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

NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL

OF THE NINTH CIRCUIT

In re:	BAP No. NC-07-1268-JuMkK
KEVIN CHIEN,	Bk. No. 05-32677
Debtor.	Adv. No. 05-03412
KHANM KIM LUC,	
Appellant,	
v.	**M E M O R A N D U M**[1]
KEVIN CHIEN,	
Appellee.	

Argued and Submitted on January 24, 2008
at San Francisco, California

Filed - February 7, 2008

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

Honorable Thomas E. Carlson, Bankruptcy Judge, Presiding

Before: JURY, MARKELL and KLEIN, Bankruptcy Judges.

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[1] 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.

I. INTRODUCTION

Creditor-Appellant Khanm Kim Luc ("Luc") appeals the bankruptcy court's judgment in favor of Debtor-Appellee Kevin Chien ("Chien" or "Debtor"), finding that a debt owed by Chien to Luc based on a California judgment for $160,000 was not excepted from discharge under § 523(a)(6).[2]

In this appeal, Luc seeks to expand the parameters of what constitutes a willful injury as defined by the United States Supreme Court in Kawaauhau v Geiger, 523 U.S. 57 (1998) and the Ninth Circuit in Carrillo v. Su (In re Su), 290 F.3d 1140 (9th Cir. 2002). Luc contends that it is enough for her to prove that Debtor knew his intentional act would result in harm to some group of persons or entities, even if she was not one of those harmed. Luc also argues that the willful conduct of another person should be imputed to Debtor because he was the surrogate or alter ego of the wrongdoer or the wrongdoer's partner.

We reject the expansion of § 523(a)(6) liability on either of these theories, conclude the trial court did not err in finding the debt at issue dischargeable, and AFFIRM.

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[2] Unless otherwise indicated, all chapter, section and rule references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1330, and to the Federal Rules of Bankruptcy Procedure, Rules 1001-9037, as enacted and promulgated prior to the effective date of The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. 109-8, 119 Stat. 23, because the case from which this appeal arises was filed before its effective date (generally October 17, 2005).

II. FACTS

The complex factual and legal background which led to Chien and Luc's battle in the bankruptcy court has been well documented in two state court trials, a jury verdict, a judgment on the verdict, a trial judge's statement of decision and judgment, and two appellate decisions. We take the facts pertinent to our determination in this case largely from the second appellate decision, which followed the trial of Luc v. Chien in the San Francisco County Superior Court and upheld the $160,000 judgment against Chien.[3]

Chien became friends with Donald Chiu ("Chiu") in 1995 soon after he graduated from college. On a number of occasions, he helped Chiu obtain money by taking out loans in his name on property Chiu owned and temporarily deeded to Chien. For example, in 1997 Chien helped Chiu obtain refinancing for a condominium Chiu's mother purportedly owned (the "Condo"), although title was in Chiu's name. To take advantage of Chien's good credit, Chiu deeded title to the Condo to Chien, Chien signed the loan papers and, three days later, deeded the property back to Chiu's mother.

On May 1, 1997, one day after the close of the Condo refinance, Chiu purchased property which he planned to develop. The only building on the property was rented out to Luc (the "Rental Property"), which was subject to San Francisco rent control law. The following November, Chiu commenced to evict

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[3] This appellate decision, along with the entire superior court transcript, exhibits, rulings, and statement of decision, was before the bankruptcy judge at trial below.

Luc from the Rental Property by giving her a thirty-day notice based on his purported intent to rent the apartment to his brother.[4] He later served her with a three-day notice based on nonpayment of rent. While the unlawful detainer was pending, Chiu and Luc entered into a settlement agreement (the "Stipulation"), whereby she agreed to vacate the Rental Property and give a general release to Chiu in exchange for a waiver of some rent and receipt of $1000.

Meanwhile, lacking sufficient credit to obtain a construction loan for the development of the Rental Property, Chiu turned again to Chien. In meetings among Chiu, Chien, and a mortgage broker, Chiu represented in Cantonese that Chien was his partner and they jointly submitted loan applications. Chien did not deny the partnership assertions, although the record reflects he did not speak Cantonese. After submitting the loan applications, Chiu conveyed the Rental Property to Chien for no consideration. Chien secured a loan to pay off the existing financing and additional loans to complete the construction and renovation of the Rental Property.

In November 1998, while the improvements to the Rental Property were under way, Luc sued Chiu for wrongful eviction under the rent control law and asked for a jury trial. The litigation between Luc and Chiu was still pending in February 2000 when Chien sold the Rental Property to a bona-fide purchaser for $1.01 million. At the time of the sale, Chien was unaware of

[4] Rental for a year to a family member was grounds for eviction under the rent control law.

the wrongful eviction litigation commenced by Luc.[5]

The sale netted $160,000 after all the costs of acquisition and construction were paid. The $160,000 was paid from the sale escrow to a Chien bank account, but Chien only received $100 and the balance went to Chiu.

On April 28, 2000, Luc obtained a judgment against Chiu for approximately $635,000 after a jury verdict setting aside the Stipulation as a "fraudulent inducement." The large judgment was based in part on treble damages awarded under the rent control law. The Chiu judgment was upheld on appeal.

In August 2000, while attempting to collect on her judgment against Chiu, Luc sued Chiu, Chiu's mother, and Chien for recovery of the Rental Property or its value based on state fraudulent conveyance theories. After a five-day bench trial and a written statement of decision, the trial court entered judgment against Chien for the profit attributable to the sale of the property on the ground that Chiu's conveyance of the property to Chien was fraudulent and, therefore, Chien held the proceeds in constructive trust for Chiu's creditors, among them Luc.[6]

This judgment against Chien was affirmed on appeal, the damages being upheld on the constructive trust theory. The appellate court commented on Chien's liability:

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[5] The record is ambiguous as to when exactly Chien learned of the Luc litigation and judgment against Chiu. However, the record does not reflect that Chien knew about the litigation before the Rental Property was sold.

[6] Judgment in the same sum was entered against Chiu and his mother. Chiu has fled the country and his mother is apparently not responsive to the judgment.

> There is no direct evidence Chien intended to defraud Luc. When he acquired the property, Luc was not a judgment creditor and had not yet filed her wrongful eviction action. When he sold the property, he conveyed it to a good faith purchaser, without knowing about Luc's wrongful eviction action.....Likewise, there is no direct evidence Chien wrongfully handled the $160,000 profit....

The appellate court also quoted the trial court's comments about Chien's responsibility:

> Moreover, the trial court concluded that Chien acted wrongfully, even if he did not act with a fraudulent intent. At the hearing on the statement of decision, the court explained: 'I don't think that Mr. Chien is without some responsibility. I said it before and I will say it again. Mr. Chien allowed himself to be used. I'm sorry, Mr. Chien. That's how I see it...I don't think that Mr. Chien is involved in any active fraud, in any active willful or malicious conduct. I wouldn't find that he is, you know, if there were an issue of punitive damages here, which there isn't, that he was subject to that....'

Chien filed his chapter 7 petition on August 19, 2005, and Luc timely filed her adversary complaint seeking to except the judgment from discharge under § 523(a)(6). The complaint purported to be based solely on the statement of decision and judgment rendered in the California Superior Court action, claiming the basis of the judgment was willful and malicious injury. The parties brought cross motions for summary judgment based on the doctrine of issue preclusion, which the bankruptcy court denied.[7] Accordingly, the parties proceeded to trial

[7] The bankruptcy court noted at the trial on this matter that even though the state court had found that Chien had not acted willfully or maliciously, the state court used a different standard.

before the bankruptcy judge based on a stipulation.[8]

After a one-day trial that consisted of the live testimony of Chien, argument of counsel, and reference to the stipulated evidence, the bankruptcy judge found that Chien did not have the subjective malicious intent to injure Luc as required by Su and entered judgment for Debtor. Luc timely appealed.

III. JURISDICTION

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

IV. ISSUES

Whether the bankruptcy court erred in determining that the debt owed to Luc was dischargeable.

V. STANDARDS OF REVIEW

Whether a claim is nondischargeable presents mixed questions of fact and law and is reviewed de novo. Su, 290 F.3d at 1142.

If two views of the evidence are possible, the trial judge's choice between them cannot be clearly erroneous. Anderson v. Bessemer City, 470 U.S. 564, 574 (1985). If a trial court's account of the evidence is plausible in light of the record viewed in its entirety, the appellate court may not reverse it, even though convinced if it had been sitting as the trier of fact it would have weighed the evidence differently. Phoenix Eng'g & Supply, Inc. v. Universal Elec., Inc., 104 F. 3d 1137, 1141 (9th Cir. 1997).

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[8] The stipulation provided that the transcript of the entire trial and ruling, including exhibits, in the San Francisco Superior Court in the matter entitled Luc, et al. v. Chien, et al., No. CAC-00-314060, would be deemed admissible.

VI. DISCUSSION

Pursuant to § 523(a)(6), a discharge under § 727 does not discharge an individual from any debt -- "(6) for willful and malicious injury by the debtor to another entity or to the property of another entity." 11 U.S.C. § 523(a)(6). The "willful and malicious" inquiry requires a two-step analysis. Khaligh v. Hadaegh (In re Khaligh), 338 B.R. 817, 831 (9th Cir. BAP 2006). The first step of the inquiry is whether there was a "willful" injury, while the second step concerns whether the conduct was "malicious." Id. In this appeal we are concerned only with the first step of the inquiry: whether there was a willful injury.[9] Such an inquiry focuses on a debtor's subjective intent.

A. The Standards for the Willful Inquiry

Debts arising from unintentionally inflicted injuries do not fall within the scope of § 523(a)(6). Geiger, 523 U.S. at 61-62 (1998)(noting that "the (a)(6) formulation triggers in the lawyer's mind the category of 'intentional torts'" which "generally require that the actor intend 'the consequences of an act,' not simply the 'act itself.'"). Geiger held that debts based on a medical malpractice judgment allegedly arising from intentionally rendered inadequate medical care that necessarily led to plaintiff's injuries were dischargeable because the doctor did not intend the injury. The court concluded that "debts

[9] The parties and court below focused their briefs and argument solely on this prong. Since we agree with the trial court that Appellant did not to establish the willful prong, a discussion of malicious conduct is unnecessary.

arising from recklessly or negligently inflicted injuries do not fall within the compass of § 523(a)(6)." Id. at 64.

The Ninth Circuit clarified Geiger in two cases pertinent to this analysis, Petralia v. Jercich (In re Jercich), 238 F.3d 1202 (9th Cir. 2001), cert. denied, 533 U.S. 930, and Su, 290 F.3d at 1140. In Jercich the court considered whether a prepetition state court judgment against a chapter 7 debtor held by the debtor's employee for unpaid wages was excepted from discharge under § 523(a)(6). The debtor-employer had deliberately breached the employment contract with the creditor-employee. He elected not to pay wages owed to his employee even though he had the funds to do so and spent the money instead on personal investments. In examining whether these acts led to a debt based on the debtor's willful and malicious injury, the court emphasized that willful and malicious was a two pronged test.

Answering a question not addressed in Geiger and relying on an earlier Supreme Court case, McIntyre v. Kavanaugh 242 U.S. 138 (1916) and Restatement (Second) of Torts § 8A, cmt a, p. 15 (1965), the Ninth Circuit held that the willful injury requirement of § 523(a)(6) is met "when it is shown either that the debtor had a subjective motive to inflict the injury or that the debtor believed that injury was substantially certain to occur as a result of his conduct." Jercich, 238 F.3d at 1207-8 (emphasis in original).[10]

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[10] The court, finding that its earlier definition of malicious injury in Murray v. Bammer (In re Bammer), 131 F.3d 788, 791 (9th Cir. 1997) (en banc), survived Geiger, reiterated the definition: "A 'malicious' injury involves '(1) a wrongful

(continued...)

The Ninth Circuit in Su, the case largely relied on by the trial court below, was compelled to resolve confusion it had created itself in Jercich.[11] The Court in Jercich had cited both a Fifth Circuit case, Miller v. J.D., Abrams, Inc. (In re Miller), 156 F.3d 598 (5th Cir. 1998), and a Sixth Circuit case, Markowitz v. Campbell (In re Markowitz), 190 F.3d 455 (6th Cir. 1999) with favor in discussing its definition of willful injury. The Su court recognized that Miller had employed an objective standard for willfulness ("...[c]onversely, the Fifth Circuit's interpretation of § 523(a)(6) exemplifies the objective approach, in which debt is nondischargeable under § 523(a)(6) either if there is a subjective intent to cause an injury or if there is an objective substantial certainty of harm"), Su, 290 F.3d at 1143-44, whereas Markowitz had employed the subjective standard which the Ninth Circuit meant to adopt.

Utilizing only the subjective test, the Su court agreed with this Panel that the bankruptcy court was required to analyze the debtor's state of mind in order to make findings of malice, rather than use the objective test (substantial certainty of

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[10](...continued)
act, (2) done intentionally, (3) which necessarily causes injury, and (4) is done without just cause or excuse.'" Jercich at 1209. The malicious prong is not at issue in this appeal.

[11] In Su the judgment creditor had been injured as a result of a chapter 7 debtor's allegedly deliberate decision to run a red light. The jury had found that the debtor/driver was guilty of malice by clear and convincing evidence based on the state court definition of malice: either conduct intended to cause injury to the plaintiff or despicable conduct carried on with a willful and conscious disregard for the safety and rights of others. Su, 290 F.3d at 1141.

harm) as it had done, relying on Miller. In so doing, the Ninth Circuit explicitly rejected "reckless disregard" as a basis for the nondischargeability of a debt under § 523(a)(6). Su, 290 F.3d at 1145-46.

In sum, both Geiger and Su demonstrate that the standard for meeting the willful prong of the two-part test under § 523(a)(6) is high. That is, the creditor must prove that the debtor had the subjective intent to cause harm or the subjective knowledge that harm was substantially certain to occur.

B. Debtor's Culpability

As detailed above, the trial before the bankruptcy judge consisted of the live testimony of one witness, Chien, and the court's consideration of all the evidence, oral and documentary, submitted into the record in the state court trial of Luc v. Chien. The record of the one-day proceeding reflects that the trial judge made an independent review of all the evidence from the state court trial and considered it, along with Chien's testimony, in making its decision.[12]

Throughout the trial and in closing argument, Luc sought to establish Debtor had the subjective knowledge that harm to Luc was substantially certain to occur when Chiu transferred the Rental Property to him. The trial judge was mindful of the Su

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[12] Appellant argues obliquely on occasion in its appellate briefs, as well as before the trial court, that the court "must" give collateral estoppel (i.e., issue preclusive) effect to findings of the state court. This argument, however, is not developed in the briefs nor is it merited, given the stipulation by the parties as to the evidence before the trial court. Therefore, we will ignore these arguments. Issue preclusion has no effect on the outcome of this case.

requirements when he ruled and knew he must find Debtor's subjective intent to injure Luc in order to except the debt from discharge. He articulated the standard in a question to Luc's counsel:

"Okay. Let me ask you. He has to intentionally perform an act with the subjective knowledge that harm is substantially certain to occur?"

To which counsel responded: "Absolutely," then went on to argue that the "act" was taking title to the Rental and conspiring to violate the rent control laws.

Applying the standard for analyzing the willful prong as articulated under Su, the trial judge found Chien did not intentionally take title to the Rental Property with the subjective knowledge that harm to Luc was substantially certain to occur. Specifically, the court found two "breaks in the chain." The first break was the Stipulation between Chiu and Luc. The court noted that the Stipulation was resolving Chiu's claim for rent against Luc and that there was no lawsuit at that time. The second break was that there was a logical reason for Chien to take title to the Rental Property: to facilitate the financing necessary for development. Thus, the court observed that while the Debtor's act of taking title may have been deceptive to the banks, the evidence did not support Luc's argument that Debtor took title to the Rental Property to evade the rent control laws and a judgment for that effect. Also, almost as an aside, the trial court found there was no harm with the sale of the Rental Property to a third party because it appeared to be for fair market value and Debtor took no profits.

Based upon the record, we perceive no defect in the bankruptcy court's conclusion that the requisite intent under the Su test was not satisfied. We give deference to his weighing of the evidence and find no clear error. Price v. Lehtinen (In re Lehtinen), 332 B.R. 404, 415 (9th Cir. BAP 2005)(noting that findings of fact based upon credibility are given particular deference by appellate courts). In sum, the rule of law set forth in Su is clear and the court's factual findings satisfy the Su standards.

C. Intent to Harm Parties Other Than Luc

Luc takes issue with the court's finding that there was no connection between Debtor's act of taking title to the Rental Property and the harm to Luc. Luc contends all that she needs to prove under the willful test is that Debtor's intentional act of taking title and using his good credit to obtain the loans needed to develop the Rental Property could foreseeably harm someone (presumably the lenders) and she need not prove foreseeable harm to her.

Luc's argument is not supported by any case law cited in her brief, nor did we find any. This lack of case law is no surprise because the statute and Su require that the debtor must commit some type of act that he or she subjectively knows would cause injury to the creditor, and not just subjective knowledge that his or her acts would cause injury to parties other than the creditor.

Further, implementation of § 523(a)(6) is established by the statute itself under subsection (c), which provides:

> Except as provided in subsection (a)(3)(B) of this section, the debtor shall be discharged from a debt of a kind specified in paragraph . . . (6)... of subsection (a) of this section, unless, on request of the creditor to whom such debt is owed, and after notice and a hearing, the court determines such debt to be excepted from discharge under paragraph...(6)...as the case may be, of subsection (a) of this section. 11 U.S.C. § 523(c)(emphasis added).

As highlighted above in the statute, the creditor to whom the debt caused by the willful and malicious conduct is owed must bring the action for nondischargeability within a specified time frame as established by Rule 4007 (c). Otherwise, the debt is discharged.

Appellant having presented no case law to support this argument and the statutory scheme providing the scope of claimants, we summarily reject Luc's suggested expansion of the willful test. Here, Luc admits she was not a lender or within the class of people foreseeably damaged by the fraudulent lending schemes concocted by Chiu and Chien. Thus, Luc cannot assert nondischargeability because Debtor's acts would potentially harm lenders because she was not a lender.

D. Imputed Conduct

Appellant articulates her proposed expansion of the willful inquiry in her Reply Brief:

> Appellant sought to exempt her judgment as 'wilful (sic) and malicious,' under Bkrtcy. C. § 523(a)(6), but the Bankruptcy Court denied relief under In re Su, 290 F. 3d 1149 (9th Cir. 2002). Appellant argued in the Bankruptcy trial court, and now, here, that In re Su should not apply to broad-based conspiracies (as here) and certainly not to Mr. Chien who was deemed to be a facilitator, complicit, partner, and instrumental, that Kevin and Donald worked together, with ongoing participation....

Luc's consistent vision is that Debtor's conduct was instrumental

to Chiu's success, which was precisely the finding of the state court of appeal. She therefore seeks to avoid the holding of Su and the plain meaning of § 523(a)(6) by maintaining that the court erred by not imputing Chiu's conduct to Chien. In other words, the standards set forth in Su are inapplicable because they do not cover injuries caused by the willful conduct of another which should be imputed to Debtor through application of alter ego, agency, conspiracy, or partnership principles.

Whether Chiu's willful conduct should have been imputed to Debtor under any of these theories was not addressed by the bankruptcy court.[13] The court found in Debtor's favor based on Su and nothing more.

Luc cites Tsurukawa v. Nikon Precision, Inc. (In re Tsurukawa), 287 B.R. 515 (9th Cir. BAP 2002) in support of her position. Close analysis of this § 523(a)(2)(A) nondischargeability case belies its applicability. In Tsurukawa, the debtor and her husband were engaged in a business partnership and, based on that partnership, the husband's fraud was imputed to debtor for purposes of creditor's § 523(a)(2)(A) argument. The genesis of this finding was the definition of a partnership under California law and the agency principles it engenders, along with the court's observation that the United States Supreme Court had already found that the fraud of a partner could be

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[13] We note that the bankruptcy judge in this case made no explicit findings on these issues. He did not find that Debtor was the partner of Chiu, never discussed alter ego or enabling behavior, and made no finding on conspiracy. For purposes of our discussion, we assume without deciding that Debtor was at least an implicit partner of Chiu.

imputed to a debtor for nondischargeability purposes. Id. at 525 citing Strang v Bradner, 114 U.S. 555, 561 (1885). Thus, even though the statute was silent regarding whether a partner's fraud could be imputed to the debtor under partnership or agency principles, the court found the existing case law imputed fraud under an § 523(a)(2)(A) analysis. See also, BancBoston Mortgage Corp. v. Ledford (In re Ledford), 970 F.2d 1556 (6th Cir. 1992)(finding the fraud of a partner was imputed to a debtor where the fraud was in the ordinary course of business of the partnership and the profits created were shared by the debtor partner).

The Tsurukawa analysis is thus specific to fraud and to apply it to willful and malicious conduct is a quantum leap we are not prepared to make. The plain language of § 523(a)(6) excepts from discharge a willful and malicious injury by the debtor to another entity (emphasis added). Further, the standards set forth in Geiger and Su compel a more measured approach. We harken back to Geiger where the Supreme Court, in the simplest possible terms, said a debtor must intend to injure the creditor before a claim is excepted from discharge based on malice. Geiger, 523 U.S. at 61-62. The Ninth Circuit in Su has refined the willful prong to require the debtor to subjectively intend to inflict injury or to believe that injury is substantially certain to occur as a result of his conduct. Su, 290 F.3d at 1144 (emphasis added).

Even if Debtor was Chiu's partner,[14] agency principles do not project a state of mind on Chien. Behaviors and outcomes might be imputed, maybe even misrepresentations, but subjective thoughts cannot be. Under no accepted legal principles can Chiu's subjective willfulness be rested upon Debtor.[15]

Regarding Luc's conspiracy theory, the recent case of Kalmanson v. Adams (In re Nofziger), 361 B.R. 236 (Bankr. M.D. Fla. 2006), while not binding, is instructive. In Nofziger, the court held that a conspiracy claim would not substitute for the intentional tort typically required to make a debt nondischargeable under § 523(a)(6). Id. at 243. The court's decision was based on the rationale that a co-conspirator's acts are not the debtor's acts which must be taken directly against the objecting creditor as required by § 523(a)(6). Id. The court observed that "action taken by someone other than the debtor" does not qualify. Id. We agree with Nofziger, consistent with the standards set forth in Geiger and Su, that

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[14] Maybe even assuming Chien was Chiu's partner is an unwarranted stretch when case law requires that a partner participate in the profits. The record makes it very clear that Chiu, not Chien, got all the money.

[15] Luc also relies on Flowers & Sons Dev. Corp. v. Mun. Court, 86 Cal.App.3d 818, 150 Cal.Rptr. 555 (1978). However, that case simply stands for the proposition that if the defendant no longer has a possessory interest in the fraudulently-conveyed property, the plaintiff creditor cannot obtain the set-aside remedy provided under Cal. Civ. Code § 3439.07, subdivision (a)(1) and may obtain an award for damages if the transferee had knowledge of the fraudulent scheme. Here, the award of damages against Chien by the state court was based on constructive trust, not his knowledge of fraud.

Luc's conspiracy theory is inapplicable in the context of § 523(a)(6).

While Luc argues that Su should not apply to this case, her argument seems to be based more on the factual distinction of Su than on any analysis that the subjective standards established by Su are wrong. These standards are controlling. Accordingly, a partner's willful conduct, which requires subjective intent to harm or subjective knowledge that harm would occur, may not be imputed to a debtor for purposes of nondischargeability under § 523(a)(6).

VII. CONCLUSION

We hold that the bankruptcy court properly applied the standards under Su to the facts of this case. We emphasize that under Su, the debtor must have the subjective knowledge that harm to the complaining creditor, and not some other group of persons or entities, would occur. We also hold that the requisite standards for a finding of willfulness, which requires subjective intent to harm or subjective knowledge that harm will occur, cannot be imputed to a debtor through the conduct of another wrongdoer. Accordingly, for the reasons noted above, we AFFIRM.