NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL

OF THE NINTH CIRCUIT

In re:	BAP No. CC-04-1628-MaMoB
SHAHRAM MESBAHI, aka SHAWN MESBAHI,	Bk. No. LA-03-39268-TD
Debtor.	Adv. No. LA-04-01407-TD
KHANBABA BANAYAN; PARIROKH BANAYAN,	
Appellants,	
v.	**M E M O R A N D U M**[1]
SHAHRAM MESBAHI,	
Appellee.	

Argued and Submitted on June 22, 2005
at Pasadena, California

Filed - October 28, 2005

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

Honorable Thomas B. Donovan, Bankruptcy Judge, Presiding.

Before: Marlar, Montali and Brandt, Bankruptcy Judges.

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

INTRODUCTION

This appeal stems from a judgment in favor of the debtor in a nondischargeability proceeding. The plaintiffs, Khanbaba Banayan ("Banayan") and Parirokh Banayan (together "Appellants"), had invested in a limited partnership with the debtor for the purpose of developing real estate. They never saw any return on this investment, and obtained a state court default judgment against the debtor for $1,264,166.67.

After the debtor filed for bankruptcy protection, Appellants sought to except this debt from discharge based on theories of fraud, embezzlement or conversion, but the bankruptcy court concluded that such conduct was not proven by a preponderance of the evidence.[2] Significantly, it found that Appellants had consented to the limited partnership's use of their money and had freely accepted substitute security.

On appeal, Appellants contend that the bankruptcy court's findings were: (1) based on inadmissible evidence resulting from the court's improper interrogation of a witness; (2) insufficient for appellate review; and (3) clearly erroneous. They also contend that Debtor was guilty of defalcation by a fiduciary and conversion.[3]

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[2] Appellants did not assert collateral estoppel, i.e., that relitigation of the issues was precluded by virtue of the default judgment. That issue is therefore deemed waived. Branham v. Crowder (In re Branham), 226 B.R. 45, 55 (9th Cir. BAP 1998), aff'd mem., 205 F.3d 1350 (9th Cir. 1999).

[3] Appellants have also filed a notice of possible mootness because there is an adversary proceeding to revoke Debtor's discharge set for trial on October 24, 2005. As that matter is still pending, we do not need to act on the mootness issue.

We conclude that the record is sufficient for review. Nor do we find an abuse of discretion in the bankruptcy court's evidentiary rulings, clearly erroneous factual findings, or incorrect legal conclusions. Therefore, we AFFIRM.

FACTS

Shahram Mesbahi ("Debtor") is a mechanical engineer who, in the late 1980's, owned and operated a construction company. Debtor met real estate developer Truman Shenassa ("Shenassa"), who asked him to become president and shareholder of Shenassa's California corporations known as American Dream Homes, Inc. ("American Dream Homes") and T.S. Investments, Inc. ("T.S. Investments"). Debtor purportedly became the 15 percent owner, while Shenassa owned 85 percent, of each corporation.[4]

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[4] Appellants have conceded that Shenassa was the controlling shareholder of both T.S. Investments and American Dream Homes. In fact, in 1995, Appellants obtained a default judgment of nondischargeability against Shenassa, in his bankruptcy case, in the amount of their original investment into the limited partnership with American Dream Homes ($425,000).

However, the record evidence of Shenassa's interest is inconsistent and unclear. The corporate certificate of T.S. Investments (plaintiffs' exhibit "P") shows that Debtor is the sole director and officer. There is no corporate certificate for American Dream Homes. Debtor explained it this way, at trial:

> MR. MESBAHI: Yes. For the reason that TS Investments or American Dream Homes was 100 percent in my name, because Mr. Shenassa, as Mr. Banayan knows, had some problems because he had a factory of North Hollywood Marble Company and he had some — he had closed that company. And he wanted me — because I had good credit, he wanted all the two corporations to be 100 percent under my name so I can apply for construction loans for different properties. Actually, in reality, I was 15 percent of the company. Mr. Banayan knows that fact and he was 85 percent. But on paper, it was 100 percent my name.

Tr. of Proceedings (Nov. 15, 2004), p. 22:6-16.

Banayan was a personal friend of Shenassa's, and through him he met Debtor. Banayan and Shenassa discussed the purchase and development of a parcel of real estate in Beverly Hills, California ("Beverly Hills Property"). The extent of Debtor's role in these discussions was disputed. Debtor testified that he was merely present when Shenassa and Banayan discussed the possibility of Appellants' investment, whereas Banayan testified that Debtor and Shenassa encouraged him to invest in the project. Banayan testified that Debtor and Shenassa told him that his investment would be fully secured, because title would be taken in Appellants' names, but Debtor denied having said that.

In any event, in November, 1988, Banayan, alleging that he relied on the representation that his investment would be 100% secured, paid a $25,000 deposit into escrow and agreed to fund the project through a new limited partnership with American Dream Homes.

On February 6, 1989, Banayan and Debtor, acting as president of American Dream Homes, executed the limited partnership agreement ("Agreement") for the "Limited Partnership of 1330 Beverly Estate" ("Limited Partnership"). The purpose of the Limited Partnership was the purchase and development of the Beverly Hills Property. Banayan was to be the sole limited partner, with a 49 percent interest, and American Dream Homes was to be the sole general partner, with a 51% interest. Banayan agreed to loan American Dream Homes $196,350, to invest $188,650 on behalf of his limited partner interest, and to loan $50,000 to the Limited Partnership.

The Agreement did not state who would hold title to the

Beverly Hills Property once it was purchased by the Limited Partnership. At signing, Banayan paid $360,000 into escrow for the purchase of the Beverly Hills Property. Debtor then purchased the Beverly Hills Property, but put title into American Dream Homes' name, not that of the Limited Partnership or Appellants.

On March 7, 1989, Banayan paid $20,000 to American Dream Homes, in partial payment of the $50,000 loan, in accordance with the terms of the Agreement.

In or about March, 1989, Appellants realized that the Beverly Hills Property was owned by American Dream Homes and that there were no documents securing their investment. Debtor, therefore, agreed to sign an "Acknowledgement" [sic], purportedly in March, 1989, which stated, in pertinent part:

> 1. The title of the property located at 1330 Beverly Estate, Beverly Hills, California (the "Property") has been taken under American Dream Homes ("ADH") name. The total purchase money for the Property has been paid by Khanbaba Banayan ("Banayan"), the limited partner of 1330 Beverly Estate, a Limited Partnership, dated February 6, 1989, (the "Partnership"), under the terms of the Partnership Agreement which is incorporated herein with this reference. ADH hereby acknowledges that ADH is holding the title of the Property for the benefit of the Partnership.
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> 2. ADH shall transfer and convey the title of the Property to the Partnership under the terms of such Partnership Agreement not later than May 31, 1989.
>
> 3. Notwithstanding the language contained in paragraph 2 above, Banayan shall have the right to demand ADH, at any time, to immediately transfer and convey the title of the Property to the Partnership upon written demand by Banayan.

Acknowledgement [sic] (undated).

On March 24, 1989, unbeknownst to Banayan, Debtor, as president of American Dream Homes, borrowed $187,000 against the Beverly Hills Property, and recorded a first deed of trust in

favor of the lender. Then, on April 24, 1989, without Banayan's knowledge, Debtor transferred the Beverly Hills Property to T.S. Investments.

Meanwhile, Banayan paid another $20,000 of the loan to American Dream Homes on May 5, 1989. By that time, Appellants had invested a total of $425,000.

Then Banayan learned, allegedly from both Debtor and Shenassa, that there was a building moratorium on the Beverly Hills Property. In August, 1989, Banayan accepted substitute security in another of American Dream Homes' properties, located in Lancaster, California (the "Lancaster Property"). Debtor, as president of American Dream Homes, signed a promissory note in favor of Appellants in the amount of $713,150, and he also signed and recorded a deed of trust to secure the note. The note stated that it might be in second priority to a construction loan, while the deed of trust, as actually recorded, indicated that it was one of five deeds of trust on the property that were all deemed to be second deeds of trust of equal priority. Banayan testified that he believed his investment was secured and that he was deceived by Debtor and Shenassa, who prepared the security documents. Nevertheless, in January 1990, Banayan accepted another promissory note and deed of trust from Debtor, on behalf of American Dream Homes, in the amount of $211,850, which was also secured by the Lancaster Property. This deed of trust was not recorded.

Banayan also requested and accepted Shenassa's personal guarantee of a $925,000 debt of American Dream Homes to Banayan, as well as Debtor's personal guaranty of Shenassa's performance. However, the evidence presented in bankruptcy court was only of a

total $425,000 investment debt. See Tr. of Proceedings (Nov. 18, 2004), p. 12:1-7.

Around 1992, Banayan allegedly discovered the facts concerning the $187,000 loan, and the lack of security, after he obtained separate counsel. (Prior to that time, Banayan had shared the same attorney with Shenassa, Debtor and their corporations.)

In 1992, Appellants filed a complaint against Shenassa, Debtor, and others, in state court.[5] On August 2, 1996, a default judgment was entered against Debtor in the sum of $1,264,166.67.

Debtor filed the instant chapter 7[6] bankruptcy case on November 14, 2003. On his schedule of unsecured creditors, he listed a $2,250,000 disputed debt to Appellants. In January, 2004, the chapter 7 trustee filed a no-asset report.

In February, 2004, Appellants filed a complaint to determine the debt nondischargeable pursuant to § 523(a)(2)(A) (fraud, false pretenses, false representation or actual fraud), § 523(a)(4) (embezzlement), and § 523(a)(6) (conversion). Appellants alleged that Debtor and Shenassa had defrauded them, breached their fiduciary duties to the Limited Partnership, and misappropriated or converted their money. Debtor denied the allegations, and pleaded the affirmative defense of consent by Banayan.

Both sides filed declarations. Although Appellants filed a

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[5] By separate order, the panel has denied Appellants' request for judicial notice of the underlying complaint and other papers that were not presented to the bankruptcy court.

[6] Unless otherwise indicated, "chapter" and "section" references are to the pre-amended Bankruptcy Code, 11 U.S.C. §§ 101-1330.

copy of the state court default judgment against Debtor, they did not argue that it was issue preclusive, nor did they attach a copy of the underlying state court complaint.

Appellants filed numerous written objections to Debtor's declaration, which were ruled upon by the bankruptcy court at the November 15, 2004 trial. Both Debtor and Banayan were cross-examined on their declarations. In addition, the bankruptcy court interrogated Debtor. The bankruptcy court continued the trial to November 18, 2004, at which time it made a 19-page record of its oral findings of fact and conclusions of law ("FFCL"). The pertinent findings (quoted and/or paraphrased) were:

- The state court default judgment was silent as to any theories of recovery, and was therefore deemed to be a simple judgment for breach of contract.

FFCL at 1:22-25 to 2:1-4.

- Debtor's testimony was more credible that he neither took part in the negotiations with Banayan nor made assurances to Banayan. The court ruled:

> "The testimony reflects that [Debtor] was the building person. Mr. Shenassa handled business arrangements, handled negotiations, handled legal matters, in my parlance."
>
> . . . .
>
> "[Debtor's] testimony was clear that his involvement was as a builder, as a supervisor of the building activity, as superintendent of the Lancaster project, as the jobsite guy, not the business guy, not the documents guy, that all of that was done by Mr. Shenassa."

Id. at 8:3-5; 16:7-11.

- Banayan's testimony was "unclear and unconvincing" and did not meet the preponderance of the evidence standard. The court ruled:

> "There is much that is murky in the evidence. Much

> of the murkiness comes from Mr. Banayan's testimony on the witness stand. Some of it comes from Mr. Banayan's hostility to questions on the witness stand and his propensity to be argumentative and to not give straightforward, clear-cut answers to questions that call for simple factual answers, but rather Mr. Banayan's tendency was to express matters in a conclusory fashion that were consistent with a complaint and written declaration that were quite obviously prepared by someone else, most likely prepared by lawyers."

Id. at 15:3-14.

- Banayan was not "forced" to accept the new notes and deeds of trust on the Lancaster Property, in 1990, but willingly contracted to accept the substitute security and guaranties in lieu of the Beverly Hills Property. In 1989, Banayan had contract enforcement rights, including the right to demand that the Beverly Hills Property be transferred to him or the Limited Partnership. He was represented by counsel at all relevant times, yet he did not make such a demand and failed to investigate the status of his collateral or his security documents. He conceded that there was a moratorium on building on the Beverly Hills Property, and Banayan willingly accepted the notes and deeds of trust on the Lancaster Property. Banayan was a frequent visitor to the Lancaster project and was interested in its progress. Moreover, there is a lack of evidence on the actual outcome of the two real estate projects. The court ruled:

> > "I conclude that the agreements were consensual and that there was mutual consent and that it was Mr. Banayan's part of the agreement that he would be covered by notes and deeds of trust representing [$]925,000 as of January 1990 in return for what is the only evidence in the record of any investment on Mr. Mesbahi's [sic] [Banayan's] part of $425,000."

Id. at 9:9; 12:1-6 (alterations added).

The bankruptcy court concluded that there was insufficient evidence of fraud or embezzlement by Debtor.[7] Its judgment in

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[7] Appellants have not challenged the bankruptcy court's judgment that the evidence did not support embezzlement under § 523(a)(4). Therefore, they have abandoned this issue by failing to argue it on appeal. See Branam, 226 B.R. at 55.

(continued...)

favor of Debtor and dismissing the complaint was entered on December 6, 2004, and was timely appealed.

ISSUES

1. Whether the bankruptcy court improperly elicited inadmissible testimony during its examination of Debtor.

2. Whether the bankruptcy court committed reversible error by not entering written findings of fact and conclusions of law.

3. Whether the bankruptcy court findings were clearly erroneous, and whether Appellants established the elements of a nondischargeable debt for fraud under § 523(a)(2)(A).

4. Whether Debtor was a "fiduciary" within the meaning of § 523(a)(4) in order to establish the elements of a

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[7](...continued)
Instead, Appellants have attempted to assert a new theory of recovery under § 523(a)(4), viz., defalcation by a fiduciary. This allegation was never made, per se, in bankruptcy court, nor did the bankruptcy court make any findings or conclusions on that theory. Therefore, this issue also may be considered waived. Nevertheless, the allegations, pleadings and factual record may support a discretionary review of this issue. A workable standard is that the argument must have been raised sufficiently for the trial court to have ruled on it. See Franchise Tax Bd. v. Roberts (In re Roberts), 175 B.R. 339, 345 (9th Cir. BAP 1994) (panel may consent to consider a pure question of law when the pertinent record has been fully developed.) Therefore, we will address the fiduciary defalcation issue.

nondischargeable debt for a defalcation by a fiduciary under § 523(a)(4).

5. Whether the evidence supported nondischargeability for a willful and malicious injury under § 523(a)(6).

STANDARDS OF REVIEW

The bankruptcy court's evidentiary rulings are reviewed for an abuse of discretion. Ardmor Vending Co. v. Kim (In re Kim), 130 F.3d 863, 865 (9th Cir. 1997).

The bankruptcy court's findings of fact are reviewed under the clearly erroneous standard, while its conclusions of law are reviewed de novo. Medley v. Ellis (In re Medley), 214 B.R. 607, 610 (9th Cir. BAP 1997). A finding of fact is clearly erroneous if, after reviewing the record, the panel is left with a definite and firm conviction that error has been committed. Flegel v. Burt & Assocs., P.C. (In re Kallmeyer), 242 B.R. 492, 495 (9th Cir. BAP 1999). We must be "especially reluctant" to set aside a finding based on the bankruptcy court's evaluation of conflicting testimony. Beech Aircraft Corp. v. United States, 51 F.3d 834, 838 (9th Cir. 1995); Fed. R. Bankr. P. 8013 ("[D]ue regard shall be given to the opportunity of the bankruptcy court to judge the credibility of the witnesses."). The deference due the bankruptcy court is also given to inferences drawn by the court. Beech Aircraft Corp., 51 F.3d at 838.

The existence of fraudulent intent--an element of § 523(a)(2)(A)--is a question of fact, which is reviewed for clear

error. Tustin Thrift & Loan Ass'n v. Maldonado (In re Maldonado), 228 B.R. 735, 737 (9th Cir. BAP 1999). Whether a person is a "fiduciary" within the meaning of § 523(a)(4) is a question of federal law, which we review de novo. Blyler v. Hemmeter (In re Hemmeter), 242 F.3d 1186, 1189 (9th Cir. 2001). Whether a particular type of debt is nondischargeable as a willful and malicious injury under § 523(a)(6) is also reviewed de novo. See Su v. Carrillo (In re Su), 259 B.R. 909, 912 (9th Cir. BAP 2001), aff'd, 290 F.3d 1140 (9th Cir. 2002).

DISCUSSION

A. Court's Interrogation was not an Abuse of Discretion

Under Federal Rule of Evidence ("FRE") 614, a bankruptcy court may call and interrogate a witness during trial. FRE 614(b). "In court trials, in bankruptcy proceedings, the trial judges, as the triers of fact, often take an active role in the questioning of witnesses." Hon. Barry Russell, Bankruptcy Evidence Manual, § 614.2, p. 991 (West 2004). "The court may ask questions of a witness to bring out needed facts not elicited by the parties or to clarify those facts to which the witness has already testified." Id.

Appellants maintain that the bankruptcy court exceeded the scope of cross-examination and elicited testimony that had been stricken by its own ruling on their evidentiary objections to Debtor's declaration.

Having made such charges, Appellants fail to provide the

specific examples of offending testimony. We are not obligated to search the record for error. Friedman v. Sheila Plotsky Brokers, Inc. (In re Friedman), 126 B.R. 63, 68 (9th Cir. BAP 1991). Nevertheless, our own review of the trial proceedings, which follows, does not support Appellants' contentions.

The bankruptcy court's trial setting order stated that testimony was to be presented through declarations and the only oral testimony at trial that could be offered would be rebuttal testimony. The order further stated that "a witness may be cross-examined only as to those matters set forth in the witness' declaration." Trial Setting Order (Oct. 7, 2004), p. 2, ¶ 1(h).

At trial, the bankruptcy court recalled Debtor to the witness stand immediately after Banayan's counsel had cross-examined him as to his declaration testimony. In doing so, it was well aware of its responsibilities, and stated:

> THE COURT: Under our rules, I have a right and sometimes the duty to ask questions of witnesses. . . . My questions are not designed to help either side. They are simply designed to help me understand what the evidence is so that I can come to a fair result in this matter. . . .
>
> I'm referring to your written declaration now, Mr. Mesbahi.
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> . . . .
>
> I've sustained some of [opposing counsel's] objections to that. . . .
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> . . . .
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> Wherever I sustain an objection, testimony is stricken. It's not part of the evidence before me.
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> . . . .
>
> Wherever I sustained an objection, I can't take that testimony into account in arriving at my decision here. I have some questions based on what you said in light of [opposing

counsel's] objections. . . .

Tr. of Proceedings (Nov. 15, 2004), pp. 34:2 to 35:1.

Debtor declared, in admissible testimony, that "Mr. Banayan's statement that I approached and induced him to invest in purchasing the Beverly Estate property is totally false." Decl. of Debtor, (Oct. 23, 2004), p. 3, ¶ 11. In cross-examination to that statement, the bankruptcy court elicited the following admissible testimony:

> THE COURT: How did you learn of Mr. Banayan's desires to invest? Did you learn that through Mr. Banayan or did you learn that through Mr. Shenassa?
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> MR. MESBAHI: Through Mr. Shenassa.
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> THE COURT: Having learned of it from Mr. Shenassa, did you also talk about that subject directly with Mr. Banayan?
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> MR. MESBAHI: No, I didn't.
>
> THE COURT: You never did?
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> MR. MESBAHI: I never did. Sometimes when he was in the office with Mr. Shenassa and his attorney, Mr. Azadegan, I was present and I would listen to their conversation. . . .

Tr. of Proceedings (Nov. 15, 2004), pp. 38:19 to 39:6.

Debtor also declared, in admissible testimony, that: "I never told Mr. Banayan that your investment was '100% secured'" . . . ." Decl. of Debtor, supra, at 3, ¶ 13. He further declared, in testimony that was not stricken, concerning the notes and deeds of trust on the Lancaster Property:

> I signed as the president of American Dream Home two Promissory Notes and deeds of trust one for $713,150.00 and another at a later date in the sum of $211,850.00 on Lancaster property which was purchased for $2.2 Million Dollars. I had no intention at any time to deceive Mr. Banayan or his wife, and I did not gain any money or benefits from their investment.

Id. at 4, ¶ 17.

At trial, the court questioned Debtor further in regards to this testimony:

> THE COURT: Okay. Mr. Banayan said that he was told that this investment was 100 percent secured. Did you ever tell him that?
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> MR. MESBAHI: I never told him the investment is 100 percent secure.
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> THE COURT: Did you ever suggest to him that it was secure?
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> MR. MESBAHI: I never suggested — I never talked to him about the investment or security.
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> THE COURT: Did you ever talk to him about the [deed of] trust that he was given with respect to Lancaster?
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> MR. MESBAHI: No, I never talked to him about deed [sic] of trust that's given to him for Lancaster. All the negotiation was with Mr. Shenassa.

Tr. of Proceedings, (Nov. 15, 2004), pp. 41:17 to 42:5.

Therefore, the record does not support Appellants' contention that the bankruptcy court exceeded the scope of the cross-examination or elicited inadmissible testimony from Debtor.

In addition, FRE 614(c) provides that, in a bench trial, any objections to the court's calling or interrogation of a witness must be made at the time it occurs. Here, Banayan's counsel did not object to the above-quoted testimony and therefore, any objections have been waived.

B. Oral FFCL Were Proper and Sufficient

Appellants also contend that the bankruptcy court committed reversible error by failing to enter written findings of fact and conclusions of law. Alternatively, they argue that it abused its

discretion by failing to require Debtor to file a trial brief and proposed findings and conclusions, in accordance with the court's trial setting order.

Appellants answer their own objection when they cite legal authorities for the rule that a trial court may make oral findings and conclusions on the record if they provide a "clear and complete understanding for the basis of the ruling." Appellants' Opening Brief, (Mar. 21, 2005), p. 18:15-20 (quoting Collier on Bankruptcy Rules (2002 Pamphlet Ed.), Cmts. on Rule 7052, at 557, and citing Leavitt v. Soto (In re Leavitt), 171 F.3d 1219 (9th Cir. 1999)). In Leavitt, the Ninth Circuit Court of Appeals held:

> The standard for adequacy of factual findings in the Ninth Circuit is "whether they are explicit enough on the ultimate issues to give the appellate court a clear understanding of the basis of the decision and to enable it to determine the grounds on which the trial court reached its decision."

Id. at 1223 (citation omitted).

Here, at the November 18, 2004 continued trial, the bankruptcy court expressly stated that it was giving its oral findings of fact and conclusions of law on the record. It then proceeded to make detailed and comprehensive findings and conclusions, drawn from the evidence, on the issues of nondischargeable fraud and embezzlement, which take 18 pages of transcript.

Appellants maintain that the harm caused by such alleged abuse was an unclear appellate record. We have found, herein, that the court's oral findings and conclusions meet the clarity

requirements of Rule 7052(a).[8] Therefore, no harm has resulted.

Finally, Appellants maintain that the bankruptcy court abused its discretion in the proceeding by failing to adhere to its pretrial orders which required Debtor to file proposed findings of fact and conclusions of law, in accordance with the Local Bankruptcy 7052-1(a). This rule provides:

> In all cases where written findings of fact and conclusions of law are required under F.R.B.P. 7052 or 7065, or as otherwise required by the court, the attorney for the prevailing party shall within 7 court days of the date of the hearing at which the oral findings and conclusions were rendered, lodge proposed findings of fact and conclusions of law.

Cent. Dist. of Cal. LBR 7052-1(a).

The bankruptcy court has broad discretion to apply its local rules. See Katz v. Pike (In re Pike), 243 B.R. 66, 69 (9th Cir. BAP 1999). Moreover, it had discretion to excuse the pro se Debtor/defendant from adherence to its requirements. If the court saw fit to craft its own findings and conclusions, and to present them orally, in accordance with Rule 7052, that was not an abuse of discretion.

C. Fraud was not Established Pursuant to § 523(a)(2)(A)

Section 523(a)(2)(A) excepts from discharge any debt for money, property, services, or an extension, renewal, or refinancing of credit, to the extent obtained by false pretenses,

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[8] Rule 7052(a) states, in pertinent part: "It will be sufficient if the findings of fact and conclusions of law are stated orally and recorded in open court following the close of evidence or appear in an opinion or memorandum of decision filed by the court." Fed. R. Bankr. P. 7052(a).

a false representation,[9] or actual fraud. Fraudulent nondisclosure by a person under a duty to disclose also amounts to actual fraud under this section. See Tallant v. Kaufman (In re Tallant), 218 B.R. 58, 65 (9th Cir. BAP 1998).

A creditor must establish the elements of a § 523 action by a preponderance of the evidence. See Grogan v. Garner, 498 U.S. 279, 287 (1991). To satisfy the requirements of § 523(a)(2)(A), a creditor must establish:

> (1) that the debtor made a representation;
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> (2) the debtor knew at the time the representation was false;
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> (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.

Apte v. Japra (In re Apte), 96 F.3d 1319, 1322 (9th Cir. 1996) (citations omitted).

"[F]raudulent intent may be established by circumstantial evidence or by inferences drawn from his or her course of conduct." Fogel Legware of Switzerland, Inc. v. Wills (In re Wills), 243 B.R. 58, 62 (9th Cir. BAP 1999).

Appellants contend that Debtor persuaded Banayan to invest in

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[9] "A false representation is an express misrepresentation, while a false pretense refers to an implied misrepresentation or 'conduct intended to create and foster a false impression.'" Nat'l Bank of N. Am. v. Newmark (In re Newmark), 20 B.R. 842, 854 (Bankr. E.D.N.Y. 1982) (quoting H.C. Prange Co. v. Schnore (In re Schnore), 13 B.R. 249, 251 (Bankr. W.D. Wis. 1981)). The "conceptual difficulty attending such a fine differentiation," however, leads courts to typically ignore the negligible difference between the two phrases. Newmark, 20 B.R. at 854.

the Beverly Hills Property and misrepresented that his investment would be 100 percent secured. However, the bankruptcy court believed the testimony of Debtor, who said that he never told Banayan that, nor did he engage in negotiations with Banayan.

The record supports the court's finding. In particular, when the bankruptcy court interrogated Banayan, he did not answer clearly that Debtor had ever talked to him alone about the Beverly Hills Property, but rather, said that Shenassa was always present. See Tr. of Proceedings (Nov. 15, 2004), p. 56-57.

Appellants also contend that Debtor falsely represented that their investment would be secured by the Lancaster Property. Appellants contend that the documents themselves are proof that Debtor was the "document guy" because he signed all of them on behalf of American Dream Homes. Thus, they contend that Debtor impliedly represented a false sense of security.

The court found that Debtor was not the negotiator or "documents guy." The evidence supports that finding. Debtor testified that he never talked to Banayan about the Lancaster Property and the negotiation for that project was also between Banayan and Shenassa. Debtor did not prepare the documents, but merely signed them on behalf of the general partner.

Appellants further contend that Debtor failed to disclose important information such as the $187,000 loan which he took against the Beverly Hills Property, and the transfer of the property to T.S. Investments, in lieu of his promise, in the Acknowledgment, to transfer the property to the Limited Partnership by a date certain. They maintain that Debtor's failure to disclose resulted in Banayan's further investment.

Furthermore, Appellants contend that the evidence showed that Debtor benefitted from his allegedly fraudulent acts, including the use of the $187,000 loan and the transfer of the Beverly Hills Property to T.S. Investments.

Debtor testified that American Dream Homes was involved in two real estate projects for which land purchases and construction loans were required. The undisputed evidence further revealed that there was a moratorium on construction at the Beverly Hills Project, and the construction focus was redirected to the Lancaster Property. In cross-examination, Appellants' counsel never asked Debtor why he borrowed the $187,000 without notifying or consulting Banayan or why he transferred the property to T.S. Investments, which the evidence shows was also owned by Shenassa. Debtor averred that he did not intend to deceive Appellants. The evidence was sufficient, therefore, for the bankruptcy court to determine that Debtor's nondisclosure was not fraudulent. Moreover, the existence of fraud is the relevant inquiry under § 523(a)(2)(A), not whether Debtor received a benefit.

Finally, Appellants contend that Debtor was the alter ego of Shenassa and that Shenassa's fraud was imputed to him. They are mistaken. Fraud may be imputed from one partner to another, under an agency-principal theory. See Tsurukawa v. Nikon Precision, Inc. (In re Tsurukawa), 287 B.R. 515, 521 (9th Cir. BAP 2002). However, at most, Shenassa and Debtor were co-owners of a corporation. Even if the American Dream Homes' corporate veil was pierced as to Shenassa, in his bankruptcy case, that would not impute liability to Debtor.

"The alter ego doctrine prevents individuals or other

corporations from misusing the corporate laws by the device of a sham corporate entity formed for the purpose of committing fraud or other misdeeds." Sonora Diamond Corp. v. Sup. Ct., 83 Cal. App. 4th 523, 538, 99 Cal. Rptr. 2d 824, 836 (Ct. App. 2000). To show fraud by a general partner in a limited partnership, Appellants must show something more than merely "mistakes made or losses incurred in the good faith exercise of reasonable business judgment." Wyler v. Feuer, 85 Cal. App. 3d 392, 402, 149 Cal. Rptr. 626, 633 (Ct. App. 1978).

There was evidence that Debtor acted according to the advice of Shenassa and for purposes of advancing the construction of the investment properties. Therefore, the bankruptcy court did not clearly err in finding that Debtor did not use American Dream Homes to defraud Appellants, such as would warrant a piercing of the corporate veil as to Debtor.

Assuming, arguendo, that these circumstances were evidence of Debtor's fraudulent intent, Appellants must also prove justifiable reliance on Debtor's misrepresentation, or in the case of fraudulent nondisclosure, that Appellants were justifiably induced to act or refrain from acting in a business transaction. See Field v. Mans, 516 U.S. 59, 73-75 (1995); Tallant, 218 B.R. at 65. The Supreme Court explained this standard:

> [A] person is "required to use his senses, and cannot recover if he blindly relies upon a misrepresentation the falsity of which would be patent to him if he had utilized his opportunity to make a cursory examination or investigation. Thus, if one induces another to buy a horse by representing it to be sound, the purchaser cannot recover even though the horse has but one eye, if the horse is shown to the purchaser before he buys it and the slightest inspection would have disclosed the defect. On the other hand, the rule stated in this Section applies only when the recipient of the misrepresentation is

> capable of appreciating its falsity at the time by the use of his senses. Thus a defect that any experienced horseman would at once recognize at first glance may not be patent to a person who has had no experience with horses. . . ."

Mans, 516 U.S. at 70 (quoting § 541, cmt. a., Restatement (Second) of Torts (1976)). Furthermore, the creditor must have suffered damage as a proximate result of the fraud.

Banayan did not prove the requisite reliance or damages because he consented to accept substitute security in the Lancaster Property for his original investment. Appellants contend that they were "forced" to take this. However, we agree with the bankruptcy court that Banayan was neither forced nor deceived as to the Lancaster transaction. The testimony showed that Banayan was involved in the project and often visited the construction site. He accepted the promissory notes and deeds of trust, and requested personal guarantees from Debtor and Shenassa, which they executed for a total amount of $925,000.

Debtor testified that the Lancaster Property was purchased for $2.2 million. Therefore, even if Banayan was one of five secured creditors, Banayan did not prove that his investment was not fully secured at the time of the transaction.

In addition, Banayan learned in 1989 that the Beverly Hills Property had not been put into the Limited Partnership's name. He was represented by counsel at all times, and could have enforced his rights as a limited partner or under the Acknowledgment. See Cal. Corp. Code § 15619 (right to enforce breach of limited partnership agreement) and § 15634 (right of limited partner to information, etc.).

Finally, the state court default judgment was not evidence of a fraud judgment, nor have Appellants argued that it was.

In summary, there was sufficient evidence to support the bankruptcy court's finding that Debtor's conduct was not fraudulent, and thus we do not have a "definite and firm conviction that a mistake has been committed." See United States v. United States Gypsum Co., 333 U.S. 364, 395 (1948). Therefore, we conclude that the bankruptcy court's factual findings were not clearly erroneous and that the § 523(a)(2)(A) claim was correctly adjudicated in Debtor's favor.

D. Debtor was not a Fiduciary Pursuant to § 523(a)(4)

Appellants contend that the acts by Debtor constituted a defalcation and breach of his fiduciary duties. Section 523(a)(4) excepts from discharge debts incurred by "fraud or defalcation while [the debtor was] acting in a fiduciary capacity, embezzlement or larceny."

The Ninth Circuit Court of Appeals has defined defalcation as:

> the "misappropriation of trust funds or money held in any fiduciary capacity; [the] failure to properly account for such funds." BLACK'S LAW DICTIONARY 417 (6th ed. 1990). Under section 523(a)(4), defalcation "includes the innocent default of a fiduciary who fails to account fully for money received." . . . An individual may be liable for defalcation without having the intent to defraud.

Lewis v. Scott (In re Lewis), 97 F.3d 1182, 1186-87 (9th Cir. 1996) (alteration in original), (citation omitted).

The threshold issue sub judice concerns whether a debtor acted "in a fiduciary capacity" when committing acts alleged to

constitute defalcation. In other words, Appellants had to establish a fiduciary relationship between Banayan and Debtor.

The broad, general definition of fiduciary--a relationship involving confidence, trust and good faith--is inapplicable in the dischargeability context. Cal-Micro, Inc. v. Cantrell (In re Cantrell), 329 F.3d 1119, 1125 (9th Cir. 2003). The Ninth Circuit has adopted a narrow definition of "fiduciary" for purposes of § 523(a)(4):

> "[T]he fiduciary relationship must be one arising from an express or technical trust that was imposed before and without reference to the wrongdoing that caused the debt."

Id., quoting Lewis, 97 F.3d at 1185. These requirements eliminate constructive, resulting or implied trusts. Runnion v. Pedrazzini (In re Pedrazzini), 644 F.2d 756, 759 (9th Cir. 1981).

Although the concept of fiduciary is to be narrowly defined as a matter of federal law, state law is to be consulted to determine when a trust in this strict sense exists. Ragsdale v. Haller, 780 F.2d 794, 796 (9th Cir. 1986).

To satisfy this standard there must exist either an express or statutory trust prior to any wrongful acts. "The essential elements 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." Banks v. Gill Distrib. Ctrs., Inc. (In re Banks), 263 F.3d 862, 871 (9th Cir. 2001). "The intent to create a trust relationship rather than a contractual relationship is the key element in determining the existence of an express trust." Pedrazzini, 644 F.2d at 758 n.2.

The Ninth Circuit has held that, under California law,

partners are trustees over the partnership assets and thus are fiduciaries within the meaning of § 523(a)(4), but corporate officers, while possessing the fiduciary duties of an agent, are not trustees with respect to corporate assets, and therefore are not fiduciaries under § 523(a)(4). Cantrell, 329 F.3d at 1127. Appellants' citation to the law in other circuits is unavailing.

Similar to a general partnership, California law recognizes that a general partner of a limited partnership also has statutory fiduciary duties to the limited partnership and to the limited partner, indeed "the same liabilities to the partnership and to the other partners as in a general partnership." Everest Invs. 8 v. McNeil Partners, 114 Cal. App. 4th 411, 424, 8 Cal. Rptr. 3d 31, 40 (Ct. App. 2003); Kazanjian v. Rancho Estates, Ltd., 235 Cal. App. 3d 1621, 1626, 1 Cal. Rptr. 2d 534, 536-37 (Ct. App. 1991). See also Cal. Corp. Code § 15643(a) ("[A] general partner of a limited partnership has the rights and powers and is subject to the restrictions of a partner in a partnership without limited partners."); Cal. Corp. Code § 16404 (outlining a partner's fiduciary duties to a partnership).

Appellants contend that Debtor breached his fiduciary duties to Banayan under the Agreement. This argument misses the mark, however, because American Dream Homes, a corporation, was the general partner of the Limited Partnership, not Debtor. Debtor, as the CEO and president of American Dream Homes could only stand in the shoes of the general partner under an alter ego or corporate piercing theory. There was no evidence presented that American Dream Homes was the alter ego of Debtor, as opposed to Shenassa, who was the 85 percent owner. The bankruptcy court's

finding that Debtor did not engage in fraudulent conduct precluded a piercing of the corporate veil of American Dream Homes in order to hold Debtor liable for acts taken on behalf of the general partner.

Therefore, we conclude that Debtor was not a fiduciary in relationship to Banayan, and Appellants' § 523(a)(4) claim was properly denied.

E. Debtor's Conduct did not Constitute a Willful and Malicious Injury Pursuant to § 523(a)(6).

Finally, Appellants alleged that Debtor converted their money to his own use and benefit. Section 523(a)(6) bars discharge in bankruptcy of any debt "for willful and malicious injury by the debtor . . . ." Conversion may constitute a "willful" injury. Thiara v. Spycher Bros. (In re Thiara), 285 B.R. 420, 427 (9th Cir. BAP 2002).

The "malicious" injury prong of § 523(a)(6) is a separate inquiry. It requires a wrongful act, done intentionally, which necessarily causes injury, and which is done without just cause or excuse. Carrillo v. Su (In re Su), 290 F.3d 1140, 1146-47 (9th Cir. 2002). Malice may be implied, but only after a "willful" injury has been established. See Thiara, 285 B.R. at 434.

State law controls to determine if the debtor's alleged conduct meets the elements of a cause of action for conversion. Id. The failure to prove the elements of a conversion is fatal to an argument that a debtor's conduct caused a willful and malicious injury. See Peklar v. Ikerd (In re Peklar), 260 F.3d 1035, 1038 (9th Cir. 2001).

Pursuant to California law, conversion is the "wrongful exercise of dominion over the property of another." Farmers Ins. Exch. v. Zerin, 53 Cal. App. 4th 445, 451, 61 Cal. Rptr. 2d 707, 709 (Ct. App. 1997). The elements of a cause of action for conversion are: 1) plaintiff's ownership or right to possession of the property at the time of the conversion; 2) the defendant's conversion by a wrongful act or disposition of the plaintiff's property rights; and 3) damages. Id.; Thiara, 285 B.R. at 427.

Using another's property is not a legal wrong when done with the person's consent. Klett v. Sec. Acceptance Co., 38 Cal. 2d 770, 789, 242 P. 2d 873 (1952). Moreover, a willful injury is one that is deliberate or intended, "not merely a deliberate or intentional act that leads to injury." Kawaauhau v. Geiger, 523 U.S. 57, 61 (1998). In other words, 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 his own conduct." Su, 290 F.3d at 1142.

The evidence supported the bankruptcy court's finding that Appellants consented to the investment of their monies in the Lancaster Property as a substitute for the Beverly Hills Property. The evidence also supported Debtor's account that he had no subjective intent to injure Appellants in his business conduct, did not directly participate in the negotiations with Banayan, and that his actions comported with the changing circumstances, such as the moratorium on the Beverly Hills Property and redirection to the Lancaster Property.

Therefore, the bankruptcy court did not err in dismissing the complaint as to the § 523(a)(6) count.

CONCLUSION

The bankruptcy court did not abuse its discretion in its interrogation of Debtor at trial, nor did it elicit inadmissible evidence thereby.

The bankruptcy court's oral findings and conclusions met the requirements of Rule 7052(a), because they were explicit enough on the ultimate issues to give the reviewing panel a clear understanding of the basis of the decision.

In its determination of the fraud issue, the bankruptcy court's factual findings were not clearly erroneous, and we affirm its judgment in favor of Debtor on the § 523(a)(2)(A) count.

Appellants failed to establish that Debtor was a fiduciary as that term is defined under § 523(a)(4), and we therefore affirm the bankruptcy court's judgment in favor of Debtor on that count.

Finally, the bankruptcy court's implicit denial of the § 523(a)(6) conversion count was supported by the evidence of Appellants' consent and the lack of evidence of Debtor's motivation to injure Appellants.

Therefore, we **AFFIRM** the bankruptcy court's judgment in favor of Debtor and dismissing Appellants' complaint.