

NOT FOR PUBLICATION

JUN 02 2009

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

UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT

In re:)	BAP No.	CC-08-1228-PaDMk
)		
JAMES L. BARKER and)	Bk. No.	RS 05-23284-PC
JEANNE A. BARKER,)		
)	Adv. No.	RS 06-01033-PC
Debtors.)		
<hr/>			
JEFF HURRELL and)		
LISA HURRELL,)		
)		
Appellants,)		
)		
v.)	MEMORANDUM¹	
)		
JAMES L. BARKER and)		
JEANNE A. BARKER,)		
)		
Appellees.)		
<hr/>			

Argued and submitted on May 14, 2009
at Pasadena, California

Filed - June 2, 2009

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

Honorable Thomas B. Donovan,² Bankruptcy Judge, Presiding

¹ This disposition is not appropriate for publication. Although it may be cited for whatever persuasive value it may have (see Fed. R. App. P. 32.1), it has no precedential value. See 9th Cir. BAP Rule 8013-1.

² Judge Donovan presided over the trial and issued the memorandum decision and judgment in this case. Judge Peter Carroll is the bankruptcy judge assigned to this bankruptcy case and adversary proceeding. Apparently, in contemplation of his retirement, the bankruptcy case and all adversary proceedings were transferred from the previous presiding judge, Judge Mitchel (continued...)

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Before: PAPPAS, DUNN and MARKELL, Bankruptcy Judges.

Appellants Jeff and Lisa Hurrell ("Jeff," "Lisa," and, collectively, "Hurrells") appeal a decision of the bankruptcy court denying their request that their alleged claims against Appellees, chapter 7 debtors James L. and Jeanne A. Barker ("James," "Jeanne," and, collectively, "the Barkers"), be excepted from discharge under 11 U.S.C. § 523(a)(2)(A) and (a)(6).³ We AFFIRM.

FACTS

Hurrells' claims against the Barkers examined in this appeal⁴ arise from their purchase of a house in Canyon Country, California (the "Property"). The Property was built in 1964 and acquired by Barkers in 1984. Barkers listed the Property for sale in

²(...continued)
Goldberg, to Judge Carroll on January 8, 2008. However, the trial in this adversary proceeding no. 06-1033 had already been scheduled, and Judge Goldberg ordered that it be retained on his calendar. For reasons not explained in the record, the day before trial began on March 17, 2008, Judge Donovan was assigned to preside at the trial.

³ Unless otherwise indicated, all chapter, section and rule references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1330, as enacted and promulgated prior to the effective date (October 17, 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.

⁴ In a separate but related appeal and decision involving these parties, the Panel reviews the judgment of the bankruptcy court revoking Barkers' discharge under § 727(d)(1) and (2). BAP case no. CC-08-1251.

1 September 2004. Barkers' real estate agent was associated with
2 the Valencia, California, office of REMAX. Hurrells retained
3 another real estate agent from the same office, Monica Barkley
4 ("Barkley"), to represent them. All communications and exchanges
5 of information were conducted through the parties' real estate
6 agents; there was no direct contact between Barkers and Hurrells.

7 On September 9, 2004, Hurrells made a purchase offer for the
8 Property to the Barkers of \$825,000. Barkers accepted the offer
9 on September 14, 2004, by executing a written "Residential
10 Purchase Agreement and Joint Escrow Instructions" (the "Purchase
11 Agreement"). What followed gave rise to this complicated dispute.

12 13 Preclosing Inspections and Documents

14 15 A. The Transfer Disclosure Statement

16 As required by the Purchase Agreement, Barkers provided a
17 Transfer Disclosure Statement form to Hurrells. In addition to
18 other information, this document included the following:

19 - Regarding the roof, Hurrells were advised to obtain a
20 professional roof inspection, at their expense, because "roofs may
21 leak for various reasons."

22 - Hurrells were cautioned that builders working in the area
23 where the Property was located had been accused of using "inferior
24 galvanized water pipes" that could corrode and leak, and that the
25 corrosion and leakage "may not be discoverable by Buyer's or
26 Broker's visual inspection [and that further inspection] by
27 licensed qualified professionals is strongly recommended to
28 determine the integrity of the plumbing system prior to expiration

1 of the inspection contingency period of the purchase contract."
2 The page of the disclosure statement containing this warning is
3 signed and initialed by both Hurrells and Barkers.

4 - The Barkers answered "yes" to questions in the form about
5 whether there had been leaks in the house that resulted in an
6 insurance claim. Moreover, on the page containing the "Mold
7 Disclosure Statement," Hurrells were advised that allegations had
8 been made regarding the presence of mold in other houses in the
9 area of the Property, and that "any type of water damage, moisture
10 or damp conditions may result in the growth of mold." Barkers
11 disclosed that there had been a leak in the laundry room in 1990
12 when a hose broke, that the insurance company had been contacted,
13 and that Barkers corrected any "defects to structure." The Mold
14 Disclosure Statement also provided that "the parties are advised
15 strongly to hire independent experts to inspect the property for
16 the presence and cause of mold[.]" The page containing the Mold
17 Disclosure Statement was signed by Hurrells and Barkers.

18

19 B. The Brassfield Report

20 On September 17, 2004, acting on Barkley's recommendation,
21 Jeff engaged Accomplished Home Inspection Services, Inc.
22 ("Accomplished"), a home inspection service company, to inspect
23 the Property, which sent Darrell Brassfield ("Brassfield") to
24 conduct the inspection and prepare a report. Barkers neither met
25 nor had any direct discussions with Brassfield. The inspection
26 took place on September 17, 2004, and was attended by Jeff,
27 Barkley and Brassfield. Barkers did not participate in this or
28 any of the Hurrell inspections of the Property.

1 On or about September 24, 2004, Brassfield delivered his
2 written report on the inspection (the "Brassfield Report") to
3 Jeff. The Brassfield Report included the following observations
4 and conclusions:

5 - The condition of the water drainage away from the house was
6 "good."

7 - The overall condition of the kitchen was described as
8 "good." The report explicitly noted that, "The kitchen is
9 visually inspected at all accessible areas." There were no
10 reports of any cracks in the flooring.

11 - The overall condition of all three bathrooms was "good."

12 - The roof, including the exposed wood members, was rated
13 "good."

14 - The report noted that the chimney crown contained minor
15 cracks and should be sealed or replaced.

16 - The condition of the plumbing was rated as "fair";
17 Brassfield indicated that repairs would be needed. The report
18 noted that Brassfield had not examined any plumbing enclosed in
19 walls. Brassfield also reported the existence of galvanized pipes
20 in the Property, and recommended that the galvanized piping be
21 replaced in the "immediate future" because of its age and
22 deteriorating condition.

23 - There was minor cracking in the house foundation.

24 - Brassfield made no observations in the report, or in his
25 subsequent conversations with Jeff, regarding the presence of any
26 mold in the Property or cracks in the flooring.

27 On September 30, 2004, Jeff wrote a letter to Barkers in
28 which he indicated that he had reviewed the Brassfield Report and

1 consulted with a contractor regarding necessary repairs to the
2 Property. Jeff acknowledged that "the house has many issues that
3 are not in compliance with Building and Safety standards." He
4 goes on to observe in this letter, "I am primarily concerned with
5 Code and Safety issues." Attached to the letter is a two-page
6 computer printout listing \$13,830 for estimated repairs to address
7 the problems Jeff identified with the Property. Jeff asked
8 Barkers for a \$13,830 credit against the purchase price.

9
10 C. The Septic System Certification

11 The Purchase Agreement required Barkers to provide a
12 certification of the septic system. Barkers selected Myers
13 Pumping Company ("Myers") to inspect the system, a company that
14 had done plumbing work for the Barkers for many years. On October
15 2, 2004, Myers Plumbing gave a written Septic System Certification
16 to Hurrells. The certification concludes that the "Septic tank
17 appears to be in good condition at this date of inspection." The
18 certification was limited to the septic tank, and did not include
19 the cesspools or leach lines. Importantly, though, the
20 certification cautioned that the septic tank was connected to an
21 electric pump, and recommended that Hurrells ask the Barkers to
22 explain how to use the pump system. In particular, it notes that,
23 "Being that the pump is operated manually rather than
24 automatic[ally] it is possible that water could back up in the
25 house if not used properly."

26 //

27 //

28 //

1 D. Other inspections and information

2 Jeff's inspection of the Property on September 17 with
3 Brassfield was the first of three visits he made to the Property
4 before the close of escrow. Barkley was present at all of these
5 inspections; Barkers were never present. There was also a
6 significant amount of correspondence flowing between the real
7 estate agents during this time, negotiating various credits, and
8 detailing side agreements to remedy perceived problems in closing
9 the transaction. Ultimately, on October 9, 2004, Hurrells removed
10 in writing "any and all contingencies" to the Purchase Agreement,
11 and escrow closed on November 10, 2004.

12
13 Events Following Closing

14 On November 15, 2004, Wayne Murphy, a plumber hired by Jeff,
15 reported that he had found mold on the Property. Hurrells
16 contacted Barkley, who recommended that Dr. Owen Seiver inspect
17 the Property which he did on December 7, 2004. He determined
18 that mold was indeed present, but could not determine with any
19 specificity how long it had been there.

20 In March 2005, Hurrells contacted Jeff Symonds ("Symonds"),
21 an architect and contractor. Symonds inspected the Property on
22 March 18, 2005, and again three months later. Symonds found
23 sources of water accumulation that could have led to mold
24 contamination. Symonds would later testify that when he first
25 entered the Property, there had already been destructive testing
26 undertaken, including "removal of the drywall materials, removal
27 of floor finishes, removal of carpets in some rooms." Symonds
28 took over 500 photographs of the Property, many of which were

1 admitted into evidence at trial.

2 At Hurrells' request, on or about April 4, 2005, Thomas
3 Hoffman, who described himself as a "forensic plumber," examined
4 the septic system. Hoffman would later testify as to various
5 defects in the septic tank system, and suggested that Barkers had
6 made unlawful repairs to the system.

7 Hurrells hired yet another expert on mold, Tonya Bunn, who
8 inspected the Property in July 2005. Bunn testified at trial that
9 she found mold in various locations in the interior of the house.⁵

10 On September 12, 2005, Hurrells sued Barkers, and others, in
11 Los Angeles County Superior Court (the "State Court Action").

12 Barkers filed a voluntary petition under chapter 7 of the
13 Bankruptcy Code on October 13, 2005.

14

15 Proceedings in the Bankruptcy Court

16 Hurrells filed this adversary proceeding against Barkers on
17 January 13, 2006, seeking a judgment determining that their claims
18 were excepted from discharge under § 523(a)(2) and (6).⁶ Hurrells

19

20 ⁵ Later, in January 2006, Michael Boeger, a building
21 inspector, examined the interior of the house, the grounds, as
22 well as the roof. Boeger would later testify that he detected
evidence of water intrusion into the house.

23 ⁶ Barkers were granted a discharge in the bankruptcy case
effective March 15, 2007. Then, on October 12, 2007, Hurrells
24 filed another adversary proceeding against Barkers under
§ 727(d)(1), (2) and (3), seeking revocation of their discharge.
25 In their complaint, Hurrells alleged that Barkers obtained their
discharge through fraud; that Barkers acquired property of the
26 estate and knowingly or fraudulently failed to report the
acquisition to the chapter 7 trustee; and that Barkers had
27 violated discovery orders. After a trial, on September 25, 2008,
Bankruptcy Judge Carroll orally announced his findings of fact,
28 conclusions of law and decision, and entered judgment against

(continued...)

1 alleged that Barkers had misrepresented or concealed information
2 regarding the condition of the Property, including the septic
3 system, the presence of mold in the house, cracks in the concrete
4 slab under the house, and repairs unlawfully made. Barkers'
5 answer denied these allegations and asserted various affirmative
6 defenses.

7 Counsel for the parties submitted a joint Pretrial Order
8 ("PTO") on February 7, 2008. The PTO identified that issues of
9 fact existed regarding the cracks in the concrete slab; water
10 intrusion in the house; circumstances surrounding the washing
11 machine leak in the laundry room in 1990; termites; the roof and
12 chimney; mold; and the septic system. The bankruptcy court
13 approved the PTO.⁷

14 A trial in the adversary proceeding was conducted by the
15 bankruptcy court spanning portions of six days in March and April,
16 2008. The bankruptcy court heard testimony from Jeff, Barkers,
17
18
19
20

21
22 ⁶(...continued)
23 Barkers and in favor of Hurrells under § 727 (d) (1) and (2),
24 revoking Barkers' discharge. The court found in favor of Barkers
25 on the § 727(d) (3) count. Barkers appealed this judgment to this
Panel (case number CC-08-1254). That appeal remains pending,
although, in a settlement with the trustee, Barkers have agreed,
pending bankruptcy court approval, to withdraw that appeal.

26 ⁷ Counsel for Barkers did not sign the PTO. Rather, he
27 added the following statement above the judge's signature:
28 "Although Defense Counsel does not believe that this proposed
'Joint Pretrial Conference Order' has been prepared in good faith,
counsel does believe that it satisfies the Court's minimum
requirements for such a document. PDF [initials of counsel]."

1 Seiver, Bunn, Richard Werth,⁸ Gloria Anguiano,⁹ and Hoffman.
2 Following a series of unrecorded telephone conferences dealing
3 with evidentiary disputes, and a hearing on July 31, 2008, the
4 bankruptcy court took all issues under submission for decision.

5 On September 3, 2008, the bankruptcy court entered a lengthy
6 Memorandum Decision and a separate Judgment. In its decision, the
7 bankruptcy court noted that it had reviewed evidence, including
8 "the purchase agreement and related documents; the written,
9 photographic and physical evidence; the trial testimony of
10 numerous witnesses; and the written and oral arguments of
11 counsel." The court discussed the contents of the Purchase
12 Agreement and disclosure documents, and analyzed the parties'
13 obligations under the purchase agreements. The court described
14 the extent of Hurrells' preclosing investigation of the Property
15 and made a detailed comparison of Hurrells' claims and Barkers'
16 responsive evidence. Based on this review and analysis of the
17 evidence, the bankruptcy court concluded:

18 The evidence does not establish by a preponderance that
19 either James Barker or Jeanne Barker intended to defraud
20 the Hurrells or conceal any material facts about the
house from the Hurrells or acted with an intent,
willfully and maliciously, to injure the Hurrells.

21 Hurrells filed a timely appeal from the bankruptcy court's
22 judgment on September 9, 2008.

23 //
24 //
25 //

26 _____
27 ⁸ A former business associate of James called as a witness
by Hurrells.

28 ⁹ A representative of State Farm Insurance Co.

1 (9th Cir. 1996).

2 In bankruptcy discharge appeals, the Panel reviews the
3 bankruptcy court's findings of fact for clear error and
4 conclusions of law de novo, and applies de novo review to "mixed
5 questions" of law and fact that require consideration of legal
6 concepts and the exercise of judgment about the values that
7 animate the legal principles. Wolkowitz v. Beverly (In re
8 Beverly), 374 B.R. 221, (9th Cir. BAP 2007), citing Murray v.
9 Bammer (In re Bammer), 131 F.3d 788, 791-92 (9th Cir. 1997).
10 Clear error exists when, on the entire evidence, the reviewing
11 court is left with the definite and firm conviction that a mistake
12 was made. Hoopai v. Countrywide Home Loans, Inc. (In re Hoopai),
13 369 B.R. 506, 509 (9th Cir. BAP 2007).

14 The bankruptcy court's credibility findings, which are
15 entitled to special deference, are also reviewed for clear error.
16 Rule 8013; Anderson v. City of Bessemer City, N.C., 470 U.S. 564,
17 573 (1985).

18

19

DISCUSSION

20

I.

21

Hurrells waived any argument that their claims against

22

Barkers are nondischargeable under § 523(a)(6).

23

24

25

26

27

28

Before addressing the substantive issues, the Panel can quickly dispose of one of the issues raised by Hurrells in this appeal. One of the issues listed in the Statement of Issues in Harrells' Opening Brief is "Whether the bankruptcy court erred, or abused its discretion, in concluding that the Hurrells failed to demonstrate by a preponderance of the evidence that the Barkers'

1 debt to the Plaintiffs should not be discharged pursuant to
2 Section 523(a)(6) of the Bankruptcy Code?" Hurrells' Opening Br.
3 at 2 ¶ E. This single sentence is the only mention in either of
4 Hurrells' briefs of § 523(a)(6), which excepts from discharge
5 debts resulting from a willful and malicious injury to the person
6 or property of another. Moreover, counsel for Hurrells did not
7 address, or even allude to, this issue at oral argument before the
8 Panel.

9 We review only issues that are argued specifically and
10 distinctly in a party's opening brief. Hansen v. Moore (In re
11 Hansen), 368 B.R. 868, 880 (9th Cir. BAP 2007); see also
12 Greenwood v. Fed. Aviation Admin., 28 F.3d 971, 977 (9th Cir.
13 1994) (citing Miller v. Fairchild Indus., Inc., 797 F.2d 727, 738
14 (9th Cir. 1986). Because Hurrells failed to argue in their
15 briefs, or even at oral argument, that their claims against
16 Barkers are excepted from discharge under § 523(a)(6) as debts for
17 willful and malicious injuries, Hurrells have waived that
18 argument.

19

20 II.

21 Hurrells' request for judicial notice.

22 At the same time they filed their opening brief and excerpts
23 of record, Hurrells submitted a separate request "pursuant to
24 Federal Rules of Evidence 201 that this [Panel] take judicial
25 notice of all pleadings and rulings in the adversary proceeding
26 filed by Appellants under Section 727 (Adv. No. 6:07-ap-01249-PC),
27 including, but not limited to those in the Appellants' Excerpts of
28 Record 192, 193, 236 and 237." These excerpt tabs refer to the

1 complaint, answer and judgment of the bankruptcy court in the
2 § 727(d) action, and to the transcript of the bankruptcy judge's
3 oral findings of fact and conclusions of law that his judgment was
4 based on.

5 As to Hurrells' request concerning the complaint, answer and
6 judgment of the bankruptcy court filed in the § 727(d) action, we
7 would normally have no significant concern about taking notice of
8 the existence of the pleadings and judgment revoking Barkers'
9 discharge.¹⁰ Even so, in this context, in the exercise of our
10 discretion, we decline to do so. This is because, in our view,
11 the fact that those pleadings and judgment exist adds nothing to
12 our analysis of the issues in this appeal.

13 Although their request provides no reasons or other support,
14 Hurrells' real intention in asking us to take notice of the
15 bankruptcy court's oral findings and conclusions in the § 727(d)
16 action is manifest in their opening brief. As discussed below, it
17 is Hurrells' position in this appeal that the bankruptcy court
18 abused its discretion when it refused to allow them to submit
19 impeachment evidence at trial attacking Barkers' credibility. In
20 effect, Hurrells' request asks us to take judicial notice that the
21 bankruptcy judge in the § 727(d) discharge revocation action found
22 that Barkers made false and misleading statements in their
23 bankruptcy schedules. In other words, via their request, Hurrells
24 pray that we assume the findings entered in the other adversary
25 proceeding to be correct.

26
27 ¹⁰ Of course, we are aware that this judgment is currently on
28 appeal to this Panel, which was heard in oral argument at the same
hearing as this appeal.

1 We decline this request. Were the Panel a trial court,
2 Hurrells' request that we take judicial notice of fact findings
3 made by a court in another action would not be permitted. Fed. R.
4 Evid. 201 restricts judicial notice solely to adjudicative facts:

5 (b) Kinds of facts. A judicially noticed fact must be
6 one not subject to reasonable dispute in that it is
7 either (1) generally known within the territorial
8 jurisdiction of the trial court or (2) capable of
9 accurate and ready determination by resort to sources
10 whose accuracy cannot reasonably be questioned.

11 FED. R. EVID. 201(b). The Ninth Circuit has decided that "taking
12 judicial notice of findings of fact from another case exceeds the
13 limits of Rule 201." Wyatt v. Terhune, 315 F.3d 1108, 1114 (9th
14 Cir. 2003). Two of the decisions cited in Terhune emphasize that
15 such findings are "not facts not subject to reasonable dispute
16 within the meaning of Rule 201." Taylor v. Charter Med. Corp.,
17 162 F.3d 827, 830 (5th Cir. 1998); Gen. Elec. Capital Corp. v.
18 Lease Resolution Corp., 128 F.3d 1047, 1081-83 (7th Cir. 1997)
19 (holding that "courts generally cannot take notice of findings
20 from other proceedings for the truth asserted therein because
21 these are disputable[.]").¹¹

22 Like a trial court, the Panel should not treat the findings
23 of fact entered by the bankruptcy court in the § 727(d) adversary
24 proceeding as "not subject to reasonable dispute." Indeed, those
25 same findings are currently before the Panel for review in another
26 appeal.

27 ¹¹ Of course, the Terhune, Taylor and GE Capital cases all
28 concerned whether a trial court could adopt findings of fact made
in another proceeding. However, we see no reason that the holding
in those cases, that another court's findings are inherently
subject to reasonable dispute, should not also be applicable to a
request that an appellate panel import findings from another court
proceeding.

1 Your Honor, all I was trying to do is show that Mr.
2 Barker does not take seriously the requirement to follow
3 the law and disclose information. So it goes to
4 character, it goes to impeachment, whether it's
5 reliable. There are a number of instances on the – and
6 I know that it's set forth in the 727 complaint, but I
7 was trying to illustrate to the court that the
8 defendants don't care of the requirements to disclose
9 information, whether it's with respect to the sale of
10 the Property or with respect to the duties that they
11 have under the penalty of perjury in this bankruptcy
12 case.

13 Trial Tr. 237:17–238:3 (March 18, 2008). The court replied,
14 “Well, 2005 schedules are pretty remote from the lawsuit arising
15 from a 2004 sale. I’m going to exclude this testimony . . .
16 unless you have a better basis for relevance than you’ve given
17 me.” Id. at 238:4–7. Counsel replied: “No, your Honor.” Id. at
18 238:8.

19 Later in the trial, during cross-examination of James
20 following Barkers’ attorney’s direct examination, counsel for
21 Hurrells again attempted to introduce this impeachment evidence.
22 The court ruled, simply, it was “irrelevant.” Trial Tr.
23 195:18–196:5 (March 21, 2008).

24 Under Fed. R. Evid. 608(b), a witness may be examined about
25 specific instances of conduct to attack the character of that
26 witness for truthfulness. However, that rule gives the trial
27 judge discretion to determine if the testimony is “probative of
28 truthfulness or untruthfulness.” FED. R. EVID. 608(b). More
generally, whether to allow impeachment on cross-examination is
within the discretion of the trial judge. United States v.
Jackson, 882 F.2d 1444, 1448 (9th Cir. 1989). In the exercise of
its discretion, the trial court may take into consideration how
remote in time the impeaching conduct occurred. Id. at 1448

1 ("Remoteness in time remains a relevant factor to consider the
2 probative value of the evidence" for impeachment under Fed. R.
3 Evid. 608(b)); United States v. Pollock, 926 F.2d 1044, 1047 (11th
4 Cir. 1991) (noting that an appellant "bears a heavy burden in
5 demonstrating an abuse of the court's 'broad discretion'" in
6 determining when a previous offense is too remote).

7 Here, the bankruptcy court ruled that James's conduct in
8 making allegedly inaccurate statements in his bankruptcy schedules
9 in 2005 was too remote in time to be probative as to his
10 truthfulness in connection with the sale of the Property to
11 Hurrells in 2004. Even were we to disagree with the bankruptcy
12 court that Barkers' conduct in relation to his bankruptcy case
13 occurring one year after the sale is "too remote" for impeachment
14 purposes, we may not substitute our judgment for that of the trial
15 judge. United States v. Henderson, 241 F.3d 538, 646 (9th Cir.
16 2000). The abuse-of-discretion standard requires that an
17 appellate court uphold a trial court's determination that falls
18 within a broad range of permissible conclusions. Cooter & Gell v.
19 Hartmarx Corp., 496 U.S. 384, 400 (1990).

20 In addition, the bankruptcy court's decision to exclude the
21 offered testimony was also justified to avoid undue delay at
22 trial. The bankruptcy court was first made aware that Hurrells
23 had filed a § 727(d) discharge revocation proceeding against
24 Barkers at the time it made its ruling excluding impeachment
25 evidence. Trial Tr. 238:10-25 (March 18, 2008). Hurrells
26 referred the bankruptcy court to the complaint in the § 727

27
28

1 proceeding for the "instances" of prior conduct of Barkers.¹² The
2 court was thus aware that the so-called impeachment "evidence"
3 that Hurrells sought to introduce was yet to be examined for its
4 veracity in the § 727 action, which had not yet gone to trial.
5 Thus, Hurrells' suggestions that Barkers had made false statements
6 in their bankruptcy schedules were still allegations, not facts.
7 Thus, in order for the bankruptcy court to consider Barkers'
8 bankruptcy schedule statements for impeachment purposes, a
9 "minitrial" would have been required to establish that the
10 schedules were indeed untrue, and therefore "instances" of bad
11 conduct.

12 Fed. R. Evid. 403¹³ empowers a trial court to refuse to admit
13 evidence if doing so would result in "undue delay" in a trial
14 proceeding. "Undue delay" in this context includes delay related
15 to the length of a trial. United States v. Smithers, 212 F.3d 306
16 (6th Cir. 2000). This rule has been applied to avoid delays
17 caused by offers of impeachment on cross-examination:

18 Federal Rule of Evidence 608(b) permits the
19 court in its discretion to allow cross
20 examination of witnesses regarding specific
21 instances of a witness's own conduct if the
22 past experiences are probative of a character
23 for untruthfulness. Even if admissible under
24 Rule 608(b), a [trial] court may nevertheless
25 exclude the evidence if its "probative value
26 is substantially outweighed by the danger of
27 unfair prejudice, confusion of the issues, or
28

24 ¹² Hurrells did not enter the complaint into evidence nor is
25 it in our excerpts of record.

26 ¹³ "Although relevant, evidence may be excluded if its
27 probative value is substantially outweighed by the danger of
28 unfair prejudice, confusion of the issues, or misleading the jury,
or by considerations of undue delay, waste of time, or needless
presentation of cumulative evidence." FED. R. EVID. 403.

1 misleading the jury, or by considerations of
2 undue delay, waste of time, or needless
3 presentation of cumulative evidence." Fed. R.
4 Evid. 403.

5 United States v. Beal, 430 F.3d 950, 956 (8th Cir. 2005).

6 Under the applicable deferential standard of review, we
7 conclude that the bankruptcy court did not abuse its discretion in
8 declining to allow Hurrells to impeach James by reference to his
9 later bankruptcy schedules.

10 IV.

11 The bankruptcy court did not abuse its discretion
12 in admitting into evidence and relying on
13 the Brassfield Report.

14 Hurrells contend in their brief that "Mr. Brassfield did not
15 testify, and as a result his report was specifically not admitted
16 for the truth of its contents, but the Court ignored that fact and
17 relied upon it anyway in the opinion." Hurrell Opening Br. at 11-
18 12. The portion of the transcript they cite to support this
19 argument consists of the following:

20 GOULD [attorney for Hurrells]: The only point that Mr.
21 Gonzalez [another Hurrell attorney] and I would make
22 again is that we still don't believe [the Brassfield
23 Report] should be admitted for necessarily the truth of
24 what's in the report. That's still hearsay without Mr.
25 Brassfield testifying about it, other than to the extent
26 that Mr. Hurrell may have confirmed something.

27 THE COURT: Okay.

28 GOULD: Thank you.

//

//

//

1 Trial Tr. 195:15-21 (March 20, 2008).¹⁴

2 Based on our review of the trial transcript, and contrary to
3 Hurrells' assertions, the bankruptcy court's cryptic statement
4 (i.e., "Okay") does not amount to a ruling that the Brassfield
5 Report was inadmissible as hearsay, or that the report would be
6 admitted for a limited purpose. In addition, Hurrells apparently
7 overlook other enlightening comments made later by the bankruptcy
8 court indicating that the Brassfield Report had indeed been
9 admitted in evidence:

10 GOULD: Your Honor, I need to object. This document [the
11 Brassfield Report] has not been put into evidence for
12 the truth of what it says, but only with respect to
13 cross-examination of Mr. Hurrell, and Mr. Brassfield
14 never testified. So to the extent that it's being
15 offered for the truth of things that Mr. Hurrell wasn't
16 examined about, that would be inappropriate.

14 THE COURT: I'm going to overrule the objection. It
15 seems to me the [Brassfield Report] was central to the
16 transaction, and this is the report Mr. Hurrell
17 purchased, and he testified about it. It's certainly
18 authenticated by Mr. Hurrell's testimony.

17 Trial Tr. 62:11-22 (April 17, 2008).

18 To put these comments by the bankruptcy court in context, by
19 that time in the trial, the bankruptcy court had heard testimony
20 from Jeff that he engaged Brassfield to inspect the Property and
21 to prepare the report. Trial Tr. 189:9-11 (March 17, 2008).

22 Indeed, Jeff testified that he engaged Brassfield "to inspect the
23 foundation, roof, plumbing, heating, air conditioning, electrical,
24 security, pool/spa, other structural and nonstructural systems and
25 components, fixtures, built-in appliances, and any other personal

26
27 ¹⁴ Again, later in their brief, Hurrells argue that, based
28 upon this same transcript excerpt, the bankruptcy court committed
error "[b]y ignoring its own ruling on the admissibility of this
report" Hurrells' Op. Br. at 28.

1 property included in the sale." Trial Tr. 242:6-12 (March 17,
2 2008). In his answer to the very next question, Jeff confirmed
3 that he was "relying solely on Darrell Brassfield and Accomplished
4 Home Inspection for those items." Trial Tr. 242: 13-16 (March 17,
5 2008).

6 Jeff received the Brassfield Report on or about September 24,
7 2004. On September 30, 2004, Jeff wrote to Barkers, confirmed
8 that he had received and read the Brassfield Report, and raised
9 numerous questions based on that report. Moreover, when a
10 question arose at trial whether the copy of the Brassfield Report
11 originally submitted to the bankruptcy court was a correct one,
12 Jeff provided an accurate copy that had never been out of his
13 possession since he received it a few days after the September 17,
14 2004 inspection. That copy of the report was admitted into
15 evidence. Trial Tr. 7:211-25 (March 18, 2008).¹⁵

16 Hurrells have consistently insisted that the Brassfield
17 Report was hearsay and not admissible for the truth of its
18 contents. Under Fed. R. Evid. 801(c), "'Hearsay' is a statement,
19 other than one made by the declarant while testifying at trial or
20 hearing, offered in evidence to prove the truth of the matter
21 asserted." A review of the transcript of the hearings on March 17
22

23 ¹⁵ The Brassfield Report had also been properly
24 authenticated. Jeff testified that he (1) commissioned the
25 report, (2) he received it from its author, (3) read it, (4)
26 subsequently discussed its contents with the author, (5)
27 identified it as the original copy that had never left his
28 possession, (6) submitted it to the bankruptcy court as a correct
copy to replace a defective copy submitted by Barkers and (7)
relied on the information in the report to complete purchase of
the Property. See FED. R. EVID. 901(b)(1) (document may be
authenticated by testimony of a witness with knowledge that a
document is what it is claimed to be).

1 and 18, 2008, where the Brassfield Report was originally presented
2 to Jeff for authentication, indicates that Jeff was asked to
3 verify the truth only of the contents on pages 1-4 of the report.
4 Those pages contain the terms of the agreement between Hurrells
5 and Brassfield. For pages 6-25, which contained Brassfield's
6 actual inspection comments concerning the Property, Jeff was not
7 asked to verify the truth of the statements but only that he had
8 read them. Both the cross-examination of Jeff regarding the
9 Brassfield Report and redirect examination concerned whether Jeff
10 was aware of the contents of the report. We find no indication
11 that Jeff ever was asked to verify the truth of the inspection
12 statements of the Property in the transcripts but only that he was
13 aware with respect to them. Thus, we conclude that the Brassfield
14 Report was submitted only for the truth of the contract terms,
15 which was verified by Jeff's testimony as a party to the contract,
16 but not for the truth of the inspection comments. The inspection
17 comments were not submitted for their truth and thus they are not
18 hearsay.

19 However, while Brassfield's comments concerning his
20 inspection of the Property were not admissible as evidence that
21 his opinions and conclusions were correct, they were admissible to
22 show Jeff's knowledge that Brassfield's comments had been made.
23 Phillips v. United States, 356 F.2d 297 (9th Cir. 1965) (letters
24 from customers to defendant were not objectionable as hearsay
25 where offered, not for the truth of their contents, but only to
26 show that defendant was aware that such statements had been made);
27 see also FDIC v. Stahl, 89 F.3d 1510, 1521 (11th Cir. 1996)
28 (transcript admissible to show defendant's knowledge of

1 underwriting problems and not to establish underwriter problems
2 existed); Barnes v. Prudential Ins. Co., 76 F.3d 889, 892 (8th
3 Cir. 1996) (evidence admissible to show defendant knew of
4 plaintiff's wishes and not to prove what plaintiff's wishes were).

5 Thus, in a fraud trial, the bankruptcy court did not abuse
6 its discretion in admitting the Brassfield Report over the hearsay
7 objection of Hurrells. Even if Brassfield did not testify, the
8 report demonstrates the type of information Hurrells were aware
9 of, and that they apparently relied on, in deciding to purchase
10 the Property. The bankruptcy court did not err in its decision to
11 consider the contents of that report in resolving the issues in
12 this action.¹⁶

13
14 V.

15 The bankruptcy court did not err in deciding that Hurrells'
16 claims against the Barkers were not excepted from discharge
17 under § 523(a)(2)(A).

18 Section 523(a)(2)(A) excepts from discharge any debt for
19 money, property, or services "to the extent obtained by false
20 pretenses, a false representation, or actual fraud." In order to
21 establish this exception to discharge, Hurrells were required to
22 demonstrate, by a preponderance of evidence all of the following

23
24 ¹⁶ Hurrells argue that several comments made in the
25 bankruptcy court's memorandum are based upon the truth of comments
26 made in the Brassfield Report. To the extent that the bankruptcy
27 court assumed that certain of Brassfield's comments were true, we
28 conclude it was harmless error. In our view, as discussed later,
there was ample other evidence submitted at trial to show that
Barkers did not misrepresent the condition of, nor actively
conceal defects in, the Property, and to show that Hurrells relied
upon their own investigation concerning the Property, not Barkers'
disclosures.

1 elements: (1) Barkers made false representations to them; (2)
2 Barkers knew the representations were false at the time they made
3 them; (3) Barkers intended to deceive Hurrells; (4) Hurrells
4 relied on the representations; and (5) Hurrells sustained the
5 alleged loss and damage as a proximate result of these
6 representations. Jung Sup Lee v. TCAST Communs., Inc. (In re Jung
7 Sup Lee), 335 B.R. 130, 136 (9th Cir. BAP 2005); Younie v. Gonya
8 (In re Younie), 211 B.R. 367, 373-74 (9th Cir. BAP 1997), aff'd
9 163 F.3d 609 (9th Cir. 1998) (noting that the elements of fraud
10 under § 523(a)(2)(A) match the elements of common law fraud and of
11 actual fraud under California law).

12 As to each of the issues presented in the PTO, the bankruptcy
13 court determined that Hurrells had not established at least one of
14 the required elements of fraud by a preponderance of the evidence.
15 We conclude that, based on the evidence submitted at trial, the
16 bankruptcy court did not clearly err in its factual findings, and
17 consequently, its decision to deny Hurrells' request that their
18 claims against the Barkers be excepted from discharge under
19 § 523(a)(2)(A) should be affirmed.

20
21 A. Credibility

22 Resolution of the issues in this action by the bankruptcy
23 court was, at bottom, a fact-intensive endeavor. Hurrells contend
24 that Barkers misrepresented, or knowingly concealed, important
25 details from them concerning the condition of the Property.
26 Hurrells' dominant theme in challenging the bankruptcy court's
27 fact findings is based almost entirely on their disagreement with
28 its analysis of the credibility of the witness testimony. They

1 devote major portions of their briefs to persuading the Panel
2 that, contrary to the bankruptcy court's assessment, James is
3 untrustworthy, and Jeff's account of the facts should have been
4 accepted by the bankruptcy court as true.

5 The bankruptcy court weighed the credibility of the parties'
6 testimony: "In terms of the relative candor of the parties as they
7 testified at trial, I find that the Barkers were direct,
8 cooperative, straightforward and candid in their answers to cross-
9 examination questions. By contrast, I find Jeff Hurrell was
10 evasive in response to cross examination on a number of issues."¹⁷
11 Simply stated, the bankruptcy court determined that James was more
12 candid in his testimony than Jeff, and that Jeff tended to be more
13 evasive than James. Hurrells argue that the bankruptcy court
14 erred in believing Barkers, who presented no expert witnesses, as
15 opposed to Jeff and his witnesses. We disagree.

16 We observe, first, that it was Hurrells' burden in this
17 action to show by a preponderance of the evidence that Barkers
18 engaged in fraud. Technically, Barkers had no obligation to prove
19 anything.

20 Second, the bankruptcy court made credibility determinations
21 in its memorandum concerning each of Hurrells' witnesses, but
22 discounted their testimony. For example, the bankruptcy court
23 found Dr. Seiver very credible, but, as discussed below, the court
24 found that his testimony did not support Hurrells' position. The
25 bankruptcy court found Bunn's testimony was inconsistent, and that

26
27 ¹⁷ The bankruptcy court described three instances during
28 trial where Jeff's testimony was, in the court's view, evasive
(regarding the Brassfield Report, estimated costs from his
contractor, and information he exchanged with the plumbers).

1 the testimony of Bunn, Symonds, Boegel, and Hoffman was less
2 convincing than Barkers' because they did not inspect the Property
3 until months after the close of escrow and, as to the house, after
4 extensive destructive testing. As to Werth, the court found that
5 he had not even visited the house in years and was engaged in
6 litigation with Barkers. As to Hoffman, the bankruptcy court
7 noted the sharp conflict between his testimony and that of James
8 regarding whether Barkers made illegal modifications of the septic
9 system. The bankruptcy court simply believed James over Hoffman.

10 The bankruptcy court's credibility determinations are
11 entitled to great deference on appeal. Bessemer City, 470 U.S. at
12 573-76; Nichols v. Azteca Restaurant Enters., Inc., 256 F.3d 864,
13 871 (9th Cir. 2001). Under this standard, we are not free to make
14 our own credibility assessments, and find no error in the
15 bankruptcy court's findings.

16
17 B. Reliance

18 As noted above, to prove an exception to discharge under
19 § 523(a)(2)(A), Hurrells must show that they relied on the facts
20 Barkers represented to them. However, the bankruptcy court found
21 that in deciding to buy the Property, Jeff, who was an
22 experienced, sophisticated businessman, accepted his contractual
23 responsibilities to make an independent investigation of the
24 Property before Hurrells would remove in writing "any and all
25 contingencies" to the Purchase Agreement and would allow escrow to
26 close. In making its decision, the bankruptcy court found that
27 Hurrells relied on independent inspectors, one of whom was
28 Brassfield, to determine the condition of the Property:

1 FIDLER [attorney for Barkers]: I want to know if you
2 hired anyone other than Accomplished Home Inspection
3 [i.e., Brassfield] to inspect the foundation, roof,
4 plumbing, heating, air conditioning, electrical,
5 mechanical, security, pool/spa, other structural and
6 nonstructural systems and components, fixtures, built-in
7 appliances, and any other personal property included in
8 the sale?

9 JEFF: No, that's what I hired him to do.

10 FIDLER: So you were relying solely on Darrell Brassfield
11 and Accomplished Home Inspection for those items?

12 JEFF: Yes.

13 Trial Tr. 242:6-16 (March 17, 2008).

14 At another point in the trial, the following exchange
15 occurred:

16 FIDLER: On the following page, directing your attention
17 to page 6 [of the Brassfield Report] [i]t reads,
18 "Miscellaneous galvanized water pipe fittings require
19 replacement where water leaks are present. See water
20 service and piping located along the eastern interior of
21 garage wall." What did you do in response to this
22 paragraph six?

23 JEFF: That might have been included in my letter to Mr.
24 Barker [of September 30, 2004], but they were exterior
25 pipes, so there wasn't any major urgency on that. I see
26 a lot of galvanized piping that has corrosion on it.
27 Kind of a reaction on galvanized --

28 FIDLER: Looking now at paragraph seven, "The interior
galvanized piping is recommended for replacement in the
near future, due to its age and condition." Did you see
that?

JEFF: I did see that, yes.

FIDLER: Did you take any action with respect to that
statement?

JEFF: Mr. Brassfield said that there was interior
galvanized water piping, but in fact, there was
comparable water piping in the interior of the house
underneath the slab.

29 Trial Tr. 209:1-25 (March 20, 2008) (emphasis added). As can be
30 seen from this testimony, Jeff acknowledged that (1) he relied on

1 the Brassfield Report; (2) through the report he was aware of the
2 existence of galvanized piping in the house; (3) independently of
3 the Brassfield Report, he was aware of the corrosion problem
4 associated with galvanized piping; and (4) that he was aware of
5 concealed galvanized piping in the house.

6 The bankruptcy court determined that Hurrells conducted
7 extensive independent investigations before the close of escrow,
8 including three personal examinations of the property, and were
9 assisted by professionals other than Brassfield, including Barkley
10 and Myers Plumbing.¹⁸ The bankruptcy court did not clearly err in
11 finding that Hurrells did not rely on Barkers' representations
12 about the Property.

13
14 C. Mold and the galvanized pipes

15 Hurrells claim that Barkers were aware of, but failed to
16 disclose to them, the presence of mold in the house.

17 Of course, as noted previously, there was general information
18 in the Transfer Disclosure Statement noting that there had been
19 allegations regarding the presence of mold in other houses in the
20 area of the Property, and that "any type of water damage, moisture
21 or damp conditions may result in the growth of mold." The
22 Brassfield Report makes no specific mention of mold, but rates the

23
24 ¹⁸ Hurrells note that the bankruptcy court incorrectly
25 identified Myers Plumbing as one of Hurrells' professionals.
26 Hurrells are correct: Myers Plumbing was engaged by Barkers, and
27 had a long-term relationship with them. However, the bankruptcy
28 court's mistake is harmless. There is no evidence in the record
that Barkers influenced Myers Plumbing to present fraudulent
information to Hurrells. Thus, the thrust of the bankruptcy
court's observation, that Hurrells were "assisted" and informed by
professional advisors, including Myers Plumbing, is correct.

1 plumbing in the house as only "fair" and confirms the presence of
2 galvanized pipes, with the attendant risk of leakage.

3 Several witnesses testified for Hurrells regarding the
4 existence of mold in the house. One authoritative witness was Dr.
5 Seiver. Hurrells' characterize his testimony as follows:

6 [Dr. Seiver] testified that this mold had been there for
7 many, many months and that the Barkers had to have known
8 about it, but that the painting before the sale of the
9 house would have temporarily covered the odors. His
10 expertise is so extensive that his company does their
11 own lab tests on site at the time of the inspection.
12 Yet the court sought to evade this definitive testimony
13 by inferences not found in what Dr. Seiver and others
14 said, ignoring the painting which temporarily covered up
15 the odors[.]

16 Hurrells' Op. Br. at 19.

17 We carefully reviewed Dr. Seiver's testimony at trial.
18 Contrary to Hurrells' suggestion, Dr. Seiver never mentioned paint
19 or odors, nor was he ever asked questions regarding paint or
20 odors. Trial Tr. 90:15-120:22 (March 18, 2008).¹⁹ Instead, Dr.
21 Seiver testified that when he entered the house on December 7,
22 2004, he could not detect the presence of mold. Trial Tr. 109:21-

23 ¹⁹ Hurrell's brief cites to Trial Tr. 95:10-96:16 to support
24 the contention that Dr. Seiver "testified that the Barkers must
25 have known they had mold before they sold the house to the
26 Hurrells." We have examined that portion of the transcript. In
27 his testimony, Dr. Seiver discusses his impression of Jeff and the
28 extent of mold in the house. There is no reference to Barkers.
We presume this cite to the transcript represents a mistake, but
note the error is not the first. Hurrells' counsel were admonished
by the bankruptcy court in its memorandum for carelessness and
wasting the time of the court as a result of poor preparation of
trial exhibits. Moreover, in this appeal, on dozens of occasions,
Hurrells' brief cites to the transcripts of various hearings which
they did not include in the excerpts of record. And,
inexplicably, ninety of the 240 exhibit tabs in their excerpts of
record are empty, and several critical documents are missing.
This approach to advocacy has significantly complicated the
Panel's ability to effectively consider Hurrells' arguments.

1 24 (March 18, 2008). Further, he stated if it were present, that
2 some people would not even be aware they were reacting to mold.
3 Trial Tr. 116:1 (March 18, 2008). In short, Dr. Seiver's
4 testimony tends to support James' argument that he was not aware
5 of any mold in the house.

6 The bankruptcy court heard testimony from Jeff, Bunn, Symonds
7 and Boeger on the mold issue. It did not find Jeff's position
8 credible:

9 [T]he Hurrell's position throws up a series of
10 insignificant, minor nondisclosures, inflates them by
11 remote, vague and unpersuasive evidence, and leaps to
12 speculative conclusions unsupported by any direct,
convincing evidence without proving by a preponderance
the Barkers' culpability for any serious damage claim
asserted.

13 Bunn's testimony was discounted by the bankruptcy court as
14 formulaic, and her report contained, in the court's view,
15 inconsistencies. Boeger did not see the house until 2006, long
16 after the demolition, remediation and remodeling had been
17 completed. Symonds conducted extensive destructive testing, and
18 his photographs, according to the bankruptcy court, showed the
19 broad extent of destructive testing after close of escrow.

20 The bankruptcy court heard testimony from Jeff that he was
21 aware of the galvanized piping before close of escrow and
22 acknowledged that, in his experience, galvanized piping corroded.
23 Hurrells' first action after the close of escrow was to send a
24 plumber, Murphy, to examine the pipes. The bankruptcy court found
25 it reasonable to infer from this evidence that the galvanized
26 pipes may have been leaking, though behind closed walls that could
27 not be seen by Barkers, and this leaking may have been the source
28 of moisture that caused the growth of mold in the house. This

1 inference is amply supported by the record.

2 The bankruptcy court summed up its findings regarding the
3 mold issue as follows:

4 After weighing all the evidence, I conclude that the
5 Hurrells have not proved by a preponderance that: (1)
6 the Barkers misrepresented any material fact; (2) the
7 Barkers concealed any material fact; (3) the Barkers
8 intended to deceive the Hurrells; (4) the Hurrells
9 justifiably relied on any material fact misrepresented
10 or concealed by the Barkers; or (5) that the Hurrells'
11 losses were proximately caused by Hurrell-reliance on
12 any material fact misrepresented or concealed by the
13 Barkers. I also conclude that the Hurrells have not
14 proved by a preponderance that prior to the close of
15 escrow the Barkers were aware of the presence, or likely
16 presence, of mold. I conclude that the Barkers appeared
17 to have acted in good faith and innocently, not to
18 deceive the Hurrells. No loss suffered by the Hurrells
19 was proximately caused by any wrongful conduct of the
20 Barkers.

21 It appears that the presence of mold was the greatest single
22 problem faced by Hurrells after purchasing the Property. The
23 bankruptcy court explicitly addressed each of the five elements of
24 § 523(a)(2)(A) fraud, all of which Hurrells must establish by a
25 preponderance of the evidence, and determined that they had proven
26 none of them. The court carefully examined evidence from all
27 sources in the record. While there was some conflict in the
28 proof, the bankruptcy court was given evidence from which it could
conclude that the cause and presence of mold in the house was
unknown to Barkers at the time of the sale. United States v.
Garcia, 135 F.3d 667, 671 (9th Cir. 1998) ("Where there are two
permissible views of the evidence, the factfinder's choice between
them cannot be clearly erroneous). Moreover, the bankruptcy court
based its findings, in part, on its credibility assessments, to
which we must give great deference. On this record, we cannot say
the bankruptcy court's findings are clearly erroneous."

1 D. Seepage, moisture and water intrusion²⁰

2 Hurrells contend that Barkers failed to disclose the
3 existence of known water intrusion, moisture and seepage.

4 The only leak Barkers acknowledge to have occurred inside the
5 house was in 1990, when a hose connected to their washing machine
6 broke and flooded the laundry room. Barkers assert that they
7 submitted a claim for water damage to their insurance company,
8 State Farm, the claim was approved, and the damage was repaired.
9 Barkers reported this incident in the Transfer Disclosure
10 Statement.

11 Hurrells challenged the Barkers' claim and subpoenaed two
12 witnesses, Anguiano (a representative of State Farm) and Werth.
13 Anguiano was unable to locate any record of the 18-year-old claim,
14 and could not answer questions about the claim or the insurance
15 company's claim-retention policy. Werth, who would testify on
16 other issues, had no recollection of the 1990 washing machine
17 flood.

18 As noted, this incident was disclosed by Barkers to Hurrells.
19 And facing little evidence to the contrary, the bankruptcy court
20 decided that Barkers had told the truth about the details of the
21 1990 flood and insurance claim, and that Hurrells had not proven
22 by preponderance of the evidence that Barkers intentionally
23 deceived them. The bankruptcy court's finding is amply supported
24 in the record and is not clearly erroneous.

25
26 ²⁰ Although we here treat the mold and piping issue as
27 separate from the concrete slab, seepage, moisture intrusion, roof
28 and stain issues discussed below, the bankruptcy court properly
treated all these issues as related to the mold problem, which
apparently was the greatest expense incurred by Hurrells after
purchasing the Property.

1 Hurrells complain about other, more general water intrusion
2 problems. Hurrells contend that, before the close of escrow,
3 there was visible water damage inside the house. Hurrell points
4 to the testimony of Seiver, Symonds, Bunn and Boeger about water
5 damage they observed. The bankruptcy court chose to discount this
6 testimony because the physical evidence of water damage introduced
7 during the trial would have been concealed behind finished walls
8 in the house, and there was no persuasive evidence to support a
9 finding that Barkers could have known about any problems. The
10 bankruptcy court also observed that the expert testimony on this
11 subject was general, speculative, and contradicted in part by
12 preclosing inspection reports and Barkers' testimony.

13 There were additional, relatively minor evidentiary squabbles
14 about overflowing toilets and sinks, which the bankruptcy court
15 disregarded in light of James's testimony that they were "no
16 problem" situations which were promptly resolved and cleaned up.

17 Symond's testimony concerned rotting tacking strips under
18 wall-to-wall carpeting that was removed from the house, that he
19 suggested showed that damp conditions had existed over a long
20 period of time. However, the bankruptcy court heard and preferred
21 to credit James' testimony that he and his family frequently
22 walked through the house barefooted and had never noticed any
23 dampness.

24 Again, the evidence concerning water intrusion is
25 conflicting. On this record, the bankruptcy court could
26 reasonably find, based on its credibility determinations, the
27 physical evidence submitted, and quality assessments concerning
28 the proof, that Hurrells failed to demonstrate by a preponderance

1 of the evidence that Barkers were aware of, and concealed, any
2 seepage, moisture or water intrusion.

3

4 E. Minor issues: Concrete Slabs, Roofs and Stains.

5 Hurrells claim that Barkers failed to disclose defects in the
6 foundation and roof. The Brassfield Report disclosed the
7 existence of cracks in the foundation and chimney, and rated the
8 roof as good. The bankruptcy court also heard testimony from
9 Jeff, James, Symonds and Werth about these defects.

10 One aspect of this dispute might be described as "the Tale of
11 Two Holes." Hurrells submitted photographic evidence, as well as
12 testimony, regarding the existence of a large break in the
13 concrete under the kitchen floor, and a smaller crack in the
14 northeastern bedroom. The kitchen crack was exposed by Symonds in
15 2005 after he removed the vinyl floor covering. However, the
16 bankruptcy court found that substantial evidence existed to show
17 that before Barkers bought the house in 1984, there had been
18 damage to a pipe under the kitchen floor.

19 Some circumstantial evidence was introduced regarding the
20 smaller crack under the northeast bedroom. Hurrells argued that
21 there was evidence that, only a few months before Barkers sold the
22 house to them, Barkers removed the carpeting in that bedroom, and
23 therefore, must have noticed the crack in the foundation.
24 Hurrells offered a photograph taken in 2006 that showed a
25 significant crack and evidence of water intrusion. However, one
26 of Symonds's 2005 photos of the same site showed a small crack
27 with no water intrusion.

28

1 Weighing this evidence, and again, based on credibility
2 determinations and examination of the physical evidence, the
3 bankruptcy court decided that, although the small bedroom
4 foundation crack was there when Barkers replaced the flooring,
5 Hurrells had not proven that the crack was significant.

6 Regarding the kitchen crack, the bankruptcy court found on
7 credibility grounds, and through examination of the physical
8 evidence, that it was unclear as to who did the floor covering
9 work, or to establish what Barkers may have known or been told
10 about the condition of the underlying slab foundation. The court
11 concluded that the Hurrells had not proven by a preponderance that
12 Barkers either knew or intentionally concealed evidence of
13 significant problems with the slab foundation or that any such
14 problem was the proximate cause of harm to Hurrells.

15 Hurrells claim that Barkers failed to disclose the correct
16 age of, and defects in, the roof. Here there was documentary
17 evidence to support the credibility of the witnesses. Brassfield
18 found the condition of the roof to be "good" in 2004, and in 2006
19 Boeger determined that the roof was 10 to 15 years old. Barkers
20 produced bills from Graziano Roofing from 1999 to show that the
21 roof was only eight years old.

22 Hurrells also claimed that Barkers failed to disclose the
23 presence of dry rot near the chimney. Based on the physical
24 evidence and its credibility assessments of the witness testimony,
25 the court found that there was no evidence Barkers knew of any dry
26 rot after the 1999 roof replacement, or that any dry rot existed
27 at the time of sale in 2004.

28

1 Finally, there was conflicting evidence concerning the
2 Barkers' concealment of certain wall stains. Jeanne stated that
3 she had painted over stains in the house. But, she testified, she
4 did so to beautify the house, not to hide the stains from
5 potential buyers. Jeff testified and provided photographs that
6 there were several locations in the house left unpainted during
7 the 20 years that Barkers lived there. However, the bankruptcy
8 court noted that Barkers had deliberately left unused paint in
9 cans when they moved out of the Property as a convenience to
10 Hurrells. The court noted the conflict in the testimony, but
11 concluded that Hurrells had not proven by a preponderance of
12 evidence that Barkers intended to deceive Hurrells or cause them
13 harm.

14 None of the bankruptcy court's findings concerning the
15 matters discussed above amounts to clear error.

16
17 F. Septic System

18 Hurrells claim that Barkers failed to disclose defects in the
19 septic system. The bankruptcy court heard testimony from Jeff,
20 James and Hoffman on this topic. In this regard, it is not
21 entirely clear from their briefs whether Hurrells contend Barkers
22 defrauded them, or if it was Myers Plumbing that submitted an
23 inaccurate report. At any rate, Hurrells argue that Myers
24 Plumbing carelessly and negligently certified the system.
25 However, even if this is true, since there was no evidence that
26 Myers Plumbing was acting under the influence of Barkers in
27 rendering the certification, there is no basis to impute any
28

1 fraudulent intent to Barkers for purposes of § 523(a)(2)(A).²¹

2 The bankruptcy court received substantial evidence that the
3 septic system was old and needed to be replaced. There was,
4 however, a sharp credibility clash at trial concerning this issue.
5 Hoffman testified that, in his opinion, a make-shift gravel
6 drainage pit had been installed on the Property within the past
7 five to seven years. In contrast, James testified that, in the 20
8 years he had lived in the Property, he had never built such a pit
9 or allowed one to be built. The bankruptcy court was not
10 persuaded that Barkers lied or attempted to deceive the Hurrells
11 about the septic system.

12 Again, none of the bankruptcy court's findings concerning the
13 septic system was clearly erroneous.

14

15 G. Summary

16 The bankruptcy court determined that Hurrells did not show
17 that the Barkers had fraudulently concealed from them any
18 information about defects in the Property. In particular, the
19 bankruptcy court determined that Hurrells did not show that
20 information about any defects in the Property was fraudulently
21 concealed from them by Barkers. In addition, in some instances,
22 the bankruptcy court found that Hurrells relied on the results of
23 their own investigation in deciding to buy the Property. The
24 extensive testimonial and physical evidence submitted at trial as

25

26 ²¹ In their state court action, Hurrells sued Barkers, their
27 realtor Barkley, Brassfield, their companies, and others, for
28 fraudulent misrepresentations and breach of contract. However, in
this action, the bankruptcy court's mission was to determine the
culpability, if any, solely of Barkers, not any other players in
the transaction.

1 to each issue was disputed and conflicting, and each of the
2 bankruptcy court's determinations was based at least in part on
3 the court's credibility assessment of the witness testimony, to
4 which we defer. The bankruptcy court entered an exhaustive, 42-
5 page review of all the issues, and supported its findings and
6 conclusions with reference to the evidence.

7 Because its findings were not clearly erroneous, we conclude
8 that the bankruptcy court did not err in denying Hurrells' request
9 that their alleged claims against Barkers be excepted from
10 discharge under § 523(a)(2)(A).

11
12 **CONCLUSION**

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