

JUL 15 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NOT FOR PUBLICATION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

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In re:)	BAP No.	CC-04-1393-RBMo
)		
RICHARD CAMPBELL GUE and)	Bk. No.	RS 03-26444 MJ
PATRICIA SHAYNE GUE,)		
)	Adv. No.	RS 04-01498 MJ
Debtors.)		
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DOUGLAS R. SPARKS,)		
)		
Appellant,)		
v.)	<u>MEMORANDUM</u> ¹	
)		
RICHARD CAMPBELL GUE; PATRICIA)		
SHAYNE GUE; DONALD R. SAMPIAS;)		
ARTHUR CISNEROS, Chapter 7)		
Trustee,)		
)		
Appellees.)		
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Argued and Submitted on May 12, 2005
at Pasadena, California

Filed - July 15, 2005

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

Honorable Meredith A. Jury, Bankruptcy Judge, Presiding.

Before: RIMEL,² BRANDT and MONTALI, Bankruptcy Judges.

¹ This disposition is not appropriate for publication and may not be cited except when pertinent under the doctrine of law of the case or the rules of res judicata, including issue and claim preclusion. See 9th Cir. BAP Rule 8013-1.

² Hon. Whitney Rimel, United States Bankruptcy Judge for the Eastern District of California, sitting by designation.

1 Douglas Sparks appeals the bankruptcy court's judgment that a
2 debt owed to him by debtors Richard C. Gue and Patricia S. Gue is
3 dischargeable. For the reasons set forth herein, the bankruptcy
4 court's decision is AFFIRMED.

5
6 **FACTS**

7 On December 29, 2001, Sparks, Richard Gue, and Donald Sampias
8 executed a partnership agreement (the "Agreement") for a
9 partnership they called BAP Medical Services & Cornerstone
10 Enterprises (the "Partnership"). The Agreement stated at
11 paragraph 3:

12 D. The partners will share equally in all expenses,
13 profits and losses from all the businesses under this
14 partnership . . .

15 . . .

16 I. All partners agree that they will not start,
17 participate or engage in any like businesses outside of
18 this partnership agreement in direct conflict . . .

19 J. The partners will draw monthly dividends and/or
20 hourly salaries as required to operate the businesses of
21 the partnership. Hourly salary rates shall be voted on
22 by the three partners and majority vote rules . . .

23 The Agreement provided that Sparks would be responsible for
24 "Real Estate Ventures;" Sampias would be responsible for
25 "Financial Ventures;" and Richard Gue would be responsible for
26 "Medical Registry Ventures." Patricia Gue is a registered nurse,
27 who served as general manager for the Medical Registry Ventures
28 portion of the Partnership. The Agreement further provided at
paragraph 5(A) that:

Any partner that finances any part of this partnership
will recoup his initial investment out of profits from
the particular venture he financed . . .

1 Sparks contributed more than \$54,000 to the Partnership that
2 the Partnership never reimbursed. The Partnership did have some
3 income, but only because the Gues negotiated a contract, as part
4 of the Medical Registry Ventures portion of the Partnership, for
5 the supply of temporary nurses to High Desert Hospital. This
6 contract provided revenues to the Partnership. During April, May,
7 and June 2002, Richard Gue worked in the Medical Registry portion
8 of the Partnership's business.

9 In May 2002, Sparks informed the Gues that he was not going
10 to conduct the Real Estate Ventures portion of the Partnership any
11 longer and at that point, the Gues believed that the Agreement had
12 been breached. Neither Sparks nor Sampias ever brought any
13 revenue into the Partnership through the real estate business or
14 the real estate loan business. Overall, the Partnership never
15 showed a profit.

16 Relations between the three partners quickly deteriorated.
17 The Gues complained about not receiving any money that was coming
18 into the business. Richard Gue placed himself on the payroll and
19 received \$2000 as an employee from the Partnership's Paychex
20 payroll account. In July 2002, just several months after the
21 formation of the Partnership, the Gues left the Partnership and
22 then attempted to operate a competing business, BAP Enterprises,
23 Inc.

24 Upon their departure, the Gues did not take any assets of the
25 Partnership with them. The Gues left the business license and the
26 one contract to supply nurses, which were essentially the only
27 assets of the Partnership. Sparks continued to attempt to service
28 the contract with the High Desert Hospital until December 31,

1 2002, when the Partnership ceased doing business.

2 The Gues were not successful in operating a competing
3 business and filed Chapter 7 on November 13, 2003. Prior to the
4 time the Gues filed their chapter 7 case, Sparks had filed a
5 complaint against them in the Superior Court for the County of
6 Riverside, California. That action was stayed when the bankruptcy
7 case was filed.

8 On February 11, 2004, Sparks filed a "Complaint to Determine
9 Non-Dischargeability of Debt under §§ 523(a)(2), (4), and (6)" in
10 the bankruptcy case. Following a trial, the bankruptcy court
11 determined that the debt owed to Sparks was dischargeable and
12 entered judgment for defendants under § 523(a)(2) and (4).³
13 Sparks timely appealed.

14

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JURISDICTION

16 The bankruptcy court had jurisdiction under 28 U.S.C. §§ 1334
17 and 157(b)(2)(I). We have jurisdiction under 28 U.S.C.
18 § 158(a)(1).

19

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ISSUES

21 1. Whether the bankruptcy court erred in determining that any
22 debt owed to Sparks by the Gues was dischargeable under
23 § 523(a)(2).

24 2. Whether the bankruptcy court erred in determining that any
25 debt owed to Sparks by the Gues was dischargeable under

26

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

1 § 523(a)(4).

2 3. Whether Sparks may assert as a basis for appeal the
3 bankruptcy court's failure to address § 523(a)(6) in its judgment.

4 4. Whether the bankruptcy court erred in implicitly
5 determining that any debt owed to Sparks by the Gues was
6 dischargeable under § 523(a)(6).

7

8

STANDARD OF REVIEW

9 The Panel reviews factual findings of the bankruptcy court
10 for clear error and its conclusions of law de novo. Anastas v.
11 Am. Sav. Bank (In re Anastas), 94 F.3d 1280, 1283 (9th Cir. 1996).
12 Findings of fact by the bankruptcy court "shall not be set aside
13 on appeal unless clearly erroneous." Fed. R. Bankr. P. 8013; In
14 re Johnston, 49 F.3d 538, 540 (9th Cir. 1995). The clearly
15 erroneous standard also applies to findings of intent to defraud,
16 to findings that the fraud proximately caused the alleged damages,
17 and to materiality. In re Candland, 90 F.3d 1466, 1469 (9th Cir.
18 1996).

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DISCUSSION

21 A. There are deficiencies in the briefs and the record on appeal.

22 Sparks, who is representing himself, did not provide a clear
23 statement of issues or supporting arguments to the Panel. Under
24 the section in his opening brief entitled "Statement of Issues,"
25 he quoted portions of § 523(a) and stated several general legal
26 concepts:

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"(a) Partnership Dissolution by filing a Voluntary
Petition in Bankruptcy; (b) Breach of Covenant; (c)
Breach of Fiduciary Duty to the partnership and other

1 partners; (d) Conversion; and (e) Constructive Trust.”
2 A subsequent section entitled “Argument” did not develop any
3 specific issue in this appeal, but instead discussed general legal
4 principles.

5 Rule 8010(a)(1)(C) requires that an appellate brief shall
6 contain an adequate “statement of issues presented.” Rule
7 8010(a)(1)(E) requires that “the argument shall contain the
8 contentions of the appellant with respect to the issues presented,
9 and the reasons therefor, with citations to the authorities,
10 statutes and parts of the record relied on.”

11 Additionally, Rule 8006 requires appellant and appellee to
12 insure that the relevant and necessary items are included in the
13 record on appeal. In re Ichinose, 946 F.2d 1169, 1173 (5th Cir.
14 1991). Fed. R. Bankr. P. 8010(a)(1)(D) and (E) require that the
15 Appellant’s brief make appropriate references to the record to
16 support any assertions of fact or arguments. Syncom Capital Corp.
17 v. Wade, 924 F.2d 167, 169 (9th Cir. 1991).

18 Here, the bankruptcy court’s findings of facts and
19 conclusions of law were made on the record, orally. Neither
20 appellant nor appellee provided the Panel with a full transcript
21 of the court’s findings of fact and conclusions of law as set
22 forth on the record. Neither appellant nor appellee provided the
23 Panel with a full transcript of the trial.

24 The explanatory note to Ninth Circuit Bankruptcy Appellate
25 Panel Rule 8009(b)-1 provides that: “The Panel generally limits
26 its review to an examination of the excerpts of the record as
27 provided by the parties. The Panel is not obligated to examine
28 portions of the record not included in the excerpts.” “The

1 appellants bear the responsibility to file an adequate record, and
2 the burden of showing that the bankruptcy court's findings of fact
3 are clearly erroneous." In re Kritt, 190 B.R. 382, 387 (9th Cir.
4 BAP 1995).

5 It is not the duty of this Panel to develop a party's
6 arguments for him, find the legal authority to support those
7 arguments, or guess at what part of the record may be relevant.
8 In re Morrissey, 349 F.3d 1187, 1189 (9th Cir. 2003). Ninth
9 Circuit BAP Rule 9010-2 requires that a pro se party "prosecute
10 the appeal with diligence." So although Sparks is litigating pro
11 se, it is still incumbent upon him to demonstrate clearly how the
12 bankruptcy court erred so as to provide a genuine issue on appeal.

13 Despite their deficiencies, Sparks' briefs and the record on
14 appeal, although incomplete, are sufficient to enable this Panel
15 to address whether the bankruptcy court erred in ruling that any
16 debt owed to Sparks by the Gues is dischargeable.

17 B. The bankruptcy court did not err in determining that any
18 debt owed to Sparks by the Gues is dischargeable under
§ 523(a)(2).

19 Section 523(a)(2)(A) excepts from discharge a debt "to the
20 extent obtained by . . . a false representation or actual fraud."

21 To prevail under this section, a plaintiff must prove the
22 elements of common law fraud:

23 (1) that the debtor made the representations;

24 (2) that at the time he knew they were false;

25 (3) that he made them with the intention and purpose of
26 deceiving the creditor;

27 (4) that the creditor relied on such representations; and

28 (5) that the creditor sustained the alleged loss and damage

1 as the proximate result of the representations having been made.
2 In re Cline, 282 B.R. 493, 495 (Bankr. W.D. Wash. 2002).

3 Under § 523(a)(2), Sparks seeks to recover his contribution
4 of start-up capital rather than any portion of potential profits
5 that may have been usurped by the Gues. The bankruptcy court
6 found that

7 on the (a)(2) on the fraud, there has been really no
8 effort or ability . . . to demonstrate that the Gues did
9 not intend to perform the partnership at the time when
they entered into it. So therefore I don't find that a
fraudulent misrepresentation.

10 Instead the bankruptcy court found that

11 everybody got in there and tried to make it go as a
12 partnership. Mr. Gue was down there every day for many
13 months as was Mr. Sparks, building out the space, then
14 working on getting the contracts, setting up and doing the
business that went with getting the one - or performing on
the one contract that was gotten.

15 So, failing to find intent not to perform at the time Richard
16 Gue became a partner and Patricia Gue became a manager for the
17 Partnership, the bankruptcy court held that Sparks was not
18 entitled to recovery under § 523(a)(2).

19 In the "Argument" section of his opening brief, Sparks
20 asserts primarily three misdeeds of the Gues: (1) their
21 withdrawal from the Partnership; (2) their operation of a
22 competing business, BAP Enterprises, Inc., after withdrawal; and
23 (3) the payment received by Richard Gue through the Partnership's
24 Paychex account. All these events occurred after the Partnership
25 was formed and operating. Sparks simply did not provide any
26 evidence that at the time of Partnership formation the Gues had
27 any intent to deceive. Therefore, he has failed to show that the
28 bankruptcy court committed clear error in finding that the Gues

1 had no intent to deceive at the time of the contributions to the
2 Partnership and the Partnership formation. Additionally, Patricia
3 Gue was never a member of the Partnership.

4
5 C. The bankruptcy court did not err in determining that any
6 debt owed by the Gues to Sparks is dischargeable under
§ 523(a)(4).

7 Section 523(a)(4) excepts from discharge a debt "for fraud or
8 defalcation while acting in a fiduciary capacity." The Ninth
9 Circuit has adopted a three-part test:

10 A debt is nondischargeable under 11 U.S.C. § 523(a)(4)
11 where "1) an express trust existed, 2) the debt was
12 caused by fraud or defalcation, and 3) the debtor acted
as a fiduciary to the creditor at the time the debt was
created [citations omitted]."

13 In re Niles, 106 F.3d 1456, 1459 (9th Cir. 1997).

14 There is no dispute here that there was a fiduciary
15 relationship among the partners, and the bankruptcy court
16 implicitly so found. But a general fiduciary duty is insufficient
17 to establish a fiduciary relationship under § 523(a)(4). In re
18 Lewis, 97 F.3d 1182, 1185 (9th Cir. 1996) (citing Ragsdale v.
19 Haller, 780 F.2d 794, 796 (9th Cir. 1996)). Instead, the fiduciary
20 relationship must be one arising from an express or technical
21 trust imposed before and without reference to the wrongdoing which
22 caused the debt. Id. The court held that

23 on the breach of the fiduciary duty . . . what really
24 has to be shown is that the partner breaching the
25 statutory trust . . . has to steal . . . either the
26 business or the assets . . . But here the facts are
27 basically unrefuted that when [the Gues] walked away,
they left the license with the business, they left the
one contract with the business which is the only asset
essentially that the business [had].

28 Hence, the bankruptcy court held that Appellant was not

1 entitled to recovery under § 523(a)(4).

2 The general rule for withdrawals by partners of California
3 partnerships has been set forth by the California Supreme Court:

4 All partnerships are ordinarily entered into with the
5 hope that they will be profitable, but that alone does
6 not make them all partnerships for a term and obligate
7 the partners to continue in the partnerships until all
8 of the losses over a period of many years have been
9 recovered.

8 Page v. Page, 55 Cal. 2d 192, 196 (Cal. 1961). The main
9 limitation on such withdrawals is that they must be in good faith.
10 Id.

11 Sparks' main argument appears to be that the close proximity
12 in time of Richard Gue's withdrawal from the Partnership and the
13 Gues' starting up of a competing business implies a bad faith
14 intent to steal the business of the Partnership. However, the
15 bankruptcy court found that Richard Gue left the business license
16 and the one asset, a contract to provide medical services, intact
17 when he withdrew from the Partnership. Further the court found
18 "there's not any evidence that they even disrupted the [former]
19 partnership's business as they were so unsuccessful [in the
20 competing business]."

21 Sparks asserts that the bankruptcy court erred by ignoring
22 the fact that Richard Gue took money to which he was not entitled
23 from the Partnership. Admitted as Plaintiff's Exhibit "B" was a
24 Paychex summary showing payments of \$2,000 to Richard Gue.
25 Further, the summary identified Richard Gue as an employee.
26 Neither of the other partners was identified as an employee on the
27 summary. The bankruptcy court did not mention the \$2000 payments
28 to Richard Gue in its findings. Sparks did not make available to

1 this Panel a copy of the full trial transcript and, in the
2 excerpts made available, there is no mention of testimony
3 regarding the \$2000 payments.

4 Mere payment to a partner is not enough to show fraud by a
5 partner. The payment must be unauthorized by the other partners.
6 Sparks had the burden to show that the funds in question had been
7 entrusted to Richard Gue as a fiduciary and then not paid over or
8 otherwise accounted for. In re Niles, 106 F.3d at 1462. If Sparks
9 had done so, the burden to render an accounting would have shifted
10 to Richard Gue. Id. However, Sparks did not provide any
11 reference to the record showing that Richard Gue was not entitled
12 to payment, that a vote on partner salaries was ever conducted or
13 not⁴, or that Richard Gue even had the ability to place himself on
14 the payroll.

15 There is nothing in the record before this Panel to show
16 whether testimony was ever developed in the bankruptcy court to
17 show that Richard Gue was not entitled to the funds. The silence
18 of the bankruptcy court on a contention implies that it made a
19 finding on the issue consistent with its general finding, which in
20 this case meant that no fraud occurred. Wright, Miller & Kane,
21 Federal Practice and Procedure, Civil 2d § 2579 (West 2005). The
22 evidence in the record includes: (1) the Paychex summary showing
23 payment to Richard Gue; (2) the Agreement that provides for hourly
24 salaries for partners upon a majority vote by partners; (3) the

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26 ⁴ Paragraph J. of the "Partnership Agreement" states that
27 "the partners will draw monthly dividends and/or hourly salaries
28 as required to operate the businesses of the partnership . . .
Hourly salary rates shall be voted on by the three partners and
majority vote rules."

1 fact that of the three initial businesses of the Partnership, only
2 the Gues' business was producing revenue; and (4) the fact that
3 Patricia Gue performed services for the Partnership as a
4 non-partner. There was, thus, evidence from which the bankruptcy
5 court could infer other facts that would support a finding that
6 the payments to Richard Gue were not fraudulent.⁵ Zack v. C.I.R.,
7 291 F.3d 407, 412 (6th Cir. 2002) (if, from the facts found, other
8 facts may be inferred which will support the judgment, such
9 inferences should be deemed to have been drawn by the trial
10 court.)

11 It is clear from the portion of the ruling quoted on page
12 ten, above, that the bankruptcy court found no fraud or
13 defalcation had occurred; Sparks has not shown that finding to be
14 clearly erroneous.

15 D. Appellant did not waive his right to appeal the
16 bankruptcy court's omission of § 523(a)(6) as a basis
for relief.

17 When the bankruptcy court made its oral findings of fact and
18 conclusions of law on the record, the court did not address
19 § 523(a)(6) as a basis for its ruling. The Gues assert that
20 because Sparks failed to object to the omission at the time of the
21 hearing, he has waived the issue on appeal. The general principle
22 of Fed. R. Civ. P. 46, made applicable here by Fed. R. Bankr. P.
23 9026, is that a party must make a timely objection or motion as
24 precedent to review on appeal in order to provide the trial court
25

26 ⁵ Such inferences include that Richard Gue was properly
27 entitled to a salary because a majority vote occurred, that
28 Patricia Gue was entitled to a salary for her non-partner services
but Richard Gue was paid accidentally, or that Sparks simply never
developed the testimony in the bankruptcy court.

1 with the opportunity to know the specific contentions and to take
2 corrective action. Neu v. Grant, 548 F.2d 281, 286 (10th Cir.
3 1977).

4 Further, under Fed. R. Civ. P. 52, made applicable here by
5 Fed. R. Bankr. P. 7052, Sparks could have moved the bankruptcy
6 court, up to ten days after entry of judgment, to clarify its
7 findings on his claim for relief under § 523(a)(6). Sparks did
8 not do so, but instead timely filed this appeal. However, Fed. R.
9 Civ. P. 52(b), made applicable by Fed. R. Bankr. P. 7052, allows
10 this Panel to consider the sufficiency of the evidence supporting
11 the findings (or in this case the silence in the findings)
12 “whether or not in the [trial] court the party raising the
13 question objected to the findings, moved to amend them, or moved
14 for partial findings.”

15 Accordingly, Sparks preserved his right to appeal the issue
16 of the bankruptcy court’s silence on § 523(a)(6) as a basis for
17 relief.

18 E. The bankruptcy court did not err in its implied finding
19 that any debt to Sparks was dischargeable under
§ 523(a)(6).

20 Section 523(a)(6) excepts from discharge a debt “for willful
21 and malicious injury by the debtor to another.” The willful
22 injury requirement is met “only when the debtor has a subjective
23 motive to inflict injury or when the debtor believes that injury
24 is substantially certain to result from his own conduct.” In re
25 Su, 290 F.3d 1140, 1142 (9th Cir. 2002). A “malicious injury”
26 involves (1) a wrongful act, (2) done intentionally, (3) which
27 necessarily causes injury, and (4) is done without just cause or
28 excuse.” Id. at 1146-47.

1 At the start of the trial, the bankruptcy court stated that
2 the most likely ground for relief for non-dischargeability was
3 under § 523(a)(4), but it acknowledged that there was a
4 possibility that Sparks was entitled to relief under § 523(a)(6).
5 However, at the end of trial, when the bankruptcy court issued its
6 findings, it made no mention of § 523(a)(6). Rather, the
7 bankruptcy court only stated, "there are two grounds that might
8 have been non-dischargeable under 523(a) - (a)(2) for fraud and
9 (a)(4) for ... breach of fiduciary duty." It then proceeded to make
10 findings as to those two grounds. From the omission of
11 § 523(a)(6), it can be inferred that the bankruptcy court found
12 that § 523(a)(6) was inapposite. Further, the silence of the
13 bankruptcy court on the question of § 523(a)(6) implies that it
14 made a finding on that issue consistent with its general findings.

15 As discussed earlier, the bankruptcy court did not commit
16 clear error when it refused to find bad faith or fraud by the Gues
17 in the withdrawal and operation of a competing business. The
18 court held that even if there were a breach of the Agreement, such
19 as a breach of the non-competition clause, it would not be enough
20 to make any damages nondischargeable. The bankruptcy court also
21 heard testimony that could refute an assertion of malicious injury
22 by the Gues in their withdrawal and operation of a competing
23 business. An excerpt of the trial transcript, with what appears
24 to be either Richard Gue or Patricia Gue testifying, states, "I
25 left my license there for him to run the business. And all, all
26 the leads, all the contracts, all the nursing information was
27 there. And again, Mr. Sampias's [a co-partner who is not
28 participating in this appeal] wife is in the medical field.

1 There's no reason why he couldn't have gone to her or he could
2 have gone to me. He could have called me for help if he needed
3 it, but he didn't."

4 Perhaps Sparks' strongest claim as to § 523(a)(6) was that
5 the purported improper payment received by Richard Gue through the
6 Paychex account constituted "willful and malicious injury" against
7 him. However, Sparks has failed to provide any references or
8 excerpts of record showing that Richard Gue was not entitled to
9 payment, let alone to show that the receipt of payment was
10 "willful and malicious."

11 Accordingly, the bankruptcy court's implicit ruling of no
12 recovery under § 523(a)(6) will not be disturbed.

13

14

CONCLUSION

15 Appellant Sparks has failed to provide an adequate statement
16 of issues presented, arguments which develop the issues presented,
17 adequate references to the record for factual assertions, and
18 relevant excerpts of trial testimony. Based on the record before
19 us, we AFFIRM.

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