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NOT FOR PUBLICATION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. EC-10-1398-HPaJu
)	
DAVINDER KAUR,)	Bk. No. 09-47201
)	
Debtor.)	Adv. No. 10-02146
)	
SAHERINDER KAUR,)	
)	
Appellant,)	M E M O R A N D U M¹
)	
v.)	
)	
DAVINDER KAUR,)	
)	
Appellee.)	
)	

Argued and Submitted on June 16, 2011
at San Francisco, California

Filed - June 29, 2011

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

Honorable David E. Russell, Bankruptcy Judge, Presiding²

Appearances: The Appellant argued pro se.
The Appellee filed a pro se brief.

Before: HOLLOWELL, PAPPAS, and JURY, 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 Honorable David E. Russell, Bankruptcy Judge, conducted the trial which gave rise to this appeal. Honorable Michael S. McManus, Bankruptcy Judge, signed the judgment on appeal which lists Judge Russell as the trial judge.

1 Saherinder Kaur (Kaur) appeals the bankruptcy court's
2 determination that a state court judgment she obtained against
3 Davinder Kaur (the Debtor) and the Debtor's husband, Parminder
4 Toor (Toor) was dischargeable. We AFFIRM.

5 **I. FACTS**

6 In March 2004, Kaur and her cousin, Toor, entered into an
7 oral business agreement (the Agreement) to start a commercial
8 trucking business (SP Transport). As part of the Agreement, Kaur
9 invested \$15,000 to partially fund the purchase of a Freightliner
10 truck (the Truck). Additionally, on March 5, 2004, Kaur and Toor
11 executed a promissory note in favor of Bank One, NA in the amount
12 of \$35,075 (the Note) for the balance of the purchase price of
13 the Truck. Toor agreed to be responsible for making the \$694.45
14 monthly payments under the Note. According to Kaur, Toor also
15 agreed to obtain the registration and insurance, to secure the
16 proper business licenses, and to manage the SP Transport
17 business.

18 Pursuant to the Agreement, after SP Transport was
19 established, it would reimburse Kaur for her \$15,000 investment
20 and its profits would be split evenly between Kaur and Toor.
21 Kaur contends that each party had an agreed-upon role in SP
22 Transport: Kaur would fund the down payment and maintenance of
23 the Truck, Toor would drive the Truck, and the Debtor would
24 handle SP Transport's accounting, scheduling and other
25 administrative responsibilities. The Debtor, however, asserts
26 that she was not involved in her husband's business dealings and
27 knew little of the SP Transport business affairs.

28 In May 2004, Kaur paid an additional \$15,000 for repairs on

1 the Truck. In July 2004, Kaur began contacting Toor to inquire
2 when SP Transport would repay her investment and her share of the
3 business profits. Kaur contended that Toor and the Debtor were
4 difficult to get a hold of, and when they did finally speak to
5 one another, they told her the business was not profitable. In
6 December 2004, the Truck required additional repairs. Because
7 Kaur was told SP Transport could not afford to pay for the
8 repairs, she agreed to pay the necessary \$4,700 to fix the Truck.

9 In May 2006, Toor filed a Fictitious Business Statement for
10 SP Transport listing Toor and the Debtor as the owners. In June
11 2006, Kaur demanded repayment of her investment. Toor signed and
12 delivered to Kaur three \$5,000 post-dated checks drawn on the
13 SP Transport account. However, the checks were returned for
14 insufficient funds or because they were drawn on a closed
15 account. In August 2006, SP Transport failed to make payments
16 under the Note and Kaur began to make the required payments.

17 Kaur filed a complaint against Toor and the Debtor in
18 California state court in December 2006 (the State Court
19 Complaint). The State Court Complaint alleged various causes of
20 action including breach of contract, breach of fiduciary duty,
21 promise without intent to perform, conversion, unjust enrichment,
22 and fraud. The State Court Complaint named the marital community
23 of Toor and the Debtor but Kaur's specific allegations were made
24 solely against Toor. The State Court Complaint was assigned to
25 arbitration. Toor and the Debtor did not file an arbitration
26 brief or appear at the arbitration hearing. On January 10, 2008,
27 the arbitrator awarded Kaur \$155,158.90. The award was reduced
28 to judgment on March 22, 2008 (the State Judgment).

1 At some point in 2009, Toor was sentenced to prison. The
2 Debtor, individually, filed a chapter 7³ petition on December 11,
3 2009. On March 15, 2010, Kaur initiated an adversary proceeding
4 by filing a complaint against the Debtor alleging the State
5 Judgment was nondischargeable under § 523(a)(2) and (a)(4) (the
6 § 523 Complaint).

7 In the § 523 Complaint, Kaur alleged that Toor never
8 intended to perform his promises under the Agreement and that
9 Toor entered into the Agreement with the intent to defraud her.
10 Additionally, Kaur alleged that the relationship with Toor was
11 fiduciary in nature. She contended that Toor owed her the duties
12 of loyalty, care, and the obligation to conduct the business in
13 good faith and fair dealing, which he failed to do by entering
14 into agreements with others for transport services, keeping the
15 profits from those agreements, and converting SP Transport
16 assets, such as proceeds from the sale of a refrigerated trailer,
17 for his and the Debtor's own use.

18 The Debtor filed an answer to the § 523 Complaint on
19 April 9, 2010, denying the allegations. On August 6, 2010, Kaur
20 filed a one-page motion for summary judgment (MSJ) contending the
21 State Judgment established that the debt was nondischargeable
22 under § 523(a)(2)(A) pursuant to the principles of issue
23 preclusion. However, the MSJ did not cite to any legal authority
24 to support the contention, including whether issue preclusion
25

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

1 applied.

2 On August 17, 2010, the Debtor filed a response to the MSJ.
3 She asserted that she was not involved in the business dealings
4 of SP Transport and was not responsible for any debt resulting
5 from her husband's fraudulent acts. On September 28, 2010, the
6 bankruptcy court denied the MSJ because it did not comply with
7 proper procedural requirements, including that it failed to
8 provide legal authority to support it.

9 A trial was held on the § 523 Complaint on September 30,
10 2010 (the Trial). The bankruptcy court made its findings of fact
11 and conclusions of law orally at the close of the Trial. On
12 October 7, 2010, it entered a final judgment by Civil Minute
13 Order determining the State Judgment was dischargeable. Kaur
14 timely appealed.

15 II. JURISDICTION

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

19 III. ISSUES

20 Did the bankruptcy court err in finding that the State
21 Judgment was dischargeable?

22 IV. STANDARDS OF REVIEW

23 Whether a claim is dischargeable presents mixed issues of
24 law and fact, which we review de novo. Peklar v. Ikerd (In re
25 Peklar), 260 F.3d 1035, 1037 (9th Cir. 2001). The Ninth Circuit
26 has held that the bankruptcy court's findings made in the context
27 of a dischargeability analysis are factual findings reviewed
28 under the clearly erroneous standard. Candland v. Ins. Co. of N.

1 Am. (In re Candland), 90 F.3d 1466, 1469 (9th Cir. 1996). Thus,
2 whether a creditor has proven an essential element of a cause of
3 action under § 523 is a factual determination reviewed for clear
4 error. Id.; Cossu v. Jefferson Pilot Sec. Corp. (In re Cossu),
5 410 F.3d 591, 595-96 (9th Cir. 2005); Am. Express Travel Related
6 Servs. Co., Inc. v. Vee Vinhnee (In re Vee Vinhnee), 336 B.R.
7 437, 443 (9th Cir. BAP 2005).

8 A finding is clearly erroneous if it is "illogical,
9 implausible, or without support in the record." Retz v. Samson
10 (In re Retz), 606 F.3d 1189, 1196 (9th Cir. 2010) (citing United
11 States v. Hinkson, 585 F.3d 1247, 1261-62 & n.21 (9th Cir. 2009)
12 (en banc)). The clearly erroneous standard does not "entitle a
13 reviewing court to reverse the finding of the trier of fact
14 simply because it is convinced that it would have decided the
15 case differently." Anderson v. City of Bessemer City, N.C.,
16 470 U.S. 564, 573 (1985).

17 Moreover, when factual findings are based on determinations
18 regarding the credibility of witnesses, we give great deference
19 to the bankruptcy court's findings, because the bankruptcy court,
20 as the trier of fact, had the opportunity to note "variations in
21 demeanor and tone of voice that bear so heavily on the listener's
22 understanding of and belief in what is said." Id. at 575; see
23 also Rule 8013.

24 V. DISCUSSION

25 The Bankruptcy Code excepts from discharge any debt for
26 money, property, services, or credit obtained by false pretenses,
27 a false representation, or actual fraud. 11 U.S.C.

1 § 523(a)(2)(A). To prevail on a claim under § 523(a)(2)(A), a
2 creditor must demonstrate five elements: (1) misrepresentation,
3 fraudulent omission or deceptive conduct by the debtor;
4 (2) knowledge of the falsity or deceptiveness of the debtor's
5 statement or conduct; (3) an intent to deceive; (4) justifiable
6 reliance by the creditor on the debtor's statement or conduct;
7 and, (5) damage to the creditor proximately caused by its
8 reliance on the debtor's statement or conduct. Turtle Rock
9 Meadows Homeowners Ass'n v. Slyman (In re Slyman), 234 F.3d 1081,
10 1085 (9th Cir. 2000); In re Candland, 90 F.3d at 1469.

11 Additionally, § 523(a)(4) excepts from discharge a debt "for
12 fraud or defalcation while acting in a fiduciary capacity,
13 embezzlement or larceny." 11 U.S.C. § 523(a)(4). In an action
14 to except a debt from discharge under § 523(a)(4), three elements
15 must be demonstrated: (1) the existence of an express trust,
16 (2) the debt was caused by the debtor's fraud or defalcation, and
17 (3) the debtor acted as a fiduciary to the creditor at the time
18 the debt was created. Otto v. Niles (In re Niles), 106 F.3d
19 1456, 1459 (9th Cir. 1997); Jacks v. Jacks (In re Jacks), 266
20 B.R. 728, 735 (9th Cir. BAP 2001).

21 The meaning of "fiduciary" under § 523(a)(4) is a matter of
22 federal law. Ragsdale v. Haller, 780 F.2d 794, 796 (9th Cir.
23 1986). Thus, for purposes of § 523(a)(4), the debtor must have
24 been a trustee through an express or technical trust imposed
25 before and without reference to the wrongdoing that caused the
26 debt. Lewis v. Scott (In re Lewis), 97 F.3d 1182, 1185 (9th Cir.
27 1996). The broad definition of fiduciary - a relationship
28 involving confidence, trust and good faith - is inapplicable in

1 the dischargeability context. Ragsdale v. Haller, 780 F.2d at
2 796. Here, there was no evidence or argument provided at the
3 Trial that an express trust existed.

4 The creditor bears the burden of proving each element of
5 § 523(a) by a preponderance of the evidence. Grogan v. Garner,
6 498 U.S. 279, 287 (1991). In order to strike a balance between
7 allowing debtors a fresh start and preventing a debtor from
8 retaining the benefits of property obtained by fraudulent means,
9 § 523(a) is strictly construed against creditors and in favor of
10 debtors. In re Slyman, 234 F.3d at 1085; Ghomeshi v. Sabban
11 (In re Sabban), 384 B.R. 1, 5 (9th Cir. BAP 2008), aff'd,
12 600 F.3d 1219, 1222 (9th Cir. 2010).

13 Kaur contends the Debtor made false statements to induce her
14 to invest money in SP Transport and that the Debtor never
15 intended to share the profits of that business. Both elements
16 involve factual determinations subject to the clearly erroneous
17 standard of review.

18 The bankruptcy court found that there was no
19 misrepresentation or deceptive conduct on the part of the Debtor
20 because there was no testimony demonstrating that the Debtor took
21 part in any of the discussions that led to the formation of the
22 SP Transport business or about the initial Agreement to split
23 profits or repay Kaur's investment. "[W]ithout any
24 misrepresentations by [the Debtor], there was no fraud by her."
25 Trial Tr. (Sept. 30, 2010) at 33:14-15.

26 Our review of the entire record convinces us that the
27 bankruptcy court's assessment of the evidence was plausible and
28 supported by inferences that may be drawn from the record.

1 Indeed, Kaur testified that she entered into the Agreement with
2 Toor and negotiated its terms with Toor. Kaur testified that she
3 did not know that the Debtor was initially even involved in the
4 SP Transport business. Kaur testified that she first began
5 talking to the Debtor about the business in July 2004, when Toor
6 was unavailable. She testified that the majority of her
7 communications with the Debtor occurred in 2006, when Kaur began
8 pressing for her share of the profits and could not reach Toor.

9 The Debtor testified that she told her husband not to start
10 the business with his relative. "And after that, . . . he didn't
11 tell me after that anything." Id. at 28. The Debtor testified
12 that Toor put her name on the SP Transport business in 2006, so
13 that she could write checks when he was out of town. She
14 testified that she wrote the checks as requested but had no idea
15 what transpired between Toor and Kaur. Furthermore, she
16 testified that she worked as a nurse's aid and that her husband
17 did not consider her a partner in the business. She did not sign
18 the Fictitious Business Statement naming her as an owner of SP
19 Transport. Finally, the Debtor testified that, as far as she
20 knew, the business was never profitable.

21 Based on this testimony, the bankruptcy court could
22 reasonably infer that the Debtor was not involved in the initial
23 discussions about the Agreement and, therefore, did not make any
24 misrepresentations to Kaur about repaying her investment or
25 sharing profits. Therefore, Kaur failed to satisfy the first
26 element of fraud - misrepresentation or deceptive conduct by the
27 Debtor.

1 While it is clear that the business relationship soured and
2 that the Debtor may have provided misinformation to Kaur about
3 SP Transport's profits,⁴ the evaluation of whether a debtor
4 intended to deceive a creditor by misrepresentation or false
5 pretenses is determined at the time the misrepresentation was
6 made. Monarch Capital Corp. v. Bath (In re Bath), 442 B.R. 377,
7 389 (Bankr. E.D. Pa 2010). A promise of future performance is
8 generally not actionable as fraud at common law unless at the
9 time the promise was made the debtor had no intention of carrying
10 through. See Restatement (Second) of Torts § 530 (1976). Since
11 the testimony of both Kaur and the Debtor support the finding
12 that the Debtor was not involved in the Agreement at its
13 inception, it follows that she could not have possessed the
14 required intent to deceive Kaur. Accordingly, Kaur could not
15 carry her burden of proving the essential elements of
16 § 523(a)(2)(A) or (a)(4). As a result, the bankruptcy court did
17 not err in determining the State Judgment was dischargeable.

21 ⁴ The statements by Toor and the Debtor regarding the
22 profitability of SP Transport were made after the Agreement was
23 made. Even so, the bankruptcy court found that there was no
24 proof in the record that there were any profits, as alleged by
25 Kaur. The bankruptcy court found "there were statements, oh,
26 that the business was or was not profitable. . . . There is
27 proof that the trucking company received money. But that doesn't
28 prove there was a profit. And even if there was, that's a
statement that's made after the original misconduct at the
beginning of the contract." Trial Tr. (Sept. 30, 2010) at 36-37.
Based on a review of the record, these findings are not
illogical, implausible, or unsupported by the evidence, and
therefore, are not clearly erroneous.

1 **VI. CONCLUSION**

2 Because we have concluded that the bankruptcy court did not
3 make clearly erroneous factual findings supporting its
4 determination that the elements of § 523(a)(2) and (a)(4) were
5 not met, we AFFIRM.

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