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NOT FOR PUBLICATION

SUSAN M SPRAUL, CLERK
U.S. BKCY. APP. PANEL
OF THE NINTH CIRCUIT

UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT

In re:)	BAP No. NC-09-1372-KiSaH
)	
TINA LOUISE DUNCAN,)	Bk. No. 09-40135-EDJ
)	
Debtor.)	Adversary No. 09-4166
_____)	
)	
TINA LOUISE DUNCAN,)	
)	
Appellant,)	
)	
v.)	MEMORANDUM¹
)	
FIDELITY NATIONAL TITLE)	
COMPANY,)	
)	
Appellee.)	
_____)	

Argued and Submitted on October 20, 2010
at San Francisco, California

Filed - February 4, 2011

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

Honorable Edward D. Jellen, Bankruptcy Judge, Presiding

Appearances: Appellant Tina L. Duncan argued pro se
Edward Kunnes argued for Appellee Fidelity
National Title Company

Before: KIRSCHER, SALTZMAN,² and HOLLOWELL, Bankruptcy Judges.

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.

² The Hon. Deborah J. Saltzman, Bankruptcy Judge for the Central District of California, sitting by designation.

1 Debtor-Appellant, Tina Louise Duncan ("Duncan"), appeals a
2 judgment from the bankruptcy court in favor of Creditor-Appellee,
3 Fidelity National Title Company ("Fidelity"), the plaintiff in
4 the underlying adversary proceeding. The judgment declared a
5 debt to Fidelity nondischargeable under 11 U.S.C.
6 § 523(a)(2)(A).³ For the following reasons, we AFFIRM.

7 **I. FACTS AND PROCEDURAL BACKGROUND**

8 **A. Facts.**

9 Duncan has a Bachelor's degree in Accounting and is
10 currently working on a graduate degree. She is employed full-
11 time, and also runs a rental property management company. Duncan
12 has purchased and sold numerous properties throughout her life,
13 including several investment properties.

14 In 2003, Duncan purchased a duplex rental unit located in
15 Oakland, California for \$339,000 (the "Property"). Duncan sold
16 the Property to her sister, Detra Duncan ("Detra"), in 2004, for
17 \$415,000. Detra obtained financing for the Property with BNC
18 Mortgage, Inc., which was succeeded by Chase Home Finance LLC
19 ("Chase"). One year later, Detra wanted to sell the Property
20 back to Duncan, but Duncan was financially unable to purchase it.
21 However, Duncan offered to help Detra secure tenants and manage
22 the Property for her. Six months later, Detra gifted the
23 Property to Duncan. At that time, Detra owed approximately
24 \$500,000 on the mortgage with Chase.

25 Duncan embarked on obtaining a loan for the Property in her
26

27 ³ Unless otherwise indicated, all chapter, section and rule
28 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532, and
to the Federal Rules of Bankruptcy Procedure, Rules 1001-9037.

1 name in January 2006. She first applied with World Savings, who
2 opened an escrow with Fidelity on January 5, 2006. On January
3 10, 2006, Fidelity sent a letter to Chase asking for its pay-off
4 demand amount. The "borrower" was noted as "Detra Duncan," and
5 Detra signed the pay-off demand letter. Chase sent its demand to
6 Fidelity on January 18, 2006. Fidelity conducted its one and
7 only title search on the Property on February 20, 2006.
8 Ultimately, World Savings rejected Duncan's loan application.

9 Sometime in February 2006, Duncan began working with Anthony
10 Randolph ("Randolph"), a mortgage broker employed by EquiPrime
11 Mortgage ("EquiPrime"). Randolph initially sought a first
12 refinance mortgage on Duncan's behalf. Randolph was not
13 successful.

14 Duncan then contacted Ameriquest Mortgage Company
15 ("Ameriquest") in March 2006. Ameriquest approved Duncan for a
16 loan in the amount of \$576,000. An appraisal obtained by
17 Ameriquest indicated that the Property's fair market value was
18 \$640,000. While the Fidelity escrow was pending, another escrow
19 with a different title insurer - Financial Title Company - was
20 opened on March 15, 2006, for the Ameriquest loan. The
21 Ameriquest loan documents were signed on March 28, 2006, and the
22 deed of trust in favor of Ameriquest was recorded on March 31,
23 2006, securing the note for \$576,000. Chase was paid off with
24 the Ameriquest proceeds. As a result, Ameriquest's lien was in
25 first position.

26 Duncan claims that she spoke with Randolph again in late
27 March 2006, just after Ameriquest approved her for the first
28 loan, and asked him to now seek out a second loan so Duncan could

1 obtain approximately \$500,000 in cash to complete various repairs
2 on the Property, as well as fund a building project on some of
3 Duncan's vacant land. Randolph allegedly contacted Duncan in
4 early April to inform her that he found a second loan with SRI
5 Mortgages, Inc. ("SRI") for \$612,000. Randolph then allegedly
6 faxed Duncan a blank loan application form, which Duncan claimed
7 she completed in her handwriting and faxed back to Randolph. No
8 fax markings exist on the handwritten loan application. The
9 handwritten loan application is dated April 8, 2006, and reflects
10 Ameriquest's first loan in the amount of \$576,000. It also
11 reflects that Duncan believed the Property to be worth \$1.15
12 million.

13 Just two weeks after obtaining the Ameriquest loan, Duncan
14 executed a deed of trust in favor SRI on April 14, 2006, to
15 secure what she alleges was a second loan for \$612,000. The deed
16 of trust in favor of SRI was recorded April 26, 2006. The
17 Fidelity escrow, opened by World Savings in January, was utilized
18 for the SRI-Duncan transaction.

19 According to the SRI loan documents in Fidelity's
20 possession,⁴ in the "Specific Closing Instructions," signed by
21 Duncan on April 19, 2006, it states that SRI's loan must be
22 recorded in first position and that no secondary financing had
23 been approved. The "California Borrower Acknowledgment" form,
24 dated April 14, 2006, and signed by Duncan on April 19, 2006,
25 indicates by a checked box that the SRI loan was a "First

26
27 ⁴ SRI did not appear in the adversary proceeding or supply
28 any documents regarding Duncan's loan. All loan documents, other
than the handwritten loan application provided by Duncan, were
submitted by Fidelity from its records.

1 Mortgage." In the "Borrower's Escrow Instructions" dated April
2 18, 2006, and signed by Duncan, it states that SRI had a "First
3 Deed of Trust." In the "Estimated Closing Statement," also dated
4 April 18, 2006, it states "New 1st Trust Deed to SRI Mortgage"
5 and that the pay-off to "Chase" is \$505,221.54. In that same
6 document, Duncan instructed that the remaining funds of
7 \$84,635.48 be wired to her bank account. In another document
8 dated April 18, 2006, Duncan approved the pay-off to "Chase" for
9 the above-stated amount. The "Appraisal Disclosure" form dated
10 April 14, 2006, and signed by Duncan on April 19, 2006, informed
11 Duncan that she had a right to receive the appraisal report
12 obtained by SRI in connection with her loan. The SRI appraisal
13 report indicates the Property was valued at \$720,000. The "Loan
14 Application," drafted by someone other than Duncan but signed by
15 Duncan on April 24, 2006, is a different version than Duncan's
16 April 8th handwritten loan application and does not include the
17 Ameriquest loan. Rather, it states that the existing lien to
18 "Chase" is \$505,000. Finally, the "Borrower's Certification &
19 Authorization form, signed by Duncan on April 19, 2006, states
20 that Duncan "made no misrepresentations in the [L]oan
21 [A]pplication or other documents, nor omit[ted] any pertinent
22 information."

23 Fidelity, who was unaware of the recorded March 31, 2006
24 Ameriquest lien because it conducted only one title search on the
25 Property in February 2006, believed that the Chase loan remained
26 outstanding and transmitted \$505,221.54 to Chase in accordance
27 with the escrow instructions signed by Duncan. Chase, however,
28 having already been paid from the Ameriquest loan proceeds, sent

1 the funds back to Fidelity. For reasons unknown, Fidelity then
2 wired the \$505,221.54 to Duncan on May 2, 2006. Duncan did not
3 contact Fidelity after receiving the funds.

4 Because the Ameriquest deed of trust remained of record,
5 SRI's deed of trust ended up being in second position. Duncan
6 serviced the Ameriquest and SRI loans for approximately 20 months
7 before defaulting on both. Both lenders sought to foreclose.
8 Option One, successor to SRI, recorded its notice of default on
9 April 28, 2008; Citiresidential, successor to Ameriquest,
10 recorded its notice of default on June 4, 2008. It was during
11 this time that Option One/SRI discovered its deed of trust was
12 not in first position. Fidelity too learned of its error.
13 Because Fidelity insured the first priority of Option One/SRI's
14 deed of trust, it negotiated a settlement payment of \$604,114.99
15 to Citiresidential on December 11, 2008, in order to place Option
16 One/SRI in first position. The Property was eventually sold.
17 Duncan filed a chapter 7 petition for relief on January 9, 2009.

18 **B. The Adversary Proceeding.**

19 Fidelity timely filed its adversary complaint on April 6,
20 2009, asserting claims against Duncan under sections
21 523(a)(2)(A), (a)(4), and (a)(6).⁵ Under section 523(a)(2)(A),
22 Fidelity alleged that Duncan, with an intent to deceive, had
23 intentionally failed to disclose the Ameriquest deed of trust.
24 Duncan never informed either SRI or Fidelity during the pendency
25

26 ⁵ The bankruptcy court determined that because Fidelity
27 prevailed on its claim against Duncan under section 523(a)(2)(A),
28 it did not need to address Fidelity's two other claims under
sections 523(a)(4) and 523(a)(6). Fidelity does not appeal this
ruling. Therefore, those two claims are not before us.

1 of Fidelity's escrow that she had obtained new financing with
2 Ameriquest and encumbered the Property with a first deed of trust
3 in favor of Ameriquest. Fidelity further alleged that Duncan
4 never disclosed that Chase had been paid off with the Ameriquest
5 loan proceeds. Furthermore, Duncan's use of the Borrower's
6 Escrow Instructions directing the pay-off to Chase, which had
7 been paid previously through another escrow, constituted an
8 intentional, materially false statement respecting her financial
9 condition. Ultimately, Fidelity asserted that Duncan's
10 intentional omissions and false representations, upon which
11 Fidelity reasonably relied, proximately caused its damages of
12 \$604,114.99.

13 The bankruptcy court held a trial on the matter on October
14 27, 2009. SRI did not appear. The two Fidelity employees that
15 handled the SRI-Duncan transaction in its Oakland escrow office
16 who no longer work for Fidelity did not testify. Rather, Stephen
17 Mapes ("Mapes"), Senior Vice President of regional title
18 operations, testified for Fidelity. Mapes admitted Fidelity's
19 error of wiring the funds to Duncan. Mapes also admitted
20 Fidelity's error in missing the Ameriquest deed of trust in its
21 title search, but he could not recall exactly when Fidelity
22 discovered the error, only that it occurred sometime after it
23 wired the funds to Duncan. Mapes further testified that Fidelity
24 made a demand on Duncan to return the erroneously wired funds of
25 \$505,221.54 and that she failed to do so. However, Mapes
26 admitted that he did not personally make the demand on Duncan,
27 and Fidelity offered no documentary evidence supporting that any
28 such demand was ever made. On cross examination, Mapes testified

1 that Duncan paid \$1,300 to Fidelity for title insurance in the
2 SRI-Duncan transaction. Mapes did not affirmatively testify that
3 Fidelity actually relied on the representations or omissions made
4 by Duncan in the SRI loan documents.

5 Duncan was the only witness for the defense.⁶ With respect
6 to any SRI-Duncan loan documents, Duncan offered only her
7 handwritten loan application into evidence and testified that all
8 other SRI documents (among others) were lost in a move; her
9 handwritten loan application was the only SRI document that
10 survived. Apparently, two boxes containing the remaining SRI
11 documents fell off the back of the mover's truck while it was
12 traveling down the freeway. As for the SRI-Duncan loan documents
13 submitted by Fidelity, Duncan admitted that she initialed and
14 signed all of them, however, she did not study or read the
15 documents before signing and faxing them to Randolph; she assumed
16 the documents were correct and reflected the information she
17 submitted to Randolph in early April 2006. Duncan also testified
18 that she never knew of the appraisals conducted by Ameriquest or
19 SRI until a month before trial, that she never requested a copy
20 of either appraisal, and that she did not base her value of the
21 Property at \$1.15 million on those appraisals. Duncan further
22 testified that she was not surprised to receive the roughly
23 \$505,000 in cash from Fidelity because this was the amount of
24 proceeds she expected from the SRI "second" loan, minus fees and
25 commissions. Duncan stated that she was not aware of Fidelity's
26 error until it filed the adversary complaint against her.

27
28 ⁶ Randolph was present at the trial, but neither party
called him as a witness.

1 Finally, Duncan testified that she never intended to mislead or
2 deceive SRI or Fidelity.

3 The bankruptcy court issued its decision on November 5,
4 2009. It determined that Duncan, a savvy real estate investor,
5 with the knowledge of material facts that she had a duty to
6 disclose and with an intent to deceive, concealed the Ameriquest
7 deed of trust and affirmatively misrepresented the state of the
8 Property and its encumbrances to SRI and Fidelity. As a result,
9 the court found that Fidelity justifiably relied on Duncan's
10 concealment and misrepresentations and suffered damages by having
11 to pay Citiresidential \$604,114.99. While the court agreed that
12 Fidelity was negligent, its negligence did not negate Duncan's
13 intentional fraudulent conduct and did not preclude recovery.

14 Accordingly, pursuant to section 523(a)(2)(A), the
15 bankruptcy court entered a nondischargeable judgment in favor of
16 Fidelity and against Duncan for \$604,114.99, plus interest
17 incurred from January 9, 2009. Duncan timely appealed.

18 **II. JURISDICTION**

19 The bankruptcy court had jurisdiction under 28 U.S.C.
20 §§ 157(b)(2)(I) and 1334. We have jurisdiction under 28 U.S.C.
21 § 158.

22 **III. ISSUE**

23 Did the bankruptcy court err when it entered the
24 nondischargeable judgment against Duncan under section
25 523(a)(2)(A)?

26 **IV. STANDARD OF REVIEW**

27 In claims for nondischargeability, the Panel reviews the
28 bankruptcy court's findings of fact for clear error and

1 conclusions of law de novo, and applies de novo review to "mixed
2 questions" of law and fact that require consideration of legal
3 concepts and the exercise of judgment about the values that
4 animate the legal principles. Oney v. Weinberg (In re Weinberg),
5 410 B.R. 19, 28 (9th Cir. BAP 2009).

6 The determination of justifiable reliance is a question of
7 fact reviewed for clear error. Eugene Parks Law Corp. Defined
8 Benefit Pension Plan v. Kirsh (In re Kirsh), 973 F.2d 1454, 1456
9 (9th Cir. 1992). The bankruptcy court's witness credibility
10 findings are entitled to special deference, and are also reviewed
11 for clear error. Weinberg, 410 B.R. at 28; Rule 8013. A finding
12 is clearly erroneous if it is illogical, implausible, or without
13 support in the record. United States v. Hinkson, 585 F.3d 1247,
14 1261 (9th Cir. 2009).

15 We may affirm the bankruptcy court on any grounds supported
16 by the record. Canino v. Bleau (In re Canino), 185 B.R. 584, 594
17 (9th Cir. BAP 1995).

18 V. DISCUSSION

19 **The Bankruptcy Court Did Not Err When It Determined That The Debt** 20 **To Fidelity Was Nondischargeable Under Section 523(a)(2)(A).**

21 While Duncan was represented by counsel at trial, she
22 appears pro se on appeal. We agree with Fidelity that Duncan's
23 opening brief and record are woefully inadequate. However, due
24 to her pro se status, we must construe her brief liberally and
25 determine if any basis for reversing is clearly evident.
26 Balistreri v. Pacifica Police Dep't, 901 F.2d 696, 699 (9th Cir.
27 1990).

1 **A. Section 523(a)(2)(A).**

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

15 **B. Analysis.**

16 **1. Misrepresentation or Omission, Knowledge, and Intent to**
17 **Deceive.**

18 Duncan asserts that no evidence exists of her intent to
19 commit fraud. She contends that the SRI loan was always intended
20 to be a second loan on the Property and that she disclosed the
21 Ameriquest loan in her handwritten loan application to SRI. In
22 other words, Duncan disputes the bankruptcy court's findings of
23 fact.

24 ⁷ Section 523(a)(2)(A) provides:

25 A discharge under . . . this title does not discharge
26 an individual debtor from any debt (2) for money,
27 property, services, or an extension, renewal or
28 refinancing of credit, to the extent obtained by (A)
false pretenses, a false representation, or actual
fraud, other than a statement respecting the debtor's
or an insider's financial condition.

1 For the first three elements, the bankruptcy court found
2 that Duncan conceded her omissions and false representations.
3 Her signed Loan Application, dated April 24, 2006, omitted the
4 Ameriquest loan but did disclose the no-longer-outstanding Chase
5 loan that Duncan paid off almost one month prior. Duncan also
6 conceded that she failed to disclose to SRI or Fidelity that she
7 had recently paid off Chase or that the Property was subject to
8 Ameriquest's first deed of trust. Further, Duncan conceded that
9 she had represented in the Borrower's Escrow Instructions and the
10 California Borrower's Acknowledgment, as well as the Specific
11 Closing Instructions, all of which she signed on April 19, 2006,
12 that her debt to SRI was to be secured by a first deed of trust,
13 and she misrepresented in the escrow and closing instructions
14 that the Chase loan was still outstanding.

15 Although Duncan testified that she signed all of the SRI
16 loan documents without knowledge of their contents and that she
17 had no intent to deceive SRI or Fidelity, the bankruptcy court
18 found that the strong weight of evidence was to the contrary.
19 Duncan, an experienced real estate investor, had been turned down
20 at least twice for a first loan prior to obtaining the alleged
21 second loan from SRI. Further, Duncan failed to show that she
22 furnished her handwritten loan application to SRI or Fidelity, in
23 which she disclosed the Ameriquest loan and claimed the Property
24 was worth \$1.15 million. Rather, she signed the Loan Application
25 stating that the Property's value was \$720,000. Moreover, even
26 her inflated valuation was less than the total of the Ameriquest
27 and SRI liens. Hence, according to the bankruptcy court,
28 Duncan's assertion that she believed SRI would lend to her on the

1 security of a second deed of trust when no other lender would
2 lend on the security of a first deed of trust, or that SRI would
3 be willing to loan \$612,000 behind a first encumbrance of
4 \$576,000, defied credulity.

5 We see no clear error here. Duncan is a savvy real estate
6 investor. As a party to a business transaction, Duncan had a
7 duty to disclose the material fact of the Ameriquest first deed
8 of trust to SRI and Fidelity. Although she claims she did
9 disclose it in her handwritten loan application, Fidelity never
10 saw the handwritten application, and Duncan failed to establish
11 that she ever submitted it to SRI. Duncan could not explain why
12 the handwritten loan application contained no fax numbers at the
13 top, even though Randolph had allegedly faxed it to her and she
14 faxed it back to Randolph.

15 In the Loan Application submitted into evidence by Fidelity,
16 Duncan did not disclose the Ameriquest deed of trust and
17 affirmatively misrepresented the state of the Property and its
18 encumbrances. Duncan also signed numerous SRI loan documents
19 stating that SRI's loan was to be secured by a first deed of
20 trust and that Chase was to be paid off. Of course, Chase had
21 already been paid off one month earlier with the Ameriquest loan
22 proceeds. Duncan's concession that she did not read the SRI loan
23 documents prior to signing them is no defense. Her reckless
24 indifference to the truth supports a cause of action under
25 section 523(a)(2). Arm v. A. Lindsay Morrison, M.D., Inc. (In re
26 Arm), 175 B.R. 349, 354 (9th Cir. BAP 1994).

27 Finally, because of Duncan's inability to obtain a first
28 loan from at least two lenders, we agree that it defies credulity

1 that Duncan believed SRI would lend to her on the security of a
2 second deed of trust. We find it even more difficult to believe
3 that Randolph was unable to obtain a first loan for Duncan but
4 somehow managed to find her an alleged second with SRI.

5 **2. Justifiable Reliance and Damages.**

6 Duncan contends that Fidelity failed to establish that it
7 relied upon her statements, especially when Fidelity had an
8 independent duty to fully investigate title to the Property.
9 Because Fidelity failed to conduct an updated title search just
10 prior to the SRI closing, as opposed to relying on the search it
11 conducted in February 2006, Duncan contends that Fidelity's
12 negligence caused its own loss.

13 For determining reliance, courts apply a subjective
14 "justifiable" reliance standard, which turns on a person's
15 knowledge under the particular circumstances. Citibank, N.A. v.
16 Eashai (In re Eashai), 87 F.3d 1082, 1090 (9th Cir. 1996).
17 "Justification is a matter of the qualities and characteristics
18 of the particular plaintiff, and the circumstances of the
19 particular case, rather than of the application of a community
20 standard of conduct to all cases." Id. (quoting Field v. Mans,
21 516 U.S. 59, 70 (1995), quoting the Restatement (Second) of Torts
22 § 545A cmt. b (1976)). "[A] person is justified in relying on a
23 representation of fact although he might have ascertained the
24 falsity of the representation had he made an investigation." Id.
25 (quoting Mans, 516 U.S. at 70). In other words, negligence in
26 failing to discover an intentional misrepresentation is no
27 defense for the fraudulent party.

28 Although generally a plaintiff must establish that it relied

1 on defendant's misrepresentations to its detriment, the debtor's
2 nondisclosure of a material fact in the face of a duty to
3 disclose can establish the requisite reliance and causation for
4 actual fraud under the Bankruptcy Code. Apte v. Romesh Japra,
5 M.D., F.A.C.C. Inc. v. Apte (In re Apte), 96 F.3d 1319, 1323 (9th
6 Cir. 1996). A party to a business transaction is under a duty to
7 disclose to the other party facts basic to the transaction before
8 the transaction is consummated, if he or she knows that the other
9 is about to enter into the transaction under a mistake as to them
10 and that the other party, because of the relationship between
11 them, would reasonably expect disclosure of such facts. Id. at
12 1324 (citing the Restatement (Second) of Torts § 551 (1976)).

13 Reliance may also be presumed when "the case can be
14 characterized as one that primarily alleges omissions." Binder
15 v. Gillespie, 184 F.3d 1059, 1064 (9th Cir. 1999)(limiting the
16 "presumption of reliance" set forth in Affiliated Ute Citizens v.
17 United States, 406 U.S. 128, 153-54 (1972) to fraud cases that
18 primarily allege omissions). This is so because of the
19 difficulty of proving "'a speculative negative' - that plaintiff
20 relied on what was not said." Id. (quoting Blackie v. Barrack,
21 524 F.2d 891, 905 (9th Cir. 1975)). In order to determine
22 whether the presumption applies, the court must analytically
23 characterize the action as either primarily a nondisclosure case
24 or a positive misrepresentation case. Id. While Affiliated Ute
25 and Binder are securities fraud cases, this Panel and other
26 bankruptcy courts within the Ninth Circuit have applied their
27 principles to fraud cases under section 523(a)(2)(A). See
28 Tallant v. Kaufman (In re Tallant), 218 B.R. 58, 67-68 (9th Cir.

1 BAP 1998)(applying "presumption of reliance" to section
2 523(a)(2)(A)); In re Gonzales, 2007 WL 7216267, at *7 (Bankr.
3 S.D. Cal. Mar. 23, 2007)(same); In re Bishop, 2008 WL 2705186, at
4 *5 (Bankr. D. Idaho July 2, 2008)(fraud case under section
5 523(a)(2)(A) but court refused to apply "presumption of reliance"
6 because plaintiff's case rested entirely on debtor's affirmative
7 misrepresentations).

8 Here, for the element of "justifiable reliance," the
9 bankruptcy court found that the SRI loan documents showed that
10 SRI intended to extend Duncan a \$612,000 loan to pay off Chase,
11 secured by a first deed of trust on the Property. The documents
12 also showed that Fidelity sent funds to Chase in belief that the
13 Chase loan was still outstanding. While recognizing that
14 Fidelity was negligent in its conduct, and that it might have
15 ascertained the truth had it made an investigation, the court
16 determined that Fidelity's negligence was far outweighed by
17 Duncan's intentional fraudulent conduct. The court therefore
18 determined that Duncan had a duty to disclose the material fact
19 of Ameriquest's first deed of trust to SRI and Fidelity, and her
20 concealment of it was sufficient to establish the requisite
21 reliance and causation for actual fraud under section
22 523(a)(2)(A). Apte, 96 F.3d at 1323.

23 The determination of justifiable reliance is a question of
24 fact reviewed for clear error. Kirsh, 973 F.2d at 1456. We
25 agree that Fidelity's contributory negligence of not conducting a
26 title search just prior to the SRI closing, which likely would
27 have revealed the Ameriquest first deed of trust, is no bar to
28 recovery because Duncan's fraudulent conduct constitutes an

1 intentional tort. Mans, 516 U.S. at 70. Although Fidelity is a
2 sophisticated party in the business of investigating and insuring
3 titles, no obvious "red flags" existed on the face of the SRI-
4 Duncan loan documents to alert Fidelity of possible fraud and
5 that it should have investigated further. No red flags could
6 have existed because Duncan intentionally omitted the Ameriquest
7 first deed of trust on all of the pertinent SRI loan documents,
8 and she failed to inform Fidelity that Chase had already been
9 paid with the proceeds from the Ameriquest loan.

10 While Mapes did not affirmatively testify as to Fidelity's
11 reliance on Duncan's statements about the actual state of the
12 Property and its encumbrances, such testimony was not necessary.
13 Fidelity's reliance can be presumed because this case is one that
14 "primarily" alleges "omissions." Binder, 184 F.3d at 1064.
15 Duncan's omissions about the Ameriquest deed of trust and the
16 pay-off to Chase - material facts she had a duty to disclose to
17 SRI and Fidelity - sufficiently establish Fidelity's reliance for
18 actual fraud under section 523(a)(2)(A). Id.; Apte, 96 F.3d at
19 1323.

20 Accordingly, none of the bankruptcy court's findings are
21 illogical, implausible, or without support in the record, and we
22 see no clear error here. The bankruptcy court correctly
23 determined that Fidelity's reliance was established by Duncan's
24 intentional omissions, which proximately caused Fidelity's loss
25 to Citiresidential for \$604,114.99.

26 VI. CONCLUSION

27 Based on this record, we conclude that the bankruptcy court
28 did not err when it entered the nondischargeable judgment in

1 favor of Fidelity and against Duncan for \$604,114.99, plus
2 interest. We AFFIRM.

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