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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NOT FOR PUBLICATION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

In re:	)	BAP No.	SC-07-1333-KPaJu
	)		
RUSSELL D. WARD,	)	Bk. No.	05-13284
	)		
Debtor.	)	Adv. No.	06-90114
	)		
RUSSELL D. WARD,	)		
	)		
Appellant,	)		
	)		
v.	)	<b>MEMORANDUM*</b>	
	)		
THE PAUL REVERE LIFE	)		
INSURANCE COMPANY,	)		
	)		
Appellee.	)		

Argued and Submitted on May 15, 2008  
at Pasadena, California

Filed - June 3, 2008

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

Honorable John J. Hargrove, Chief Bankruptcy Judge, Presiding

Before: KLEIN, PAPPAS and JURY, Bankruptcy Judges.

\*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 On December 14, 1994, a month after the State Bar had filed  
2 formal charges against Ward with respect to six cases, Ward  
3 applied for a disability policy from appellee Paul Revere Life  
4 Insurance Company ("Paul Revere"). Ward did not disclose the  
5 pending State Bar charges against him. Unaware of any scheme and  
6 relying upon representations in Ward's application, Paul Revere  
7 issued Ward a disability insurance policy as of February 14,  
8 1995.

9 In February 1996, Ward made a claim against the disability  
10 policy. Ward did not disclose the pending State Bar disciplinary  
11 proceedings to Paul Revere when he made his claim. Ward claimed  
12 that an alleged automobile accident caused him "anxiety, stress +  
13 major depressive disorder," completely disabling him and leaving  
14 him unable to perform the duties of an attorney.<sup>2</sup>

15 On April 26, 1996, Paul Revere began paying Ward benefits  
16 under the policy. The payments were made under an express  
17 reservation of rights pending investigation of its liability  
18 under the claim. Paul Revere made payments until June 29, 2001,  
19 totaling about \$290,260.<sup>3</sup>

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20  
21 <sup>1</sup>(...continued)  
22 and with an impending trial on at least one of the cases  
23 scheduled in three days, on December 12, 1997, Ward resigned from  
24 the State Bar with charges pending.

25 <sup>2</sup>Claimant's Statement for Disability Benefits, Ex. 7 to App.  
26 of Exs. in Supp. of Mot. for Summ. J. (June 5, 2007).

27 <sup>3</sup>Ward contends that \$290,260 is too high because the  
28 declaration in support of Paul Revere's motion indicates that 63  
monthly payments were made and initially set at \$3,800 then  
raised to \$4,480 (whether retroactively is unclear), which  
implies that payments would not have exceeded \$282,240. There  
are, however, multiple difficulties. First, no counter evidence  
(continued...)

1 Paul Revere's investigation of Ward's claim revealed  
2 discrepancies as to his pre-disability income and revealed that  
3 he had provided false and misleading information regarding his  
4 employment as a corporate attorney for R.A. Shacket, Inc., a  
5 medical corporation.<sup>4</sup> When Paul Revere pressed Ward for proof of  
6 his pre-disability income, he claimed to have done work for King  
7 Medical and submitted a Form 1099 from King Medical showing gross  
8 income for 1994 of \$78,000.<sup>5</sup> Ward later admitted in the federal  
9

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10 <sup>3</sup>(...continued)  
11 addressed to the calculation is presented. Second, there are  
12 sufficient plausible explanations for a damages total that is  
13 within 3 percent of the apparent maximum, that the question does  
14 not present a genuine issue of material fact.

15 <sup>4</sup>Ward's insurance application listed his occupation as  
16 "attorney," employer as "R.A. Shacket, Inc.," and length of  
17 employment as ten months. Ward also stated that his earned  
18 income was \$84,000 for the then-current year 1994 and \$50,000 for  
19 the prior year 1993. In a letter to Paul Revere, dated December  
20 15, 1994, Shacket verified that his corporation retained the  
21 services of Ward since February 1, 1994, as the corporate  
22 attorney of record at a \$6,000 per month salary.

23 Notwithstanding the representations on his application, Ward  
24 later represented on his claim for disability that he was "self  
25 employed (corp. attorney for R.A. Shacket, Inc.)." When Paul  
26 Revere requested proof of Ward's pre-application income, Ward  
27 submitted a Form 1099 from R.A. Shacket, Inc., rather than a W-2  
28 form, indicating a gross income paid to Ward in 1994 of \$78,000.  
This amount did not match the \$84,000 income stated on Ward's  
application. Further, the \$6,000 per month salary alleged in  
Shacket's letter would mean that Ward would have only received  
\$66,000 in 1994, not \$78,000 as stated in the Form 1099.

<sup>5</sup>Ward also argues that Paul Revere's investigation included  
information (that belied his assertions regarding perpetuation  
income) that was obtained in violation of law. We do not rely on  
the Social Security Administration information in making our  
decision. We note, however, that in the authorization section of  
his Claimant's Statement for Disability Benefits, Ward authorized  
the Social Security Administration to release to Paul Revere  
information about his account.

1 criminal matter against him that King Medical was a "fictitious  
2 corporation set up by [Ward and Shacket] as part of their  
3 criminal agreement to impede the Internal Revenue Service."  
4 Information at 11, United States v. Ward, Case No. 01 CR 2258 JM  
5 (S.D. Cal. July 25, 2001). Notwithstanding Ward's  
6 representations to Paul Revere that he was completely disabled,  
7 he continued to receive post-disability income without disclosing  
8 this to Paul Revere. Until September 1997, more than a year and  
9 a half after he began receiving disability payments from Paul  
10 Revere, Ward continued to receive the \$6,000 monthly payments  
11 from Shacket. Ward also maintained several "client trust  
12 accounts," including an account in Las Vegas, for almost three  
13 years after his alleged disability began.

14 Pursuant to the criminal information filed July 21, 2001,  
15 Ward pled guilty to conspiring with Shacket and others to income  
16 tax fraud, and was later sentenced to eighteen months in federal  
17 prison. As part of his plea agreement, Ward admitted that King  
18 Medical was a sham corporation created by Ward and Shacket to  
19 defraud the federal government. United States v. Ward, Case No.  
20 01 CR 2258 JM (S.D. Cal. July 25, 2001). Also in 2001, Shacket  
21 was indicted on thirty-six counts involving tax fraud, later pled  
22 guilty, and was sentenced to prison.

23 In 2002, Paul Revere sued Ward and others in the United  
24 States District Court alleging insurance fraud, rescission, and  
25 other causes of action.<sup>6</sup>

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26  
27 <sup>6</sup>In the United States District Court for the Southern  
28 District of California in Case No. 02cv2235-BEN (WMC) against  
Ward, Shacket, and others, Ward counterclaimed, seeking

(continued...)

1 On October 14, 2005, Ward filed a chapter 7 bankruptcy case,  
2 listing Paul Revere as a disputed creditor. Ward was granted a  
3 discharge on January 27, 2006.

4 On January 23, 2006, Paul Revere timely filed an adversary  
5 proceeding to except its debt from discharge based on alleged  
6 insurance fraud pursuant to 11 U.S.C. §§ 523(a)(2)(A), (a)(2)(B),  
7 and (c).

8 After the bankruptcy court denied Ward's motion to dismiss  
9 the complaint but granted his motion to strike the portion of the  
10 adversary complaint that incorporated Paul Revere's complaint  
11 against Ward that was pending in the district court, Ward filed  
12 his answer on May 26, 2006. He contended that the determination  
13 of the existence of a debt under state tort or contract law was a  
14 non-core proceeding, objected to the bankruptcy court entering an  
15 order or judgment on the non-core issues, and demanded a jury  
16 trial. He further alleged that his discharge had terminated any  
17 unfiled claims arising under state tort or contract law.

18 Following discovery cutoff, on June 5, 2007, Paul Revere  
19 filed a motion for summary judgment, or alternatively, for  
20

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21 <sup>6</sup>(...continued)

22 declaratory relief and alleging breach of contract, insurance bad  
23 faith, intentional infliction of emotional distress, negligent  
24 infliction of emotional distress, and invasion of privacy. The  
25 district court granted summary judgment in favor of Paul Revere  
26 as to all causes of action in Ward's counterclaim, ruling that he  
27 was never entitled to disability benefits under the policy. The  
28 district court concluded that, because Ward's resignation from  
the State Bar with charges pending created a "legal disability"  
that pre-dated any physical disability that Ward may have had, he  
was never entitled to benefits under the policy. The district  
court case was later stayed by the filing of Ward's bankruptcy  
petition.

1 summary adjudication of facts, and Ward cross-filed a motion for  
2 judgment on the pleadings, or alternatively, for summary  
3 judgment.

4 Paul Revere contended that the facts were undisputed that it  
5 had a \$290,260 claim against Ward for the benefits paid to Ward  
6 under the insurance policy and that the claim against Ward was  
7 nondischargeable. Paul Revere also argued that, because the  
8 district court had previously granted Paul Revere's motion for  
9 summary judgment in the district court case ruling that Ward was  
10 not entitled to any of the disability benefits paid under the  
11 policy, then either the doctrine of issue preclusion or the law  
12 of the case doctrine applied.

13 In his cross-motion, Ward argued that Paul Revere only had  
14 an alleged claim for nondischargeability because the debt was not  
15 first established under state tort or contract theories, and  
16 thus, the proceeding was improperly before the bankruptcy court  
17 as a non-core proceeding. Ward further contended that Paul  
18 Revere raised new claims in its motion not alleged in the  
19 complaint, that the statute of limitations barred Paul Revere's  
20 claims, and that its evidence, including business records and  
21 declarations, was hearsay.

22 At the hearing on July 3, 2007, the bankruptcy court granted  
23 Paul Revere's motion for summary judgment and denied Ward's  
24 cross-motion. The bankruptcy court incorporated its tentative  
25 ruling into the final ruling and final judgment.

26 It concluded that, because there were no genuine issues of  
27 material fact as to Ward's fraud, Paul Revere was entitled to a  
28 \$290,260 judgment as a matter of law. Furthermore, pursuant to

1 §§ 523(a) (2) (A) and (B), Paul Revere's claim and judgment against  
2 Ward was not dischargeable. As to the other issues raised by the  
3 parties, the bankruptcy court ruled that Paul Revere had not  
4 alleged any new theories of fraud not previously raised in its  
5 complaint, that neither the doctrine of collateral estoppel  
6 (i.e., issue preclusion) nor the law of the case doctrine  
7 applied, that Paul Revere was not barred to bring its action for  
8 relief based on fraud by the three-year statute of limitations,  
9 and that Ward's evidentiary objections were overruled.

10 The bankruptcy court entered its Amended Minute Order  
11 incorporating its tentative ruling on the same day. The order  
12 denying Ward's cross-motion was entered on August 21, 2007.

13 The judgment awarding \$290,260 to Paul Revere and declaring  
14 the judgment to be excepted from discharge pursuant to  
15 § 523(a) (2) was entered on August 21, 2007.

16 Ward subsequently filed objections and supplemental  
17 objections to the orders and findings of the bankruptcy court and  
18 requested de novo review by the district court.

19 This timely appeal ensued.  
20

#### 21 JURISDICTION

22 The bankruptcy court had jurisdiction via 28 U.S.C. § 1334.  
23 We have jurisdiction under 28 U.S.C. § 158(a) (1).  
24

#### 25 ISSUES

26 (1) Whether determination of the existence and amount of  
27 debt is a core issue.  
28



1 (2) Whether the bankruptcy court's summary judgment order is  
2 sufficiently specific for appellate review.

3 (3) Whether the bankruptcy court erred in overruling Ward's  
4 evidentiary objections to introduction of business records as  
5 summary judgment evidence.

6 (4) Whether the bankruptcy court erred in concluding that  
7 Paul Revere's summary judgment motion did not allege any new  
8 theories of fraud.

9 (5) Whether the bankruptcy court erred in granting Paul  
10 Revere's motion for summary judgment awarding \$290,260 to Paul  
11 Revere and determining that Paul Revere's claim and judgment  
12 against Ward were excepted from discharge pursuant to 11 U.S.C.  
13 §§ 523(a)(2)(A) and (B).

14  
15 STANDARDS OF REVIEW

16 We review summary judgment de novo to assess whether there  
17 is a genuine issue of material fact and whether the moving party  
18 is entitled to judgment as a matter of law. Khaligh v. Hadaeqh  
19 (In re Khaligh), 338 B.R. 817, 823 (9th Cir. BAP 2006), aff'd &  
20 adopted, 506 F.3d 956, 957 (9th Cir. 2007).

21 Whether the bankruptcy court erred in overruling the  
22 debtor's evidentiary objections is reviewed for abuse of  
23 discretion. Lee-Benner v. Gergely (In re Gergely), 110 F.3d  
24 1448, 1452 (9th Cir. 1997).

25  
26 DISCUSSION

27 In addition to appealing the bankruptcy court judgment based  
28 on the grant of summary judgment determining the existence of the

1 \$290,260 debt and determining that the debt was nondischargeable,  
2 Ward raises a variety of putative procedural errors said to have  
3 been made by the bankruptcy court. We address the procedural  
4 issues before addressing the actual ruling on the merits.

5  
6 I

7 Ward asserts that the determination of the existence of a  
8 debt based on tort or contract law is a non-core issue outside  
9 the jurisdiction of the bankruptcy court. He further contends  
10 that, because the determination of the existence of a debt under  
11 state law is a non-core proceeding, his rights to de novo review  
12 by an Article III judge and trial by jury have been violated.  
13 None of the positions has merit.

14  
15 A

16 Bankruptcy judges may hear and determine all cases under  
17 title 11 and all core proceedings arising under title 11, or  
18 arising in a case under title 11. 28 U.S.C. § 157(b)(1). Core  
19 proceedings include determinations as to the dischargeability of  
20 particular debts. 28 U.S.C. § 157(b)(2)(I).

21 Ward contends that, even if the determination of  
22 dischargeability is a core proceeding, establishing the existence  
23 of the debt itself under state law is a non-core matter not  
24 properly before the bankruptcy court.

25 The Ninth Circuit has expressly rejected Ward's position and  
26 has long held that the bankruptcy court has core jurisdiction to  
27 enter a money judgment on a disputed state law claim in the  
28 course of making a determination that a debt is nondischargeable.

1 Sasson v. Sokoloff (In re Sasson), 424 F.3d 864, 868 (9th Cir.  
2 2005); Cowen v. Kennedy (In re Kennedy), 108 F.3d 1015, 1016 (9th  
3 Cir. 1997).

4 Bankruptcy courts have core jurisdiction over  
5 nondischargeability actions brought pursuant to § 523(a). 28  
6 U.S.C. § 157(b)(2)(I); see Rein v. Providian Fin. Corp., 270  
7 F.3d. 895, 904 (9th Cir. 2001). The instant case involves a  
8 dischargeability action brought pursuant to § 523(a)(2).

9 The Ninth Circuit in Kennedy was “particularly persuaded” by  
10 the reasoning that, “[i]f it is acknowledged as beyond question  
11 that a complaint to determine dischargeability of a debt is  
12 exclusively within the equitable jurisdiction of the bankruptcy  
13 court, then it must follow that the bankruptcy court may also  
14 render a money judgment in an amount certain without the  
15 assistance of a jury” and that “[t]his is true not merely because  
16 equitable jurisdiction attaches to the entire cause of action but  
17 more importantly because it is impossible to separate the  
18 determination of dischargeability function from the function of  
19 fixing the amount of the non-dischargeable debt.” Kennedy, 108  
20 F.3d at 1017-18.

21 Thus, the bankruptcy court had the power to hear and  
22 determine the existence of the \$290,260 debt as well as to  
23 determine that the debt was nondischargeable.

24  
25 B

26 Paul Revere correctly points out that, even if the  
27 bankruptcy court had erred in determining the matter to be a core  
28 proceeding and notwithstanding the assertion of non-core status

1 in the answer, Ward waived any assertion of the right to de novo  
2 review by the district court because he consented to resolution  
3 and entry of the final order by the bankruptcy court when he  
4 brought his motion for judgment on the pleadings, or  
5 alternatively, for summary judgment, which expressly requested  
6 that the bankruptcy court enter a final judgment on his behalf.

7 Parties who seek relief from the bankruptcy court impliedly  
8 consent to the bankruptcy court's jurisdiction. See Mann v.  
9 Alexander Dawson, Inc. (In re Mann), 907 F.2d 923, 926 (9th Cir.  
10 1990) (conduct of never objecting to bankruptcy court's  
11 jurisdiction prior to time it rendered judgment is consent to  
12 court's jurisdiction).

13 During the hearing, the bankruptcy court determined that the  
14 entire nondischargeability action was a core proceeding. See  
15 Hr'g Tr. 81:21-25 (July 3, 2007). As such, if a trial had been  
16 held, the bankruptcy court was not required to submit proposed  
17 findings of fact and conclusions of law to the district court,  
18 nor did Ward have a right to de novo review by the district court  
19 before the entry of a final order.

20 Of course, as the matter was resolved on summary judgment,  
21 the appellate review is de novo. Thus, Ward could have had his  
22 de novo review by the district court if only he had timely so  
23 elected under 28 U.S.C. § 158(c)(1)(A). Since the appeal is  
24 properly before this Panel, we are conducting the de novo review  
25 and Ward's Article III review is available from the court of  
26 appeals.

27 Furthermore, as we already have explained, the determination  
28 of the existence of the debt in the context of the

1 nondischargeability action is actually a core proceeding squarely  
2 within the jurisdiction of the bankruptcy court.

3  
4 C

5 Ward also contends that he has a Seventh Amendment right to  
6 trial by jury on Paul Revere's claim. This position also lacks  
7 merit.

8 The fundamental flaw in Ward's argument is that he  
9 voluntarily invoked the equitable claim resolution procedures of  
10 bankruptcy when he filed his bankruptcy case. See Hickman v.  
11 Hana (In re Hickman), 384 B.R. 832, 839 (9th Cir. BAP 2008) (act  
12 of filing voluntary chapter 7 case invokes equitable jurisdiction  
13 of bankruptcy court and debtor thereby agrees to litigate  
14 adversary proceeding in equitable proceedings in which Seventh  
15 Amendment does not apply); cf. Langenkamp v. Culp, 498 U.S. 42,  
16 45 (1990), reh'g denied, 498 U.S. 1043 (1991) (per curiam) (no  
17 Seventh Amendment jury trial for creditor who files proof of  
18 claim).

19 As such, regardless of whether Ward would have a Seventh  
20 Amendment right to jury trial in a nonbankruptcy setting on Paul  
21 Revere's cause of action for civil fraud, he does not have such a  
22 right on Paul Revere's complaint in the bankruptcy court.

23  
24 II

25 Ward also asserts that the bankruptcy court's order is not  
26 adequate for appellate review. In particular, he argues that,  
27 after an extended hearing on the motions occurred, the court did  
28 not render clear findings of fact and conclusions of law, but

1 instead incorporated its tentative ruling into the Amended Minute  
2 Order as the basis for the court's judgment and order entered.  
3 We are satisfied that this is adequate.

4 While a court is expected to explain its reasoning, findings  
5 of fact and conclusions of law are not required for motions under  
6 Rule 12 and Rule 56. See Fed. R. Civ. P. 52, incorporated by  
7 Fed. R. Bankr. P. 7052. It is permissible for a court to explain  
8 itself in any manner, including a tentative decision, so long as  
9 the explanation is included in the record.

10 The bankruptcy court ruled on Paul Revere's Rule 56 motion  
11 for summary judgment, and, thus, was not required to issue  
12 separate findings of fact and conclusions of law. In fact, the  
13 Ninth Circuit points out in Zilog that a bankruptcy court has "no  
14 authority" to make such findings on summary judgment that are  
15 eligible for deferential clearly erroneous review as provided in  
16 Rule 52(a). See Zilog, Inc. v. Corning (In re Zilog, Inc.), 450  
17 F.3d 996, 1002 (9th Cir. 2006) (district court erred by deferring  
18 to the bankruptcy court's explicit factual findings that  
19 bankruptcy court had no authority to make on motion for summary  
20 judgment).

21 Furthermore, we are persuaded that the record is sufficient  
22 for appellate review, as the Amended Minute Order incorporates  
23 the bankruptcy court's detailed tentative ruling. The record  
24 also includes the hearing transcript and all of the pleadings,  
25 declarations, and other summary judgment evidence available for  
26 review.

27 The court did not err in relying on the reasoning it set  
28 forth in its Amended Minute Order, which incorporated its

1 tentative ruling, in entering its judgment and order granting  
2 Paul Revere's motion for summary judgment. There is no merit to  
3 the argument that the court was required to issue separate  
4 findings and conclusions on a motion for summary judgment. The  
5 record is sufficient for appellate review.

6  
7 III

8 The court's evidentiary rulings are questioned because Rule  
9 56(e) requires affidavits be limited to facts that "would be  
10 admissible in evidence." Fed. R. Civ. P. 56(e), incorporated by  
11 Fed. R. Bankr. P. 7056.

12 During the hearing, the bankruptcy court overruled Ward's  
13 evidentiary objections to the declaration of Hope Troilo, a  
14 senior customer care specialist of Paul Revere's parent company,  
15 rejecting Ward's contention that Ms. Troilo lacked personal  
16 knowledge and was not the custodian of the records.

17 Contrary to Ward's arguments, foundation for admission of  
18 business records does not require that the custodian of records  
19 is the sole permissible witness. The phrase "other qualified  
20 witness" in the foundational requirements of Federal Rule of  
21 Evidence 803(6) is broadly interpreted to require only that the  
22 witness understand the record-keeping system. United States v.  
23 Childs, 5 F.3d 1328, 1334 (9th Cir. 1993); United States v. Ray,  
24 930 F.2d 1368, 1370 (9th Cir. 1991).

25 The bankruptcy court agreed with Paul Revere's position that  
26 sufficient foundation was established that the documents offered  
27 qualified under the business records exception, in which a  
28 presumption as to their accuracy and truthfulness would apply.

1 We agree.

2 Thus, we hold that the bankruptcy court did not abuse its  
3 discretion in overruling Ward's evidentiary objections to the  
4 summary judgment evidence.

5

6

IV

7 Ward next argues that Paul Revere attempted to add new  
8 theories of fraud in its summary judgment motion that were not  
9 alleged in the adversary complaint and adds that fraud must be  
10 pled with the particularity required by Federal Rule of Civil  
11 Procedure 9(b).

12 The bankruptcy court concluded that Paul Revere's summary  
13 judgment motion did not allege new theories of fraud but "simply  
14 fleshes out the facts alleged in its nondischargeability  
15 complaint regarding debtor's fraud" and that these "additional  
16 facts are consistent with [Paul Revere's] complaint alleging  
17 nondischargeability under Section 523(a)(2)(A) and (B)." Amended  
18 Minute Order at 2, section 1 (July 3, 2007). We agree.

19 The bankruptcy court did not err. Moreover, as stated in  
20 the bankruptcy court's Amended Minute Order, Ward could have  
21 attacked the complaint for lack of specificity under Federal Rule  
22 Civil Procedure 9(b), incorporated by Federal Rule of Bankruptcy  
23 Procedure 7009, at an earlier time, but he waived this right by  
24 not doing so. Thus, Ward was not prejudiced by additional facts  
25 brought in that are consistent with Paul Revere's complaint.

26 //

27 //

28 //



1  
2 In reviewing the merits of the bankruptcy court's decision  
3 to grant Paul Revere's motion for summary judgment awarding  
4 \$290,260 to Paul Revere and its determination that Paul Revere's  
5 claim and judgment against Ward was not dischargeable pursuant to  
6 §§ 523(a)(2)(A) and (B), we first discuss the rules of summary  
7 judgment before turning to the specifics of this case.

## A

8  
9  
10 We review summary judgment de novo to assess whether there  
11 is a genuine issue of material fact and whether the moving party  
12 is entitled to judgment as a matter of law. Khaligh, 338 B.R. at  
13 823.

14 A summary judgment shall be rendered forthwith if the movant  
15 can show that there is no genuine issue as to any material fact  
16 and the movant is entitled to judgment as a matter of law. Fed.  
17 R. Civ. P. 56(c), incorporated by Fed. R. Bankr. P. 7056.

18 The mere existence of some alleged factual dispute between  
19 the parties will not defeat an otherwise properly supported  
20 motion for summary judgment; the requirement is that there be no  
21 genuine issue of material fact. Anderson v. Liberty Lobby, Inc.,  
22 477 U.S. 242, 247 (1986) (emphasis in original).

23 The movant seeking summary judgment bears the initial burden  
24 of establishing, in light of the pleadings, depositions, answers  
25 to interrogatories, admissions, and affidavits, the absence of a  
26 genuine issue of material fact. However, the ultimate burden of  
27 demonstrating the existence of a genuine issue of material fact  
28

1 lies with the non-moving party. Horphag Research Ltd. v. Garcia,  
2 475 F.3d 1029, 1035 (9th Cir. 2007).

3 When the movant has carried its burden under Rule 56(c), the  
4 non-moving party must come forward with "specific facts showing  
5 that there is a genuine issue for trial." Garcia, 475 F.3d at  
6 1035 (quoting Fed. R. Civ. P. 56(e)); see also Hayes v. Palm  
7 Seedlings Partners (In re Agric. Research), 916 F.2d 528, 533  
8 (9th Cir. 1990). Ward has not done so.

9  
10 B

11 Although Ward was granted a discharge, the judgment  
12 establishes that Paul Revere's right to recover \$290,260 in  
13 disability insurance payments made to Ward is excepted from  
14 discharge pursuant to §§ 523(a)(2)(A) and (B).

15 A debtor is not discharged from any debt for money to the  
16 extent obtained by:

17 (A) false pretenses, a false representation, or actual  
18 fraud, other than a statement respecting the debtor's  
or an insider's financial condition;

19 (B) use of a statement in writing ---

20 (i) that is materially false;

21 (ii) respecting the debtor's or an insider's  
22 financial condition;

23 (iii) on which the creditor to whom the debtor is  
24 liable for such money, property, services, or  
25 credit reasonably relied; and

26 (iv) that the debtor caused to be made or  
27 published with intent to deceive. . . .

28 11 U.S.C. §§ 523(a)(2)(A) & (B).

Paul Revere asserts that overwhelming uncontroverted  
evidence exists that Ward committed insurance fraud against Paul  
Revere. In proving that the debt is nondischargeable on grounds  
of fraud under §§ 523(a)(2)(A) and (B), and thus, that the



1 (1) a representation of fact by the debtor, (2) that  
2 was material, (3) that the debtor knew at the time to  
3 be false, (4) that the debtor made with the intention  
4 of deceiving the creditor, (5) upon which the creditor  
relied, (6) that the creditor's reliance was  
reasonable, (7) that damage proximately resulted from  
the representation.

5 Candland v. Ins. Co. of N. Am. (In re Candland), 90 F.3d 1466,  
6 1469 (9th Cir. 1996).

7 At the hearing and in the Amended Minute Order that  
8 incorporated its tentative ruling, the bankruptcy court examined  
9 each element in concluding that Ward's \$290,260 debt owed to Paul  
10 Revere was nondischargeable under § 523(a)(2)(B). We agree that  
11 the evidence is overwhelming that Ward made false statements  
12 regarding his income on which Paul Revere reasonably relied and  
13 was damaged.

14 The representations made at the time Ward filled out his  
15 insurance application were deceptive because he created the false  
16 impression that his income was derived from a legitimate  
17 enterprise, when in fact, Ward colluded with Shacket in  
18 defrauding the federal government with the sham corporation, King  
19 Medical.

20 Furthermore, the misrepresentations were material because  
21 the disability payments made to Ward would be calculated  
22 initially according to the financial information Ward provided.  
23 See First Interstate Bank of Nev. v. Greene (In re Greene), 96  
24 B.R. 279, 283 (9th Cir. BAP 1986) ("material falsity" can be  
25 premised upon the inclusion of false information or upon the  
26 omission of information about debtor's financial condition).

27 As the bankruptcy court found, Ward knew that these  
28 representations or omissions from his application were false. It

1 can also be inferred that Ward intended to deceive Paul Revere  
2 because he probably knew he would be forced to resign or he would  
3 face disciplinary action with the State Bar when he applied for  
4 disability insurance less than a month after formal disciplinary  
5 charges were filed against him by the State Bar.

6 Paul Revere reasonably relied on Ward's representations,  
7 evidenced by its issuance of the policy, which proximately  
8 resulted in damage of about \$290,260 in payments.

9 These facts are not in dispute. The bankruptcy court was  
10 correct in ruling that the debt was nondischargeable under  
11 § 523(a) (2) (B).

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13 2

14 In order to establish that a debt is nondischargeable under  
15 § 523(a) (2) (A), the creditor must establish five elements by a  
16 preponderance of the evidence:

17 (1) misrepresentation, fraudulent omission or deceptive  
18 conduct by the debtor; (2) knowledge of the falsity or  
19 deceptiveness of his statement or conduct; (3) an  
20 intent to deceive; (4) justifiable reliance by the  
creditor on the debtor's statement or conduct; and (5)  
damages to the creditor proximately caused by its  
reliance on the debtor's statement or conduct.

21 Harmon v. Kobrin (In re Harmon), 250 F.3d 1240, 1246 (9th Cir.  
22 2001).

23 Again, the bankruptcy court methodically analyzed each  
24 element at the hearing and in the Amended Minute Order that  
25 incorporated its tentative ruling, in determining that the  
26 \$290,260 debt owed to Paul Revere was nondischargeable under  
27 § 523(a) (2) (A). We hold that the bankruptcy court did not err in  
28 this regard.

1           Ward's misrepresentation on his claim for disability that he  
2 was completely disabled constitutes deceptive conduct because, in  
3 actuality, he continued to receive \$6,000 a month from Shacket  
4 for more than a year and a half after he began receiving  
5 disability payments from Paul Revere.

6           Furthermore, with Ward's testimony and plea agreement in  
7 evidence, we agree with the bankruptcy court that Ward's  
8 knowledge of falsity can be inferred by his silence as to the  
9 \$6,000 per month payments that were made to Ward post-disability  
10 and as to the existence of the "client trust account" in Las  
11 Vegas.

12           As discussed earlier, Ward's intent to deceive can be  
13 inferred from the circumstances, Paul Revere justifiably (and  
14 reasonably) relied on Ward's claim of disability by making  
15 payments, and Paul Revere was damaged in the amount of \$290,260.

16           With the elements of § 523(a)(2)(A) satisfied, Paul Revere  
17 established that the \$290,260 in payments to Ward were  
18 nondischargeable.

19           Paul Revere carried the initial burden under Federal Rule of  
20 Civil Procedure 56(c). No genuine issue of material fact was  
21 presented to the bankruptcy court. Although Ward contends that  
22 whether he suffered a physical or mental disability is a genuine  
23 issue of fact, the bankruptcy court emphasized that his  
24 disability was not at issue here. Rather, the issue was whether  
25 fraud and misrepresentations were committed, and he did not raise  
26 any genuine issue of material fact regarding the controlling  
27 question.

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