22 to produce both the transcripts for the record, and the exhibits  
23 relied on by the bankruptcy court. She ultimately provided  
24 unofficial copies of the transcripts, which she had privately  
25 prepared, rather than securing preparation of an official  
26 transcript, as ordinarily required by Fed. R. App. P. 10(b).  
27 Moreover, Porter did not provide any of the documentary exhibits  
28 relied on by the bankruptcy court at trial in reaching its

1 decision.

2       Although the Kamiens have objected to our review of the  
3 unofficial transcripts, they are not prejudiced because we  
4 conclude that the transcripts do not support Porter's position.  
5 It is true that Porter's testimony at trial provides facts and  
6 dates which might indicate an intent to form a partnership.  
7 However, that testimony is contradicted by that of the Kamiens.  
8 The bankruptcy court ultimately ruled that neither the Kamiens  
9 nor Porter were credible witnesses. But, since the documentary  
10 evidence supported the court's decision that no partnership  
11 existed, we need not consider accepting Porter's testimony  
12 supporting her position that a partnership existed.

13       Although the bankruptcy court discounted her credibility as  
14 a witness at trial, we are able to glean from the transcripts  
15 two unquestioned facts that are not affected by that credibility  
16 determination. At one point in her testimony, Porter admits  
17 that there is no documentary evidence to show the existence of a  
18 partnership. Trial Tr. 74:3386-3389.<sup>10</sup> Second, Porter's  
19 attorney did not object to the admission of the seven documents  
20 relied on by the court. Trial Tr. 81:3711.

21       At the heart of this appeal are the trial exhibits  
22 discussed and relied upon by the bankruptcy court for its  
23 finding that there was no adequate proof of a partnership:  
24 (1) Exhibit 13, where Porter "demands repayment of the loans  
25

---

26       <sup>10</sup> The unofficial transcripts do not provide the date when  
27 this testimony occurred. From internal references, we infer  
28 that the transcripts from pages 74 and 81 were on August 16,  
2010.

1 made for the purchase and remodel of the home." Hr'g Tr.  
2 6:10-14; (2) Exhibit 14, the Lien, twice describes the Kamiens  
3 as owner of the Property, characterizes the relationship between  
4 Porter and the Kamiens as a contract and "makes no reference to  
5 a partnership." Hr'g Tr. 6:16; (3) Exhibit 34, a memo to a Mr.  
6 Treppani at World Savings, where Ms. Porter "thanks him for  
7 helping her friends with the financing of their home." Hr'g Tr.  
8 6:17-21; (4) The promissory note, which is in the form of a debt  
9 instrument, Hr'g Tr. 6:22, 7:1; and (5-7) The State Court  
10 Complaint, Amended Complaint, and Second Amended Complaint. The  
11 first two complaints allege a breach of contract, and make no  
12 reference to any partnership. The Second Amended Complaint, for  
13 the first time, alleges the existence of a partnership, but this  
14 allegation, in the bankruptcy court's words, was made "five or  
15 six years after the facts." Hr'g Tr. 7:13-16. Except for the  
16 Second Amended Complaint, none of the documents refers to a  
17 partnership and all but the Second Amended Complaint support an  
18 interpretation of a debtor-creditor relationship.

19 From the early stages of this appeal, the Panel has  
20 instructed Porter to submit these seven documents. In the  
21 Panel's order of July 27, 2011, denying the Kamiens' motion to  
22 dismiss the appeal, the Panel strongly cautioned Porter of the  
23 consequences of failing to file the exhibits:

24 In order to review a factual finding for clear error,  
25 the record should usually include the entire  
26 transcript and all other relevant evidence considered  
27 by the bankruptcy court. See In Re Friedman, 126 B.R.  
28 63, 68 (9th Cir. BAP 1991) (failure to provide an  
adequate record may be grounds for affirmance); In re  
Burkhart, 84 B.R. 658 (9th Cir. BAP 1988). (Emphasis  
added). . . . No [] exhibits were provided. Based on  
appellant's arguments in her informal brief, it

1 appears such [] exhibits are necessary in order for  
2 appellant to have any chance of prevailing on appeal.  
3 If appellant does not provide the [] exhibits, the  
4 Panel is entitled to assume that she does not believe  
5 there is anything in those documents that will help  
6 her position on appeal. In re Gionis, 170 B.R. 675,  
7 680-81 (9th Cir. BAP 1994). Failure to provide the []  
8 exhibits will likely result in summary affirmance of  
9 the bankruptcy court's decision. See explanatory note  
10 to 9th Cir. BAP R. 8006-1; Ehrenberg v. Cal. State  
11 Univ., Fullerton Found. (In re Beachport Entm't), 396  
12 F.3d 1083, 1087 (9th Cir. 2005); Morrissey v.  
13 Stuteville (In re Morrissey), 349 F.3d 1187 (9th Cir.  
14 2003).

15 Panel's Order of July 27, 2011, at 3-4.

16 Porter was again ordered to produce the trial exhibits in a  
17 Clerk's Order of August 25, 2011. And finally, the Panel  
18 directed Porter to submit the exhibits in its Order of September  
19 20, 2011, granting a final extension of time to file the  
20 transcripts and exhibits. Porter never produced the exhibits.

21 As noted above, Porter did file unofficial trial  
22 transcripts. But these transcripts do not support her position  
23 because the bankruptcy court did not rely on the parties'  
24 testimony in making its decision. Because Porter has ignored  
25 multiple orders of this Panel directing her to provide the trial  
26 exhibits relied on by the bankruptcy court in resolving the  
27 contested issues of fact,<sup>11</sup> we are entitled to assume that the  
28 exhibits do not support her position and, indeed, instead  
29 buttress the bankruptcy court's reasons for determining that as  
30 a question of fact there was no partnership relationship among

---

31 <sup>11</sup> Along with the unofficial transcripts, Porter did  
32 include copies of the depositions of Eric and Terry Kamien,  
33 without explaining their purpose. The bankruptcy court did not  
34 refer to these depositions in its decision, but specifically  
35 referenced and discussed the seven documents.

1 the Kamiens and Porter. In re Gionis, 170 B.R. at 680-81.  
2 Further, the bankruptcy court's determination based on  
3 credibility and documentary findings are entitled to deference  
4 by this Panel. Rule 8013. On this record, we do not hold a  
5 definite and firm conviction that a mistake was been committed  
6 by the bankruptcy court. Fisher, 652 F.3d at 1135. Therefore,  
7 the court was correct in denying Porter's request for an  
8 exception to discharge under § 523(a)(4).

9 **CONCLUSION**

10 We AFFIRM the judgment of the bankruptcy court.  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28