

SEP 02 2009

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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NOT FOR PUBLICATION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

6	In re:	)	BAP No.	EC-09-1064-DJuMk
		)		
7	ASHISH J. BISWAS,	)	Bk. No.	07-10440-WRL
		)		
8	Debtor.	)	Adv. No.	07-01097-WRL
		)		
9	_____	)		
		)		
10	YADIVINDER NARANG AND	)		
	RAUSHANI NARANG,	)		
		)		
11	Appellants,	)		
		)		
12	v.	)	<b>M E M O R A N D U M</b> <sup>1</sup>	
		)		
13	ASHISH J. BISWAS,	)		
		)		
14	Appellee.	)		
		)		
15	_____	)		

Argued and Submitted on July 30, 2009  
at San Francisco, California

Filed - September 2, 2009

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

Hon. W. Richard Lee, Bankruptcy Judge, Presiding.

\_\_\_\_\_  
Before: DUNN, JURY and MARKELL, Bankruptcy Judges.

\_\_\_\_\_  
<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 Yadivinder Narang, M.D. ("Dr. Narang") and Raushani Narang  
2 (collectively, the "Narangs") employed the debtor, Ashish Biswas  
3 ("Biswas"), as the general contractor in the construction of  
4 their custom home. Midway through construction, the Narangs  
5 fired Biswas and employed another contractor to complete the  
6 house and correct the various defects throughout the house caused  
7 by Biswas's poor workmanship. The Narangs subsequently obtained  
8 a state court judgment against Biswas for their damages.

9 Shortly after Biswas filed for chapter 7 relief, the Narangs  
10 initiated an adversary proceeding to except the state court  
11 judgment from discharge under § 523(a)(2)(A).<sup>2</sup> Because the  
12 Narangs did not provide sufficient evidence to establish fraud  
13 under § 523(a)(2)(A), the bankruptcy court determined that the  
14 state court judgment was dischargeable. We AFFIRM.

## 15 16 I. FACTS

17 On June 2, 2003, Biswas, doing business as Biswas  
18 Construction Company, contracted with the Narangs to act as the  
19 general contractor in the construction of their home  
20 ("Construction Contract").<sup>3</sup> The Narangs hired Biswas based on  
21 the recommendation of friends, who themselves had hired Biswas to  
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24 <sup>2</sup> Unless otherwise indicated, all chapter, section and rule  
25 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532, and  
to the Federal Rules of Bankruptcy Procedure, Rules 1001-9037.

26  
27 <sup>3</sup> The original contract amount was \$986,080, but during the  
course of construction, change orders increased the contract  
amount by \$78,905, for a total of \$1,064,985.

1 build their home, and on his bid, which was significantly lower  
2 than the next competing bid.

3 The Construction Contract provided that Biswas was to supply  
4 all work, labor and services and to furnish all the materials  
5 necessary to construct the house. It further provided that  
6 Biswas was to complete construction within twelve months and in a  
7 "workmanship like manner" in compliance with applicable building  
8 codes and laws. The Construction Contract acknowledged that  
9 state law required contractors to be licensed through the state  
10 contractor's licensing board.

11 Before forming Biswas Construction Company, Biswas's  
12 experience was in commercial and residential remodels and  
13 residential additions. Before entering into the Construction  
14 Contract, Biswas told Dr. Narang that he had built a few houses  
15 in Fresno, California and a temple in Bakersfield, California.  
16 Dr. Narang was familiar with the temple.<sup>4</sup> Biswas assured  
17 Dr. Narang that he would be able to "build a good house"  
18 according to the plans and complete construction of the house  
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21 <sup>4</sup> At the trial, Dr. Narang testified that he viewed a home  
22 under construction by Biswas and learned that the homeowners were  
23 satisfied with the construction at the time. Dr. Narang further  
24 testified that he did not ask Biswas to see any other houses  
25 Biswas had built. He also stated that Biswas did not take him to  
26 view any other projects.

27 The bankruptcy court did not make a finding as to whether  
28 Dr. Narang managed to observe Biswas's work to ascertain his  
ability. The bankruptcy court instead found that the Narangs  
could have asked for prior examples of Biswas's work to verify  
his qualifications but did not do so, instead relying on their  
friends' recommendations.

1 within twelve months. Dr. Narang did not inquire further into  
2 Biswas's experience in residential construction, nor did he  
3 question Biswas about the status of his contractor's license.

4 The house designed for the Narangs was approximately 7,000  
5 square feet; it consisted of two stories and a basement. The  
6 house was the largest residential project Biswas had undertaken  
7 and the first with a basement.

8 Biswas held a valid contractor's license when he entered  
9 into the Construction Contract. However, during construction of  
10 the Narangs' home, from June 2, 2004 to February 7, 2005,  
11 Biswas's contractor's license was suspended because he did not  
12 renew his contractor's bond. Biswas was unaware that his  
13 contractor's license was suspended until after the suspension had  
14 occurred; though he received notice of the suspension by mail, he  
15 did not read the notice because it "got caught up in [his moving  
16 residences]." Tr. of January 8, 2009 Hr'g, 22:21-25, 23:1-2. A  
17 few weeks after Biswas obtained a new contractor's bond, his  
18 contractor's license was reinstated. Biswas did not inform the  
19 Narangs that his contractor's license had been suspended.

20 The Narangs obtained a \$975,000 home construction loan from  
21 Bank of America. Loan funds were disbursed to Biswas based upon  
22 the percentage of work completed after an inspection by the  
23 bank's representative. Between July 1, 2003 and October 22,  
24 2004, Biswas received draws totaling 80% of the available funds.

25 Progress of the construction was slow and subject to  
26 excessive delays. Biswas did not pay some subcontractors and  
27

1 materials suppliers. On February 7 and February 8, 2005, when  
2 the house was only 50% complete and while the house had water  
3 damage and mold issues, Biswas requested two additional draws.

4 On February 18, 2005, the Narangs notified Biswas that he  
5 was to cease and desist his work on the house. A week later,  
6 concerned with the quality of the work done by Biswas, the  
7 Narangs hired an inspection company which concluded that the  
8 house was not near completion. The Narangs hired another general  
9 contractor to complete construction of the house, who performed  
10 substantial remedial and corrective work of various defects  
11 throughout the house at a cost of \$299,313.27, over and above the  
12 amount agreed in the Construction Contract.

13 The Narangs initiated a state court action against Biswas,  
14 alleging breach of contract, fraud and negligent  
15 misrepresentation. They also demanded that Biswas disgorge  
16 \$220,128, which Biswas received while his contractor's license  
17 was suspended, on the grounds that California Business and  
18 Professions Code ("B & P Code") § 7031 bars an unlicensed  
19 contractor from demanding or receiving payment for labor and  
20 services rendered. On February 1, 2007, they obtained a state  
21 court judgment in the total amount of \$519,441.27 ("state court  
22 judgment").<sup>5</sup> The damages awarded in the state court judgment  
23 consisted of the \$299,313.27 in costs the Narangs incurred to  
24 complete corrective work on their home ("construction cost  
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26 <sup>5</sup> The state court judgment was entered after an unopposed  
27 motion for summary judgment filed by the Narangs.

1 award") and the \$220,128 in funds Biswas received while his  
2 contractor's license was suspended ("disgorgement award").

3 Three months after Biswas filed for chapter 7 relief on  
4 February 20, 2007, the Narangs initiated an adversary proceeding  
5 against Biswas to except the state court judgment from discharge  
6 under § 523(a)(2)(A).<sup>6</sup> They alleged that Biswas fraudulently  
7 represented that he was qualified to construct the Narangs' home  
8 competently and that he would maintain a contractor's license  
9 during the course of the construction.

10 Before the two-day trial, the parties stipulated to many of  
11 the material facts. Biswas admitted that he caused some of the  
12 construction delays because he did not properly organize the  
13 project. He also stipulated that he had neither the experience  
14 nor the competence to take on the project, as evident from the  
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20 <sup>6</sup> The Narangs also asserted that the debt owed by Biswas  
21 arose from his willful and "maliciously made" misrepresentations  
22 to the Narangs under § 523(a)(6). The bankruptcy court  
23 determined that the debt did not arise from a willful and  
24 malicious injury within the meaning of § 523(a)(6); it found that  
25 the Narangs did not produce any evidence demonstrating that  
26 Biswas acted willfully with the intent to cause them injury. The  
27 Narangs do not appeal the bankruptcy court's determination as to  
28 their § 523(a)(6) claim for relief. Appellants' Opening Brief  
at 2. In fact, the Narangs assert that they dropped their  
§ 523(a)(6) claim before the trial in the adversary proceeding.  
Appellants' Opening Brief at 2. We therefore do not address the  
bankruptcy court's determination as to the § 523(a)(6) claim.

1 manner in which he ran it.<sup>7</sup> He further stipulated that his work  
2 was substandard and did not conform with industry standards.

3 Dr. Narang and Biswas testified at the trial. After the  
4 trial, the bankruptcy court took the matter under submission. On  
5 February 18, 2009, the bankruptcy court issued its Memorandum  
6 Decision and entered a judgment in favor of Biswas. The  
7 bankruptcy court held that the Narangs did not establish fraud  
8 under § 523(a)(2)(A), as they did not present any evidence  
9 demonstrating that at the time he induced the Narangs to enter  
10 into the Construction Contract, Biswas subjectively knew he was  
11 not competent to build the house and that he intended to deceive  
12 the Narangs. The bankruptcy court opined that, in light of his  
13 experience in residential and commercial construction, as well as  
14 the fact that a professional architect designed the house and  
15 that subcontractors performed much of the work, "it [was] more  
16 likely than not that Biswas actually believed he could build the  
17 house . . . [and] the fact that Biswas overestimated his own  
18 ability does not mean that he knowingly lied." Memorandum  
19 Decision, 6:5-11. The bankruptcy court concluded that Biswas

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21  
22 <sup>7</sup> The bankruptcy court noted that Biswas stipulated to this  
23 statement in the state court action. Memorandum Decision  
24 Regarding Complaint to Determine Dischargeability of Debt  
25 ("Memorandum Decision"), 4:8-10. Based on our review of the  
26 record, Biswas stipulated to this fact in the adversary  
27 proceeding, but not in the state court action. This same  
statement was made in the Narangs' statement of undisputed facts  
in support of their motion for summary judgment in the state  
court action. Biswas did not oppose the motion for summary  
judgment.

1 simply exaggerated his qualifications, which did not rise to the  
2 level of fraud.

3 The bankruptcy court further held that the Narangs did not  
4 show that Biswas's lapse of his contractor's license constituted  
5 fraud within the meaning of § 523(a)(2)(A). The bankruptcy court  
6 found that the Narangs did not provide evidence that they  
7 suffered actual injury as a result of the lapse of Biswas's  
8 contractor's license.<sup>8</sup>

9 The Narangs timely appealed the bankruptcy court's judgment.  
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15 <sup>8</sup> On appeal, the Narangs claim that the bankruptcy court  
16 incorrectly referenced B & P Code § 7160 in its Memorandum  
17 Decision analysis. Appellant's Opening Brief at 14 n.3. B & P  
18 Code § 7160, entitled "Contract induced by falsity or fraud; suit  
for penalty, fees and damages," provides:

19 Any person who is induced to contract for a work of  
20 improvement, including but not limited to a home  
21 improvement, in reliance on false or fraudulent  
22 representations or false statements knowingly made, may  
23 sue and recover from such contractor or solicitor a  
24 penalty of five hundred dollars (\$500), plus reasonable  
attorney's fees, in addition to any damages sustained  
by him by reason of such statements or representations  
made by the contractor or solicitor.

25 The bankruptcy court questioned whether B & P Code § 7160 even  
26 applied to the facts in the case before it. Memorandum Decision,  
27 8: 18-20. In any event, the bankruptcy court's decision rests on  
§ 523(a)(2)(A), so B & P Code § 7160 is not dispositive as to the  
handling of the case.

1 **II. JURISDICTION**

2 The bankruptcy court had jurisdiction under 28 U.S.C.  
3 §§ 1334 and 157(b)(2)(I). We have jurisdiction under 28 U.S.C.  
4 § 158.

5  
6 **III. ISSUES**

7 (1) Did the bankruptcy court err in its determinations of  
8 knowledge and intent under § 523(a)(2)(A)?

9 (2) Did the bankruptcy court err in finding that the lapse  
10 of Biswas's contractor's license did not support an award of  
11 damages for fraud within the meaning of § 523(a)(2)(A)?

12  
13 **IV. STANDARDS OF REVIEW**

14 Whether a claim is nondischargeable presents mixed issues of  
15 law and fact, which we review de novo. Carrillo v. Su (In re  
16 Su), 290 F.3d 1140, 1142 (9th Cir. 2002)(citing Murray v. Bammer  
17 (In re Bammer), 131 F.3d 788, 792 (9th Cir. 1997)(en banc)). We  
18 review the bankruptcy court's conclusions of law and its  
19 interpretations of the Bankruptcy Code de novo and its findings  
20 of fact for clear error. Id.

21 "A finding of whether a requisite element of a section  
22 523(a)(2)(A) claim is present is a factual determination reviewed  
23 for clear error." Anastas v. Am. Sav. Bank (In re Anastas),  
24 94 F.3d 1280, 1283 (9th Cir. 1996). A finding of fact is clearly  
25 erroneous, even though there is evidence to support it, if we  
26 have the definite and firm conviction that a mistake has been

1 committed. Banks v. Gill Distribution Ctrs., Inc. (In re Banks),  
2 263 F.3d 862, 869 (9th Cir. 2001). "Where there are two  
3 permissible views of the evidence, the factfinder's choice  
4 between them cannot be clearly erroneous." Anderson v. City of  
5 Bessemer City, 470 U.S. 564, 574 (1985).

## 7 V. DISCUSSION

### 8 A. Exception to discharge standards

9 Section 523(a)(2)(A) excepts from discharge debts for money,  
10 property or services obtained by the debtor by false pretenses, a  
11 false representation or actual fraud. Because excepting a claim  
12 from the debtor's discharge limits the debtor's "fresh start"  
13 following a bankruptcy, § 523(a)(2)(A) "should not be read more  
14 broadly than necessary to effectuate policy, e.g., preventing  
15 debtors from avoiding debts incurred by fraud or other culpable  
16 conduct." Hayhoe v. Cole (In re Cole), 226 B.R. 647, 654  
17 (9th Cir. BAP 1998). In other words, the exception to discharge  
18 provided for in § 523(a)(2)(A) "should be construed strictly  
19 against creditors and in favor of debtors." Ghomeshi v. Sabban  
20 (In re Sabban), 384 B.R. 1, 5 (9th Cir. BAP 2008).

21 The creditor seeking to except a debt from the debtor's  
22 discharge generally bears the burden of proof. Since the Supreme  
23 Court's decision in Grogan v. Garner, 498 U.S. 279 (1991), the  
24 burden of proof standard for exception to discharge actions under  
25 § 523 is preponderance of the evidence. Id. at 286-91. The  
26 relatively lenient burden of proof standard set against the

1 consistent admonition to construe the standards to except a debt  
2 from the debtor's discharge strictly in favor of debtors creates  
3 a tension that informs the decision making of bankruptcy courts  
4 in considering exception to discharge claims.

5 To prevail on a § 523(a)(2)(A) claim, a creditor must show,  
6 by a preponderance of evidence, that: (1) the debtor made  
7 representations; (2) the debtor knew at the time they were false;  
8 (3) the debtor made them with the intent to deceive the creditor;  
9 (4) the creditor justifiably relied on such representations; and  
10 (5) the creditor sustained the alleged damage as a proximate  
11 result of the debtor's false representations. In re Britton,  
12 950 F.2d 602, 604 (9th Cir. 1991); see also Turtle Rock Meadows  
13 Homeowners Assoc. v. Slyman (In re Slyman), 234 F.3d 1081, 1085  
14 (9th Cir. 2000)(citations omitted).

15 The bankruptcy court concluded that the Narangs established  
16 all but the second and third elements of fraud under  
17 § 523(a)(2)(A), finding that the Narangs did not provide  
18 sufficient evidence to demonstrate that Biswas knew he falsely  
19 represented his competence and experience with the intent to  
20 deceive them. Memorandum Decision, 5:26-27, 6:2-4, 7:13-16. On  
21 appeal, the Narangs contend that they did not need to show that  
22 Biswas had actual knowledge of the falsity of his  
23 representations; rather, they only needed to show that he made  
24 the representations with reckless disregard for their truth.  
25 They further argue that Biswas's intent to deceive may be gleaned  
26 from the surrounding circumstances.

1 B. The bankruptcy court did not clearly err in its  
2 determination of knowledge and intent under § 523(a)(2)(A)

3 1. Knowledge

4 Reckless disregard for the truth of a representation  
5 satisfies the knowledge element under § 523(a)(2)(A).<sup>9</sup> Houtman v.  
6 Mann (In re Houtman), 568 F.2d 651, 656 (9th Cir. 1978),  
7 overruled in part on other grounds by Grogan, 498 U.S. at 284  
8 & n.11; see also Rubin v. West (In re Rubin), 875 F.2d 755, 759  
9 (9th Cir. 1989)("[D]eclarations made with reckless indifference  
10 for the truth may be found to be fraudulent.")(quoting Chase  
11 Manhattan Bank v. Fordyce (In re Fordyce), 56 B.R. 102, 105  
12 (Bankr. M.D. Fla. 1985)(internal quotation marks omitted));  
13 Gertsch v. Johnson & Johnson Finance Corp. (In re Gertsch), 237  
14 B.R. 160, 167 (9th Cir. BAP 1999)(quoting Houtman, 568 F.2d at  
15 656); Arm v. A. Lindsay Morrison, M.D., Inc. (In re Arm), 175  
16 B.R. 349, 354 (9th Cir. BAP 1994). "A representation may be  
17 fraudulent, without knowledge of its falsity, if a person making  
18 it is conscious that he [or she] has merely a belief in its  
19 existence and recognizes that there is a chance, more or less  
20 great, that the fact may not be as it is represented." Gertsch,  
21 237 B.R. at 168 (quoting Restatement (Second) of Torts § 526  
22 cmt. e (1977)(internal quotation marks omitted)). In such  
23 circumstances, the person makes the representation "without

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24  
25 <sup>9</sup> "Reckless disregard for the truth of the representation"  
26 is used interchangeably with "reckless indifference to [the  
27 debtor's] actual circumstances" within the Ninth Circuit.  
Advanta Nat'l Bank v. Kong (In re Kong), 239 B.R. 815, 826  
(9th Cir. 1999).

1 [believing] in its truth or recklessly, careless of whether it is  
2 true or false." Kong, 239 B.R. at 827 (quoting Restatement  
3 (Second) of Torts § 526 cmt. e).

4       However, even applying the concept of reckless disregard,  
5 based on the record before us, the Narangs do not establish that  
6 Biswas represented his qualifications with reckless disregard as  
7 to their truth.<sup>10</sup> At the trial, Biswas testified that he intended  
8 to comply with the Construction Contract and to build the house  
9 according to the Narangs' plans. Tr. of January 8, 2009 Hr'g,  
10 18:19-24. Though the house was the largest he had undertaken to  
11 build, Biswas testified that he believed he would be able to  
12 perform the Construction Contract, using experienced  
13 subcontractors to "make sure [he would] be able to perform [under  
14 the Construction Contract]." Tr. of January 8, 2009 Hr'g, 18:25,  
15 19:1, 19:5-7. Biswas's testimony reflects his belief that he had  
16 the competence and experience to build the Narangs' house.

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18       <sup>10</sup> The Narangs cite McCain v. Fuselier (In re Fuselier),  
19 211 B.R. 540 (Bankr. W.D. La. 1997), as factually similar to the  
20 instant case. Appellant's Opening Brief at 9. In Fuselier, the  
21 debtor, who was not a licensed contractor in Louisiana, accepted  
22 a project to construct a home for the creditors. Id. at 541.  
23 The debtor obtained a written proposal from the construction  
24 company for which he worked, substituting his name as the general  
25 contractor and using the contractor's license number of the  
26 construction company's owner without his permission. Id. The  
27 creditors eventually terminated the debtor's services. Id. at  
28 542. The bankruptcy court in Fuselier found that the debtor  
represented that he was a licensed contractor to induce the  
creditors to hire him. Id. at 543.

26       Unlike the creditors in Fuselier, the Narangs have not  
27 demonstrated that Biswas knew that he misrepresented his  
28 qualifications at the time he made the representations.

1 As the bankruptcy court pointed out, Biswas may have  
2 exaggerated his ability to build the house, but this does not  
3 mean he knowingly or recklessly misrepresented his ability.<sup>11</sup>  
4 See, e.g., Smith v. Myers (In re Schwartz & Myers), 130 B.R. 416,  
5 423 (Bankr. S.D.N.Y. 1991)(holding that, for a representation to  
6 be actionable under § 523(a)(2)(A), it must be one of existing  
7 fact and not simply an expression of opinion, expectation or a  
8 declaration of intention). Biswas had prior experience in  
9 residential construction; he had built several homes in Fresno,  
10 California. He also used experienced subcontractors to work on  
11 the Narangs' house. Given these circumstances, we agree with the  
12 bankruptcy court's conclusion that Biswas's "high opinion of his  
13 ability was not without some foundation." Memorandum Decision,  
14 6:6. In any event, we are in no position to substitute our  
15 perceptions from the evidence for those of the bankruptcy court  
16 on what is admittedly a close question. We therefore conclude  
17 that the bankruptcy court's finding as to the second element of  
18 § 523(a)(2)(A) was not clear error.

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23 <sup>11</sup> The Narangs stress that Biswas stipulated that he lacked  
24 the competence and experience to build their house. Such after-  
25 the-fact stipulations do not establish that Biswas represented  
26 his qualifications without believing them to be true or  
27 represented his qualifications without caring whether they were  
true or false. In short, the stipulations do not go to his state  
of mind at the time he made the representations.



1           Reviewing the record, we do not have a definite and firm  
2 impression that the bankruptcy court clearly erred in finding  
3 that Biswas did not intend to deceive the Narangs. Even though  
4 he never had built such a large house, with a basement, Biswas  
5 had prior experience in commercial and residential construction  
6 to bolster his assertion that he had the ability to build the  
7 Narangs' home. He also used experienced subcontractors to ensure  
8 that he built the home according to the plans. Biswas testified  
9 that he fully intended to comply with the Construction Contract.  
10 The fact that he fell short of his promise to build the Narangs a  
11 "good house" does not demonstrate that he intended to deceive  
12 them. Cf. Rubin, 875 F.2d at 759 ("[A] promise made with a  
13 positive intent not to perform or without a present intent to  
14 perform satisfies § 523(a)(2)(A)."). Rather, it shows that  
15 Biswas simply bit off more than he could chew, as he later  
16 admitted in his stipulations. We therefore conclude that the  
17 bankruptcy court did not clearly err in finding that Biswas did  
18 not intend to deceive the Narangs.

19  
20 C. The bankruptcy court did not clearly err in finding that the  
21 lapse in Biswas's contractor's license did not constitute  
22 fraud within the meaning of § 523(a)(2)(A)

23 At the trial, the Narangs sought to have the disgorgement  
24 award deemed nondischargeable.<sup>12</sup> Relying on Ghomeshi v. Sabban

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25           <sup>12</sup> The Narangs did not distinguish between the construction  
26 cost award and the disgorgement award in their adversary  
27 proceeding complaint; rather, they sought a determination that  
28 (continued...)

1 (In re Sabban), 384 B.R. 1 (9th Cir. BAP 2008), the bankruptcy  
2 court declined to do so, finding that the Narangs produced no  
3 evidence demonstrating that they suffered actual injury from the  
4 lapse in Biswas's contractor's license. Memorandum Decision,  
5 8:18-20, 9:24-25.

6 As noted earlier, the Narangs' disgorgement award was based  
7 on B & P Code § 7031. B & P Code § 7031 prohibits unlicensed  
8 contractors from initiating or maintaining actions to recover  
9 compensation and allows persons who have utilized the services of  
10 an unlicensed contractor to recover all compensation paid to the  
11 contractor.<sup>13</sup> Sabban, 384 B.R. at 3. B & P Code § 7031 does not  
12

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13 <sup>12</sup>(...continued)  
14 the entire state court judgment was nondischargeable on the  
15 grounds that both the construction cost award and the  
16 disgorgement award arose from Biswas's fraudulent  
17 representations. We nonetheless analyze the disgorgement award  
18 separately because the state court judgment was based, in part,  
19 on the Narangs' claim under B & P Code § 7031.

18 <sup>13</sup> B & P Code § 7031(a) provides:

19 Except as provided in subdivision (e), no person  
20 engaged in the business of or acting in the capacity of  
21 a contractor, may bring or maintain any action, or  
22 recover in law or equity in any action, in any court of  
23 this state for the collection of compensation for the  
24 performance of any act or contract where a license is  
25 required by this chapter without alleging that he or  
26 she was a duly licensed contractor at all times during  
27 the performance of that act or contract, regardless of  
28 the merits of the cause of action brought by the  
29 person, except that this prohibition shall not apply to  
30 contractors who are each individually licensed under  
31 this chapter but who fail to comply with Section 7029.

(continued...)

1 limit disgorgement to persons who have been defrauded by an  
2 unlicensed contractor. Id. It "operates even where the person  
3 for whom the work was performed knew the contractor was  
4 unlicensed." Id. at 4 (quoting Hydrotech Sys., Ltd. v. Oasis  
5 Waterpark, 803 P.2d 370, 376 (1991)(internal quotation marks  
6 omitted)).

7 In Sabban, we confronted the issue of whether an amount  
8 awarded under B & P Code § 7031(b) constituted a nondischargeable  
9 debt within the meaning of § 523(a)(2)(A). In Sabban, the  
10 debtor, an unlicensed contractor, performed remodeling work for  
11 the creditor. 384 B.R. at 3. To induce the creditor into  
12 engaging his services, the debtor represented that he was a  
13 licensed contractor. Id. The creditor later obtained a state  
14 court judgment against the debtor under B & P Code § 7031(b) for  
15 disgorgement of the \$123,000 compensation the debtor received for  
16 the remodeling work ("award"). Id. at 3-4. After the debtor  
17 filed for chapter 7 relief, the creditor filed a complaint for a  
18 determination that the award was nondischargeable under  
19 § 523(a)(2)(A). Id. at 4. The bankruptcy court determined that  
20 the award was dischargeable because it was not proximately caused  
21

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22 <sup>13</sup>(...continued)

23 B & P Code § 7031(b) provides:

24 Except as provided in subdivision (e), a person who  
25 utilizes the services of an unlicensed contractor may  
26 bring an action in any court of competent jurisdiction  
27 in this state to recover all compensation paid to the  
unlicensed contractor for performance of any act or  
contract.

1 by the creditor's reliance on the debtor's misrepresentation  
2 regarding his unlicensed status. Id.

3 In light of Cohen v. De La Cruz, 523 U.S. 213 (1998), which  
4 emphasized that a debtor's liability for a debt must flow from  
5 his or her fraud, we agreed with the bankruptcy court in Sabban  
6 that an award under B & P Code § 7031(b) did not necessarily  
7 constitute a nondischargeable debt under § 523(a)(2)(A). Id. at  
8 6-7. Because B & P Code § 7031(b) was "neutral as to fraudulent  
9 intent and was enacted to deter unlicensed contractors from  
10 offering their services for pay[,] the award did not arise from  
11 the debtor's fraudulent representations as required under  
12 § 523(a)(2)(A). Id. at 7. We pointed out that, even if the  
13 creditor had known about the debtor's unlicensed status, the  
14 creditor still could have obtained an award under B & P Code  
15 § 7031(b). Id. The award, we concluded, was unrelated to the  
16 debtor's fraud and could have been granted in the absence of  
17 justifiable reliance. Id. Indeed, the state court awarded  
18 statutory damages under B & P Code § 7031(b), even though it held  
19 that the creditor had suffered no compensatory damages. Id. at  
20 6-7.

21 On appeal, the Narangs attempt to distinguish Sabban from  
22 the instant case. Appellant's Opening Brief at 16. The Narangs  
23 contend that, unlike the creditor in Sabban, they suffered actual  
24 injury as a result of Biswas's false representation to maintain a  
25 valid contractor's license. When the Narangs entered into the  
26 Construction Contract with Biswas, Biswas represented that he was

1 a licensed contractor. The Narangs relied on this representation  
2 in allowing Biswas to take draws on their construction loan.  
3 Appellant's Opening Brief at 14. While his license was  
4 suspended, Biswas received two draws, which brought the total  
5 amount of draws to 80% of the construction loan, even though he  
6 had completed only approximately 50% of the work on the house.  
7 Appellant's Opening Brief at 16. As a result, the Narangs claim,  
8 they overpaid Biswas. Appellant's Opening Brief at 16.

9 We agree with the bankruptcy court that the Narangs did not  
10 establish that they sustained damage as a result of Biswas's  
11 representation regarding the status of his contractor's license.  
12 Nothing in the record indicates that the Narangs conditioned  
13 construction loan draws on the continued validity of Biswas's  
14 contractor's license. The Narangs made the alleged overpayment  
15 to Biswas based on the work performed on the house, not on  
16 whether Biswas maintained his contractor's license.<sup>14</sup> As noted  
17 above, draws on the construction loan were allowed based on the  
18 percentage of work completed, after inspections by the bank's  
19 representatives. Based on our review of the record, we do not  
20 have a definite and firm conviction that the bankruptcy court  
21 clearly erred in finding that the lapse in Biswas's contractor's  
22 license did not support an exception to discharge under  
23 § 523(a)(2)(A) for the disgorgement award.

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24  
25 <sup>14</sup> Interestingly, Dr. Narang testified that, had he known  
26 Biswas's contractor's license was suspended, he simply would have  
27 had Biswas stop work until his contractor's license was  
reinstated. Tr. of January 8, 2009 Hr'g, 16:17-24.

1 **VI. CONCLUSION**

2 Based on the record before us, we conclude that the  
3 bankruptcy court did not clearly err in its findings supporting  
4 its ultimate holding that the Narangs' state court judgment  
5 against the debtor was not excepted from discharge under  
6 § 523(a)(2)(A). We AFFIRM.

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