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

NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL  
OF THE NINTH CIRCUIT

5	In re:	)	BAP No.	NV-12-1037-KiDJu
6	MARC E. RADOW,	)	Bk. No.	10-52176-GWZ
7	Debtor.	)	Adv. No.	10-05093-GWZ
8	_____	)		
9	SPIGOT RESOURCES, INC.,	)		
10	Appellant,	)		
11	v.	)	<b>MEMORANDUM<sup>1</sup></b>	
12	MARC E. RADOW,	)		
13	Appellee.	)		
	_____	)		

Argued and Submitted on January 25, 2013  
at Las Vegas, Nevada

Filed - April 2, 2013

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

Honorable Bruce T. Beesley, Bankruptcy Judge, Presiding

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APPEARANCES: Mark D. Wray, Esq. of Law Offices of Mark Wray  
argued for appellant, Spigot Resources, Inc.;  
Kevin Darby, Esq. of The Darby Law Practice argued  
for appellee, Marc E. Radow.

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Before: KIRSCHER, DUNN and JURY, Bankruptcy Judges.

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

1 Appellant, Spigot Resources, Inc. ("Spigot"), appeals a  
2 judgment from the bankruptcy court determining Spigot had failed  
3 to prove that its state court judgment against Marc E. Radow  
4 ("Radow") was excepted from discharge under 11 U.S.C.  
5 § 523(a)(2)(A) and (a)(6).<sup>2</sup> We AFFIRM.

6 **I. FACTUAL BACKGROUND AND PROCEDURAL HISTORY**

7 **A. Events leading to Radow's lawsuit against Spigot and judgment**  
8 **against Radow**

9 On August 9, 2005, Radow, as buyer, and Spigot, as seller,  
10 entered into a contract for the sale of land in Reno, Nevada for  
11 \$6.5 million. On that same date, Radow placed \$50,000 into escrow  
12 as a deposit on the property. On September 23, 2005, the parties  
13 executed an addendum to the sales contract, agreeing to continue  
14 to negotiate in good faith the property's purchase price.

15 During the parties' negotiations, Radow was also negotiating  
16 with a third party for the purchase of water rights for the  
17 property. On September 28, 2005, Radow and Spigot modified the  
18 sales contract by executing Addendum #3, in which Spigot agreed to  
19 lower the sales price to \$5.3 million, plus an additional \$300,000  
20 in two years, or a two bedroom, three bath condominium of Spigot's  
21 choice. Addendum #3 also required Radow to release his \$50,000  
22 earnest money deposit within seven days of closing on the water  
23 rights.

24 Spigot executed Addendum #3 as a result of Radow's false  
25 representations that the costs of the water rights, sewer upgrades

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26  
27 <sup>2</sup> Unless specified otherwise, all chapter, code and rule  
28 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532, and  
the Federal Rules of Bankruptcy Procedure, Rules 1001-9037. The  
Federal Rules of Civil Procedure are referred to as "Civil Rules."

1 and impact fees were higher than anticipated. Radow made these  
2 misrepresentations orally to Spigot and in an email Radow sent to  
3 his real estate agent, who then forwarded it to Spigot. In the  
4 email, sent initially by the seller of the water rights to Radow,  
5 Radow intentionally altered the cost of the proffered water rights  
6 from \$38,000 per acre foot to \$100,000 per acre foot, and altered  
7 the actual sales price for the water rights from \$2.28 million to  
8 \$5 million.

9 Radow closed on the water rights on October 6, 2005. Radow  
10 did not reveal to his real estate agent, the escrow company, or to  
11 Spigot that he had closed on the water rights on October 6, and he  
12 did not release the \$50,000 earnest money deposit on October 13,  
13 2005, as required by Addendum #3.

14 On October 14, 2005, Radow knowingly drafted supplemental  
15 escrow instructions that did not accurately recite the parties'  
16 agreement in Addendum #3. Spigot objected to the supplemental  
17 instructions. Ultimately, Radow never released the \$50,000  
18 earnest money deposit to Spigot or performed pursuant to the terms  
19 of the sales contract.

20 On November 7, 2005, Radow sued Spigot in state court for  
21 breach of written contract, breach of the covenant of good faith  
22 and fair dealing, declaratory relief, quiet title, fraudulent  
23 misrepresentation and specific performance. Because of the  
24 lawsuit, Radow also filed a Notice of Pendency of Action ("Lis  
25 Pendens"). Spigot filed its amended answer and counterclaims on  
26 November 29, 2005, denying Radow's claims and alleging

27

28

1 counterclaims for breach of contract and declaratory relief.<sup>3</sup>

2 After a bench trial on July 25, 2007, the state court entered  
3 a judgment in favor of Spigot on August 20, 2007 ("State Court  
4 Judgment"), determining that Radow had no right, title or interest  
5 in Spigot's property and that Spigot was entitled to damages. As  
6 part of its oral findings entered on July 27, 2007, the state  
7 court announced:

8 This [Radow's misrepresentations regarding the water  
9 rights] is the clearest example of the breach of covenant  
10 of good faith and fair dealing that I have ever seen, and  
11 I think damages then do flow.

12 . . . . .

13 As to the issue of fraud on the inducement, I am not  
14 going to directly find fraud. I think there was a breach  
15 of the covenant of good faith and fair dealing by a  
16 representation that Mr. Radow knew was not true, but I  
17 think he's explained, you know, some reasoning for it,  
18 and we are somewhat at arms length trying to renegotiate  
19 deals. And I don't want to find that this was  
20 specifically fraud.

21 . . . . .

22 And when I look at the totality of the circumstances I am  
23 not going to find, for purposes of issuing any punitive  
24 damages, that there was fraud, malice or oppression  
25 proven by clear and convincing evidence.

26 So I do find that all the elements of the breach of the  
27 covenant of good faith and fair dealing exist since we  
28 had the contract, we had all the predicates to deal in  
good faith, and I believe that this effort to renegotiate  
by presenting a false statement with regard to the  
purchase of water rights and their cost which were

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23 <sup>3</sup> Spigot asserts that it alleged counterclaims for breach of  
24 contract, declaratory relief, civil conspiracy and fraud in the  
25 inducement. We disagree. In reviewing the complaint, the only  
26 claim actually labeled as a "claim" is for declaratory relief,  
27 which is the "Second Claim for Relief." No "First Claim for  
28 Relief" appears as such, but paragraphs 4-8 appear to set forth a  
claim for breach of contract. The alleged conspiracy and fraud  
claims, which would arguably be the "Third" and "Fourth" claims  
for relief, appear nowhere in the complaint, and neither do the  
words "fraud" or "fraud in the inducement" or "conspiracy."

1 already known to Mr. Radow when he sent this information  
2 to his agent for purposes of negotiating was in bad faith  
and that it did breach the contract, and damages flow  
3 from that.

4 . . . .

5 I think appropriate damages should flow from the breach  
of the covenant of good faith and fair dealing[.]

6 Hr'g Tr. (July 27, 2007) at 3:5-7; 4:12-18; 5:13-6:1; 3:14-15.

7 In its written findings and conclusions entered with the  
8 State Court Judgment (both of which were drafted by Spigot's  
9 counsel), the state court found that Radow had fraudulently  
10 misrepresented material facts to Spigot and fraudulently induced  
11 Spigot into lowering its asking price for the property. The state  
12 court found that Spigot was damaged by Radow's breach and awarded  
13 Spigot damages of \$485,961 for the loss of use of its money from  
14 January 11, 2006 to the date of the State Court Judgment - i.e.,  
15 the time during which the Lis Pendens was in place. Spigot was  
16 also awarded the \$50,000 earnest money deposit, plus accrued  
17 interest of \$7,614.25. The state court further ordered the Lis  
18 Pendens released, expunged and discharged. Radow appealed. The  
19 Nevada Supreme Court affirmed the State Court Judgment on  
20 April 30, 2009.

21 On January 11, 2010, an amended State Court Judgment was  
22 entered to include post-judgment interest, attorney's fees and  
23 costs, for a total judgment of \$703,209.56.

24 **B. The adversary proceeding**

25 Radow filed a chapter 7 bankruptcy case on June 3, 2010. On  
26 September 9, 2010, Spigot filed an adversary complaint seeking a  
27 determination that the State Court Judgment was excepted from  
28 discharge under § 523(a)(2)(A) and (a)(6). Notably, Spigot based

1 its § 523(a)(6) claim on damages it believed it suffered due to an  
2 alleged fraudulent transfer by Radow of a second deed of trust  
3 secured by certain property, that occurred approximately two weeks  
4 after the state court announced its oral ruling in favor of  
5 Spigot.

6 Radow moved to dismiss Spigot's complaint under Civil  
7 Rule 12(b)(6), incorporated by Rule 7012, contending that the  
8 State Court Judgment, which consisted of damages for breach of  
9 contract, did not constitute a claim for fraud under  
10 § 523(a)(2)(A). Further, argued Radow, Spigot failed to show how  
11 the transfer of a second deed of trust from Radow to his wife  
12 damaged Spigot or amounted to a claim for willful and malicious  
13 injury under § 523(a)(6). In its opposition, Spigot contended  
14 that the damages awarded in the State Court Judgment flowed from  
15 Radow's fraud, and therefore it had a claim under § 523(a)(2)(A).  
16 As for its claim under § 523(a)(6), Spigot now contended that  
17 either the purported fraudulent transfer by Radow, or the  
18 fraudulent inducement findings by the state court, satisfied a  
19 claim for willful injury.

20 On January 20, 2011, the parties stipulated to a Settled  
21 Statement of Facts, including certain exhibits, for trial. Based  
22 on the stipulated facts, Radow moved for summary judgment on  
23 January 28, 2011. Spigot filed a response and cross-motion for  
24 summary judgment on February 11, 2011. While Radow contended that  
25 the State Court Judgment was merely for breach of contract damages  
26 and dischargeable, Spigot argued that the damages awarded were  
27 based on findings of fraud in the inducement and intentional  
28 injury, and therefore the debt was excepted from discharge under

1 § 523(a)(2)(A) and (a)(6). Spigot argued that the state court had  
2 specifically held that Spigot suffered actual harm as a proximate  
3 result of Radow's fraud.

4 On June 7, 2011, the bankruptcy court entered a Minute Order  
5 denying Radow's motion to dismiss and the parties' cross-motions  
6 for summary judgment. The court did not explain its reasons for  
7 denying the cross-motions for summary judgment.

8 On June 16, 2011, the bankruptcy court held a trial on the  
9 matter, which consisted only of oral argument based on the  
10 stipulated facts. During a colloquy with Spigot's counsel about  
11 the issue of causation for its § 523(a)(2)(A) claim, the  
12 bankruptcy court agreed that Radow breached the covenant of good  
13 faith and fair dealing by fraudulently inducing Spigot into  
14 lowering the sales price and executing Addendum #3. However, the  
15 court doubted that a causal connection existed between those  
16 actions and Spigot's damages of loss of use, which were incurred  
17 due to Radow's filing of the Lis Pendens when a dispute arose over  
18 the closing of the sale:

19 My sense is that the only element you're missing here  
20 is the causal link between the bad acts of Mr. Radow  
21 and the damages that came about as a result of the  
[L]is [P]endens.

22 Hr'g Tr. (June 16, 2011) at 41:17-20. The bankruptcy court  
23 further questioned Spigot's claim for willful and malicious injury  
24 because the state court had made no findings that the Lis Pendens  
25 was improperly filed, or that Radow had acted intentionally to  
26 injure Spigot. After hearing further argument from the parties,  
27 the court took the matter under advisement.

28 The bankruptcy court entered its findings of fact and

1 conclusions of law and judgment in favor of Radow on January 13,  
2 2012. Spigot timely appealed.

3 **II. JURISDICTION**

4 The bankruptcy court had jurisdiction under 28 U.S.C. §§ 1334  
5 and 157(b)(2)(I). We have jurisdiction under 28 U.S.C. § 158.

6 **III. ISSUES**

7 1. Did the bankruptcy court err in determining that the State  
8 Court Judgment was not excepted from discharge under  
9 § 523(a)(2)(A)?

10 2. Did the bankruptcy court err in determining that the State  
11 Court Judgment was not excepted from discharge under § 523(a)(6)?

12 **IV. STANDARDS OF REVIEW**

13 Whether a claim is excepted from discharge presents mixed  
14 issues of law and fact, which we review de novo. Peklar v. Ikerd  
15 (In re Peklar), 260 F.3d 1035, 1037 (9th Cir. 2001). When facts  
16 are undisputed and issues of credibility are not before the  
17 bankruptcy court, de novo review is appropriate. Cal. State Bd.  
18 of Equalization v. Taxel (In re Sluggo's Chi. Style, Inc.),  
19 912 F.2d 1073, 1074 (9th Cir. 1990)(citing Brown v. Cal., 743 F.2d  
20 664, 666 (9th Cir. 1984)). We construe exceptions to discharge  
21 under § 523 liberally in favor of the debtor. Su v. Carrillio  
22 (In re Su), 259 B.R. 909, 912 (9th Cir. BAP 2001), aff'd, 290 F.3d  
23 1140 (9th Cir. 2002).

24 **V. DISCUSSION**

25 **A. The bankruptcy court did not err when it determined that the**  
26 **State Court Judgment was not excepted from discharge under**  
**§ 523(a)(2)(A).**

27 **1. Exception to discharge under § 523(a)(2)(A)**

28 The Code excepts from discharge any debt for money, property,



1 services, or credit obtained by false pretenses, a false  
2 representation, or actual fraud. § 523(a)(2)(A). To prevail on a  
3 claim under § 523(a)(2)(A), a creditor must demonstrate five  
4 elements: (1) misrepresentation, fraudulent omission or deceptive  
5 conduct by the debtor; (2) knowledge of the falsity or  
6 deceptiveness of his statement or conduct; (3) an intent to  
7 deceive; (4) justifiable reliance by the creditor on the debtor's  
8 statement or conduct; and (5) damage to the creditor proximately  
9 caused by its reliance on the debtor's statement or conduct. Oney  
10 v. Weinberg (In re Weinberg), 410 B.R. 19, 35 (9th Cir. BAP 2009)  
11 (citing Turtle Rock Meadows Homeowners Ass'n v. Slyman (In re  
12 Slyman), 234 F.3d 1081, 1085 (9th Cir. 2000)). "The creditor  
13 bears the burden of proof to establish all five of these elements  
14 by a preponderance of the evidence." Id. (citing Slyman, 234 F.3d  
15 at 1085).

## 16 2. Analysis

17 The bankruptcy court determined that Spigot had failed to  
18 prove that the State Court Judgment was excepted from discharge  
19 under § 523(a)(2)(A). Spigot does not contest the bankruptcy  
20 court's findings on the first four elements, which it found in  
21 Spigot's favor. Spigot does, however, dispute the bankruptcy  
22 court's finding that its damages were not proximately caused by  
23 its reliance on Radow's misrepresentations about the water rights,  
24 but rather by the Lis Pendens Radow filed when he sued Spigot for  
25 not closing on the land sale.<sup>4</sup>

26

27 <sup>4</sup> Spigot contends that the state court's written findings and  
28 conclusions "found that Radow had committed fraud." Aplt. Op. Br.  
(continued...)

1           **a. Misrepresentation or fraudulent omission or**  
2           **deceptive conduct by debtor**

3           The bankruptcy court found that this element was met based on  
4 the state court's findings that Addendum #3 was executed by Spigot  
5 because of Radow's false representations regarding the water  
6 rights, and Radow's knowing failure to reveal to his real estate  
7 agent, the escrow company, or to Spigot that he had closed on the  
8 water rights as required by Addendum #3, which would have  
9 triggered the release of the \$50,000 earnest money deposit. We  
10 agree with this analysis and find that Spigot established this  
11 first element.

12           **b. Knowledge of the falsity or deceptiveness of his**  
13           **statement or conduct; Intent to deceive**

14           The bankruptcy court found that, based on the state court's  
15 findings, Radow knowingly and intentionally falsified emails from  
16 the third party by changing the cost of the water rights from  
17 \$38,000 per acre foot to \$100,000 per acre foot and changing the  
18 sales price for the water from \$2.28 million to \$5 million. The  
19 bankruptcy court further found that Radow knowingly sent these  
20 falsified emails to his real estate agent with the intent to  
21

22 \_\_\_\_\_  
23           <sup>4</sup>(...continued)

24 at 18:1-3. We agree the written findings make reference to fraud.  
25 However, in reviewing page 4 of the state court transcript, the  
26 court specifically said it was not directly finding fraud, and not  
27 just as to punitive damages, but at all. Hr'g Tr. at 4:12-18;  
28 5:13-6:1. Clearly, an inconsistency exists between the state  
court's oral findings and its later written findings, which were  
drafted by Spigot's counsel. We review awards with special  
scrutiny when the trial court engages in the regrettable practice  
of adopting the findings drafted by the prevailing party  
wholesale. Sealy, Inc. v. Easy Living, Inc., 743 F.2d 1385 n.3  
(9th Cir. 1984).

1 deceive Spigot, with the expectation that Spigot would lower the  
2 price of the property. Finally, the bankruptcy court found that  
3 Radow knowingly did not reveal that he had closed on the water  
4 rights on October 6, 2005. We agree with this assessment of the  
5 facts and find that Spigot established these elements.

6 **c. Justifiable reliance by the creditor on the**  
7 **debtor's statement or conduct**

8 For determining reliance, courts apply a subjective  
9 "justifiable" reliance standard, which turns on a person's  
10 knowledge under the particular circumstances. Citibank, N.A. v.  
11 Eashai (In re Eashai), 87 F.3d 1082, 1090 (9th Cir. 1996).  
12 "Justification is a matter of the qualities and characteristics of  
13 the particular plaintiff, and the circumstances of the particular  
14 case, rather than of the application of a community standard of  
15 conduct to all cases." Id. (quoting Field v. Mans, 516 U.S. 59,  
16 70 (1995)(quoting the RESTATEMENT (SECOND) OF TORTS § 545A cmt.b  
17 (1976)). "[A] person is justified in relying on a representation  
18 of fact although he might have ascertained the falsity of the  
19 representation had he made an investigation." Id. (quoting Mans,  
20 516 U.S. at 70). However, a person cannot justifiably rely on a  
21 representation if he or she knows it is false or its falsity is  
22 obvious. Eugene Parks Law Corp. Defined Benefit Pension Plan v.  
23 Kirsh (In re Kirsh), 973 F.2d 1454, 1459 (9th Cir. 1992)(a "person  
24 cannot purport to rely on preposterous representations or close  
25 his eyes to avoid discovery of the truth").

26 The bankruptcy court found that this element was met based on  
27 the state court's finding that Spigot lowered the sales price of  
28 the property from \$6.5 million to \$5.3 million, plus a condominium

1 for Spigot, as a result of Radow's misrepresentations. It is  
2 undisputed that Spigot lowered its sales price because of Radow's  
3 misrepresentations about the water rights. The bankruptcy court's  
4 findings, however, fail to say that Spigot "justifiably" relied on  
5 these misrepresentations. Spigot assumes this finding was made;  
6 Radow has not commented on this issue. In any event, we conclude  
7 on this record that Spigot's reliance was justified. Spigot had  
8 been in negotiations for the land sale with Radow, an apparently  
9 sophisticated buyer, for some time, and likely had no reason to  
10 doubt his representations regarding the price of the water rights.  
11 Further, the artificial price must not have been so "preposterous"  
12 as to put Spigot on notice that something was amiss. Accordingly,  
13 we find that Spigot established the fourth element.

14 **d. Damage to the creditor proximately caused by its**  
15 **reliance on the debtor's statement or conduct**

16 To prevail on a § 523(a)(2)(A) claim, a creditor must prove  
17 that he sustained loss and damage as the proximate result of his  
18 reliance on the debtor's representations. Britton v. Price  
19 (In re Britton), 950 F.2d 602, 604 (9th Cir. 1991). Simply put,  
20 there must be a causal nexus between the fraud and the debt.  
21 Archer v. Warner, 538 U.S. 314, 325 (2003)(Thomas, J.,  
22 dissenting).

23 Causation or proximate cause entails (1) causation in fact,  
24 which requires a defendant's misrepresentations to be a  
25 substantial factor in determining the course of conduct that  
26 results in loss and (2) legal causation, which requires a  
27 creditor's loss to "reasonably be expected to result from the  
28 reliance." Beneficial Cal., Inc. v. Brown (In re Brown), 217 B.R.

1 857, 862 (Bankr. S.D. Cal. 1998)(citing RESTATEMENT (SECOND) OF TORTS  
2 §§ 546, 548A). "A fraudulent misrepresentation is a legal cause  
3 of a pecuniary loss resulting from action or inaction in reliance  
4 upon it if, but only if, the loss might reasonably be expected to  
5 result from the reliance." RESTATEMENT (SECOND) OF TORTS § 548A. In  
6 other words, could Spigot's damages of loss of use reasonably be  
7 expected from its reliance on Radow's misrepresentations about the  
8 water rights?

9 The bankruptcy court found that Spigot had failed to meet its  
10 burden of proof on this element, determining that the state court  
11 awarded damages for Radow's recording of the Lis Pendens, Spigot's  
12 inability to sell the property, and Spigot's loss of use of the  
13 sales price (less the deposit) for the duration of time the sale  
14 was not closed by Radow, not because of Radow's misrepresentations  
15 about the water rights. The bankruptcy court further determined  
16 Spigot had failed to prove that its loss of time use of the sale  
17 price for the property was foreseeable at the time Radow  
18 manipulated the emails.

19 Spigot argues that not only was it reasonably foreseeable  
20 from Radow's conduct that Spigot would have its property tied up  
21 in a lawsuit, it was almost inevitable. According to Spigot,  
22 after Radow induced it to sign Addendum #3, Radow closed on the  
23 water rights for the property, which he purchased for \$2.28  
24 million but told Spigot cost \$5 million. Presuming Radow would  
25 not want to lose his investment on the water rights, argues  
26 Spigot, it was not only foreseeable, but almost inevitable, that  
27 Spigot would end up in court as a foreseeable result of signing  
28 Addendum #3. Therefore, Spigot reasons, had it not been duped

1 into signing Addendum #3, escrow would have ended, and Spigot  
2 would never have been in the position to have its property tied up  
3 by Radow's campaign of fraud and manipulation. Hence, argues  
4 Spigot, its damages, which were reasonably foreseeable at the time  
5 Radow committed the fraud, flowed directly from his fraud, and  
6 therefore should be excepted from discharge under § 523(a)(2)(A)  
7 per Cohen v. de la Cruz, 523 U.S. 213, 218 (1998).

8         It is undisputed that Radow made misrepresentations to Spigot  
9 that caused Spigot to lower the sales price of the property and  
10 execute Addendum #3. However, in reviewing the State Court  
11 Judgment, which was based on Radow's breach of contract and his  
12 breach of the covenant of good faith and fair dealing, we conclude  
13 that the damages awarded were to compensate Spigot for the delay  
14 it endured in its inability to sell the property due to Radow's  
15 failure to close on the sale and the filed Lis Pendens. Even  
16 though Radow's misrepresentations about the water rights provided  
17 the basis for what the state court determined was a breach of the  
18 covenant, the awarded damages of loss of use were not the  
19 proximate result of those misrepresentations or Spigot's reliance  
20 on those misrepresentations.

21         We understand Spigot's argument that because of Radow's  
22 misrepresentations, which led to Addendum #3, it was inevitable  
23 the parties would end up in litigation over the property, so  
24 therefore Spigot should be able to except from discharge whatever  
25 losses it suffered as a result of Radow's bad conduct. While this  
26 sounds logical, the loss for which Spigot was awarded damages is  
27 simply too attenuated from the misrepresentations Radow made to  
28 Spigot about the water rights.

1           Unfortunately, we do not have a complete record of the state  
2 court proceedings, but it defies logic that Radow would dupe  
3 Spigot into executing Addendum #3, so he could then turn around  
4 and draft escrow instructions that contradicted the terms of  
5 Addendum #3, so he would then have a basis to sue Spigot and incur  
6 a tremendous amount of attorney's fees and risk losing the case,  
7 which he did. In reaching our conclusion, we certainly do not  
8 condone Radow's conduct, but we fail to see the causal connection.

9           Accordingly, Spigot has not proven by a preponderance that  
10 Radow's misrepresentation about the price of the water rights was  
11 the proximate cause of Spigot's damages. As a result, it did not  
12 prove its claim under § 523(a)(2)(A), and the bankruptcy court did  
13 not err in concluding so.

14 **B. Although the bankruptcy court applied an incorrect standard  
15 of law, it did not err when it determined that the State  
16 Court Judgment was not excepted from discharge under  
17 § 523(a)(6).**

18 **1. Exception to discharge under § 523(a)(6)**

19           The Code also excepts from discharge any debt for willful and  
20 malicious injury by the debtor to another entity or to the  
21 property of another entity. § 523(a)(6). Whether a particular  
22 debt is for willful and malicious injury by the debtor to another  
23 or the property of another under § 523(a)(6) requires application  
24 of a two-pronged test to the conduct giving rise to the injury.  
25 The creditor must prove that the debtor's conduct in causing the  
26 injuries was both willful and malicious. Barboza v. New Form,  
27 Inc. (In re Barboza), 545 F.3d 702, 711 (9th Cir. 2008)  
28 (reinforcing In re Su, 290 F.3d at 1146-47 and the application of  
a separate analysis in each prong of "willful" and "malicious").

1 "Willfulness" requires proof that the debtor deliberately or  
2 intentionally injured the creditor or the creditor's property, and  
3 that in doing so, the debtor intended the consequences of his act,  
4 not just the act itself. In re Su, 290 F.3d at 1143. The debtor  
5 must act with a subjective motive to inflict injury, or with a  
6 belief that injury is substantially certain to result from the  
7 conduct. Id.

8 For conduct to be malicious, the creditor must prove that the  
9 debtor: (1) committed a wrongful act; (2) done intentionally;  
10 (3) which necessarily causes injury; and (4) was done without just  
11 cause or excuse. Id.

## 12 **2. Analysis**

13 As to the willfulness prong, the bankruptcy court found that  
14 Spigot had not shown Radow "intended" to cause Spigot's loss of  
15 use damages. Further, the state court had not made a finding that  
16 Radow's lawsuit was filed in bad faith or that he wrongfully  
17 recorded the Lis Pendens. Therefore, reasoned the bankruptcy  
18 court, because Spigot had not proven that Radow intended to cause  
19 Spigot's loss of use damages by filing the lawsuit and recording  
20 the Lis Pendens, it could not find that Radow intended those  
21 consequences as a result of his falsifying the emails. Thus, the  
22 willful element was not met.

23 The bankruptcy court also determined that the malicious prong  
24 was not met because (1) Radow's wrongful acts of altering emails  
25 and breaching the covenant of good faith and fair dealing did not  
26 necessarily cause Spigot's loss of use damages, and because  
27 (2) neither party had presented any evidence or argument about  
28 just cause or excuse. As a result, Spigot had failed to prove the



1 State Court Judgment was excepted from discharge under  
2 § 523(a)(6).

3 Spigot contends the bankruptcy court erroneously applied the  
4 willful prong by holding that the actual injury suffered by Spigot  
5 had to be the same injury Radow intended to inflict in order for  
6 it to prevail on its claim. Spigot further argues that the state  
7 court's findings provided sufficient evidence that Radow acted  
8 without any just cause or excuse.

9 We conclude that the bankruptcy court erred in applying an  
10 incorrect standard of law, but not for the reasons Spigot asserts.  
11 Because tortious conduct is a required element for a finding of  
12 nondischargeability under § 523(a)(6), Spigot's breach of contract  
13 claim does not meet the statute's requirements. See Lockerby v.  
14 Sierra, 535 F.3d 1038 (9th Cir. 2008).

15 In Lockerby, the Ninth Circuit held that a claim for an  
16 intentional breach of contract is not "willful and malicious"  
17 under § 523(a)(6) unless it is accompanied by conduct that  
18 constitutes a tort under state law. 535 F.3d at 1043 (citing  
19 Petralia v. Jercich (In re Jercich), 238 F.3d 1202, 1206 (9th Cir.  
20 2001); Del Bino v. Bailey (In re Bailey), 197 F.3d 997, 1000 (9th  
21 Cir. 1999)(while bankruptcy law governs whether a claim is  
22 nondischargeable under § 523(a)(6), the court looks to state law  
23 to determine whether an act falls within the underlying tort).  
24 Simply put, an intentional breach of contract is not enough.  
25 Therefore, for Spigot to have had a claim under § 523(a)(6),  
26 Radow's breach of the covenant of good faith and fair dealing must  
27 have constituted a tort under Nevada law.

28 Although in Nevada "every contract contains an implied

1 covenant of good faith and fair dealing, an action in tort for  
2 breach of the covenant arises only 'in rare and exceptional cases'  
3 when there is a special relationship between the victim and  
4 tortfeasor. A special relationship is 'characterized by elements  
5 of public interest, adhesion, and fiduciary responsibility.'  
6 Examples of special relationships include those between insurers  
7 and insureds, partners of partnerships, and franchisees and  
8 franchisers." Ins. Co. of the W. v. Gibson Tile Co., 134 P.3d  
9 698, 702 (Nev. 2006)(en banc)(internal citations omitted).

10 Here, we have equal parties who negotiated a contract at arms  
11 length and who do not appear to be in any special relationship.  
12 Accordingly, the breach in this case did not constitute a tort  
13 under Nevada law, so Spigot could not prevail on a claim under  
14 § 523(a)(6). Even if Spigot could show fraud as the accompanying  
15 tort, as we concluded above, Radow's wrongful conduct did not  
16 necessarily cause Spigot's loss of use damages; thus, the  
17 malicious prong is not met.

## 18 VI. CONCLUSION

19 Based on the foregoing reasons, we AFFIRM.  
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