

**OCT 28 2005**

**NOT FOR PUBLICATION**

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

**UNITED STATES BANKRUPTCY APPELLATE PANEL  
OF THE NINTH CIRCUIT**

In re:	)	BAP No.	CC-04-1628-MaMoB
	)		
SHAHRAM MESBAHI, aka SHAWN	)	Bk. No.	LA-03-39268-TD
MESBAHI,	)		
	)	Adv. No.	LA-04-01407-TD
Debtor.	)		
<hr/>			
KHANBABA BANAYAN; PARIROKH	)		
BANAYAN,	)		
	)		
Appellants,	)		
	)		
v.	)	<b><u>MEMORANDUM</u></b> <sup>1</sup>	
	)		
SHAHRAM MESBAHI,	)		
	)		
Appellee.	)		
<hr/>			

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.

<sup>1</sup> 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.

1 **INTRODUCTION**

2  
3 This appeal stems from a judgment in favor of the debtor in a  
4 nondischargeability proceeding. The plaintiffs, Khanbaba Banayan  
5 ("Banayan") and Parirokh Banayan (together "Appellants"), had  
6 invested in a limited partnership with the debtor for the purpose  
7 of developing real estate. They never saw any return on this  
8 investment, and obtained a state court default judgment against  
9 the debtor for \$1,264,166.67.

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

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

23  
24 \_\_\_\_\_  
25 <sup>2</sup> Appellants did not assert collateral estoppel, *i.e.*,  
26 that relitigation of the issues was precluded by virtue of the  
27 default judgment. That issue is therefore deemed waived. Branham  
28 v. Crowder (In re Branham), 226 B.R. 45, 55 (9th Cir. BAP 1998),  
aff'd mem., 205 F.3d 1350 (9th Cir. 1999).

<sup>3</sup> 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.

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

5  
6 **FACTS**  
7

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

16  
17 

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

21 However, the record evidence of Shenassa's interest is  
22 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:

23 MR. MESBAHI: Yes. For the reason that TS  
24 Investments or American Dream Homes was 100 percent in my  
25 name, because Mr. Shenassa, as Mr. Banayan knows, had some  
26 problems because he had a factory of North Hollywood  
27 Marble Company and he had some - he had closed that  
28 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.

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

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

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

28 The Agreement did not state who would hold title to the

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

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

9 In or about March, 1989, Appellants realized that the Beverly  
10 Hills Property was owned by American Dream Homes and that there  
11 were no documents securing their investment. Debtor, therefore,  
12 agreed to sign an "Acknowledgement" [sic], purportedly in March,  
13 1989, which stated, in pertinent part:

14 1. The title of the property located at 1330 Beverly  
15 Estate, Beverly Hills, California (the "Property") has  
16 been taken under American Dream Homes ("ADH") name. The  
17 total purchase money for the Property has been paid by  
18 Khanbaba Banayan ("Banayan"), the limited partner of 1330  
19 Beverly Estate, a Limited Partnership, dated February 6,  
20 1989, (the "Partnership"), under the terms of the  
21 Partnership Agreement which is incorporated herein with  
22 this reference. ADH hereby acknowledges that ADH is  
23 holding the title of the Property for the benefit of the  
24 Partnership.

20 2. ADH shall transfer and convey the title of the  
21 Property to the Partnership under the terms of such  
22 Partnership Agreement not later than May 31, 1989.

22 3. Notwithstanding the language contained in  
23 paragraph 2 above, Banayan shall have the right to demand  
24 ADH, at any time, to immediately transfer and convey the  
25 title of the Property to the Partnership upon written  
26 demand by Banayan.

25 Acknowledgement [sic] (undated).

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

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

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

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

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

1 total \$425,000 investment debt. See Tr. of Proceedings (Nov. 18,  
2 2004), p. 12:1-7.

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

8         In 1992, Appellants filed a complaint against Shenassa,  
9 Debtor, and others, in state court.<sup>5</sup> On August 2, 1996, a default  
10 judgment was entered against Debtor in the sum of \$1,264,166.67.

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

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

23         Both sides filed declarations. Although Appellants filed a  
24

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25         <sup>5</sup> By separate order, the panel has denied Appellants'  
26 request for judicial notice of the underlying complaint and other  
papers that were not presented to the bankruptcy court.

27         <sup>6</sup> Unless otherwise indicated, "chapter" and "section"  
28 references are to the pre-amended Bankruptcy Code, 11 U.S.C.  
§§ 101-1330.

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

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

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

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

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

17 "The testimony reflects that [Debtor] was the  
18 building person. Mr. Shenassa handled  
19 business arrangements, handled negotiations,  
handled legal matters, in my parlance."

20 . . . .

21 "[Debtor's] testimony was clear that his  
22 involvement was as a builder, as a  
23 supervisor of the building activity, as  
24 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."

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

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

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



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

12 Id. at 15:3-14.

- 13 • Banayan was not "forced" to accept the new notes and  
14 deeds of trust on the Lancaster Property, in 1990, but  
15 willingly contracted to accept the substitute security  
16 and guaranties in lieu of the Beverly Hills Property.  
17 In 1989, Banayan had contract enforcement rights,  
18 including the right to demand that the Beverly Hills  
19 Property be transferred to him or the Limited  
20 Partnership. He was represented by counsel at all  
21 relevant times, yet he did not make such a demand and  
22 failed to investigate the status of his collateral or  
23 his security documents. He conceded that there was a  
24 moratorium on building on the Beverly Hills Property,  
25 and Banayan willingly accepted the notes and deeds of  
26 trust on the Lancaster Property. Banayan was a frequent  
27 visitor to the Lancaster project and was interested in  
28 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."

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

23 The bankruptcy court concluded that there was insufficient  
24 evidence of fraud or embezzlement by Debtor.<sup>7</sup> Its judgment in  
25

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26 <sup>7</sup> Appellants have not challenged the bankruptcy court's  
27 judgment that the evidence did not support embezzlement under  
28 § 523(a)(4). Therefore, they have abandoned this issue by failing  
to argue it on appeal. See Branam, 226 B.R. at 55.

(continued...)

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

3  
4 **ISSUES**

- 5
- 6 1. Whether the bankruptcy court improperly elicited  
7 inadmissible testimony during its examination of Debtor.  
8
  - 9 2. Whether the bankruptcy court committed reversible error  
10 by not entering written findings of fact and conclusions  
11 of law.  
12
  - 13 3. Whether the bankruptcy court findings were clearly  
14 erroneous, and whether Appellants established the  
15 elements of a nondischargeable debt for fraud under  
16 § 523(a)(2)(A).  
17
  - 18 4. Whether Debtor was a "fiduciary" within the meaning of  
19 § 523(a)(4) in order to establish the elements of a  
20

21 \_\_\_\_\_  
22 <sup>7</sup>(...continued)

23 Instead, Appellants have attempted to assert a new theory of  
24 recovery under § 523(a)(4), viz., defalcation by a fiduciary.  
25 This allegation was never made, per se, in bankruptcy court, nor  
26 did the bankruptcy court make any findings or conclusions on that  
27 theory. Therefore, this issue also may be considered waived.  
28 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.

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

3  
4 5. Whether the evidence supported nondischargeability for a  
5 willful and malicious injury under § 523(a) (6).

6  
7 **STANDARDS OF REVIEW**

8  
9 The bankruptcy court's evidentiary rulings are reviewed for  
10 an abuse of discretion. Ardmor Vending Co. v. Kim (In re Kim),  
11 130 F.3d 863, 865 (9th Cir. 1997).

12 The bankruptcy court's findings of fact are reviewed under  
13 the clearly erroneous standard, while its conclusions of law are  
14 reviewed de novo. Medley v. Ellis (In re Medley), 214 B.R. 607,  
15 610 (9th Cir. BAP 1997). A finding of fact is clearly erroneous  
16 if, after reviewing the record, the panel is left with a definite  
17 and firm conviction that error has been committed. Flegel v. Burt  
18 & Assocs., P.C. (In re Kallmeyer), 242 B.R. 492, 495 (9th Cir. BAP  
19 1999). We must be "especially reluctant" to set aside a finding  
20 based on the bankruptcy court's evaluation of conflicting  
21 testimony. Beech Aircraft Corp. v. United States, 51 F.3d 834,  
22 838 (9th Cir. 1995); Fed. R. Bankr. P. 8013 ("[D]ue regard shall  
23 be given to the opportunity of the bankruptcy court to judge the  
24 credibility of the witnesses."). The deference due the bankruptcy  
25 court is also given to inferences drawn by the court. Beech  
26 Aircraft Corp., 51 F.3d at 838.

27 The existence of fraudulent intent--an element of  
28 § 523(a) (2) (A)--is a question of fact, which is reviewed for clear

1 error. Tustin Thrift & Loan Ass'n v. Maldonado (In re Maldonado),  
2 228 B.R. 735, 737 (9th Cir. BAP 1999). Whether a person is a  
3 "fiduciary" within the meaning of § 523(a)(4) is a question of  
4 federal law, which we review de novo. Blyler v. Hemmeter (In re  
5 Hemmeter), 242 F.3d 1186, 1189 (9th Cir. 2001). Whether a  
6 particular type of debt is nondischargeable as a willful and  
7 malicious injury under § 523(a)(6) is also reviewed de novo. See  
8 Su v. Carrillo (In re Su), 259 B.R. 909, 912 (9th Cir. BAP 2001),  
9 aff'd, 290 F.3d 1140 (9th Cir. 2002).

## 10 DISCUSSION

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

12  
13  
14  
15 Under Federal Rule of Evidence ("FRE") 614, a bankruptcy  
16 court may call and interrogate a witness during trial. FRE  
17 614(b). "In court trials, in bankruptcy proceedings, the trial  
18 judges, as the triers of fact, often take an active role in the  
19 questioning of witnesses." Hon. Barry Russell, Bankruptcy  
20 Evidence Manual, § 614.2, p. 991 (West 2004). "The court may ask  
21 questions of a witness to bring out needed facts not elicited by  
22 the parties or to clarify those facts to which the witness has  
23 already testified." Id.

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

28 Having made such charges, Appellants fail to provide the

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

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

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

16 THE COURT: Under our rules, I have a right and sometimes  
17 the duty to ask questions of witnesses. . . . My  
18 questions are not designed to help either side.  
19 They are simply designed to help me understand  
20 what the evidence is so that I can come to a  
21 fair result in this matter. . . .

22 I'm referring to your written declaration  
23 now, Mr. Mesbahi.

24 . . . .

25 I've sustained some of [opposing counsel's]  
26 objections to that. . . .

27 . . . .

28 Wherever I sustain an objection, testimony  
is stricken. It's not part of the evidence  
before me.

. . . .

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

1 counsel's] objections. . . .

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

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

9 THE COURT: How did you learn of Mr. Banayan's  
10 desires to invest? Did you learn that  
11 through Mr. Banayan or did you learn that  
12 through Mr. Shenassa?

13 MR. MESBAHI: Through Mr. Shenassa.

14 THE COURT: Having learned of it from Mr. Shenassa, did  
15 you also talk about that subject directly with  
16 Mr. Banayan?

17 MR. MESBAHI: No, I didn't.

18 THE COURT: You never did?

19 MR. MESBAHI: I never did. Sometimes when he was in the  
20 office with Mr. Shenassa and his attorney, Mr.  
21 Azadegan, I was present and I would listen to  
22 their conversation. . . .

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

24 Debtor also declared, in admissible testimony, that: "I never  
25 told Mr. Banayan that your investment was '100% secured'" . . . ."  
26 Decl. of Debtor, supra, at 3, ¶ 13. He further declared, in  
27 testimony that was not stricken, concerning the notes and deeds of  
28 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.

1 Id. at 4, ¶ 17.

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

4 THE COURT: Okay. Mr. Banayan said that he was told  
5 that this investment was 100 percent  
secured. Did you ever tell him that?

6 MR. MESBAHI: I never told him the investment is 100 percent  
7 secure.

8 THE COURT: Did you ever suggest to him that it was secure?

9 MR. MESBAHI: I never suggested – I never talked to him about  
the investment or security.

10 THE COURT: Did you ever talk to him about the [deed of]  
11 trust that he was given with respect to  
Lancaster?

12 MR. MESBAHI: No, I never talked to him about deed [sic] of  
13 trust that's given to him for Lancaster. All  
the negotiation was with Mr. Shenassa.

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

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

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

23

24 **B. Oral FFCL Were Proper and Sufficient**

25

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

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

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

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

18 Id. at 1223 (citation omitted).

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

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



1 requirements of Rule 7052(a).<sup>8</sup> Therefore, no harm has resulted.

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

7 In all cases where written findings of fact and  
8 conclusions of law are required under F.R.B.P. 7052 or  
9 7065, or as otherwise required by the court, the attorney  
10 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.

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

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

19

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

21

22 Section 523(a)(2)(A) excepts from discharge any debt for  
23 money, property, services, or an extension, renewal, or  
24 refinancing of credit, to the extent obtained by false pretenses,  
25

26

27 <sup>8</sup> Rule 7052(a) states, in pertinent part: "It will be  
28 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).

1 a false representation,<sup>9</sup> or actual fraud. Fraudulent  
2 nondisclosure by a person under a duty to disclose also amounts to  
3 actual fraud under this section. See Tallant v. Kaufman (In re  
4 Tallant), 218 B.R. 58, 65 (9th Cir. BAP 1998).

5 A creditor must establish the elements of a § 523 action by a  
6 preponderance of the evidence. See Grogan v. Garner, 498 U.S.  
7 279, 287 (1991). To satisfy the requirements of § 523(a)(2)(A), a  
8 creditor must establish:

- 9 (1) that the debtor made a representation;
- 10 (2) the debtor knew at the time the representation was  
11 false;
- 12 (3) the debtor made the representation with the intention  
13 and purpose of deceiving the creditor;
- 14 (4) the creditor relied on the representation; and
- 15 (5) the creditor sustained damage as the proximate result of  
16 the representation.

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

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

23 Appellants contend that Debtor persuaded Banayan to invest in

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24 <sup>9</sup> "A false representation is an express misrepresentation,  
25 while a false pretense refers to an implied misrepresentation or  
26 'conduct intended to create and foster a false impression.'" Nat'l  
27 Bank of N. Am. v. Newmark (In re Newmark), 20 B.R. 842, 854  
28 (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.

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

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

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

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

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

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

5 Debtor testified that American Dream Homes was involved in  
6 two real estate projects for which land purchases and construction  
7 loans were required. The undisputed evidence further revealed  
8 that there was a moratorium on construction at the Beverly Hills  
9 Project, and the construction focus was redirected to the  
10 Lancaster Property. In cross-examination, Appellants' counsel  
11 never asked Debtor why he borrowed the \$187,000 without notifying  
12 or consulting Banayan or why he transferred the property to T.S.  
13 Investments, which the evidence shows was also owned by Shenassa.  
14 Debtor averred that he did not intend to deceive Appellants. The  
15 evidence was sufficient, therefore, for the bankruptcy court to  
16 determine that Debtor's nondisclosure was not fraudulent.  
17 Moreover, the existence of fraud is the relevant inquiry under  
18 § 523(a)(2)(A), not whether Debtor received a benefit.

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

28 "The alter ego doctrine prevents individuals or other

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

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

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

22 The Supreme Court explained this standard:

23 [A] person is "required to use his senses, and cannot  
24 recover if he blindly relies upon a misrepresentation the  
25 falsity of which would be patent to him if he had utilized  
26 his opportunity to make a cursory examination or  
27 investigation. Thus, if one induces another to buy a horse  
28 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

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

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

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

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

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

28

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

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

11  
12 **D. Debtor was not a Fiduciary Pursuant to § 523(a)(4)**

13  
14 Appellants contend that the acts by Debtor constituted a  
15 defalcation and breach of his fiduciary duties. Section 523(a)(4)  
16 excepts from discharge debts incurred by "fraud or defalcation  
17 while [the debtor was] acting in a fiduciary capacity,  
18 embezzlement or larceny."

19 The Ninth Circuit Court of Appeals has defined defalcation  
20 as:

21 the "misappropriation of trust funds or money held in any  
22 fiduciary capacity; [the] failure to properly account for  
23 such funds." BLACK'S LAW DICTIONARY 417 (6th ed. 1990).  
24 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.

25 Lewis v. Scott (In re Lewis), 97 F.3d 1182, 1186-87 (9th Cir.  
26 1996) (alteration in original), (citation omitted).

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

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

3 The broad, general definition of fiduciary--a relationship  
4 involving confidence, trust and good faith--is inapplicable in the  
5 dischargeability context. Cal-Micro, Inc. v. Cantrell (In re  
6 Cantrell), 329 F.3d 1119, 1125 (9th Cir. 2003). The Ninth Circuit  
7 has adopted a narrow definition of "fiduciary" for purposes of  
8 § 523(a) (4):

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

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

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

19 To satisfy this standard there must exist either an express  
20 or statutory trust prior to any wrongful acts. "The essential  
21 elements of an express trust are (1) sufficient words to create a  
22 trust; (2) a definite subject; and (3) a certain and ascertained  
23 object or res." Banks v. Gill Distrib. Ctrs., Inc. (In re Banks),  
24 263 F.3d 862, 871 (9th Cir. 2001). "The intent to create a trust  
25 relationship rather than a contractual relationship is the key  
26 element in determining the existence of an express trust."  
27 Pedrazzini, 644 F.2d at 758 n.2.

28 The Ninth Circuit has held that, under California law,



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

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

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

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

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

8  
9 **E. Debtor's Conduct did not Constitute a Willful and Malicious**  
10 **Injury Pursuant to § 523(a)(6).**

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

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

23 State law controls to determine if the debtor's alleged  
24 conduct meets the elements of a cause of action for conversion.  
25 Id. The failure to prove the elements of a conversion is fatal to  
26 an argument that a debtor's conduct caused a willful and malicious  
27 injury. See Peklar v. Ikerd (In re Peklar), 260 F.3d 1035, 1038  
28 (9th Cir. 2001).

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

9 Using another's property is not a legal wrong when done with  
10 the person's consent. Klett v. Sec. Acceptance Co., 38 Cal. 2d  
11 770, 789, 242 P. 2d 873 (1952). Moreover, a willful injury is one  
12 that is deliberate or intended, "not merely a deliberate or  
13 intentional act that leads to injury." Kawaaauhau v. Geiger, 523  
14 U.S. 57, 61 (1998). In other words, the willful injury  
15 requirement is met "only when the debtor has a subjective motive  
16 to inflict injury, or when the debtor believes that injury is  
17 substantially certain to result from his own conduct." Su, 290  
18 F.3d at 1142.

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

28

