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

NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT

5	In re:)	BAP No.	WW-10-1274-MkHJu
)		
6	JOSEPH D. MALICH and DANA C. MALICH,)	Bk. No.	08-46701
)		
7)	Adv. No.	09-04048
	Debtors.)		
8	_____)		
)		
9	FRED WAGNER,)		
)		
10	Appellant,)		
)		
11	v.)	MEMORANDUM*	
)		
12	JOSEPH D. MALICH; DANA C. MALICH,)		
)		
13)		
	Appellees.)		
14	_____)		

Argued And Submitted On January 21, 2011
at Seattle, Washington

Filed: March 15, 2011

Appeal From The United States Bankruptcy Court
for the Western District of Washington

Honorable Paul B. Snyder, Chief Bankruptcy Judge, Presiding

Appearances: John Mills arugued on behalf of Appellant Fred Wagner; Rebecca Larson of Davies Pearson, P.C., argued on behalf of Appellees Joseph and Dana Malich.

Before: MARKELL, HOLLOWELL and JURY, Bankruptcy Judges.

*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 **INTRODUCTION**

2 Fred Wagner ("Wagner") appeals a judgment in favor of Joseph
3 Malich ("Malich") and his wife, debtors in this case, on Wagner's
4 complaint to determine dischargeability of debt under
5 § 523(a)(2)(A).¹ Wagner also appeals the order denying his post-
6 trial motion to alter or amend the judgment. We AFFIRM.

7 **FACTS**

8 **1. Malich's Business and Wagner's Financing Transactions**

9 Malich owned and operated a business known as PowerBoats NW
10 ("PBNW"). PBNW sold new and used power boats and yachts.
11 Beginning in 2002, Wagner began lending money to PBNW to enable
12 it to purchase boats for resale. Over the course of several
13 years, Wagner financed PBNW's purchase of between 25 and 50
14 boats.

15 **2. The General Course of Dealing Between the Parties**

16 In each financing transaction, Malich would sign and deliver
17 to Wagner a promissory note on behalf of PBNW, as well as his
18 personal guaranty of the note. Wagner's counsel drafted these
19 documents. Malich also would normally deliver to Wagner an
20 original title document for the boat to be financed: a
21 Manufacturer's Statement of Origin ("MSO") for a new boat, or a
22 certificate of title for a used boat.

23 Occasionally, Malich failed to deliver an original title
24 document to Wagner. In these cases, Wagner lent the funds

25 _____
26 ¹Unless specified otherwise, all chapter and section
27 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532, and
28 all Rule references are to the Federal Rules of Bankruptcy
Procedure, Rules 1001-9037. All Civil Rule references are to the
Federal Rules of Civil Procedure.

1 requested anyway and did not condition future loans to PBNW on
2 delivery of the missing title documents.

3 Generally, when Malich sold a boat financed by Wagner, he
4 would repay the loan Wagner made to finance PBNW's acquisition of
5 that boat. Occasionally, however, Malich would delay in repaying
6 Wagner. In particular, as winter was PBNW's slow season, Malich
7 sometimes kept the proceeds from the winter sale of a boat
8 financed by Wagner and paid PBNW's operating expenses. He then
9 repaid Wagner later, after business picked up the next spring.

10 According to Malich, he did not perceive these infrequent
11 delays as material to his lending relationship with Wagner.
12 Malich testified that, even when he delayed payment, it was
13 always his intention to repay Wagner as soon as business picked
14 up, and that the occasional delay simply reflected the highly
15 cyclical nature of PBNW's business. Malich also testified that,
16 when PBNW entered into each loan with Wagner, he generally
17 intended to repay Wagner when each boat financed sold.²

18 **3. The Four Key Loan Transactions**

19 Of their 25 to 50 loan transactions, all but four had been
20 paid off at the time of Malich's bankruptcy.³ It is from these
21 four transactions that the dispute between Wagner and Malich
22 arises. Each of these transactions is described in detail
23

24 ²The notes that Malich signed on behalf of PBNW specified
25 that the loans had a term of one year, but both Wagner and Malich
26 testified that the one-year term did not actually reflect the
parties' understanding or course of dealing.

27 ³Malich closed PBNW in October, 2008, and filed his personal
28 bankruptcy in December, 2008.

1 below.⁴

2 **a. The Activator Transaction**

3 On September 26, 2006, Wagner financed PBNW's purchase of a
4 2007 30-foot Activator boat. Consistent with their normal course
5 of dealing, Malich executed on behalf of PBNW a note in the
6 original principal amount of \$45,000, and Malich executed a
7 personal guaranty. Malich also delivered to Wagner the original
8 title document for the 2007 Activator.

9 At the time PBNW ceased operations in October 2008, the 2007
10 Activator still had not been sold, so Wagner took possession of
11 it. As of the time of trial, Wagner had been unable to sell the
12 2007 Activator and still had it in his possession.

13 **b. The Skater Transaction**

14 On February 1, 2007, Wagner financed PBNW's purchase of a
15 2007 28-foot Skater boat and trailer. Again, consistent with
16 their course of dealing, Malich executed on behalf of PBNW a note
17 in the original principal amount of \$150,000, and Malich executed
18 a personal guaranty. At the time of the financing, however,
19 Malich did not deliver to Wagner the original title document for
20 the 2007 Skater. Instead, Malich gave Wagner a copy of the title
21 document and promised to deliver the original as soon as Malich
22 obtained it from the manufacturer. However, Malich never gave
23 Wagner the original title document for the 2007 Skater.

24 According to Malich, he did not have the original title
25 document at the time of the financing, and when he later received

26
27 ⁴Most of the facts regarding these four transactions are
28 undisputed and are drawn from Wagner's complaint and Malich's
answer.

1 the original title document, it was filed away inadvertently
2 rather than delivered to Wagner.

3 In or around January 2008, PBNW sold the 2007 Skater to a
4 third party. Malich never repaid the amounts due on account of
5 the Skater Transaction.

6 **c. The Daytona Transaction**

7 On August 26, 2007, Wagner financed PBNW's purchase of a
8 2005 30-foot Daytona boat. Consistent with their course of
9 dealing, Malich executed on behalf of PBNW a note in the original
10 principal amount of \$125,000, and Malich executed a personal
11 guaranty. At the time of the financing, Malich did not deliver
12 to Wagner the original title document for the 2005 Daytona.
13 Instead, Malich gave Wagner a copy of the title document and
14 promised to deliver the original as soon as Malich obtained the
15 original. However, Malich never gave Wagner the original title
16 document for the 2005 Daytona. According to Malich, he did not
17 have the original title document at the time of the financing.
18 As with the 2007 Skater, when Malich later received the original
19 title document, it was filed away inadvertently rather than
20 delivered to Wagner.

21 In or around December 2007 or January 2008, PBNW sold the
22 2005 Daytona to a third party. Malich never repaid the amounts
23 due on account of the Daytona Transaction.

24 **d. The Calabria Transaction**

25 After PBNW's sale of the 2005 Daytona and the 2007 Skater,
26 on April 7, 2008, Wagner financed PBNW's purchase of a 2007
27 Calabria V2 boat. Consistent with their course of dealing,
28 Malich executed on behalf of PBNW a note in the original

1 principal amount of \$38,607, and Malich executed a personal
2 guaranty. Malich delivered to Wagner the original title document
3 for the 2007 Calabria. At the time PBNW ceased operations in
4 October 2008, the 2007 Calabria still had not been sold, so
5 Wagner took possession of it. Thereafter, Wagner sold the 2007
6 Calabria at auction, but it sold for less than the amount
7 financed, and PBNW never repaid the balance plus interest.⁵

8 **4. Malich's Bankruptcy and Wagner's Adversary Proceeding**

9 After Malich and his wife filed their chapter 7 bankruptcy,
10 Wagner filed a complaint in March 2009 seeking to have the debt
11 owed by Malich and his wife declared nondischargeable under
12 § 523(a)(2).⁶

13 After a half-day bench trial, the bankruptcy court took the
14 matter under submission, and on May 3, 2010, the court announced
15 its findings of fact and conclusions of law orally on the record.
16 In relevant part, the bankruptcy court made the following
17 findings:⁷

- 18 • "The financing documents prepared by [Wagner's counsel] do
19 not support [Wagner's] case."

20
21 ⁵The record indicates that PBNW purchased a total of 20
22 Calabrias in 2008, and after PBNW sold 14 of them, Wagner
23 financed PBNW's purchase of an additional six. Of those six that
24 Wagner financed, four sold and Wagner was repaid in full. The
25 fifth Malich sold at a loss, and the sixth, referred to above in
26 the Calabria Transaction, was repossessed by Wagner and sold at a
27 loss.

28 ⁶Wagner also sought the debt to be declared nondischargeable
under § 523(a)(4) and § 523(a)(6), but later voluntarily
dismissed these claims.

⁷Unless the recited finding is enclosed in quotation marks,
our recitation paraphrases the bankruptcy court's language.

- 1 • "The documents do not provide for a security interest, and
2 it is questionable whether [Wagner] was in fact properly
3 secured on the financed boats."
- 4 • Malich's testimony, that he always intended to repay Wagner
5 as soon as he could after sale of a boat he financed, was
6 credible.
- 7 • ". . . [Malich] had every intention of paying [Wagner] when
8 the transactions were entered into, but an unforeseen drop
9 in the economy substantially affecting the sale of new and
10 used power boats led to [Wagner] not being paid by
11 [Malich]."
- 12 • Wagner's testimony, that he believed his loans were secured
13 by the boats financed and that he expected to be repaid when
14 the boats financed sold, also was credible.
- 15 • "At trial, [Wagner] was unable to articulate one false oral
16 or written representation made by [Malich]."
- 17 • Wagner primarily based his claim of misrepresentation on
18 Malich's allegedly false promise that PBNW would repay
19 Wagner on each loan when PBNW sold each boat financed.
- 20 • Wagner further based his claim of misrepresentation on
21 Malich's failure to disclose, at the time of the Calabria
22 Transaction, that PBNW had sold the 2007 Skater and the 2005
23 Daytona without having repaid Wagner's loans.
- 24 • There is no evidence that Malich knowingly made a false
25 representation with the intent to deceive Wagner.
- 26 • Wagner's trial testimony established a lack of justifiable
27 reliance: (1) Wagner made no inquiry into the financial
28 status of Malich/PBNW; (2) Wagner utilized loan documents
that did not reflect the parties' agreement or course of
dealing; (3) Wagner's loan documents also arguably failed to
create a security interest in the boats financed; (4) Wagner
never performed title searches on the boats financed; and
(5), Wagner seldom inquired regarding potential delinquent
loan payments.

23 See 5/3/10 Transcript at 9:10-12:10.

24 Based on these findings, the bankruptcy court entered
25 judgment on May 3, 2010 in favor of Malich and his wife,
26 declaring the Malichs' debts to Wagner to be dischargeable. On
27 May 17, 2010, Wagner filed a motion under Civil Rule 59(e),
28 applicable under Rule 9023, seeking to alter or amend the court's

1 judgment. Wagner asserted that the court's ruling placed undue
2 weight on the fact that Wagner's loan documents did not
3 accurately reflect the parties' dealings. Wagner also asserted
4 that there was no evidence in the record from which the court
5 could rationally infer that Malich really intended, when the
6 transactions were entered into, to repay Wagner when the boats
7 financed sold. The motion for reconsideration further suggested
8 that Malich falsely represented that Wagner would hold a security
9 interest in each boat financed.

10 After holding a hearing on the motion to alter or amend the
11 judgment, the bankruptcy court denied the motion. Wagner timely
12 appealed.

13 JURISDICTION

14 The bankruptcy court had jurisdiction pursuant to 28 U.S.C.
15 §§ 1334 and 157(b)(2)(I). We have jurisdiction under 28 U.S.C.
16 § 158(a)(1).

17 ISSUES⁸

- 18 1. Whether the bankruptcy court committed reversible error in
19 rendering its findings of fact.
- 20 2. Whether the bankruptcy court committed reversible error in
21 denying Wagner's motion to alter or amend the judgment.

22 STANDARDS OF REVIEW

23 Whether a debt is dischargeable generally presents mixed
24

25 ⁸Wagner has not challenged on appeal the court's ruling in
26 favor of Malich's wife, Dana Malich. Wagner's appellate brief
27 contains no legal or factual argument in any way asserting that
28 any debt owed by Dana Malich should have been declared
nondischargeable. Consequently, Wagner has waived any such
arguments. See Golden v. Chicago Title Ins. Co. (In re Choo),
273 B.R. 608, 613 (9th Cir. BAP 2002).

1 issues of law and fact, which we review de novo. Peklar v. Ikerd
2 (In re Peklar), 260 F.3d 1035, 1037 (9th Cir. 2001). But the
3 bankruptcy court's findings made as part of its dischargeability
4 ruling are reviewed under the clearly erroneous standard.
5 Candland v. Ins. Co. of N. Am. (In re Candland), 90 F.3d 1466,
6 1469 (9th Cir. 1996); Advanta Nat'l Bank v. Kong (In re Kong),
7 239 B.R. 815 (9th Cir. BAP 1999). Thus, whether a creditor has
8 proven an essential element of a cause of action under
9 § 523(a)(2)(A) is a factual determination reviewed for clear
10 error. Anastas v. Am. Sav. Bank (In re Anastas), 94 F.3d 1280,
11 1283 (9th Cir. 1996); Am. Express Travel Related Servs. Co., Inc.
12 v. Vee Vinhnee (In re Vee Vinhnee), 336 B.R. 437, 443 (9th Cir.
13 BAP 2005).

14 "A court's factual determination is clearly erroneous if it
15 is illogical, implausible, or without support in the record."
16 Retz v. Samson (In re Retz), 606 F.3d 1189, 1196 (9th Cir. 2010)
17 (citing United States v. Hinkson, 585 F.3d 1247, 1261-62 & n.21
18 (9th Cir. 2009) (en banc)). "'Where there are two permissible
19 views of the evidence, the factfinder's choice between them
20 cannot be clearly erroneous.'" Donald v. Curry (In re Donald),
21 328 B.R. 192, 203 (9th Cir. BAP 2005) (quoting Anderson v. City
22 of Bessemer City, N.C., 470 U.S. 564, 574 (1985)); Rifino v. U.S.
23 (In re Rifino), 245 F.3d 1083, 1086-87 (9th Cir. 2001).

24 Moreover, when factual findings are based on determinations
25 of witness credibility, we give great deference to the bankruptcy
26 court's findings, because the bankruptcy court, as the trier of
27 fact, had the opportunity to note "variations in demeanor and
28 tone of voice that bear so heavily on the listener's

1 understanding of and belief in what is said." Anderson, 470 U.S.
2 at 575. Accord, Oney v. Weinberg (In re Weinberg), 410 B.R. 19,
3 28 (9th Cir. BAP 2009), aff'd, 2010 WL 5395646 (9th Cir., Dec.
4 27, 2010); Rule 8013.

5 Additionally, a clearly erroneous finding of fact does not
6 always justify reversal; we must ignore harmless error. See
7 Litton Loan Serv'g, LP v. Garvida (In re Garvida), 347 B.R. 697,
8 704 (9th Cir. BAP 2006) (citing 28 U.S.C. § 2111, Rule 9005,
9 Civil Rule 61, and Donald, 328 B.R. at 203-04).

10 We review the bankruptcy court's denial of a motion to alter
11 or amend judgment under Rule 9023 for abuse of discretion. See
12 Ta Chong Bank Ltd. v. Hitachi High Techs. Am., Inc., 610 F.3d
13 1063, 1066 (9th Cir. 2010). Under the abuse of discretion
14 standard, we first "determine de novo whether the [bankruptcy]
15 court identified the correct legal rule to apply to the relief
16 requested." Hinkson, 585 F.3d at 1262. And if the bankruptcy
17 court identified the correct legal rule, we then determine under
18 the clearly erroneous standard whether its factual findings and
19 its application of the facts to the relevant law were:
20 "(1) illogical, (2) implausible, or (3) without support in
21 inferences that may be drawn from the facts in the record." Id.
22 (internal quotation marks omitted).

23 **DISCUSSION**

24 Section 523(a)(2)(A) excepts from discharge debts incurred
25 through "false pretenses, a false representation, or actual
26 fraud." To fall within this exception to discharge, a creditor
27 must prove by a preponderance of the evidence each of the
28 following elements: "(1) misrepresentation, fraudulent omission

1 or deceptive conduct by the debtor; (2) knowledge of the falsity
2 or deceptiveness of his statement or conduct; (3) an intent to
3 deceive; (4) justifiable reliance by the creditor on the debtor's
4 statement or conduct; and (5) damage to the creditor proximately
5 caused by its reliance on the debtor's statement or conduct.'" Weinberg,
6 410 B.R. at 35 (quoting Turtle Rock Meadows Homeowners
7 Ass'n v. Slyman (In re Slyman), 234 F.3d 1081, 1085 (9th Cir.
8 2000)).

9 **A. False Promise**

10 Wagner argues on appeal the bankruptcy court clearly erred
11 when it found that Malich intended to honor his promises at the
12 time he made them. Wagner concedes that a debt arising from a
13 false promise is nondischargeable under § 523(a)(2)(A) only if
14 the intention not to perform existed at the time the promise was
15 made. See generally Eashai v. Citibank, South Dakota, N.A.,
16 (In re Eashai), 167 B.R. 181, 185 (9th Cir. BAP 1994), aff'd,
17 87 F.3d 1082 (9th Cir. 1996) (holding that bankruptcy court could
18 infer debtor fraudulently lacked intent to perform under credit
19 card contract at the time he incurred charges because debtor had
20 no reasonable prospect of repaying charges at the time they were
21 incurred); see also Restatement (Second) of Torts § 530 (1976).

22 Initially, we note a significant problem with Wagner's
23 argument both before the bankruptcy court and on appeal: a
24 pervasive lack of precision as to what Malich promised. For
25 instance, the evidence supported, and the bankruptcy court found,
26 that Malich generally promised to repay Wagner's loans as soon as
27 he could after each boat financed sold; his guaranties are
28 evidence of that intent. We acknowledge that the evidence was

1 disputed as to when repayment was due. Wagner testified that he
2 expected to be paid immediately upon sale, but Wagner's
3 expectation of immediate repayment appeared to be based solely on
4 his unverified perception of the ongoing course of dealing, and
5 the fact that he usually held the original title documents. On
6 the other hand, Malich testified that he occasionally delayed
7 repaying Wagner for up to three months, particularly when the
8 sale occurred during the slow winter months.

9 A fair reading of the bankruptcy court's findings indicates
10 the court determined that Malich's practice of occasionally
11 delaying payment was part of the parties' course of dealing.
12 Wagner advocated that the bankruptcy court should infer a promise
13 to repay based on the parties' course of dealing (overriding the
14 documents indicating that PBNW had a year to repay), but then
15 also insisted that the bankruptcy court should ignore part of
16 that course of dealing in making its inferences regarding what
17 was promised. We cannot conclude that the court's determination
18 regarding the promised specific timing of repayment was, within
19 the meaning of Hinkson, "implausible," "illogical" or "without
20 support in inferences that may be drawn from the facts in the
21 record."

22 The alleged promise regarding title/security is also far
23 from precise. According to Wagner's argument, Malich promised
24 that Wagner would have a valid, perfected security interest in
25 each boat financed, and that each boat would be sufficient
26 security for the amount loaned. However, the loan documents and
27 the trial testimony are devoid of such promises, representations
28 or warranties. Rather, the trial testimony reflects that Wagner

1 generally would fund PBNW's purchase of a boat upon receipt from
2 Malich of the original title document for that boat, without any
3 promise, representation or warranty as to the legal effect of
4 Wagner's possession of the original title document or as to the
5 sufficiency of the boat as security.⁹

6 More importantly, the undisputed trial testimony of both
7 Wagner and Malich establishes that Wagner and Malich knowingly
8 and voluntarily deviated from the parties' general course of
9 dealing when the parties entered into the Skater Transaction and
10 the Daytona Transaction. Instead of financing based on receipt
11 of the original title documents, Wagner funded these two loan
12 transactions based on Malich's promise to deliver to Wagner the
13 original title documents in the future, when Malich obtained
14 them. This is the only promise related to title/security that is
15 apparent from the record.

16 Having articulated what Malich promised, we can now review
17 the sufficiency of the bankruptcy court's findings that Malich
18 intended to honor his promises at the time he made them. As
19 shown below, even a cursory review of the evidence before the
20 bankruptcy court is sufficient to support the bankruptcy court's
21 findings as to Malich's intent with respect to the promises he
22 made.

23 In most cases, the intent or state of mind of a party
24

25 ⁹Wagner's argument also ignores the fact that Article 9 of
26 the Uniform Commercial Code, as drafted originally and as adopted
27 in Washington, requires that the debtor "authenticate[] a
28 security agreement that provides a description of the collateral"
§ 62A.9A-203(b)(3)(A).

1 largely hinges on their credibility. See, e.g., Hernandez v. New
2 York, 500 U.S. 352, 364 (1991); Batson v. Kentucky, 476 U.S. 79,
3 98 & n.21 (1986). Here, the bankruptcy court found credible
4 Malich's testimony that he intended to honor his promises at the
5 time he made them. Nothing in the record is sufficient to cause
6 us to conclude that the court's credibility findings were clearly
7 erroneous or to deprive those findings of the particular
8 deference to which they are entitled. See Anderson, 470 U.S. at
9 573.

10 Wagner argues on appeal that the bankruptcy court's intent
11 finding is illogical. Wagner cites the following language from
12 the bankruptcy court's findings in support of this argument:

13 . . . [Malich] had every intention of paying [Wagner]
14 when the transactions were entered into, but an
15 unforeseen drop in the economy substantially affecting
the sale of new and used power boats led to [Wagner]
not being paid by [Malich].

16 5/3/10 Trans. at 11:19-23.

17 According to Wagner, as a matter of logic, the unforeseen
18 drop in the economy could not have caused Malich to form a
19 different intent regarding his promise to repay Wagner when the
20 boat financed sold because the drop in the economy did not affect
21 Malich's ability to repay Wagner when the boat sold.

22 But Wagner's logic argument only would make sense if Malich
23 had promised to immediately repay Wagner from the sale proceeds.
24 As set forth above, the bankruptcy court found no such promise,
25 and the bankruptcy court's finding regarding Malich's actual
26 promise - that Malich would repay Wagner as soon as he could
27 after sale of the boat financed - was not clearly erroneous.

28

1 Thus, Wagner's logic argument fails.¹⁰

2 Wagner also argues on appeal that the evidence in the record
3 is contrary to the bankruptcy court's findings regarding Malich's
4 intent to honor his promises. In making this argument, Wagner
5 exclusively relies on: (1) Malich's failure to immediately repay
6 Wagner as soon as PBNW sold the 2005 Daytona and the 2007 Skater,
7 (2) Malich's failure to partially repay Wagner for these two
8 transactions, (3) Malich's failure to notify Wagner of the delay
9 in repayment, and (4) Malich's failure to notify Wagner that
10 Malich had delivered the original title documents for these two
11 boats to the third party purchasers, instead of delivering them
12 to Wagner as promised.

13 According to Wagner, the bankruptcy court clearly erred by
14 not concluding on this evidence that Malich never intended to
15 honor any of his promises to repay or any of his promises to
16 deliver title with respect to any of his loan transactions with
17 Wagner. We disagree. The bankruptcy court chose to credit over
18 this evidence Malich's testimony regarding his intent. Further,
19

20
21 ¹⁰Wagner also attempts to tie the above-referenced finding
22 regarding unforeseen economic conditions to the promise to
23 deliver the original title documents for the 2005 Daytona and the
24 2007 Skater, but the bankruptcy court never said nor implied that
25 changing economic conditions caused Malich to form a different
26 intent regarding his promise to deliver title. Malich testified
27 that he initially intended to deliver to Wagner the two original
28 title documents as promised but that he failed to take them to
Wagner out of neglect or inadvertence. The bankruptcy court
apparently credited this testimony as credible when it credited
Malich's other testimony. We have found nothing in the record,
nor has Wagner pointed us to anything, that would cause us to
conclude that this credibility finding of the court's was clearly
erroneous.

1 Malich's testimony regarding his intent is consistent with his
2 performance as promised in the 25 to 50 other transactions with
3 Wagner. In the face of conflicting evidence, we cannot say that
4 the bankruptcy court's decision to infer that Malich intended to
5 honor his promises when he made them was "implausible,"
6 "illogical" or "without support in inferences that may be drawn
7 from the facts in the record."

8 In sum, the bankruptcy court did not clearly err when it
9 found that Malich intended to honor his promises when he made
10 them.

11 **B. Fraudulent Nondisclosure**

12 Alternately, Wagner argues that Malich fraudulently failed
13 to disclose to Wagner, after he had sold the 2005 Daytona and the
14 2007 Skater, his failure to repay these loans as promised and his
15 failure to deliver the two title documents to Wagner as promised.
16 We look to the Restatement (Second) of Torts for guidance in
17 determining what constitutes a fraudulent nondisclosure for
18 purposes of § 523(a)(2)(A). See Apte v. Romesh Japra, M.D.,
19 F.A.C.C., Inc. (In re Apte), 96 F.3d 1319, 1324 (9th Cir. 1996);
20 Tallant v. Kaufman (In re Tallant), 218 B.R. 58, 64-64 (9th Cir.
21 BAP 1998) (citing Field v. Mans, 516 U.S. 59, 68-70 (1995)).

22 Restatement (Second) of Torts § 551(1) makes clear that
23 fraudulent nondisclosure can only occur when the party with
24 knowledge has a duty to disclose:

25 One who fails to disclose to another a fact that he
26 knows may justifiably induce the other to act or
27 refrain from acting in a business transaction is
28 subject to the same liability to the other as though he
had represented the nonexistence of the matter that he
has failed to disclose, if, but only if, he is under a
duty to the other to exercise reasonable care to

1 disclose the matter in question.

2 Restatement (Second) of Torts § 551 (Emphasis Added.)

3 Restatement (Second) of Torts § 551(2) specifies that a
4 party to a business transaction is under a duty to disclose to
5 the other party, before the transaction is entered into:

6 (a) matters known to him that the other is entitled to
7 know because of a fiduciary or other similar relation
of trust and confidence between them; and

8 (b) matters known to him that he knows to be necessary
9 to prevent his partial or ambiguous statement of the
facts from being misleading; and

10 (c) subsequently acquired information that he knows
11 will make untrue or misleading a previous
representation that when made was true or believed to
12 be so; and

13 (d) the falsity of a representation not made with the
14 expectation that it would be acted upon, if he
subsequently learns that the other is about to act in
reliance upon it in a transaction with him; and

15 (e) facts basic to the transaction, if he knows that
16 the other is about to enter into it under a mistake as
to them, and that the other, because of the
17 relationship between them, the customs of the trade or
other objective circumstances, would reasonably expect
18 a disclosure of those facts.

19 Id.

20 Wagner argues on appeal that the factors referenced in
21 clause (c) are present here.¹¹ According to Wagner, Malich
22 should have disclosed the broken promises before the parties
23 entered into the Calabria Transaction. We disagree.¹²

24
25 ¹¹Wagner perhaps could have argued that some of the other
26 clauses under Restatement (Second) of Torts § 551(2) apply, but
he waived these arguments by not raising them. See In re Choo,
27 273 B.R. at 613.

28 ¹²Even if we were to agree with Wagner and hold that Malich
(continued...)

1 The Comments accompanying Restatement (Second) of Torts
2 § 551 explain and clarify the requirements of clause (c):

3 One who, having made a representation¹³ which when made
4 was true or believed to be so, remains silent after he
5 has learned that it is untrue and that the person to
6 whom it is made is relying upon it in a transaction
7 with him, is morally and legally in the same position
8 as if he knew that his statement was false when made.

9 Comment h to Restatement (Second) of Torts § 551 (emphasis
10 added).

11 Thus, Malich's duty to disclose hinged on whether (or when)
12 he knew that he had broken his promises with respect to the
13 Skater Transaction and the Daytona Transaction, and whether (or
14 when) he knew that Wagner was relying on these promises in
15 entering into the Calabria Transaction. With respect to his
16 promise to repay Wagner for the 2005 Daytona and the 2007 Skater,
17 Malich testified that he still intended and expected to repay
18 Wagner for these two transactions as late as April 2008, when the
19 Calabria Transaction was entered into. As discussed previously,
20 the bankruptcy court found this testimony credible, and we have
21 identified no clear error in this finding. Accordingly, Malich

22 ¹²(...continued)
23 had a duty to disclose his broken promises before entering into
24 the Calabria Transaction, the bankruptcy court's error in not
25 finding such a duty would have been harmless because the
26 bankruptcy court correctly found that the loss that Wagner
27 sustained in the Calabria Transaction flowed from a simple breach
28 of contract rather than any fraud by Malich. See our discussion,
infra, regarding § 523(a)(2)(A)'s other elements.

¹³According to the Restatement (Second) of Torts, a
contractual promise also qualifies as a representation that the
promisor intends to perform as promised. See Comment C to
Restatement (Second) of Torts § 530 (1977).

1 had no duty to disclose with respect to his promise to repay.

2 Meanwhile, with respect to Malich's promise to deliver to
3 Wagner the title documents for the 2005 Daytona and the 2007
4 Skater, the bankruptcy court did not expressly focus on this
5 promise, and it seems likely on this record that Malich realized
6 sometime before the Calabria Transaction that he no longer
7 intended to honor this promise. However, there is no evidence in
8 the record that would support an inference that Malich knew
9 Wagner was relying on any promise relating to the Skater
10 Transaction and the Daytona Transaction when he financed the
11 Calabria Transaction.

12 To the contrary, many of the facts in the record indicate
13 that the promise to deliver the Skater and Daytona title
14 documents had no relevance to the parties in entering into the
15 Calabria Transaction. First of all, as set forth above, Malich
16 at that time still intended and expected to repay Wagner for the
17 2005 Daytona and the 2007 Skater, and Wagner testified that he
18 did not really care about delivery of title - what he really
19 cared about was getting paid. See 4/29/10 Trial Trans. at 38:13-
20 38:23. In addition, the original title document for the 2007
21 Calabria was delivered to Wagner at the time he funded the
22 Calabria Transaction, so there was no promise made in the
23 Calabria Transaction similar to the promise regarding title made
24 in the Daytona and Skater Transactions. Finally, Wagner's
25 testimony indicates that the parties treated each loan as a
26 separate transaction. See 4/29/10 Trial Trans. at 11:5-11:11,
27 34:12-34:16. All of these facts would have tended to lead Malich
28 to believe that Wagner was not relying on the promise to deliver

1 the Daytona and Skater title documents in entering into the
2 Calabria Transaction. As a result, Malich had no duty to
3 disclose with respect to his promise to deliver the Daytona and
4 Skater title documents.¹⁴

5 Wagner also suggests on appeal that, if Malich had
6 immediately disclosed his broken promises, Wagner could have
7 "exercised remedies to protect himself from what happened" in the
8 transactions that he already had entered into - the Activator,
9 Daytona and Skater Transactions. Wagner in essence is arguing
10 that, when a party breaches a contract, that party must
11 immediately notify the non-breaching party of the breach or face
12 nondischargeable liability for any losses that occur after the
13 breach. We know of no authority that supports this novel and
14 broad proposition nor has Wagner cited us to any. Moreover, this
15 proposition would threaten to turn virtually all breach of
16 contract liability into nondischargeable debt. In short, this
17 proposition is fundamentally inconsistent with the principle that
18 exceptions to discharge are to be interpreted narrowly in favor
19

20 ¹⁴We are mindful that Apte held that there is a presumption
21 of reliance when the subject nondisclosure is determined to be
22 material. See Apte, 96 F.3d at 1323-24. However, the Ninth
23 Circuit has limited this presumption to cases in which the
24 plaintiff primarily alleges nondisclosure; where the plaintiff
25 instead primarily alleges misrepresentation, the presumption does
26 not apply. See Poulos v. Caesars World, Inc., 379 F.3d 654, 666-
27 67 (9th Cir. 2004); Binder v. Gillespie, 184 F.3d 1059, 1063-64
28 (9th Cir. 1999). Here, Wagner predominantly complains of false
promise, a form of misrepresentation. See Comment c to
Restatement (Second) of Torts § 530. Thus, the Apte presumption
does not apply. Furthermore, the Apte presumption also does not
apply because the broken promise regarding delivery of title was
not material or relevant to the Calabria Transaction, for the
reasons stated above.

1 of discharge. See Ghomeshi v. Sabban (In re Sabban), 600 F.3d
2 1219, 1222 (9th Cir. 2010). Thus, we reject this argument.

3 In sum, on the record before us, we cannot conclude that the
4 bankruptcy court clearly erred by not finding any fraudulent
5 nondisclosure.

6 **C. Other § 523(a)(2)(A) Elements**

7 Above, we hold that the bankruptcy court did not clearly err
8 when it found no false promise and no fraudulent nondisclosure.
9 Because Malich did not commit any actionable misrepresentation or
10 omission, we need not dwell at length on the other elements for
11 nondischargeability under § 523(a)(2)(A).¹⁵

12 One specific finding and Wagner's objection to it does merit
13 a bit of discussion. Wagner particularly objected to the court's
14 finding that "[Wagner] received what he was bargaining for when
15 he took back both the Activator and Calabria boats." 5/3/10

17 ¹⁵We do note, however, that the bankruptcy court found that
18 Wagner had not established justifiable reliance, which is one of
19 the five elements that a plaintiff must prove to have a debt
20 declared nondischargeable. See Weinberg, 410 B.R. at 35. Wagner
21 did not challenge on appeal this finding, and thus the issue is
22 deemed waived. See Choo, 273 B.R. at 613. Consequently, even if
23 Wagner were to prevail on all of his other arguments on appeal,
24 affirmance of the bankruptcy court's judgment in favor of Malich
25 still would be appropriate given Wagner's lack of justifiable
26 reliance. We further note that the record fully supports the
27 bankruptcy court's finding regarding the absence of justifiable
28 reliance. As the bankruptcy court pointed out, Wagner made no
effort: (1) to verify Malich's or PBNW's financial condition,
(2) to use transaction documents that actually reflected the
parties' understanding and course of dealing, or (3) to verify
whether boats he had financed had been sold.

Questions of justifiable reliance are also raised by
Wagner's laxness in neglecting to comply with Article 9 of the
Uniform Commercial Code to ensure that he had a security interest
in the boats financed.

1 Trans. at 10:21-23. According to Wagner, the bankruptcy court
2 clearly erred in making this finding because it is undisputed
3 that Wagner lost money on the Activator and Calabria
4 Transactions.

5 But the bankruptcy court obviously did not intend what it
6 said in this finding to be taken literally. Taking into account
7 the fraud/nondischargeability context and the entirety of the
8 record, a fair construction of this finding would be that any
9 loss that Wagner suffered on the Activator and Calabria
10 Transactions was the result of a simple breach of contract and
11 not the result of fraud. By this finding, the bankruptcy court
12 was attempting to emphasize that, in the Activator and Calabria
13 Transactions, Malich duly delivered the title documents and
14 Wagner successfully repossessed the Activator and the Calabria.
15 Consequently, any loss arising in these transactions flowed from
16 the insufficiency of the collateral, and Malich made no
17 misrepresentations or omissions concerning the sufficiency of the
18 collateral. Simply put, this finding reflects that Wagner did
19 not satisfy the fifth element under § 523(a)(2)(A): that his
20 damages were proximately caused by his reliance on a
21 misrepresentation or omission by Malich.

22 As construed above, the record fully supports this finding,
23 and the bankruptcy court did not clearly err in making this
24 finding.

25 **D. Motion to Alter or Amend Judgment**

26 Wagner filed his motion to alter or amend under Civil
27 Rule 59(e), made applicable to this case by Rule 9023. A trial
28 court generally should deny a motion under Civil Rule 59(e)

1 unless the movant: (1) presents newly discovered evidence,
2 (2) shows clear error, or (3) shows an intervening change in
3 controlling law. See Marlyn Nutraceuticals, Inc. v. Mucos Pharma
4 GmbH & Co., 571 F.3d 873, 880 (9th Cir. 2009) (citing 389 Orange
5 St. Partners v. Arnold, 179 F.3d 656, 665 (9th Cir. 1999)).

6 Wagner's Civil Rule 59(e) motion argued clear error. Wagner
7 claimed the bankruptcy court clearly erred when it found that
8 "[t]he financing documents prepared by [Wagner] do not support
9 his case." 5/3/10 Trans. at 9:10-11. According to Wagner, the
10 bankruptcy court's determination that no fraud occurred "centered
11 on" this finding. This assertion is simply wrong. As the
12 bankruptcy court explained to Wagner at the hearing on his
13 motion, the court's determination hinged on the testimony of the
14 parties and their credibility. Further, we note that the record
15 fully supports the bankruptcy court's finding that the loan
16 documents did not support Wagner's case.

17 In the remainder of Wagner's motion, he simply rehashed his
18 argument made at trial that the court should draw from the
19 evidence the inference that Malich never intended to honor his
20 promises. Even if this argument had merit (which it does not -
21 see supra), it would not satisfy the requirements for bringing a
22 motion to alter or amend judgment.

23 The bankruptcy court applied the correct standard in
24 evaluating Wagner's motion, and we see no error in the bankruptcy
25 court's application of that standard. Accordingly, the
26 bankruptcy court did not abuse its discretion when it denied
27 Wagner's motion to alter or amend judgment.

28

CONCLUSION

For all of the reasons set forth above, the judgment of the bankruptcy court, and its denial of Wagner's Civil Rule 59(e) motion, are AFFIRMED.

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