NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL

OF THE NINTH CIRCUIT

In re:	BAP Nos. NV-06-1165-BSN
	NV-06-1173-BSN
SHELDON H. CLOOBECK,	(cross-appeals)
Debtor.	Bk. No. 05-10179
	Adv. No. 05-01104
GILBERT DREYFUSS; LA CANADA FLINTRIDGE DEVELOPMENT CORP.,	Ref. Nos. 06-14
	06-16
Appellants and Cross-Appellees,	**AMENDED**
v.	**M E M O R A N D U M**[1]
SHELDON H. CLOOBECK,	
Appellee and Cross-Appellant.	

Argued and Submitted on January 17, 2007 at
Pasadena, California

Original Filed - March 30, 2007

Amended - May 2, 2007

Appeal from the United States Bankruptcy Court
for the District of Nevada

Honorable Bruce A. Markell, Bankruptcy Judge, Presiding

Before: BRANDT, SMITH, and NAUGLE,[2] Bankruptcy Judges.

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

[2] Hon. David N. Naugle, U.S. Bankruptcy Judge for the Central District of California, sitting by designation.

After trial on nondischargeability claims under § 523(a)(2)(A)[3] and (a)(4) arising out of a 1989 real estate transaction which had been litigated in state court, the bankruptcy court dismissed the complaint, finding appellants' claim against debtor dischargeable. They appealed (06-1165).

The bankruptcy court also overruled debtor's objection to appellants' proof of claim and entered judgment against debtor in the claim amount. Debtor cross-appealed (06-1173).

We AFFIRM in both appeals.

I. FACTS

The background of the claim is lengthy and complicated, as the able bankruptcy judge detailed in his unpublished 21 April 2006 memorandum (the "Memorandum"). The facts relevant to this appeal are:

The Real Estate Transaction. In early 1989, Gilbert Dreyfuss, an attorney, accountant, developer, and businessman, (Transcript, 9 January 2006 ("Transcript") at 29-31 and 110-111, and La Canada Flintridge Development Corporation, an entity through which Dreyfuss conducted some of his business (jointly, "Dreyfuss"), entered into negotiations with 409 Olympic Building Partnership (the "Partnership") to purchase an office building in downtown Los Angeles (the "Property"). The

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[3] Absent contrary indication, all "Code," chapter and section references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1330 prior to its amendment by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. 109-8, 119 Stat. 23, as the case from which this appeal arises was filed before its effective date (generally 17 October 2005). All "Rule" references are to the Federal Rules of Bankruptcy Procedure, and all "FRE" references are to the Federal Rules of Evidence.

All "CCP" references are to the California Code of Civil Procedure, and "CCC" references are to the California Corporations Code.

Partnership was composed of Steven Good, who held a one-half interest, and several others, including debtor Sheldon Cloobeck, a Nevada real estate developer.

The acquisition of the Property for $4.5 million closed on 2 June 1989. Dreyfuss received an undivided one-third interest for his cash contribution of $1.6 million, and the Partnership received the remaining two-thirds. The deed is not in the excerpts of record provided to us, but apparently did not specify the nature of the ownership. Transcript at 112-113. The Property was encumbered with a new $5.2 million deed of trust securing a note taken out by the Partnership in favor of Olympic Imperial Bank (the "Bank"). Part of Dreyfuss' contribution was allegedly used to pay off the Partnership's existing $850,000 note held by the Bank of Los Angeles.

Although a written agreement was drafted, it was not signed, so the deal for the Property's purchase and the nature and terms of the business arrangements between the Partnership and Cloobeck were entirely oral. Transcript at 118-119.

The Partnership defaulted on its loan obligation when the Bank's note came due. Dreyfuss contributed an additional $400,000 to bring the Bank loan current, Transcript at 51 and 117, but the Partnership again defaulted. The Bank commenced a non-judicial foreclosure and eventually sold the Property for $2.2 million.

State Court Action and Appeal. In 1994, the Bank commenced an action in California state court (the "State Court")[4] against Dreyfuss, the Partnership, and others; Dreyfuss filed a cross-complaint against the Partnership and others, alleging four causes of action: breach of

[4] Superior Court of California, County of Los Angeles, Case No. BC 096405.

oral contract, breach of implied covenant of good faith and fair dealing, breach of fiduciary duty and intentional and negligent misrepresentation. Other issues were also litigated, including whether Dreyfuss was a surety to the Bank, and whether the Bank's use of nonjudicial foreclosure was proper, none of which affect this appeal.

After a four and a half month trial, the State Court jury issued a special verdict in January 1998, finding for Dreyfuss on all four causes of action. Of particular importance, and as recounted in the Memorandum at 5-6, the jury found that Dreyfuss had relied on the Partnership's representations, which were false, knowingly made with the intent to induce reliance, and which resulted in the loss, and also found a breach of fiduciary duty. The jury's special verdict identified neither the fraudulent representation nor the breach of fiduciary duty. The jury awarded Dreyfuss damages of $3,188,020, which the State Court reduced to $1,755,157, plus costs. The jury awarded punitive damages only against Good.

Dreyfuss thereafter entered into settlements totaling approximately $1.8 million with all defendants except Cloobeck. Meanwhile, the Partnership filed several motions for judgment notwithstanding the verdict (the "JNOV motions"). The State Court denied all but one of the JNOV motions, granting one relating to attorney's fees and punitive damages. Statement of Decision, 3 March 1999. The Partnership appealed the denial of the JNOV motions to the state Court of Appeal,[5] which rendered an unpublished opinion on 29 August 2002, affirming in part and remanding on the attorney's fees issue (the "Opinion"). The State Court

[5] Court of Appeal of the State of California, Second Appellate District, Division One, No. B113194.

ultimately awarded Dreyfuss attorney's fees and costs of $135,000, as reflected in its minutes of 10 March 2004.

Cloobeck's Bankruptcy and Adversary Proceeding. Cloobeck filed a chapter 11 petition in the District of Nevada on 12 January 2005, which he voluntarily converted to chapter 7 on 12 October 2005.[6] The petition and schedules are not in the excerpts of record, but we have taken judicial notice of them. In re E.R. Fegert, Inc., 887 F.2d 955, 957-58 (9th Cir. 1989) (permitting judicial notice of bankruptcy court records). Section 362 stayed the remanded action in the State Court as against Cloobeck; Dreyfuss did not seek relief from the stay. No judgment has been entered.

In April 2005, Dreyfuss filed a complaint objecting to dischargeability for fraud under § 523(a)(2)(A) and for breach of fiduciary duty under (a)(4), which was tried with Cloobeck's objection to Dreyfuss' proof of claim of 12 May 2005. Two witnesses testified: Dreyfuss, and State Court trial counsel for the Partnership and Cloobeck.

After trial, the bankruptcy court accepted post-trial briefs and then ruled in its Memorandum that the debt was not excepted from discharge under either subsection of § 523.

Based on the State Court jury verdict, and crediting the partial satisfactions received from the parties and adding interest, Dreyfuss calculated that his claim against Cloobeck was $1,006,417.68.[7] The

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[6] Chapter 7 Trustee Timothy Cory was not joined as a party to the adversary proceeding, nor to this appeal. He did, however, commence a § 727(a)(5) action (No. 06-1034) against debtor, which is still set for trial in August 2007.

[7] Corrected for a mathematical error by the bankruptcy court, (continued...)

bankruptcy court entered judgment in that amount, and denied Cloobeck's objection to claim under § 502(b).

Dreyfuss appealed and Cloobeck cross-appealed.

II. JURISDICTION

The bankruptcy court had jurisdiction via 28 U.S.C. § 1334(b) and § 157(b)(1) and (2)(B) and (I), and we do under 28 U.S.C. § 158(c).

III. ISSUES

1. Whether the Opinion is hearsay, admissible only for its legal effect;
2. Whether the Opinion should be given preclusive effect;
3. Whether Dreyfuss' claim is nondischargeable under
   a. for fraud, § 523(a)(2)(A) or
   b. for fraud or defalcation in a fiduciary capacity, § 523(a)(4);
4. Whether the bankruptcy court properly overruled Cloobeck's objection to claim under § 502(b); and
5. Whether entry of a money judgment was proper.

IV. STANDARDS OF REVIEW

A. We review conclusions of law and questions of statutory interpretation, including construction of the Code de novo, and findings of fact for clear error. Rule 8013; In re Mednet, 251 B.R. 103, 106 (9th Cir. BAP 2000). A factual finding is clearly erroneous if the appellate court, after reviewing the record, has a firm and definite conviction that a mistake has been made. Anderson v. Bessemer City,

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[7](...continued)
Memorandum at 18, n.16.

N.C., 470 U.S. 564, 573 (1985). If two views of the evidence are possible, the trial judge's choice between them cannot be clearly erroneous. Id. at 574.

B. We review a bankruptcy court's evidentiary rulings for abuse of discretion. In re Carolan, 204 B.R. 980, 984 (9th Cir. BAP 1996). They are not to be reversed unless the ruling is manifestly erroneous. General Electric Co. v. Joiner, 522 U.S. 136, 141 (1997). Under the abuse of discretion standard, we must have a definite and firm conviction that the bankruptcy court committed a clear error of judgment in the conclusion that it reached before reversal is proper. S.E.C. v. Coldicutt, 258 F.3d 939, 941 (9th Cir. 2001); In re Black, 222 B.R. 896, 899 (9th Cir. BAP 1998).

C. We review the determination of whether issue or claim preclusion applies "de novo as mixed questions of law and fact in which legal questions predominate." In re George, 318 B.R. 729, 732-33 (9th Cir. BAP 2004), aff'd, 144 Fed. Appx. 636 (9th Cir. 2005), cert. den., __ U.S. ___, 126 S. Ct. 1068 (2006).

V. DISCUSSION

First, we must clear some underbrush. Dreyfuss argues that the bankruptcy court should not have limited the evidentiary consideration of the Opinion to its legal effect. Next, he contends that it should be given preclusive effect because, although there was never the final judgment which California requires for preclusion, the Opinion is "sufficiently final" and law of the case.

The California Court of Appeal noted:

> The 409 partnership appeals from the orders denying its various JNOV motions. Such orders are directly appealable. 'The scope of appellate review of a trial court's denial of a

> motion for judgment notwithstanding the verdict is to determine whether there is any substantial evidence, contradicted or uncontradicted, supporting the jury's conclusion and where so found, to uphold the trial court's denial of the motion.' (Shapiro v. Prudential Property & Casualty Co., (1997) 52 Cal. App. 4th 722, 730.) Any conflict in the evidence is resolved in favor of the prevailing party and inferences are drawn to uphold the verdict. Holmes v. Lerner, (1999) 74 Cal. App. 4th 442, 445.

Opinion at 10 (selected citations omitted). In short, the court of appeal was not finding facts; it was looking to see if there was any evidence to support the jury's findings in its special verdict, Exhibit B at trial.

A. Hearsay?

Dreyfuss sought to introduce the Opinion in his motion in limine. The bankruptcy court ruled the Opinion was inadmissable hearsay and thus admitted it only "for the purpose of establishing the status of the California action, and not for the truth of the statements contained therein." Memorandum at 8, n.6; Transcript at 19. See Greycas, Inc. v. Proud, 826 F.2d 1560, 1567 (7th Cir. 1987) (noting that civil judgments are inadmissible hearsay). Dreyfuss argues the bankruptcy court abused its discretion in admitting the Opinion only for that limited purpose.

As noted, the California Court of Appeal did not purport to find facts. Rather, its task was to determine whether there was evidence supporting the jury's factual findings. Dreyfuss has not articulated how the fact that there was some — or any at all — evidence supporting a particular proposition establishes that proposition.

B. Preclusion?

The burden is on the party who asserts preclusion to establish the necessary elements. In re Khaligh, 338 B.R. 817, 825 (9th Cir. BAP

2006); In re Summerville, ____ B.R. ____, 2007 WL 601230(9th Cir. BAP Feb. 7, 2007).

Claim preclusion is inapplicable to nondischargeability under § 523(a)(2) and (a)(4) because those causes of action are within exclusive bankruptcy jurisdiction. In re Moncur, 328 B.R. 183, 190 (9th Cir. BAP 2005), citing Restatement (Second) of Judgments § 26(1)(c) (1982). However, a party may assert issue preclusion in a nondischargeability case, but issue preclusion only: "prevents relitigation of all 'issues of fact or law that were actually litigated and necessarily decided' in a prior proceeding." Robi v. Five Platters, Inc., 838 F.2d 318, 322 (9th Cir. 1988) (citation omitted). Federal courts look to the law of the state in which the judgment was rendered to determine whether it has preclusive effect. Id.

The elements of issue preclusion under California law are: "(1) the issue decided in the prior action is identical to the issue presented in the second action; (2) there was a final judgment on the merits; and (3) the party against whom estoppel is asserted was a party to the prior adjudication." In re Bugna, 33 F.3d 1054, 1057 (9th Cir. 1994) (citation omitted). Here, no final judgment was entered in the State Court proceeding, and as the bankruptcy court noted, California courts will not apply issue preclusion when "a judgment is still open to direct attack by appeal or otherwise . . . ." National Union Fire Ins. Co. v. Stites Prof. Law Corp., 235 Cal. App. 3d 1718, 1726, 1 Cal. Rptr. 2d 570, 574 (1991).

As Appellants point out, California courts recognize an exception to the final judgment requirement in the context of issue preclusion when the prior adjudication is "sufficiently firm to be accorded conclusive effect." Sandoval v. Superior Court, 140 Cal. App. 3d. 932,

935, 190 Cal. Rptr. 29 (1983) (citing Restatement (Second) of Judgments § 13 (1982)). See also Robi, 838 F.2d at 327. Appellants argue that this exception applies because the jury found fraud after a four-month trial, and this finding was upheld by the Court of Appeal. They argue that these findings are not subject to further attack notwithstanding the lack of a judgment, as they are the law of the case. See Yu v. Signet Bank/Virginia, 103 Cal. App. 4th 298, 126 Cal. Rptr. 2d 516 (2002).

Assuming the doctrine applies, they cite the Court of Appeal's holding that the jury's fraud finding was supported by "substantial evidence," specifically, that "[t]he 409 partnership's removal of its capital investment is circumstantial evidence of its intent not to complete payment of the [Bank] loan." Opinion, at 14. Of course, law of the case would not apply directly to the nondischargeability proceeding, as that doctrine applies only to matters decided by an appellate court in the same case. Yu, 103 Cal. App. 4th at 309.

The authority Appellants rely upon, Sandoval, 140 Cal. App. 3d at 932, and the cases cited therein, clarify that the exception is fact-specific. In Sandoval, the jury found for plaintiff on the merits, judgment was entered, and the judgment appealed. During the pendency of the appeal, the parties settled, and plaintiff dismissed its action with prejudice. In a subsequent proceeding, the court of appeal reversed the trial court's ruling that the judgment in the prior action was not final, holding that the matters determined were sufficiently final despite dismissal during the pendency of the appeal. Here, no judgment has ever been entered; the appeal was taken from denial of the Partnership's JNOV motions.

The bankruptcy court did not err in its issue preclusion analysis, and we decline to expand California's preclusion doctrines (more precisely, we decline to predict that California courts would do so if presented with this procedural history), where the jury's verdict itself has never been reduced to judgment and exposed to appellate review.

C. Nondischargeability

But admitting the Opinion without qualification, or giving it preclusive effect, would not get Dreyfuss very far. As noted by the able trial judge, the Opinion still leaves gaps in Dreyfuss' proof, even when considered with the jury's special verdict.

There is no evidence in these proceedings that Cloobeck ever took independent action or had direct communications with Dreyfuss. Consequently, both claims must be analyzed in the context of Cloobeck as a member of the Partnership.

Of course, we must construe the Code's nondischargeability sections liberally in favor of the debtor. In re Su, 259 B.R. 909, 912 (9th Cir. BAP 2001), aff'd, 290 F.3d 1140 (9th Cir. 2002).

1. Fraud - § 523(a)(2)(A)

The Code excepts from discharge any debt

> for money, property, services, or an extension, renewal, or refinancing of credit, to the extent obtained by false pretenses, a false representation, or actual fraud, other than a statement respecting the debtor's or an insider's financial condition.

§ 523(a)(2)(A).

To establish nondischargeability under this section,

> the creditor must establish (1) that the debtor made a representation; (2) the debtor knew at the time the representation was false; (3) the debtor made the representation with the intention and purpose of deceiving the creditor; (4) the creditor relied on the representation; and

(5) the creditor sustained damage as the proximate result of the representation.

In re Apte, 96 F.3d 1319, 1322 (9th Cir. 1996) (citations omitted). The burden is on the creditor to establish each of these elements by a preponderance of the evidence. See Grogan v. Garner, 498 U.S. 279, 291 (1991). When the misrepresentation is a promise to perform in the future, the subsequent failure to perform is not enough to prove the promise was fraudulent; rather it must be shown that the debtor did not intend to perform at the time the promise was made. In re Lee, 186 B.R. 695, 699 (9th Cir. BAP 1995). Any fraud committed by Good on behalf of the Partnership would be imputed to Cloobeck under agency/partnership principles. In re Tsurukawa, 287 B.R. 515, 525-26 (9th Cir. BAP 2002).

Dreyfuss testified at trial that he relied upon the statements of Steve Good that members of the Partnership had a combined net worth of $12 million and had the financial strength to complete the transaction and make the payments. Transcript, at 44-45 and 72-73. See also id. at 106 (summarizing on redirect the representations Dreyfuss relied upon, including that his one-third interest would be free from any debt).

The Code's definition of "insider" with respect to an individual debtor includes a partnership in which the debtor is a general partner. § 101(31). Appellants do not dispute the bankruptcy court's conclusions that the Partnership was Cloobeck's insider, and that some of Good's statements were of the Partnership's financial condition. It is uncontested that those statements were not in writing.

The bankruptcy court found that Good's statements fell into two categories: statements regarding the Partnership's financial condition, and promises to pay in the future. It concluded that the former were within the exception for statements respecting the debtor's or an

insider's financial condition, and the latter were promises to pay, but there was no evidence that the statements were made with knowledge of their falsity and intent to deceive.

Respecting the promises to pay, Appellants argue that intent to deceive was established by the Court of Appeal's conclusion that the partners' removal of their capital investment was circumstantial evidence of their intent not to repay the Bank loan. As discussed above, the bankruptcy court admitted the Opinion only for its "legal effect" and correctly gave the factual matters discussed therein no preclusive effect. This is the only "evidence" of intent, and it was properly excluded as hearsay. Greycas, 826 F.2d at 1567.

But even if admitted unconditionally, neither the Opinion nor the jury verdict (considered separately or together) establishes all the elements of § 523(a)(2)(A). The Court of Appeal noted that "the Dreyfuss Group relied on statements made by Good that he and his associates had had the financial capital and that they would make the payments . . .," Opinion, at 14, (emphasis added): Good, and thus the Partnership and Cloobeck, made representations of both financial condition and of intent to perform. Those representations were oral.

We do not know which ground was the basis for the fraud found by the jury, or whether both were. Treating the Opinion as hearsay, the bankruptcy court found insufficient evidence of intent to defraud. Dreyfuss contends that the Opinion provides that evidence. But as he also pursued a fraud claim based on an oral misrepresentation of the financial condition of an insider, we cannot tell from the Opinion, even read together with the jury's special verdict, which fraud was established, or whether both were.

Since Dreyfuss has not excluded the possibility that the fraud found by the jury was predicated on the misrepresentation of an insider's financial condition, and he concedes that none of the representations were in writing, his § 523(a)(2)(A) cause of action fails, for we must construe the Code's nondischargeability provisions liberally in favor of the debtor. Su, 259 B.R. at 912.

2. Fiduciary Capacity - § 523(a)(4)

Section 523(a)(4) provides, in part:

> A discharge under section 727 . . . does not discharge an individual debtor from any debt –
>
> (4) for fraud or defalcation while acting in a fiduciary capacity, embezzlement, or larceny[.]

Dreyfuss must establish three elements for nondischargeability under this section: "(1) an express trust; (2) the debt was caused by fraud or defalcation; and (3) the debtor acted as a fiduciary to the creditor at the time the debt was created." In re Niles, 106 F.3d 1456, 1459 (9th Cir. 1997) (citation omitted).

The questions raised are whether, first, Dreyfuss was Cloobeck's partner in a joint venture or whether they held their interests in the Property as tenants in common; second, whether that status gave rise to a fiduciary relationship for purposes of § 523(a)(4); and if so, whether there was a fraud or defalcation in that capacity.

The State Court determined that Cloobeck was a partner in the Partnership and that consequently the Partnership's fraud can be imputed to Cloobeck. It did not find a joint venture. Dreyfuss' logic is that partners are fiduciaries, that Good's false statements while acting in a fiduciary capacity are imputable to Cloobeck, and the debt arising thereunder is nondischargeable.

(a) Express Trust

> Generally, an express trust is created by an agreement between two parties to impose a trust relationship. The general characteristics of an express trust are: (1) sufficient words to create a trust; (2) a definite subject; and (3) a certain and ascertained object or res.

In re Stanifer, 236 B.R. 709, 714 (9th Cir. 1999) (citation omitted). State law determines when a trust in this strict sense arises, which includes relationships in which "trust-type obligations are imposed pursuant to statute or common law." Id.

In Niles, for example, debtor was a real estate agent and collected rents for clients in her capacity as a licensed real estate broker, and was required to pay funds to clients or hold in a trust fund account. Thus she was the trustee of an express trust under California law under Cal. Bus & Prof. Code. § 10131(b). Id. at 1459. And in Stanifer, the Ninth Circuit held that California's family code imposes a fiduciary duty on spouses.

The express trust element is met here if there was a partnership between Cloobeck and Dreyfuss. In a general partnership, each general partner is an agent of the other, and can bind the other. CCC § 16031(1). Though a partnership agreement can alter the respective rights, there was no such agreement here.

State partnership law can give rise to a sufficient trust for § 523(a)(4) liability. Ragsdale v. Haller, 780 F.2d 794 (9th Cir. 1986). In Ragsdale, a partner in a fishing enterprise failed to disclose certain bonuses he paid to himself from partnership receipts. The Ninth Circuit held that under CCC § 15021[8] a trust arises only when

[8] Which provides: "Every partner must account to the partnership for any benefit, and hold as trustee for it any profits (continued...)

a partner derives profits without the consent of the partnership. While no express trust arose under that provision, "partners are trustees for each other in all proceedings in connection with the partnership and were required to act in good faith" and "California case law made partners trustees within the meaning of § 523(a)(4)." Id. at 796.

(b) Fiduciary Relationship

The second element is closely related to the first. The issue is whether there was a fiduciary relationship between Dreyfuss and Cloobeck (via his status as a partner in the Partnership), as Dreyfuss argues, or whether there was only an agreement to hold the Property as tenants in common.

Under California law,

> [i]f an estate is conveyed or transferred and it is not expressly declared an estate in joint tenancy (requiring concurrence of the four unities, time, title, interest and possession), or an estate in partnership, for partnership purposes (as determined by the intent of the parties), it will be held by the grantees or transferees as tenants in common.

Wilson v. S.L. Rey, Inc., 17 Cal. App. 4th 234, 242 (1993) (citation omitted). For purposes of California state law, co-tenants do stand in fiduciary relationship to each other. Id., citing Aaron v. Puccinelli, 121 Cal. App. 2d 675 (1953).

The bankruptcy court so found, agreeing with the State Court's finding that the relationship between Dreyfuss and the 409 Partnership was a tenancy in common, not a joint venture. Statement of Decision, 3 March 1999, at 2-3; Memorandum at 14-15.

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[8](...continued)
derived by him without the consent of the other partners from any transaction connected with the formation, conduct, or liquidation of the partnership or from any use by him of its property."

The additional evidence at trial, consisting only of Dreyfuss' testimony on this point, was fairly superficial. He testified that he did not want to take on the Partnership's debt, and wanted to make his contribution with a group of "high net worth," e.g., over $12 million. Transcript at 72. There was no written agreement, but the proposed form of agreement would have arguably created a tenancy in common. Id. at 118-19. Dreyfuss testified that a partnership was not the optimal form because of liability concerns (id. at 44-49), tax benefits (id. at 46-47), and minority voting rights (id. at 120). The record is insufficient to establish the existence of a partnership or intent to form a partnership between the Partnership and Dreyfuss.

Turning back to the Niles elements, the bankruptcy court found no Ninth Circuit authority putting co-tenants in California within the narrow definition of "fiduciary" for purposes of § 523(a)(4), Memorandum at 15, nor has Dreyfuss cited any. Rather, he attempts a flanking maneuver, contending that the State Court and the bankruptcy court were wrong in concluding that the tenancy in common did not suffice:

> California Corporations Code Section 16202 states in relevant part as follows:
>
> > (a) . . ., the association of two or more persons to carry on as coowners a business for profit forms a partnership, whether or not the persons intend to form a partnership.
> >
> > . . .
> >
> > (c) In determining whether a partnership is formed, the following rules apply:
> >
> > (1) Joint tenancy, tenancy in common, tenancy by the entireties, joint property, common property, or part ownership does not by itself establish a partnership . . . (Emphasis added.)
>
> Thus, the fundamental statute in California defining a partnership expressly states that carrying on a business for

> profit as coowners establishes a partnership, whether or not there is intention to create a partnership.

Appellants' Opening Brief, 18 September 2006, at 26 (emphasis in original).

This argument was not raised before the bankruptcy court, and we decline to consider it on appeal. In re Roberts, 331 B.R. 876, 881 (9th Cir. BAP 2005) (citing Kontrick v. Ryan, 540 U.S. 443, 446 (2004)).

Finally, Dreyfuss' argues in his reply brief (at 14, n.7) that co-ownership and profit sharing tend to establish a partnership, citing Tsurukawa, 287 B.R. at 521. Reply Brief, 19 Oct. 2006, at 14 n.7. True, but a tendency does not equal establishment, nor does co-ownership equal partnership.

The bankruptcy court's findings that there was neither a partnership nor the necessary fiduciary relationship between Cloobeck and Dreyfuss to satisfy § 523(a)(4) were not clearly erroneous.

(c) Fraud or Defalcation

The bankruptcy court addressed fraud or defalcation in a footnote, concluding that any fraud occurred before the relationship was formed, and thus was not done in a fiduciary capacity. Further, that the alleged removal of $850,000 was not established, and that the Partnership's failure to make payments from its own funds was not a defalcation. Memorandum, at 17 n.15.

On appeal, Dreyfuss argues that the Partnership's representation that it would pay the bank loans were continuing representations made without the intent to perform, and that the Partnership's fraudulent removal of its $850,000 capital investment (by not paying on the bank loan, apparently) was a defalcation. But there is no evidence

establishing that the undertaking to pay on the bank loan was fraudulent, or that it was continuing. It was not addressed in either the jury's special verdict or the Opinion, and Dreyfuss points to no evidence that the representation was false or made with intent to deceive. Even if considered a continuing representation, the fact that the payment was not made does not necessarily mean that the maker of the representation did not intend to perform – it may only evidence inability to do so.

Nor has the alleged removal of $850,000 been established. Dreyfuss' own testimony was inconclusive, Transcript, at 115-16, and the reference in the Opinion, at 14, is not a finding of fact, only a determination that there was some evidence to that effect presented to the jury. But the jury made no removal finding, and its special verdict finds $190,020 in damages from the breach of fiduciary duty - inconsistent with a finding that the alleged removal of Dreyfuss' $850,000 investment was that breach.

Dreyfuss has not shown that the bankruptcy court's finding that there was no fraud or defalcation in a fiduciary capacity was clearly erroneous.

D. <u>Objection to Claim; Judgment amount</u>

Cloobeck argues that Dreyfuss' claim should be disallowed for three reasons. First, that interest should not have accrued from the date of the jury verdict. Second, that the $135,000 attorney's fees awarded as mitigation damages should not be included in the calculation until actually awarded. And third, as the punitive damage award was only against Good, it should not have been included in the calculations.

In a claims objection, the claimant establishes a prima facie case against the debtor upon filing a proper proof of claim. "A proof of claim executed and filed in accordance with these rules shall constitute prima facie evidence of the validity and amount of the claim." Rule 3001(f). See also In re Networks Electronic Corp., 195 B.R. 92, 96 (9th Cir. BAP 1996); In re Pugh, 157 B.R. 898, 901 (9th Cir. BAP 1993).

An objecting party must rebut the presumption in favor of validity. See In re Garner, 246 B.R. 617, 622-23 (9th Cir. BAP 2000). The objector must produce evidence which, if believed, would refute at least one of the allegations essential to the claim's legal sufficiency. Lundell v. Anchor Construction Specialists, 223 F.3d 1035, 1040 (9th Cir. 2000) (citation omitted, emphasis in original).

1. Interest

As he testified, Transcript at 57-58, Dreyfuss calculated his claim by aggregating all amounts awarded by the State Court jury, deducting State Court's modifications, which netted $1,755,147. He then added interest at 10% per annum (presumably the California judgment rate, and not objected to) from the date of the verdict. From this sum, settlements were deducted from interest and then from principal, arriving at a claim amount as of the petition date of $1,004,934.31. The bankruptcy court noted in a footnote to its Memorandum that there was a minor calculation error, corrected for that error, determined the claim was $1,006,417.68, and entered judgment in that amount.

Cloobeck set forth his calculation of the claims in Exhibit A to his post-trial brief. He, too, calculates the claim based on the jury verdict of $1,520,157. He applied interest to the principal starting 24 March 1999, not the date of the jury verdict, because the State Court's

minute order of 8 April 1999 stated "Pre-judgment interest shall be calculated FROM AT LEAST 3/24/1999." Each time a settlement payment was made, he applied interest on the net principal amount, arriving at a claim of $527,874.49. He also calculated interest on the mitigation damage (attorneys fees) award of $135,000 from its date of entry.

On the first ground for his objection, Cloobeck argues three cases support a later start date for interest accrual: Espinoza v. Rossini, 257 Cal. App. 2d 567 (1967), Dixon Mobile Homes, Inc. v. Walters, 48 Cal. App. 3d 964 (1975), and Stockton Theatres v. Palermo, 55 Cal. 2d 439 (1960).

Dixon has been overruled -- see Segura v. McBride, 5 Cal. App 4th 1028 (1992). In Espinoza, the trial court ruled that interest accrued only from the remittitur, but the court of appeal reversed, interpreting the former statute, holding that the award bears interest at the legal rate for the interim period following verdict or decision until entry of judgment. Stockton interprets interest on costs on appeal, governed by another former statute, and is thus distinguishable. We do not find them persuasive here: a minute order is only a clerk's entry on the docket and does not determine when interest begins to accrue.

The current statute, CCP § 685.020, providing that interest on judgments at 10% accrues from date of verdict until paid, governs. See also California Rule of Court 875, which states: "The clerk shall include in the judgment any interest awarded by the court and the interest accrued since entry of the verdict."

Ehret v. Congoleum Corp., 87 Cal. App. 4th 202, 208, 104 Cal. Rptr. 2d 370 (2001) is controlling when the appellate court has modified rather than reversed a judgment on appeal. In that case the state court jury returned a special verdict, but the court entered a JNOV, deducting

25% of a settlement from the jury verdict. Ehret held that the JNOV was a modification of judgment, not a reversal. Interpreting CCP § 685.020(a), the court held plaintiffs were entitled to postjudgment interest from the date of entry of the original judgment on the jury's verdict. Id. at 375-76. That is the situation here: interest accrues from the entry of the jury verdict.

2. Mitigation Damages

Regarding his second ground, that the attorney's fees awarded Dreyfuss as mitigation damages should only figure in the calculation from the date of the award, Cloobeck contends that the award should be treated like the result of a new trial after a reversal. By not making this argument in his opening brief on his cross appeal (he simply states the contention at p. 27, citing no authority), he has waived this argument. In re Sedona Institute, 220 B.R. 74, 76 (9th Cir. BAP 1998) aff'd, 21 Fed. Appx. 723 (9th Cir. 2001). In any event, the authorities he does cite in his reply brief, Stockton Theaters, 55 Cal. 2d at 442-43, and Landsberg v. Scrabble Crossword Game Players, Inc., 802 F.2d 1193, 1199 (9th Cir. 1986), do not support his position. They stand for the propositions that a judgment modified on appeal is treated as if the correct judgment had been entered originally, while the judgment from a new trial after reversal takes effect when entered. What happened here was a jury award of attorney' fees as mitigation damages, then a JNOV reducing that award to the fees incurred on the relevant causes of action, which required a further hearing to sort out, followed by an appeal of the JNOV, affirmance, and then the hearing. There was no reversal, and the outcome was, as in Stockton Theaters, to make the

award what it should have been originally — a modification. 55 Cal. 2d at 443-44.

Treating the mitigation damages award as part of the initial award was not error.

3. Punitive Damages

As the punitive damages were awarded exclusively against Good, not the Partnership, Cloobeck argues that the bankruptcy court should not have included this amount in the principal sum. That is, of course, correct, but Cloobeck never clearly explicated a critique of Dreyfuss' calculations either to the bankruptcy court or in his briefs to us, choosing instead to propose his own analysis.

Cloobeck has not shown any flaw in the bankruptcy court's calculation of the claim and thus the judgment amount.

E. Money Judgment

Finally, Cloobeck argues, without citation to authority, that the bankruptcy court should not have entered a money judgment, which he asserts binds entities not party to the adversary proceeding. He does not identify which entities, nor address the fact that his co-defendants in state court have settled, nor articulate how those unspecified entities might be bound. Even if the State Court is "more familiar" with those proceedings, relative case familiarity is not a predicate to entering a judgment. The bankruptcy court must "determine the amount of such claim" on a claims objection hearing, § 502, and, after all, he objected.

The bankruptcy court has power to enter a money judgment in a § 523(a) action. In re Sasson, 424 F.3d 864, 870 (9th Cir. 2005) cert.

Denied, 126 S.Ct. 2890 (2006). Although we have held that the bankruptcy court should not enter a new judgment when the nonbankruptcy court has already entered one, that is not the situation here. See In re Smith, 242 B.R. 694, 704 (9th Cir. BAP 1999) ("federal court is . . . precluded from entering a monetary judgment based on a cause of action fully litigated in . . . state court").

The bankruptcy court did not abuse its discretion in entering a money judgment.

VI. CONCLUSION

As Dreyfuss did not establish all of the elements of his nondischargeability causes of action, we AFFIRM the bankruptcy court's judgment in favor of Cloobeck. Likewise, as Cloobeck has shown no error in the bankruptcy court's calculation and entry of a money judgment for Dreyfuss, we AFFIRM in his appeal.