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U.S. BKCY. APP. PANEL
OF THE NINTH CIRCUIT

NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL

OF THE NINTH CIRCUIT

In re: CARL BUTTO and MARGUERITE BUTTO, Debtors. _____ RICHARD LAPIN, Appellant, v. CARL BUTTO; MARGUERITE BUTTO, Appellees. _____	BAP No. NV-04-1402-SPK Bk. No. S-03-11633-LBR Adv. No. 03-01126 LBR **M E M O R A N D U M**[1]

Argued and Submitted on June 23, 2005
at Las Vegas, Nevada

Filed - August 17, 2005

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

Honorable Linda B. Riegle, Bankruptcy Judge, Presiding

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Before: SMITH, PERRIS and KLEIN, Bankruptcy Judges.

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[1] This disposition is not appropriate for publication and may not be cited except when relevant under the doctrines of law of the case, res judicata, or collateral estoppel. See 9th Cir. BAP Rule 8013-1.

Richard Lapin appeals a judgment discharging a debt of $146,449.91, owed to him by the Buttos, ("Debtors"). We AFFIRM.

FACTS

This case involves the sale of a business known as Creative Talent Agency ("CTA"), owned and operated by the Buttos[2] and sold to Lapin. The transaction was brokered by Larry Roscoe, on behalf of Lapin, and Todd Jeffries, on behalf of the Buttos and CTA (collectively "the Brokers"). The Brokers both worked for the same company, Nevada First Business Brokers. The business was listed for sale in January 2000. The broker listing stated that CTA's annual income was $101,000. Lapin expressed an interest in buying the business and asked the Brokers for CTA's financial information, including tax returns and profit and loss statements.

In June, Butto provided Lapin, through his broker, CTA's income statement for January - March 31, 2000. The income statement indicates that CTA incurred commission expenses of $26,585 for the quarter (approximately $8,861 per month) and that the company's quarterly net income was $5,044. Lapin claims that Butto told him that CTA's monthly income was $8,000 (or $96,000 annually). Lapin was unable to ascertain from CTA's financial documents what the term "commissions" represented. Since the income statement reflected an annual income of only about $20,000, Lapin asked his broker whether the amounts listed as

[2] The business was owned and operated by both Carl and Marguerite Butto, but only Carl was involved in the sale of the business. Hereafter, "Butto" refers to Carl Butto.

commissions on the income statement constituted income, rather than expenses, which would explain the discrepancy. Lapin's testimony, which was apparently considered in the state court action but overruled on hearsay grounds in the adversary proceeding, was that his broker, Roscoe, conferred with Butto's broker, Jefferies, who conveyed to him that the commissions were indeed income.

Butto denies ever having a discussion with Lapin about CTA's monthly income. He also denies speaking with Lapin or the Brokers about the characterization of the commissions.

Based on his understanding that the business earned $101,000 per year, Lapin purchased CTA for $170,000, paying $85,000 down and signing a promissory note requiring monthly payments over 2-1/2 years for the balance. The deal closed on August 15 and Lapin took possession the following day. Once Lapin had the opportunity to carefully analyze the income, bills and expenses of the business, he came to believe that he had been mislead about CTA's income capacity. He confronted Butto and demanded the return of his money. Butto responded that the money had been spent and blamed the Brokers for any misunderstanding. Lapin closed the business on November 1, 2000 and filed an action in state court against Butto and the Brokers, alleging fraud, negligent representation, breach of fiduciary duty, negligence, and conversion. He also sought rescission of the purchase agreement and restitution of his down payment, along with other related damages.

Following the trial, the state court rendered its decision

in favor of Lapin and commented,

> The Court has wrestled with this decision for several weeks and after reviewing all of the evidence in detail and then pondering the matter in its conceptual state, this Court has concluded that it is more probable than not by the narrowest of margins that the business concept of commissions being viewed as income to an owner of a business originated with Defendants CTA and more specifically Carl Butto as opposed to either Todd Jeffries acting alone or in concert with Larry Roscoe for the purpose of earning a commission by deceiving Mr. Lapin into buying this business.
>
> The Court readily admits that the documentary evidence on its face would appear to support the claim of CTA and Carl Butto in this matter. However, the Court is convinced that Mr. Lapin was told, either by Carl Butto directly or inadvertently that the income of CTA was approximately $8,000 a month. Had this initial representation not been made, it is clear that Mr. Lapin would not have been interested in any further investigation into buying this business.

See Memorandum Decision and Order, District Court, Clark County, Nevada, November 13, 2002, pp. 5-6.

The court added,

> It appears from the testimony that Agent Roscoe went to Agent Jeffries and asked for a clarification on the issue of commissions. The answer apparently, to a preponderance of the evidence at least, came from the Seller Mr. Butto to the effect that commissions were actually treated as income. This information was relayed by Mr. Jeffries to Mr. Lapin, Mr. Lapin relied on it, the information was in fact a misrepresentation by the Seller. . .

Id. at 13.

The judgment, entered on January 31, 2003 in favor of Lapin, provided for rescission of the contract, restitution for Lapin of his down payment of $85,000, $2,000 for the conversion claim pursuant to a pre-trial stipulation between the parties, attorneys' fees in the amount of $56,451.75, and costs of $2,998.16, for a total judgment of $146,449.91.

On February 13, the Buttos filed a voluntary chapter 7[3] petition. Thereafter, Lapin commenced a nondischargeability action pursuant to §§ 523(a)(2)(A), 523(a)(2)(B), and 523(a)(6), based upon the asserted preclusive effect of the state court judgment.[4]

After trial, the bankruptcy court ruled that collateral estoppel did not apply because the state court did not make findings that were coextensive with fraud. The court found that Lapin had not proven by a preponderance of the evidence that Butto committed fraud. Additionally, the court determined that Butto's alleged oral misrepresentations concerning CTA's financial condition did not fall within § 523(a)(2). The court did not specifically address Lapin's claims under § 523(a)(6). Lapin appeals.

JURISDICTION

The bankruptcy court had jurisdiction under 28 U.S.C. § 1334 and § 157(b)(1) and (b)(2)(I). This Panel has jurisdiction under 28 U.S.C. § 158(c).

ISSUES

1. Whether the court erred in refusing to give preclusive effect to the state court judgment.
2. Whether the court erred in determining that the debt

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[3] Unless otherwise indicated, all chapter, section and rule references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1330, and to the Federal Rules of Bankruptcy Procedure, Rules 1001-9036.

[4] Lapin's complaint also included a § 523(a)(4) cause of action but he apparently dropped the claim because he did not argue it to the bankruptcy court, nor did he raise it on appeal.

was not excepted from discharge under § 523(a)(2).

3. Whether the court erred in determining that the debt was not excepted from discharged under § 523(a)(6).

4. Whether the court erred in it evidentiary ruling with respect to the Broker's testimony.

STANDARDS OF REVIEW

Whether preclusive effect should be given to a prior judgment is a mixed question of law and fact, in which legal issues predominate, which we therefore review de novo. Haupt v. T.D. Dillard, 17 F.3d 285, 288 (9th Cir. 1994); Heath v. Cast, 813 F.2d 254, 258 (9th Cir. 1987).

We review rulings regarding the availability of res judicata doctrines, including issue preclusion, de novo as mixed questions of law and fact in which legal questions predominate. Robi v. Five Platters, Inc., 838 F.2d 318, 321 (9th Cir.1988); George v. City of Morro Bay, 318 B.R. 729, 732-33 (9th Cir. BAP 2004). To the extent that the doctrines are determined to be available to be applied, the actual decision to apply them is left to the trial court's discretion. Robi, 838 F.2d at 321.

A bankruptcy court's evidentiary rulings are reviewed for an abuse of discretion and should not be reversed absent a showing of prejudice. In re Sternberg, 85 F.3d 1400, 1408 (9th Cir. 1996)(citing City of Long Beach v. Standard Oil Co., 46 F.3d 929, 936 (9th Cir. 1995)).

We review the court's findings of fact for clear error and the court's interpretation of the Code de novo. Citibank (S.D.), N.A. v. Eashai (In re Eashai), 87 F.3d 1082 (9th Cir. 1996);

United States Trustee v. Celebrity Home Entm't Inc. (In re Celebrity Home Entm't Inc), 210 F.3d 995, 997 (9th Cir. 2000). Review under the clearly erroneous standard is significantly deferential, and requires that an appellate court accept the court's findings of fact unless left with the definite and firm conviction that a mistake has been committed. Comm. for Idaho's High Desert, Inc. v. Yost, 92 F.3d 814, 819 (9th Cir. 1996). "If the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently." Phoenix Eng'g & Supply, Inc. v. Universal Elec. Co., 104 F.3d 1137, 1141 (9th Cir. 1997)(quoting Anderson v. Bessemer City, 470 U.S. 564, 573-74 (1985)).

DISCUSSION

The nondischargeability complaint alleges exceptions to discharge under §§ 523(a)(2)(A), 523(a)(2)(B), and 523(a)(6).

Under § 523(a)(2)(A), a debt is nondischargeable if it was for money or property obtained by "false pretenses, a false representation, or actual fraud, other than a statement respecting the debtor's . . . financial condition." McCrary v. Barrack (In re Barrack), 217 B.R. 598, 605 (9th Cir. BAP 1998). Section 523(a)(2)(A) is written in general fraud terms, which are common-law terms, and their elements are so defined. Field v. Mans, 516 U.S. 59, 69 (1995). The creditor must show that (1) the debtor made the misrepresentation; (2) the debtor knew the representation was false at the time made; (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 damages as a proximate result. In re Kirsh, 973 F.2d 1454, 1457 (9th Cir. 1992).

Section 523(a)(2)(B) excludes from discharge a debt for money or property obtained through the use of a false written statement regarding the debtor's financial condition.[5] Although Lapin's complaint includes an exception to discharge under § 523(a)(2)(B), this exception was not fully developed at trial or on this appeal. Accordingly, no further discussion of § 523(a)(2)(B) is required.

Section 523(a)(6) excepts from discharge any debt resulting from "willful and malicious injury" by a debtor to another entity or the property belonging to another entity. Carillo v. Su (In re Su), 290 F.3d 1140, 1142 (9th Cir. 2002). The willful injury requirement is met only when the debtor has a subjective motive to inflict injury or when the debtor believes that injury is substantially certain to result from her own conduct. Id. "[D]ebts arising from recklessly or negligently inflicted injuries do not fall within the compass of § 523 (a)(6)." Kawaauhau v. Geiger, 523 U.S. 57, 64 (1998).

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[5] The creditor must prove (1) the debtor made a representation of fact; (2) that was material; (3) that the debtor knew at the time to be false; (4) that the debtor made the representation with the intent to deceive the creditor; (5) upon which the creditor relied; (6) the creditor's reliance was reasonable; and, (7) that damage proximately resulted from the representation. In re Candland, 90 F.3d 1466, 1469 (9th Cir. 1996).

A. Issue preclusion does not apply.

Lapin argues that the court erred by failing to give preclusive effect to the state court judgment under the doctrine of issue preclusion because the issue of Debtors' fraud was already litigated and decided in his favor by that court.

The U.S. Supreme Court has recognized that a creditor who successfully obtains a fraud judgment in state court can invoke issue preclusion in an action under § 523(a). Grogan v. Garner, 498 U.S. 279, 284-85 n.10 (1991). We look to Nevada law to determine the preclusive effect of Lapin's prior state court judgment against Debtors. Clements v. Airport Auth. Of Washoe County, 69 F.3d 321, 328 (9th Cir. 1995). Under Nevada law, issue preclusion "prevents the relitigation of issues previously adjudicated where the causes of action in the two proceedings are different." In re Shuman, 68 B.R. 290, 292 (Bankr. D. Nev. 1986) (citing Clark v. Clark, 80 Nev. 52, 55-57 (1964)).

For issue preclusion to apply, (1) the issue in the prior litigation must be identical to the issue in the current action, (2) the initial ruling must have been on the merits and be final, and, (3) the parties in both proceedings must be the same or in privity. University of Nevada v. Tarkanian, 110 Nev. 581, 598 (1994); see also, Marine Midland Bank v. Monroe, 104 Nev. 307 (1988)(A litigant is estopped from raising an issue if the issue was "actually litigated" and "necessarily determined" in a prior proceeding, and the parties in both proceedings were the same or in privity.). In determining whether the issues are identical, the court looks to "whether the sets of facts essential to

maintain the two suits are the same." Clements, 69 F.3d at 328 n.4.

There is no dispute that the state court ruling was on the merits and final, or that the parties in both proceedings are the same or in privity. The only dispute here is whether the issue of fraud was necessarily determined by the state court.

Lapin's state court complaint pleaded causes of action for fraud, negligent representation, breach of fiduciary duty, negligence, and conversion. Lapin sought the remedies of rescission and restitution, along with related damages. Although the state court found in favor of Lapin and ordered the contract rescinded and restitution, it made no specific findings with respect to any of the causes of action. The bankruptcy court determined the lack of such findings precluded Lapin from establishing fraud under the doctrine of issue preclusion.

Lapin nevertheless maintains that, taken as a whole, the state court's findings sufficiently address each element of his fraud claim. Debtors argue that the absence of specific fraud findings prevent the judgment from having preclusive effect here. Debtors also argue that issue preclusion does not apply because the elements of fraud in Nevada are not the same as those which must be proven under § 523(a).

The elements for fraudulent representation in Nevada are: (1) a false representation made by the defendant; (2) knowledge or belief on the part of the defendant that the representation is false; (3) an intention to induce the plaintiff to act or to refrain from acting in reliance on the misrepresentation; (4)

justifiable reliance upon the representation on the part of the plaintiff in taking action or refraining from it; and, (5) damage to the plaintiff, resulting from such reliance. Anderson v. Reynolds, 588 F.Supp. 814, 818 (D. Nev. 1984) (citing Lubbe v. Barbe, 91 Nev. 596, 599 (1975)).

Contrary to Debtors' contention, the elements of § 523(a)(2)(A) mirror the elements of common law fraud and match those for fraudulent misrepresentation under Nevada law. Younie v. Gonya (In re Younie), 211 B.R. 367, 373-74 (9th Cir. BAP 1997). Additionally, the standard of proof for dischargeability exceptions under § 523(a) is the preponderance-of-the-evidence standard, the same standard applied by the state court in deciding the issues before it. Grogan, 498 U.S. at 289.

In holding that the state court judgment did not make findings sufficient to invoke issue preclusion, the bankruptcy court stated,

> In this case, the state court did not make all the findings that are necessary for fraud which is a statement made with intent to deceive upon which the plaintiff reasonably relied, justifiably relied, and which caused damage and harm.
>
> Here, the state court talked in terms at one point of an inadvertent statement, and it waffled as to who made the statement.

Transcript of Proceedings, July 14, 2004, 3:21-4:11.

We agree that the state court's ruling did not make explicit findings with respect to each element of fraud. As to the first element, the state court found that Butto misrepresented to Lapin that CTA's income was approximately $100,000 per year, with commissions of $8,000 per month. The court also ruled that Lapin

relied on the misrepresentation which resulted in damages to him, satisfying the fourth and fifth elements. With respect to reliance, the court did not indicate that Lapin's reliance on Butto's misrepresentation was anything other than justifiable.[6]

The second and third elements, those concerning Butto's intent and scienter, are less straightforward because the state court's findings are not as clear with respect to those issues.

"[A]n intent to deceive may logically be inferred from a false representation which the debtor knows or should know will induce another" to act or refrain from acting.[7] In re Kimzey, 761 F.2d 421, 423 (7th Cir. 1985); see also, Engalla v. Permanente Medical Group, Inc., 15 Cal. 4th 951, 974 (1997) (citing Yellow Creek Logging Corp. v. Dare, 216 Cal. App. 2d 50, 55 (Cal. Ct. App. 1963)("[F]alse representations made recklessly

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[6] In Nevada, a plaintiff need not show reliance where the false representation is grounds for rescission of a contract. Pacific Maxon, Inc. v. Wilson, 96 Nev. 867, 870 (1980). However, reliance is required to prevail on a § 523(a) claim. For application of § 523(a)(2)(A), a creditor's reliance need be only justifiable, not reasonable. Apte v. Japra (In Re Apte), 96 F.3d 1319, 1322 (9th Cir. 1996) (citing Field v. Mans, 116 S. Ct. 437, 446 (1995)). "[A] person is justified in relying on a representation of fact 'although he might have ascertained the falsity of the representation had he made an investigation.'" Field, 116 S. Ct. at 444 (quoting the Restatement (Second) of Torts (1976) § 540). "Although one cannot close his eyes and blindly rely, mere negligence in failing to discover an intentional misrepresentation is no defense to fraud." In re Apte, 180 B.R. 223, 229 (9th Cir. BAP 1995).

[7] Similarly, under § 523(a)(2)(A) the "[i]ntent to deceive . . . can be inferred and established from the surrounding circumstances." Alexander & Alexander of Washington, Inc. v. Hultquist (In re Hultquist), 101 B.R. 180, 183 (9th Cir. BAP 1989).

and without regard for their truth in order to induce action by another are the equivalent of misrepresentations knowingly and intentionally uttered.”)). We find that the element of “intent” was not satisfied by the state court’s findings.

“Where a person makes statements which he does not believe to be true, in a reckless manner without knowing whether they are true or false, the element of scienter is satisfied and he is liable for intentional misrepresentation.”[8] Yellow Creek, 216 Cal. App. 2d at 57. Quoting Wishnick v. Frye, 111 Cal. App. 2d 926, 930 (Cal. Ct. App. 1952), the court in Yellow Creek held that “[i]n order to satisfy the requirement of scienter, it may be established either that defendant had actual knowledge of the untruth of his statements, or that he lacked an honest belief in their truth, or that the statements were carelessly or recklessly made, in a manner not warranted by the information available to defendant.” Id. The fact that the court’s findings did not state in so many words that the misrepresentations were made “recklessly” is of little import because, the court held, recklessness can be reasonably concluded from the substance of the court’s findings. Id.

As in Yellow Creek, the state court’s findings here are general in nature and unclear in parts. However, unlike Yellow Creek, the state court here stated that Lapin was told “by Carl

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[8] Because there is little Nevada case law discussing what proof is needed to show scienter and intent to deceive in fraudulent misrepresentation cases, we look to other jurisdictions. See, Schnelling v. Budd (In re Agribiotech, Inc.), 291 F. Supp. 2d 1186, 1190 (D. Nev. 2003).

Butto directly or inadvertently that the income of CTA was approximately $8,000 a month." (Emphasis added.) Such a finding precludes a finding that Butto "had actual knowledge of the untruth of his statements, or that he lacked an honest belief in their truth, or that the statements were carelessly or recklessly made, in a manner not warranted by the information available to defendant." Id. The court's findings are not sufficient to support the conclusion that Butto either had actual knowledge of the untruth of his statement, or lacked an honest belief in its truth, or that the statement was carelessly or recklessly made, in a manner not warranted by the information available to Butto. Id. Therefore, we find that the scienter element of Lapin's fraud claim was not met.

The absence of explicit "intent" and "scienter" findings is fatal to establishing Lapin's fraud claim through issue preclusion. As the state court did not necessarily determine the issue of fraud in favor of Lapin, the court did not err in holding that the state court judgment should not be given preclusive effect in Lapin's adversary proceeding with respect to his § 523(a)(2)(A) claim.

B. **Lapin's debt is not excepted from discharge under §§ 523(a)(2) or 523(a)(6).**

After trial, the court held that "the allegedly fraudulent statement - that is that the commissions were $8,000 - are statements [sic] which relate to the debtors' financial condition, and those statements were oral. Accordingly, they would not come within (a)(2)."

The court also found that Butto did not make the oral statement that CTA had commissions of $8,000 per month, but if he did make the statement, he did not do so with the intent to deceive Lapin, and, Lapin was not justified in relying on the statement. Therefore, the court held, Lapin did not prove by a preponderance of the evidence that Butto committed fraud with respect to the sale of the business and, particularly, the representations concerning the commissions.

1. Section 523(a)(2)

Lapin argues that the court's finding that Butto did not make the misrepresentation is contrary to overwhelming evidence that Butto mistated CTA's income, including Lapin's testimony and the documents Lapin testified were provided him by Butto. There is little to analyze by way of findings because the court simply found Butto's testimony to be credible, with no discussion of its reasoning.[9] The court also found that Lapin failed to show that he justifiably relied on Butto's statements "because he was given a financial statement which did not contain those provisions" (presumably referring to the income statement).

Whether Butto made the misrepresentation and whether a party's reliance is reasonable are questions of fact." Candland

[9] According to the transcript, the court transposed the parties' names in several places. For example, it states: "But I find Mr. Lapin's (sic) testimony to be credible, and that he did not make the oral statement the commissions were $8,000." Transcript of Proceedings, July 14, 2004, 4:21-5:10. Lapin contends that this indicates the court intended to find Lapin's testimony credible, rather than Buttos. A full reading of the transcript, however, makes clear that it was a either a transcription error or an inadvertent error of the court.

v. Insurance Co. of North America (In re Candland), 90 F.3d 1466 (9th Cir. 1996) (citing In re Lansford, 822 F.2d 902, 904 (9th Cir. 1987)). We must accept the court's findings of fact unless we are left with the definite and firm conviction that a mistake has been committed. Comm. for Idaho's High Desert, Inc. v. Yost, 92 F.3d 814, 819 (9th Cir. 1996).

Reviewing the record in its entirety, we find that the court's account of the evidence is plausible. While we may have weighed the evidence differently, we are not left with the firm and definite conviction that a mistake has been committed. The court found Butto's testimony to be more credible that Lapin's. It is within the court's mandate, as trier of fact, to weigh the credibility of witnesses. The state court, which reluctantly reached the opposite conclusion, considered additional evidence that was not presented here, including testimony and argument by the Brokers.

Section 523(a)(2)(B) requires that a false statement "respecting the debtor's or an insider's financial condition" be in writing before a debt arising from the statement can be excepted from discharge. CTA was an insider of Butto. So, while the court erred in stating that the statement was with respect to the "debtor's" financial condition, it ultimately was correct that the statement had to be in writing because it concerned the financial condition of an insider. Therefore, we find no error with the court's ruling on the § 523(a)(2) claim.

2. Section 523(a)(6)

The court did not specifically address Lapin's § 523(a)(6)

exception, other than to find that he had not proven Butto's statements were made with fraudulent intent. Lapin argues on appeal that this was error because the evidence showed that Butto's conduct was willful since he deliberately and intentionally told Lapin that the commissions were income and provided certain income figures to the business brokers in response to Lapin's inquiry. Lapin also argues that Butto has never claimed that either the written or oral representations were accidental or mistakenly quoted figures. We disagree.

Section 523(a)(6) essentially precludes a debtor from obtaining a discharge of an obligation based on a claim arising out of the debtor's tortious misconduct, when that misconduct results in harm to another's person or property. In re Jercich, 238 F.3d 1202, 1206 (9th Cir. 2001).

Because the court did not err in finding that Lapin failed to prove that Butto made any misrepresentations, and no other tortious conduct by Butto was alleged or proven, there would have been no basis for granting Lapin relief under § 523(a)(6).

3. Evidentiary Objections

Lapin argues, very briefly, that the court abused its discretion by excluding, as hearsay evidence, Lapin's testimony regarding information he received from Butto's real estate agent. According to Lapin, he should have been allowed to testify about Butto's statements to the Brokers because such evidence is an admission by a party-opponent and therefore falls within the Fed.

R. Evid. ("FRE") 801(d) exception to the hearsay rule.[10] We disagree.

The court sustained Debtors' objection to the testimony because Lapin testified that he never discussed the subject of commissions with Debtors' broker. Butto testified that he never had any discussion with anyone – including his broker – about the commissions. There was no cross examination testimony of Butto in the record impeaching Butto's testimony. There was no testimony from the Brokers at trial. There was absolutely no foundation laid for Lapin to testify as to what Butto told his broker, or that any such statement would fall into the admission of a party-opponent exception to the hearsay rule. In addition, it does not appear that Lapin ever made an offer of proof with respect to the alleged admission.

The court did not abuse its discretion in excluding the testimony.

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[10] Under FRE Rule 801(d)(2), a statement is not hearsay if it is offered against a party and is (A) the party's own statement in either an individual or a representative capacity or (B) a statement of which the party has manifested an adoption or belief in its truth, or (C) a statement by a person authorized by the party to make a statement concerning the subject, or (D) a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship, or (E) a statement by a coconspirator of a party during the course and in furtherance of the conspiracy. The contents of the statement shall be considered but are not alone sufficient to establish the declarant's authority under subdivision (C), the agency or employment relationship and scope thereof under subdivision (D), or the existence of the conspiracy and the participation therein of the declarant and the party against whom the statement is offered under subdivision (E).

CONCLUSION

Based on the foregoing, we AFFIRM.