

JUL 16 2008

HAROLD S. MARENUS, CLERK
U.S. BKCY. APP. PANEL
OF THE NINTH CIRCUIT

NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT

6 In re:) BAP No. CC-08-1039 PaMkSn
7)
7 DESMOND J. CHRISTALL, d/b/a)
Desmond J. Christall Construction,) Bk. No. LA 05-40301-AA
8)
Debtor.)
9)
_____))
10 ROLO ENTERPRISES, LLC,)
))
11 Appellant,)
) **MEMORANDUM**¹
12 v.)
))
13 HOWARD EHRENBERG, Chapter 7)
Trustee; DESMOND J. CHRISTALL,)
14)
Appellees.)
15)
_____)

Argued and Submitted on
June 19, 2008 at Pasadena, California

Filed - July 16, 2008

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

Honorable Alan M. Ahart, Bankruptcy Judge, Presiding

Before: PAPPAS, MARKELL, and SNYDER,² 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 Hon. Paul B. Snyder, Bankruptcy Judge for the Western District of Washington, sitting by designation.

1 Creditor Rolo Enterprises, LLC, ("Rolo") appeals the "Order
2 After Hearing on Debtor's Objection to Allowance of Claim Number 5
3 by Rolo Enterprises, LLC," entered by the bankruptcy court on
4 January 23, 2008. We AFFIRM.

5 **FACTS**

6 In February 2004, Desmond J. Christall d/b/a Desmond J.
7 Christall Construction ("Debtor") agreed to perform roofing work
8 on two buildings owned by Rolo. Rolo found Debtor's performance
9 unsatisfactory and contends that Debtor breached the contract.

10 Rolo sued Debtor in Orange County, California, Superior
11 Court, Rolo Enter., LLC v. D.J. Christall, American Contractors
12 Indemnity Co., case no. 05-CC-04487. Debtor did not contest the
13 lawsuit. On July 5, 2005, Rolo was granted a default judgment
14 against Debtor by the state court for \$60,190 in compensatory
15 damages, and \$150,000 in punitive damages (the "State Court
16 Judgment"). Rolo did not appeal the State Court Judgment.

17 On October 11, 2005, Debtor filed a chapter 7³ bankruptcy
18 petition. Howard M. Ehrenberg was appointed chapter 7 trustee
19 ("Trustee"). Debtor listed the State Court Judgment on his
20 Schedule F in the amount of \$210,579.50, and did not indicate that
21 the claim was contingent, unliquidated, or disputed. Debtor did
22 not list any real property assets in his Schedule A.

23 Although Debtor failed to appear at the initial § 341(a)
24

25 ³ Unless otherwise indicated, all chapter, section and rule
26 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1330, as
27 enacted and promulgated prior to the effective date (October 17,
28 2005) of the relevant provisions of the Bankruptcy Abuse
Prevention and Consumer Protection Act of 2005, Pub. L. 109-8,
April 20, 2005, 119 Stat. 23, and to the Federal Rules of
Bankruptcy Procedure, Rules 1001-9037.

1 meeting of creditors, he appeared at the continued meeting held on
2 December 20, 2005, and was examined by Trustee. There are three
3 accounts in the record concerning events at the continued § 341(a)
4 meeting. Trustee, in a sworn declaration of September 22, 2006,
5 states that Debtor testified that he was renting a house in Long
6 Beach, California (the "Property") and was not its owner. Debtor,
7 in an unsworn pleading filed September 19, 2007, admits that he
8 did not schedule the Property, but indicates that he did testify
9 at the meeting that he had owned the Property and transferred it
10 to Joseph Mancuso ("Mancuso"). John D. Monte ("Monte"), attorney
11 for Rolo, in a sworn declaration filed November 7, 2007, states
12 that he attended the § 341(a) meeting and, based on his
13 handwritten notes, confirmed that Debtor testified at the § 341(a)
14 meeting that Debtor briefly owned an interest in the Property.

15 Rolo filed an adversary proceeding in the bankruptcy court on
16 January 12, 2006, seeking to except the State Court Judgment from
17 discharge in Debtor's case under § 523(a)(2) and (6). Consistent
18 with the findings of the state court when it entered the State
19 Court Judgment, Rolo alleged that Debtor had fraudulently
20 presented himself to Rolo as a licensed roofing contractor, that
21 Debtor could not competently perform and complete the roofing
22 services under his contract with Rolo, and that as a result of
23 Debtor's willful deceit and fraud, Rolo suffered damages,
24 eventually resulting in entry of the State Court Judgment.

25 On February 7, 2006, Rolo and Debtor entered into a
26 settlement agreement (the "Settlement Agreement") resolving the
27 adversary proceeding. Among the salient terms of the Settlement
28 Agreement were that: (1) Christall agreed to pay Rolo \$60,190 on

1 or before February 17, 2006; (2) when it received the \$60,190,
2 Rolo agreed to file a dismissal with prejudice of the adversary
3 proceeding and to file a satisfaction of judgment in the state
4 court; and (3) the parties acknowledged that they had been
5 represented by counsel in the negotiation of the agreement.

6 There are two release clauses in the Settlement Agreement.
7 Under the first clause,

8 Provided that all conditions hereto are met, upon
9 execution of the agreement and receipt of the settlement
10 sum, Rollo hereby releases any and all of its claims,
11 demands and causes of action, whether known or unknown,
12 against each party, including but not limited to,
13 Christall, his predecessors and/or successors in
interest, attorneys, and/or agents or representatives
arising out of or giving rise to the [state court
lawsuit] and/or the [adversary proceeding] except such
claims that may arise or exist as a result of this
agreement.

14 Under the second clause, Christall agreed to release Rolo from all
15 claims, using nearly identical terms. There is no representation
16 or admission by Debtor in the Settlement Agreement regarding the
17 ownership of any assets. The copy of the Settlement Agreement in
18 the excerpts of record reflects that it was signed by both Debtor
19 and Daniel Rodriguez, president of Rolo, and by the attorneys for
20 the parties who negotiated the Settlement Agreement.⁴

21 Debtor paid the \$60,190 to Rolo, Rolo caused the adversary
22 proceeding to be dismissed with prejudice by the bankruptcy court
23

24 ⁴ The record includes documents showing that attorneys for
25 Rolo and Debtor negotiated the Settlement Agreement. A letter
26 from Debtor's attorney, Weil, to Rolo's attorney, Monte, dated
27 February 1, 2006, contains a counter-offer of payment of \$50,000
28 in apparent response to a previous demand of \$100,000 by Rolo to
terminate the adversary proceeding. Of particular interest in
this letter is Weil's statement that "Mr. Christall, having
contacted and exhausted all of his sources, believes that this
will probably have to be his final offer."

1 on March 1, 2006, and Rolo filed a satisfaction of judgment of the
2 State Court Judgment on March 6, 2006.

3 In the meantime, Mancuso initiated an action against Debtor
4 in Los Angeles Superior Court, Mancuso v. Christall, case no.
5 NC038036, on February 1, 2006 (the "Mancuso Case"). A copy of the
6 complaint in the Mancuso Case is not included in the record, but
7 Mancuso would later summarize his state court claims against
8 Debtor in a pleading filed in the bankruptcy court. Mancuso
9 alleged that: (1) Debtor induced Mancuso to purchase the Property,
10 with the title and mortgage in Mancuso's name, because Mancuso had
11 a better credit rating than Debtor; (2) Debtor made the down
12 payment, and promised to make all mortgage payments and obtain
13 financing so that Mancuso could transfer title to Debtor; (3) in
14 1999, Mancuso transferred title to Debtor so that Debtor could
15 attempt to sell the Property, but kept the mortgage obligation in
16 Mancuso's name; and (4) in 2003, without Mancuso's knowledge or
17 consent, Debtor transferred title to the Property back to Mancuso.
18 Mancuso claimed damages stemming from the injury to his credit
19 rating from Debtor's failure to make loan payments, and Mancuso's
20 entitlement to a share of the appreciation in the Property. The
21 Mancuso Case was dismissed without prejudice on Debtor's motion on
22 September 20, 2006.⁵

23 Trustee filed a "no asset" report in the bankruptcy case on
24 March 8, 2006. Debtor received a discharge on July 7, 2006, and
25

26 ⁵ Mancuso is not a party to this appeal. We describe the
27 Mancuso Case here because Rolo argues that the Mancuso Case
28 demonstrates that Debtor was aware of his interest in the Property
at the same time that Debtor allegedly told Rolo that he had no
assets.

1 the bankruptcy case was closed on July 11, 2006. However, at some
2 later time, Trustee learned that Debtor may hold an interest in
3 the Property. On October 13, 2006, on Trustee's motion, the
4 bankruptcy court reopened the bankruptcy case to allow Trustee to
5 administer the unscheduled asset.

6 On February 3, 2007, Rolo submitted a proof of claim in the
7 reopened bankruptcy case for \$178,636 based on the State Court
8 Judgment. In calculating the amount of the claim, Rolo credited
9 Debtor's payment of \$60,190 under the Settlement Agreement against
10 the \$210,389.50 originally demanded in the adversary complaint,
11 and recalculated the accrued interest.

12 On October 17, 2007, Debtor filed an Objection to Allowance
13 of Rolo's claim. Debtor asserted that Rolo's claim had been fully
14 satisfied by his payment under the Settlement Agreement, and that
15 consistent with the terms of the Settlement Agreement and mutual
16 releases, Rolo had filed a satisfaction of judgment of the State
17 Court Judgment. Attached to the Objection was Debtor's
18 declaration that he had borrowed the \$60,190 and had paid Rolo
19 under the Settlement Agreement.⁶

20 Rolo responded to Debtor's Objection on November 7, 2007. In
21 its opposition, Rolo accused Debtor of fraud in inducing Rolo to
22 enter into the Settlement Agreement. Rolo contended that Debtor
23 concealed assets (i.e., Debtor's interest in the Property) and
24

25 ⁶ Normally, a debtor lacks standing to object to allowance
26 of a creditor's claims in the bankruptcy case. Heath v. Am.
27 Express Travel Related Servs. Co. (In re Heath), 331 B.R. 424, 429
28 (9th Cir. BAP 2005). However, where there is potentially a
surplus of assets available for distribution to creditors with
allowed claims, the debtor holds the requisite pecuniary interest
to support an objection. Id. In this instance, if Rolo's claim
is disallowed, a surplus may result.

1 that, had Rolo known about the Property, Rolo would not have
2 entered into the Settlement Agreement. According to Rolo,
3 California law provides that an agreement entered into by parties
4 based on the fraud of one party is enforceable only to the extent
5 intended by the aggrieved party. To the extent that Rolo intended
6 to release Debtor from further personal liability, Rolo
7 acknowledged that the Settlement Agreement is enforceable.
8 However, due to Debtor's fraud, Rolo contends that, under these
9 facts, the Settlement Agreement should not bar Rolo's entitlement
10 to a distribution as a creditor from the bankruptcy estate.

11 The bankruptcy court conducted a hearing on Debtor's
12 objection to Rolo's proof of claim on November 21, 2007. Debtor
13 argued that the Settlement Agreement released all claims that Rolo
14 had against Debtor, that there was no fraud in the inducement of
15 Rolo to enter into the Settlement Agreement, and that any
16 interpretation of the agreement must be based on its four corners.

17 Rolo argued that Debtor had not met its burden of going
18 forward with an objection to Rolo's claim. If the bankruptcy
19 court determined that the burden of proof had shifted to Rolo, it
20 argued that, under California law, the Settlement Agreement was
21 procured by fraud, and that any offensive terms were therefore
22 voidable at Rolo's option, as the defrauded party, including any
23 waivers or releases of any claims. To evidence Debtor's fraud in
24 inducing Rolo to settle, Rolo offered declarations from Rolo's
25 counsel and president attesting to the representations made by
26 Debtor to Rolo during negotiations that Debtor had no assets.
27 Rolo's attorney argued:

28 We have the oral representation that was made to Rolo's

1 counsel that there were no assets other than borrowed
2 monies. We have a letter from Debtor's counsel that
3 says he's exhausted all of the sources, there's nothing
4 else that's going on, and we have a declaration from Mr.
5 Mancuso that says, at the same time that Rolo was
6 engaging in settlement discussions with the Debtor, Mr.
7 Mancuso and the Debtor were arguing over Mr. Christall's
8 ownership interest, or claim of complete ownership . . .
9 in the property at hand. So it wasn't true. The
10 representations that were made to us in inducing us to
11 settle this case were not true.

12 Tr. Hr'g 6:23 - 7:10 (November 21, 2007).

13 After a colloquy between the bankruptcy court and Rolo's
14 counsel regarding Debtor's representations, the bankruptcy judge
15 asked Rolo's counsel, "Well, what should [Debtor] have said?"
16 Rolo's counsel acknowledged that, in negotiating the agreement,
17 Debtor was under no obligation to speak, but argued that if he
18 did, he had a duty to tell the truth:

19 I think he should have said that he has an interest in
20 the [Property], and he may get it, and if he gets the
21 house, then he may have more money to settle the case.
22 We would have withheld settling the case, and/or we
23 would have prosecuted the adversary and gotten the
24 entire debt excepted from discharge. So that right was
25 lost because we relied on those representations.

26 Tr. Hr'g 7:24 - 8:10.

27 Debtor's counsel responded that Rolo was attempting to
28 rescind the Settlement Agreement without giving back the money
29 paid by Debtor. Rolo's counsel insisted that Rolo was not seeking
30 rescission, citing Ninth Circuit case law allowing the defrauded
31 party to void a contract in whatever parts it chooses.

32 After considering these arguments, the bankruptcy court
33 concluded by telling Rolo's attorney, succinctly, "You can't have
34 it both ways So what I'm going to do is . . . I will
35 overrule the objection, predicated on your returning the monies,
36 which will then give you your full amount of your claim as

1 determined by the state court, okay, in your judgment." Tr. Hr'g
2 12:18-22.

3 The bankruptcy court implemented its decision in an "Order
4 After Hearing on Debtor's Objection to Allowance of Claim Number 5
5 Filed by Rolo Enterprises, LLC" entered on January 23, 2008. This
6 order provides that:

7 1. The objection of claim number 5 filed herein by Rolo
8 Enterprises, LLC, is sustained unless claimant Rolo
9 Enterprises, LLC, pays to the debtor by close of
10 business on January 25, 2008, the sum of \$60,190.00.

11 2. However, if claimant Rolo Enterprises, LLC, pays to
12 the debtor the sum of \$60,190.00 on or before the close
13 of business on January 25, 2008 claim no. 5 will be
14 allowed in the amount of \$178,636.00.

15 Rolo did not return the settlement money to Debtor; it filed
16 a timely appeal on February 1, 2008.

17 JURISDICTION

18 The bankruptcy court had jurisdiction under 28 U.S.C. §§ 1334
19 and 157(b) (2) (B). We have jurisdiction under 28 U.S.C. § 158.⁷

20 ISSUE

21 Whether the bankruptcy court erred when it ruled that Rolo's
22 proof of claim would be disallowed unless Rolo returned the

23 ⁷ Although the bankruptcy court's order included alternative
24 resolutions dependent upon a condition, we have no jurisdictional
25 concerns about the finality of the order for appellate purposes.
26 We found no case law which examines the finality of an order that
27 allows or disallows a claim in a bankruptcy case based upon the
28 fulfillment or failure of a condition. However, use of
conditional orders is an important traditional tool for any
federal judge. Charles Alan Wright, Arthur Miller & Edwin H.
Cooper, 15B FEDERAL PRACTICE AND PROCEDURE § 3915.3 (2nd ed. 1998)
("Judgment may be entered in a form that gives a party a choice
between alternatives or imposes some condition on the effect of
the judgment."). A conditional judgment is not final under FED.
R. CIV. P. 54(a) until the contingency has been removed. *Id.*
Here, Rolo was required to return the settlement funds to Debtor
by a fixed date, January 25, 2008, or its claim would be
disallowed. Because Rolo did not comply, any contingency has been
removed and the bankruptcy court's order disallowing Rolo's claim
constitutes a final order subject to review on appeal.

1 payment it received from Debtor.

2 **STANDARD OF REVIEW**

3 We review a bankruptcy court's legal conclusions, including
4 its interpretation of the Bankruptcy Code and state law, de novo.
5 Roberts v. Erhard (In re Roberts), 331 B.R. 876, 880 (9th Cir. BAP
6 2005).

7 **DISCUSSION**

8 I.

9 Under § 501(a), a creditor may file a proof of claim.
10 Section 502(a) provides that "a claim or interest, proof of which
11 is filed under section 501 of this title, is deemed allowed unless
12 a party in interest . . . objects." If there is an objection to
13 the claim, with exceptions not relevant here, the bankruptcy
14 court, under § 502(b), after notice and a hearing, "shall
15 determine the amount of such claim in lawful currency of the
16 United States as of the date of the filing of the petition, and
17 shall allow such claim in such amount, except to the extent that"
18 one of nine circumstances justifying disallowance are found to
19 exist. Of particular interest here is the first type of claim to
20 be disallowed under § 502(b), where "(1) such claim is
21 unenforceable against the debtor and property of the debtor, under
22 any agreement or applicable law for a reason other than because
23 such claim is contingent or unmatured[.]"⁸

24 The Panel recently examined the competing burdens of the

25
26 ⁸ Rules 3001 through 3013 provide the procedures governing
27 the filing and objection to proofs of claim. None of these are
28 relevant to our consideration of this appeal except, of course,
Rule 3001(f), which provides that "a proof of claim executed and
filed in accordance with these rules shall constitute prima facie
evidence of the validity and amount of the claim."

1 creditor and objector in the context of a claims dispute. In
2 Litton Loan Servicing, LP v. Garvida (In re Garvida), 347 B.R. 697
3 (9th Cir. BAP 2006), the Panel described the progression and
4 shifting burden of proof concerning allowance of a claim, as
5 follows:

6 First, the creditor must submit a claim that meets the
7 requirements of the Bankruptcy Code and Rules. Assuming the
8 creditor complies with the formal requirements for a proper proof
9 of claim, a presumption of validity arises, and that claim is
10 deemed allowed unless there is an objection. Id. at 708.

11 Next, if an interested party objects to the proof of claim,
12 that objecting party must submit evidence that the claim was
13 satisfied in whole or in part, such that it should be disallowed
14 under § 502(b)(1). Id.

15 Finally, assuming the objector comes forward with sufficient
16 proof, the ultimate burden of persuasion will be allocated under
17 otherwise applicable law. Id. at 706.

18 We apply this paradigm to analyze the issues presented in
19 this appeal.

20 II.

21 A.

22 Rolo filed a proof of claim in proper form in Debtor's
23 reopened bankruptcy case in compliance with the Bankruptcy Code
24 and Rules. Under Rule 3001(f), Rolo's proof of claim was thus
25 presumptively valid.

26 Debtor, as an interested party,⁹ objected to allowing Rolo's
27

28 ⁹ See note 6, infra.

1 proof of claim. In doing so, Debtor had the burden of submitting
2 evidence to the bankruptcy court that Rolo's claim based on the
3 State Court Judgment was no longer enforceable for purposes of
4 disallowance under § 502(b)(1).¹⁰

5 To satisfy this burden, Debtor submitted the Settlement
6 Agreement, which on its face showed that, if Debtor paid Rolo
7 \$60,190, his debt to Rolo would be satisfied and all other claims
8 held by Rolo, known or unknown, would be released. Debtor
9 submitted proof that he had paid Rolo the settlement amount, and
10 that Rolo had dismissed the adversary proceeding and filed a
11 satisfaction of judgment in the state court as required under the
12 Settlement Agreement. The bankruptcy court implicitly, and we
13 explicitly, accept this evidence as an adequate showing that
14 Rolo's claim had been extinguished by an agreement consistent with
15 § 502(b)(1).¹¹

16 Since Debtor had satisfied his burden, the ultimate burden of
17 persuasion that the claim should be allowed shifted back to Rolo.
18 In re Garvida, 347 B.R. at 108. Rolo challenged the notion that

20 ¹⁰ There is nothing in the language of § 502(b)(1)
21 restricting its application solely to prepetition agreements
22 concerning claims. Further, to refuse to enforce a postpetition
23 agreement in bankruptcy court that would be fully enforceable
24 under state law would seem inconsistent with the general policy
that state law governs the substance and enforceability of claims
in bankruptcy cases. Raleigh v. Ill. Dep't of Revenue, 530 U.S.
15, 20 (2000). We thus apply § 502(b)(1) to our analysis of the
allowance/disallowance of Rolo's claim.

25 ¹¹ Although the bankruptcy judge did not state on the record
26 that "the claim is extinguished," his comments are reasonably
27 interpreted to have this meaning. The court told counsel for
28 Rolo, "you can't have it both ways." We understand this to mean
that Rolo could not enjoy both the benefits of the Settlement
Agreement (i.e., the cash payment), and participation in the
bankruptcy case as a creditor, because the Settlement Agreement
and payment extinguished Rolo's claim against Debtor.

1 the Settlement Agreement and payment operated to satisfy and
2 release all of its claims against Debtor. Instead, Rolo argued
3 that the Settlement Agreement was binding only to the extent
4 intended by Rolo, because Rolo had been duped into the settlement
5 by Debtor's fraudulent misrepresentations about the extent of his
6 assets. In Rolo's view, under these facts, the bankruptcy court
7 should have allowed Rolo to retain the settlement funds received
8 from Debtor, and also should have excused Rolo from the release of
9 claims provision in the Settlement Agreement, thereby allowing
10 Rolo to participate in distributions to creditors in the
11 bankruptcy case.

12 To determine if Rolo has carried its burden, we look to the
13 applicable law concerning rescission of settlement agreements.¹²

14 B.

15 Rolo correctly argues that California law should be applied
16 to resolve the issues raised here. In re Garvida, 347 B.R. at 705
17 ("nonbankruptcy (usually state) law governs the substance of
18 claims") (citing Raleigh v. Ill. Dep't of Revenue, 530 U.S. 15, 20
19 (2000)). Beyond this point, we part company with Rolo's
20 arguments.

21 In the bankruptcy court and on appeal, Rolo relies heavily on
22 a statement by the court in Kaufman & Broad v. Unisys Corp., 822
23 F.Supp. 1468, 1474 (N.D. Cal. 1993) for the proposition that:

24
25 ¹² Debtor asserts that, because rescission is an equitable
26 remedy, pursuant to Rule 7001(7), an adversary proceeding was
27 required before the bankruptcy court could "order" that the
28 Settlement Agreement be rescinded. However, the Panel in Hickman
v. Hana (In re Hickman), 384 B.R. 382 (9th Cir. BAP 2008), ruled
that since, by their nature, all claims processing decisions in
bankruptcy cases are essentially equitable in nature, adversary
proceedings are only required when an objection to allowance of a
claim is coupled with a demand for other affirmative relief.

1 [T]he Ninth Circuit,^[13] following the California Supreme
2 Court and California Courts of Appeal, has held that
3 ". . . if the parties have not dealt at arms' length
4 and the releasor has relied on fraudulent statements or
5 misrepresentations by the releasee, then the release is
6 binding only to the extent actually intended by the
7 releasor." [Kaufman citation as above, quoting:]
8 Frusetta v. Hauben (1990) 217 Cal. App. 3d 551.

6 Rolo's Opening Br. at 7 (also cited in Rolo's Opposition to
7 Debtor's Objection to Claim, and quoted by Rolo's counsel at the
8 hearing, Tr. Hr'g 12:1-7). Standing on this authority, Rolo
9 advances several arguments to make what amounts to a single point:
10 since Debtor misrepresented the extent of his assets to Rolo
11 during negotiations and upon which Rolo relied in executing the
12 Settlement Agreement, California law allows Rolo to, simply put,
13 interpret the Settlement Agreement as it chooses.

14 To succeed with this argument, Rolo must show in the record
15 that Debtor fraudulently induced Rolo into entering into the
16 Settlement Agreement. Before examining Rolo's proof, though, we
17 explore the first nine words of the Kaufman/Hauben quotation: "if
18 the parties have not dealt at arms length. . . ."

19 C.

20 Kaufman, and the California case law on this issue, all hold
21 that where there is no arms length bargaining during negotiations,
22 the power to release the binding effect of agreements inures to
23 the weaker party. See e.g., Rogers v. Warden, 20 Cal.2d 286,
24 288-89 (1942) (widow, unsophisticated in business and without an

26 ¹³ Ordinarily, we would not admonish an attorney for
27 incorrectly referring to a district court decision as "The Ninth
28 Circuit has held" Such an error is usually a mere
oversight. However, when the same error occurs three times and
forms the core of the argument that Ninth Circuit precedent binds
us, we must take note.

1 attorney, was cheated out of her mineral rights by three
2 businessmen); Seeger v. Odell, 18 Cal. 2d 409, 412-13 (1941)
3 (elderly couple without legal advice were dispossessed from their
4 home by businessmen who falsely indicated they were holders of any
5 interest the couple had in the land). In other words, under
6 Kaufman and similar California cases, the Panel need not decide
7 whether Debtor engaged in a misrepresentation unless Rolo first
8 establishes that the Settlement Agreement was not the product of
9 arms length negotiation.

10 There is a presumption under California law that contracts
11 negotiated by parties represented by attorneys are "arms length."
12 "A characteristic of arms length negotiation is extensive and
13 hard-fought adversarial negotiation between competent attorneys."
14 Wershiba v. Apple Computer, 91 Cal. App. 4th 224, 245 (Cal. Ct.
15 App. 2001). The California Supreme Court defines arms length
16 bargaining as that between "parties of equal strength and
17 sophistication." County of L.A. v. Soto, 35 Cal.3d 483, 490
18 (1984).

19 Here, the record demonstrates that the negotiations of the
20 settlement between Rolo and Debtor were placed in the hands of two
21 attorneys who, over a period of time, exchanged information,
22 offers and counteroffers. Both attorneys approved the final
23 Settlement Agreement, as did their clients, presumably after
24 considering their lawyer's advice. In short, there is nothing in
25 the record that would support the suggestion that the Settlement
26 Agreement was not negotiated at arms length.

27 Indeed, to the extent there might have been some slight
28 imbalance in bargaining power, the record would arguably favor

1 Rolo as having superior power. Rolo held a State Court Judgment
2 against Debtor for a substantial sum, including an award of
3 punitive damages, based on the state court's finding that Debtor
4 had engaged in intentionally bad conduct. On this record, Rolo
5 could persuasively argue that the State Court Judgment should be
6 excepted from discharge in Debtor's bankruptcy case. The record
7 also contains evidence that Debtor, already in chapter 7, was
8 forced to borrow money from family and friends to fund the
9 settlement. While Rolo was also apparently facing some financial
10 difficulties, there is no evidence in the record that it was not
11 at that time an operating business. In short, if there was any
12 imbalance of power between Rolo and Debtor in negotiating their
13 deal, it modestly favored Rolo, not Debtor.

14 The cases cited by Rolo all involve circumstances much
15 different than those presented here. The principal California
16 Supreme Court case relied on by Rolo is Casey v. Proctor, 59
17 Cal.2d 97, 98 (1963). In that case, Casey was a young man
18 contacted by an insurance adjuster a few days after he was
19 involved in an auto accident. The court excused Casey where it
20 was shown the adjuster had pressured Casey to execute a release
21 that had a "no injury" block checked. Casey, in turn, relied on
22 earlier cases involving a common theme. For example, in Raynale
23 v. Yellow Cab Co., 115 Cal. App. 90 (1931), the plaintiff was
24 injured in an auto accident involving a taxi. Shortly after the
25 accident, at the request of the cab company, the plaintiff signed
26 a release in exchange for \$25 for "coat damage." The court found
27 that there had been fraud in connection with the settlement, not
28 consisting of affirmative misrepresentations, but in the cab

1 company's agent discussing property damage with plaintiff, then
2 without explaining its effect, asking her to sign a release
3 covering other matters not discussed. Id. at 92. In Meyer v.
4 Haas, 58 P. 1042 (Cal. 1899), the plaintiff fell down an elevator
5 shaft, and shortly thereafter entered into a settlement with the
6 operators of the elevator. A jury later found that the plaintiff
7 was tricked into settling because his English was poor and his
8 agent was actually working for the operators.

9 As can be seen, the Kaufman and Casey lines of cases do not
10 help Rolo because they did not involve an agreement that resulted
11 from an arms length negotiation by parties represented by counsel.
12 Because Rolo has not shown that the Settlement Agreement was not
13 the product of an arms length negotiation between the parties'
14 attorneys, the bankruptcy court did not err in refusing to allow
15 Rolo both to escape the effect of the release in Settlement
16 Agreement and to retain the settlement funds.

17 D.

18 Even assuming the bankruptcy court should have examined
19 whether Debtor engaged in misrepresentation in connection with
20 negotiating the Settlement Agreement, the record on this question
21 is, contrary to Rolo's argument, far from clear. Although there
22 certainly is evidence that Debtor defrauded Rolo in the business
23 relations that gave rise to the State Court Judgment, it is
24 questionable whether Rolo was tricked into settling the discharge
25 litigation by Debtor's alleged claims of poverty.

26 In California, fraud in the inducement of a contract is a
27 subset of the tort of fraud. Hinesley v. Oakshade Town Center,
28 135 Cal. App. 4th 289, 294-95 (Cal. Ct. App. 2005). To establish

1 fraud, California requires proof of all five of these elements:
2 "(a) misrepresentation (false representation, concealment, or
3 nondisclosure); (b) knowledge of falsity (or "scienter"); (c)
4 intent to defraud, i.e., to induce reliance; (d) justifiable
5 reliance; and (e) resulting damage." Id.

6 Rolo has provided only fragile evidence that Debtor engaged
7 in misrepresentation. Rodriguez' account of Debtor's
8 representations concerns negotiations in which Rodriguez did not
9 participate, and his statements are likely hearsay. Moreover, the
10 record does not support Rolo's argument that Debtor was asserting
11 his rights in the Property at the same time that he was
12 negotiating the Settlement Agreement. Debtor's allegations as to
13 his interest in the Property in the state court action upon which
14 Rolo relies did not occur until he filed his answer in the Mancuso
15 Case on March 1, 2006, almost a month after entering into the
16 Settlement Agreement.

17 Finally, and perhaps of paramount interest, there is no
18 evidence that Debtor ever acknowledged in the settlement
19 negotiations that he had an interest in the Property; instead,
20 Rolo asserts that Debtor represented he had "no assets." Even
21 assuming that Rolo is correct, the term "no assets" is equivocal
22 at best. In the context of their settlement negotiations, where
23 the emphasis was on Debtor's then-present ability to pay Rolo, it
24 could mean that Debtor had exhausted his sources (contacts) to
25 raise money to fund a settlement, or that Debtor did not have
26 assets that could be liquidated within a reasonable time to
27 generate the money to pay Rolo. Thus, contrary to Rolo's
28 arguments, it is far from clear on this record that Rolo was duped

1 by Debtor into entering the Settlement Agreement.

2 Even if Debtor lied to Rolo during the negotiations, Rolo
3 faces a daunting task in proving it "justifiably relied" on any
4 representations made by Debtor. "Reliance exists when the
5 misrepresentation or nondisclosure was an immediate cause of the
6 plaintiff's conduct which altered his or her legal relations, and
7 when without such misrepresentation or nondisclosure he or she
8 would not, in all reasonable probability, have entered into the
9 contract or other transaction." Alliance Mortgage Co. v.
10 Rothwell, 10 Cal.4th 1226, 1239 n.4 (1995). And while ordinarily
11 the elements of fraud are matters of fact that an appellate
12 tribunal cannot determine, the California Supreme Court allows
13 that "whether a party's reliance was justified may be decided as a
14 matter of law if reasonable minds can come to only one conclusion
15 based on the facts." Id. In this instance, we believe that
16 "reasonable minds" can only conclude that Rolo could not
17 justifiably rely on any of Debtor's representations, false or
18 otherwise, in deciding to settle its claims against Debtor.

19 According to the Rodriguez declaration,

20 At the time Debtor filed bankruptcy, Rolo was
21 financially distressed in part due to the fact that Rolo
22 not only paid for services he was to perform, but also
23 had to pay a third party to correct Debtor's work and
24 finish the job anew and Rolo had to pay significant
25 attorney fees. Rolo's state court attorney wanted to do
26 a full asset investigation on Debtor, but Rolo could not
27 afford the cost, in part, as a result of the financial
28 drain incurred Rolo learned of the possibility
that Debtor may own an interest in a house, but was
unable to verify with certainty that such was the case.

26 Rolo then filed an action in the bankruptcy
27 proceeding to determine dischargeability of the debt.
28 Rolo's attorney engaged in a dialogue with Debtor's
attorney. Rolo's attorney told Rolo that Debtor
represented he had no assets and that, if a resolution
was worked out, any money to settle with Rolo would be

1 coming from friends and family. Rolo's attorney also
2 told Rolo that Debtor represented that all of his
3 sources for funding a settlement were exhausted and he
4 would be unable to pay anything further. Based upon
5 these representations, Rolo believed the prudent
6 decision was to resolve the case even though it meant
7 significantly less than it would have if other assets
8 were available to satisfy the Judgment.

6 Again, this declaration is fraught with hearsay statements. But
7 even if considered, it is apparent that Rolo was advised by its
8 counsel to do a "full asset investigation of Debtor" and was aware
9 of "the possibility that Debtor may own" the Property during
10 settlement negotiations. In addition, according to Rolo's
11 attorney, during Debtor's § 341(a) meeting examination, Debtor
12 admitted that at some time he had owned the Property. Moreover,
13 Debtor had a poor track record with Rolo: Rolo had been allegedly
14 victimized by the past frauds of Debtor that resulted in the State
15 Court Judgment in Rolo's favor against Debtor.

16 Given this record, we believe the California courts would
17 conclude that no reasonable person possessing the knowledge and
18 information of Rolo could justifiably rely on any representations
19 made to it by Debtor. It seems far more likely that Rolo took a
20 calculated risk that it was better off receiving the \$60,190 in
21 cash than in fighting to preserve what might be an uncollectible
22 money judgment against Debtor for a larger sum.

23 **CONCLUSION**

24 Under these facts, Rolo was required to persuade the
25 bankruptcy court that the release provision in the Settlement
26 Agreement was not effective, such that Rolo should be allowed to
27 both retain the settlement payment and participate as a creditor
28 in distributions from Debtor's bankruptcy case.

1 The bankruptcy court was not persuaded, nor is this Panel,
2 that Rolo's claim should be allowed in the bankruptcy case without
3 returning the cash. In exercising its discretion, the bankruptcy
4 court offered Rolo the opportunity to rescind the Settlement
5 Agreement, but only on condition that Rolo return the \$60,190 to
6 Debtor. See Runyan v. Pac. Air Indus., Inc., 2 Cal.3d 304, 319
7 (1970). Rolo declined this invitation, and instead appealed the
8 bankruptcy court's order.

9 We conclude that the bankruptcy court's ruling to disallow
10 Rolo's claim was consistent with California and bankruptcy law.

11 AFFIRMED.

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