NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL

OF THE NINTH CIRCUIT

In re:	BAP No. NC-10-1289-HBaJu
CHRISTIAN PETER MIRNER and TAMARA LYNNE CULLEN-MIRNER,	Bk. No. 09-49872
Debtors.	Adv. No. 10-04009
CHRISTIAN PETER MIRNER; TAMARA LYNNE CULLEN-MIRNER,	
Appellants,	
v.	**M E M O R A N D U M**[1]
FIRST REPUBLIC BANK,	
Appellee.	

Argued and Submitted on May 11, 2011
at San Francisco, California

Filed - May 24, 2011

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

Honorable Leslie J. Tchaikovsky, Bankruptcy Judge, Presiding

Appearances: Appellant Christian Peter Mirner argued pro se; Edward J. Tredinnick of Greene Radovsky Maloney Share & Hennigh LLP argued for the Appellee.

Before: HOLLOWELL, BARRECA[2], 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] The Hon. Marc L. Barreca, Bankruptcy Judge for the Western District of Washington, sitting by designation.

Christian Mirner and Tamara Cullen-Mirner (the Debtors) appeal a $102,000 nondischargeability judgment based on the bankruptcy court's finding that the Debtors committed waste on two properties subject to deeds of trust in favor of the appellee. We AFFIRM.

I. FACTS

In late 2007, the Debtors entered into two loans with First Republic Bank (the Bank): they executed a promissory note in the amount of $2,145,000, secured by a deed of trust on real property in Lafayette, California (the Park Lane Property) and a second promissory note in the amount of $627,250, secured by a deed of trust on real property in Truckee, California (the Wagon Wheel Property) (collectively, the Properties). The Debtors subsequently defaulted on the promissory notes. In June 2009, the Bank initiated foreclosure proceedings.

As part of the foreclosure proceedings, the Bank had the Properties appraised. In July 2009, the Wagon Wheel Property was appraised at $550,000; the Park Lane Property was appraised at $1,900,000. The Bank scheduled the sale of the Wagon Wheel Property for October 22, 2009. On October 20, 2009, the Debtors filed for chapter 7[3] relief.

In order to conclude its foreclosures on the Properties, the Bank filed motions for relief from the automatic stay. The bankruptcy court granted the stay relief motions on December 2,

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

2009, and the Bank conducted nonjudicial foreclosure sales on the Properties in late December and early January. It was the sole bidder at the sales, with credit bids of $525,000 on the Wagon Wheel Property and $1,866,000 on the Park Lane Property.[4]

After the Bank took title, it inspected the Properties and discovered that numerous items had been removed, including sinks, bathtubs, plumbing hardware, light fixtures, wall sconces, kitchen appliances, cabinetry hardware, and built-in vacuum and speaker systems (the Appliances and Fixtures). In removing the Appliances and Fixtures, the Debtors caused substantial damage to the Properties' outlets and wiring, tiling, plumbing, cabinetry, countertops and walls.

On January 11, 2010, the Bank filed a complaint pursuant to § 523(a)(6) alleging that the Debtors willfully and maliciously committed conversion and bad faith waste[5] by removing the Appliances and Fixtures, which also resulted in substantial damage to the Properties (the Complaint).

A trial was held on June 21, 2010 (the Trial). The Bank's representative testified about the extent of damage to the Properties and submitted photographs substantiating its claim. The Bank submitted an estimate from a contractor itemizing

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[4] The Debtors owed $661,420.26 on the note secured by the Wagon Wheel Property. The Debtors owed $2,310,443.14 on the note secured by the Park Lane Property.

[5] California Civil Code § 2929 provides that "No person whose interest is subject to the lien of a mortgage may do any act which will substantially impair the mortgagee's security." A violation of Cal. Civ. Code § 2929 gives rise to a claim of "waste."

necessary repairs to the Park Lane Property at $77,000 (the Repair Estimate). The Repair Estimate included $26,700 to replace and install the removed Appliances and Fixtures.

The Bank did not get an estimate for the cost of repairs to the Wagon Wheel Property, but had brokers value the property in order to list it for sale. The Bank sold the Wagon Wheel Property for $525,000 in March 2010. It asserted that the $25,000 difference between the appraised value of $550,000 and the actual sale price was due to the removal of the Appliances and Fixtures and the damage that resulted from that removal. Therefore, the Bank asserted a claim for damages on the Properties in the total amount of $102,000.

The only evidence that the Debtors presented at Trial was the testimony of Mr. Mirner. He testified that he personally removed the Appliances and Fixtures from the Properties and admitted that doing so caused damage. However, he testified that he considered himself the rightful owner of the Appliances and Fixtures and did not remove them with the willful and malicious intent to injure the Bank. Mr. Mirner asserted that his actions, to the extent they constituted waste, were only a breach of contract under the Bank's deeds of trust, for which the Bank's sole remedy was to sell the Properties, not to obtain a judgment for damages.

On July 2, 2010, the bankruptcy court issued a Memorandum of Decision determining that the Bank could recover damages for bad faith waste under California law; that the Debtors acted willfully and maliciously in removing the Appliances and Fixtures because they had actual knowledge of the damage that was being

caused as they did so; and, that the Bank's claim was, therefore, nondischargeable under § 523(a)(6). The bankruptcy court determined that the amount of the nondischargeable claim was $102,000, which was calculated by accepting the $77,000 Repair Estimate and the $25,000 diminution in value of the Wagon Wheel Property. It entered a judgment consistent with its decision on July 15, 2010 (the Judgment). The Debtors timely appealed.[6]

II. JURISDICTION

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

III. ISSUE

Did the bankruptcy court err when it calculated the Judgment amount of $102,000?

IV. STANDARDS OF REVIEW

The bankruptcy court's findings of fact are reviewed for clear error and its conclusions of law de novo. Hansen v. Moore (In re Hansen), 368 B.R. 868, 874 (9th Cir. BAP 2007). To reverse a court's finding of fact, we must have a definite and firm conviction that the court committed a clear error of judgment in the conclusion it reached. Id.; United States v. Hinkson, 585 F.3d 1247, 1263 (9th Cir. 2009) (en banc) (holding

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[6] The Debtors filed an Objection to the Memorandum Decision (Objection) on July 16, 2010, and a notice of appeal on July 28, 2010. The Objection mirrors the Debtors' brief on appeal.

The Bankruptcy Appellate Panel considered the Objection a tolling motion to alter or amend the Judgment and issued an order on October 27, 2010, requiring that the Debtors obtain an order or resolution of the Objection. A hearing was subsequently held on the Objection on March 17, 2011, and denied on March 23, 2011.

that a court's factual determination is clearly erroneous if it is illogical, implausible, or without support in the record).

V. DISCUSSION

The Debtors do not appeal the bankruptcy court's findings that their conduct was willful and malicious.[7] Instead, they contend that there was no evidence produced at Trial to support a claim in the amount of $102,000 and that the Judgment should be reduced to $24,765.

Our role as an appellate tribunal is limited. We are not the trier of fact, and we do not "find" facts. We review the fact findings of the trial court for clear error, and we do not

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[7] Section 523(a)(6) prevents discharge of "any debt for a willful and malicious injury by the debtor to another entity . . . ." To prevail in a § 523(a)(6) action, a plaintiff must prove, by a preponderance of the evidence, both a willful and a malicious injury. Grogan v. Garner, 498 U.S. 279, 287 (1991); Carrillo v. Su (In re Su), 290 F.3d 1140, 1146-47 (9th Cir. 2002); Barboza v. New Form, Inc. (In re Barboza), 545 F.3d 702, 711 (9th Cir. 2008).

Willfulness requires that the debtor deliberately or intentionally injured the creditor and that in doing so the debtor intended the consequences of his act, not just the act itself. In re Su, 290 F.3d at 1143. The debtor must act with a subjective motive to inflict injury, or with a belief that injury is substantially certain to result from the conduct. Id. at 1146. For conduct to be malicious, the debtor must have intentionally committed a wrongful act that necessarily caused injury, and was done without just cause or excuse. Id. at 1146-47.

The Debtors testified at the Trial that their conduct was not willful because it was not done with the intent to cause injury. However, the bankruptcy court found that their actions were willful because they had actual knowledge that they were causing damage or injury to the Bank when they removed the Appliances and Fixtures. Because the Debtors do not challenge these findings, we accept that the Bank's claim was correctly excepted from discharge under § 523(a)(6).

overturn a trial court's fact finding as clearly erroneous unless the court's account of the evidence is implausible in light of the record viewed in its entirety. Anderson v. City of Bessemer City, N.C., 470 U.S. 564, 573-74 (1985).

Furthermore, we generally do not consider an issue raised for the first time on appeal, where the trial court had no opportunity to consider it. El Paso v. Am. West Airlines, Inc. (In re Am. West Airlines, Inc.), 217 F.3d 1161, 1165 (9th Cir. 2000); United Student Funds, Inc. v. Wylie (In re Wylie), 349 B.R. 204, 213 (9th Cir. BAP 2006) (court will not consider issue raised for the first time on appeal absent exceptional circumstances); Oyama v. Sheehan (In re Sheehan), 253 F.3d 507, 512 n.5 (9th Cir. 2001); Kirshner v. Uniden Corp. of Am., 842 F.2d 1074, 1077 (9th Cir. 1988) (evidence not before the trial court is generally not considered on appeal). With these considerations in mind, we address whether the bankruptcy court erred in finding that the Bank's damages were $102,000.

The bankruptcy court found that the Debtors caused $25,000 in damages to the Wagon Wheel Property and $77,000 in damages to the Park Lane Property. The $25,000 figure was based on the diminution in value between the Bank's appraisal obtained before foreclosure and the resale price after the Appliances and Fixtures were removed. The Debtors contend that the reason the buyer of the Wagon Wheel Property paid $25,000 less than the appraisal was not because of the damage and lack of the Appliances and Fixtures; they contend the lower purchase price was "just as likely driven by market conditions" and buyers who were willing to buy foreclosed properties "as is." However, they

provided no evidentiary support for their contention beyond their own opinion. The Debtors did not assert that the Bank's appraisal was inaccurate or submit an alternative appraisal to support their assertion that the sale price was fair.

In fact, the Bank's appraisal of the Wagon Wheel Property described the property as having a newly remodeled kitchen, which included high-end appliances, copper sink, and refrigerator wrapped in matching cabinetry, all of which were removed or damaged. Therefore, the bankruptcy court determined that the Wagon Wheel Property would necessarily have a lower value after the Appliances and Fixtures were removed. Accordingly, the bankruptcy court's finding that the damages amounted to $25,000 – the diminution in value – is not implausible, illogical, or unsupported by the record.

The Debtors presented no challenge to the Repair Estimate for the Park Lane Property and made no argument to the bankruptcy court that it was inaccurate or inflated. However, on appeal, the Debtors assert that the Repair Estimate should be reduced. The Debtors assert that certain Appliances and Fixtures should be "exempted" as personal property not affixed to the Properties.[8] Additionally, the Debtors assert that two of the items listed on the Repair Estimate were either not removed or did not exist so should not be included in the estimate. Finally, the Debtors

[8] The Debtors do not mean that the Appliances and Fixtures should be exempted from their bankruptcy estate, only exempted from the Repair Estimate. They did not list the Appliances and Fixtures as personal property on their bankruptcy schedules or seek exemptions for them under § 522.

quibble with the contractor's calculation of labor and installation time and seek to except that amount from the total. Thus, the Debtors urge us to reduce the amount of the Judgment, contending that $24,765 more accurately reflects the cost of damage caused by the removal of the Appliances and Fixtures.

However, we cannot conclude, based on our review of the record before us, that the bankruptcy court made a clear error of judgment when it found that the Debtors were responsible for $77,000 in damages to the Park Lane Property as a result of removing the Appliances and Fixtures. The Debtors did not provide any information or documentation at Trial that challenged the Repair Estimate, nor did they dispute they caused the damages to the Park Lane Property. Accordingly, the bankruptcy court's finding regarding the amount of damages to the Park Lane Property was not implausible, illogical, or unsupported by the record. In short, the bankruptcy court did not err in entering a $102,000 nondischargeable Judgment against the Debtors.

VI. CONCLUSION

For the foregoing reasons, we AFFIRM.