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OF THE NINTH CIRCUIT

NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL

OF THE NINTH CIRCUIT

In re:	BAP No. AZ-10-1381-MaDMk
CHARLES R. ROSE, Debtor.	Bk. No. 2:07-bk-05284-EWH
	Adv. No. 2:08-ap-00033-EWH
CHARLES R. ROSE, Appellant, v. DERRICK COLLINS, Appellee.	M E M O R A N D U M[1]

Argued and Submitted on May 13, 2011
at Phoenix, Arizona

Filed - June 8, 2011

Appeal from the United States Bankruptcy Court
for the District of Arizona

Honorable Eileen W. Hollowell, Bankruptcy Judge, Presiding

Appearances: Allan D. NewDelman argued for Appellant.
No appearance for Appellee.

Before: MANN,[2] DUNN, and MARKELL, 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]Hon. Margaret M. Mann, Bankruptcy Judge for the Southern District of California, sitting by designation.

Debtor and Defendant Charles Rose ("Rose") appeals the bankruptcy court's judgment determining that his loan obligation to Plaintiff, Derrick Collins ("Collins") was excepted from Rose's discharge under 11 U.S.C. § 523(a)(2)(A) because it was obtained by fraud.[3] Rose also appeals the bankruptcy court's denial of his motion to reconsider the judgment.

The central issue on appeal is whether the bankruptcy court erred in finding a third party, Adell McDaniels ("McDaniels"), was neither Collins' actual nor ostensible agent in the loan transaction. Rose contends the evidence required a finding that McDaniels was Collins' agent, and that McDaniels' knowledge of collection problems with the loan should be imputed to Collins to defeat the findings of fraud. Rose also asserts he should have been permitted to present additional evidence on the agency issue at a new trial on the matter.

The bankruptcy court's finding that McDaniels was a facilitator to all of the parties to the transaction, rather than Collins' agent alone, was supported by substantial evidence and is not error. Rose was aware of the dual role played by McDaniels, and was obligated to confirm his agency assumption before McDaniels' knowledge could be imputed to Collins. Since the fraud findings were not otherwise challenged on appeal, we AFFIRM both the judgment and the denial of the motion for reconsideration.

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

FACTS

Rose and Collins are two of five parties to an unusually structured financing transaction. The transaction called for Collins to write a $100,000 check to Gibraltar Properties, LLC ("Gibraltar") in return for a promissory note ("Note") signed by Rose, and by another individual, Emmanuel Illuminardi ("Illuminardi"). Collins expected a 50% return on his investment in no less than four months. The Note was secured, not by a standard deed of trust, but instead by two unrecorded grant deeds to real property ("Property") in California: one conveying title from Gibraltar to Illuminardi, and one conveying title from Illuminardi to Collins. Whether the Property was a real estate development actually owned by Gibraltar, or a firing range owned by the federal government, is not clear from the record.

Collins understood that in the event of default on the loan, he could record both deeds, and thereby acquire title to the Property to satisfy the loan. However, when the loan was not timely repaid, Collins found he was unable to record the deeds, a fact not challenged on appeal. Although he received from McDaniels $25,000 of what he described as hush money, or payment of a moral obligation relating to the loan, Collins' investment has not otherwise been repaid.

This financing transaction was closed and the money was exchanged without Rose and Collins meeting or communicating directly with each other in any way. Rather, all of their communication was through McDaniels, who was Collins' long standing tax accountant. McDaniels informed Collins that the loan was needed for a "land transaction deal." After initially

declining to invest, Collins changed his mind after McDaniels pressed on with his solicitation efforts.[4] Collins testified he relied on McDaniels to explain and structure the transaction, and to serve as the intermediary for the exchange of documents and funds.[5] No evidence was presented that McDaniels either actually conveyed, or was responsible for conveying, to Collins, the risks of the deal, including that Rose could not personally perform under the Note, and that the Property suffered from title problems.

McDaniels also had a pre-existing relationship with the other side of the transaction. He had done previous deals with

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[4]When describing the transaction, Collins testified as follows:

> [COLLINS]: I had been dealing with my tax accountant for over six years. His name is Mac McDaniels. . . He knew I had this money in there. He came at me with a deal. 'Derrick, I got these two guys-' Which I never knew their names, never knew anything about the deal or anything. He just came at me and said it was a land transaction deal. . . I thought about it for a minute, I said 'Nah, I'm cool with it.'. . . The third time I said 'Okay. Let me think about it' . . . He called me again later on that night. And I said 'Okay. It sounds like a good deal' . . . .

Trial Tr. at 90:17-25, 91:1-20 (May 27, 2010).

[5]Collins testified:

> [COLLINS]: My understanding of this converse - of this transaction through McDaniels and Illuminardi was that I was to encumber them with $100,000. . . . And McDaniels had this chart all laid out and "This is what we're getting ready to buy. And this is our township right here. We trying to get the water rights. And we're going to -"

Trial Tr. at 97:6-13 (May 27, 2010). And when asked by the bankruptcy court who Collins would return the Note to after he received his money, Collins testified: "Back to Mr. McDaniels, as far as I was concerned." Trial Tr. at 103:14-15 (May 27, 2010).

Illuminardi and was considered a 'go to' guy for quick financing opportunities. Gibraltar had previously retained Illuminardi and Rose to do title consulting work on the Property, which it was seeking to acquire and develop. Gibraltar asked Rose and Illuminardi to help it raise $100,000 to pursue the project, which they then arranged from Collins through McDaniels. Rose and Illuminardi received nearly half of the proceeds of Collins' $100,000 check written to Gibraltar when the transaction closed.[6] The record does not reveal whether McDaniels received any of the proceeds.

Rose and Illuminardi testified they were confident Gibraltar would repay the Note after obtaining title insurance to the Property, based upon their title work for Gibraltar. Rose testified that when he executed the Note, he knew that he could not personally pay the Note, and advised McDaniels of this disability. Rose apparently did not ask McDaniels to ensure that Collins knew Rose could not pay the Note, or that the Property was plagued by title problems.

After the default on the Note, Rose filed bankruptcy, and listed Collins as an unsecured creditor. Collins filed this adversary proceeding in propia persona, which was tried in bankruptcy court on May 27, 2010. Collins was not represented by counsel at the trial. The bankruptcy court heard testimony from Rose, Illuminardi, and Collins, but not McDaniels, who was not

[6]From the loan proceeds, Rose received $25,000, which he testified was for past work he had done for Gibraltar. Illuminardi received $20,000, and testified that half of this was for past work, and half was for procuring the loan.

called as a witness, even though he was on both parties' witness lists. After the trial, the bankruptcy court took the matter under advisement, resulting in its memorandum decision.

Rose had argued at trial that McDaniels was Collins' agent. As such, he claimed Collins, as McDaniels' principal, should be imputed with his agent's knowledge, including McDaniels' knowledge of Rose's inability to pay the debt and of the title problems. Illuminardi described McDaniels as Collins' agent, and the bankruptcy court used that terminology as well. The bankruptcy court nevertheless found in its memorandum decision that McDaniels was not Collins' agent, but a facilitator to all parties. It concluded: "Absent proof that McDaniels was Collins' agent, notice to McDaniels cannot be treated as notice to Collins." The bankruptcy court found material omissions regarding the title problems and Rose's inability to pay the debt, which it found to be fraudulent, and then entered a nondischargeable judgment against Rose in the amount of $75,000. The bankruptcy court gave Rose credit on the judgment for the $25,000 McDaniels had separately paid Collins.

After the judgment was entered, Rose filed his motion to reconsider, and argued that the bankruptcy court erred in not finding that McDaniels was Collins' agent. Rose also asked for a retrial to present more evidence on the agency issue. The bankruptcy court reiterated that Rose had not met his burden of proving an agency relationship between Collins and McDaniels, and suggested that, if anything, the evidence was more consistent with a finding that McDaniels was the agent of the other side of the deal. The bankruptcy court also concluded that Rose could

not present any new evidence on the agency issue, since he could have called McDaniels to testify at the trial. The motion for reconsideration was denied by order entered on October 5, 2010. This appeal timely followed.

JURISDICTION

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

ISSUES

1. Did the bankruptcy court err in finding that McDaniels was not Collins' actual or ostensible agent, and in not imputing McDaniels' knowledge to Collins?[7]

2. Did the bankruptcy court abuse its discretion in denying Rose's motion for reconsideration?

STANDARD OF REVIEW

The bankruptcy court's findings of fact in the context of a dischargeability analysis are reviewed under the clearly erroneous standard. Candland v. Ins. Co. Of N. Am. (In re

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[7]Rose has not challenged the sufficiency of the evidence supporting each of the elements under § 523(a)(2)(A). Consequently, we deem waived any issue regarding the sufficiency of that evidence. See Golden v. Chicago Title Ins. Co. (In re Choo), 273 B.R. 608, 613 (9th Cir. BAP 2002); Branam v. Crowder (In re Branam), 226 B.R. 45, 55 (9th Cir. BAP 1998); aff'd, 205 F.3d 1350 (table) (9th Cir. 1999). Nonetheless, to aid our analysis of the issues raised on appeal, we briefly discuss below the evidence supporting the bankruptcy court's findings.

Candland), 90 F.3d 1466, 1469 (9th Cir. 1996).[8] Whether a creditor has proven an essential element of a cause of action under § 523(a)(2)(A) is a factual determination reviewed for clear error. Cossu v. Jefferson Pilot Sec. Corp. (In re Cossu), 410 F.3d 591, 595-96 (9th Cir. 2005); Am. Express Travel Related Servs. Co., Inc. v. Vee Vinhnee (In re Vee Vinhnee), 336 B.R. 437, 443 (9th Cir. BAP 2005). A finding is clearly erroneous when "although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." Anderson v. City of Bessemer City, N.C., 470 U.S. 564, 573 (1985). The clearly erroneous standard does not "entitle a reviewing court to reverse the finding of the trier of fact simply because it is convinced that it would have decided the case differently." Id. A court's factual determination is clearly erroneous if it is illogical, implausible, or without support in the record. United States v. Hinkson, 585 F.3d 1247, 1261-62 (9th Cir. 2009) (en banc). Where there are two permissible views of the evidence, the fact finder's choice between them cannot be clearly erroneous. Anderson, 470 U.S. at 574; Rifino v. United States (In re Rifino), 245 F.3d 1083, 1086 (9th Cir. 2001).

A bankruptcy court's denial of a motion for reconsideration is reviewed for an abuse of discretion. Ta Chong Bank Ltd. v. Hitachi High Techs. Am., Inc., 610 F.3d 1063, 1066 (9th Cir.

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[8]Whether a claim is dischargeable presents mixed issues of law and fact, which we review de novo. Peklar v. Ikerd (In re Peklar), 260 F.3d 1035, 1037 (9th Cir. 2001). As only factual issues are raised, the de novo standard is not applicable here.

2010); Zimmerman v. City of Oakland, 255 F.3d 734, 737 (9th Cir. 2001). A bankruptcy court abuses its discretion when it applies the incorrect legal rule or its application of the correct legal rule is illogical, implausible, or without support in the record. United States v. Loew, 593 F.3d 1136, 1139 (9th Cir. 2009).

DISCUSSION

I. THE JUDGMENT OF NONDISCHARGEABILITY WAS PROPERLY ENTERED.

A. The Bankruptcy Court Did Not Err in Finding Rose's Debt to Collins was Nondischargeable.

Section 523(a)(2)(A) excepts from discharge any debt for money, property or credit obtained by false pretenses, false representations or actual fraud. Collins bears the burden of proving each element of his claim by a preponderance of the evidence. These elements are strictly construed against him and in favor of Rose to facilitate a fresh start for debtors. Grogan v. Garner, 498 U.S. 279, 287 (1991); Ghomeshi v. Sabban (In re Sabban), 600 F.3d 1219, 1222 (9th Cir. 2010); Turtle Rock Meadows Homeowners Ass'n v. Slyman (In re Slyman), 234 F.3d 1081, 1085 (9th Cir. 2000). Collins' § 523(a)(2)(A) claim required him to establish: 1) Rose made a representation to him, 2) that Rose knew to be false, 3) with the intention of deceiving Collins, 4) that Collins justifiably relied upon, and 5) to his damage. In re Sabban, 600 F.3d at 1222; Cossu, 410 F.3d at 596 (citing In re Britton, 950 F.2d 602, 604 (9th Cir. 1991)).

The bankruptcy court found Collins met his burden on each of these elements. Its findings are supported by substantial evidence, which Rose does not challenge on appeal separately from

the agency issue. The bankruptcy court found Rose falsely promised to pay the Note despite his admitted inability to perform and also falsely represented in the Note that it was secured when Gibraltar did not have insurable title to the Property. Rose's omission of these key facts was fraudulent within the meaning § 523(a)(2)(A). In re Eashai, 87 F.3d 1082, 1089 (9th Cir. 1996) (an omission can satisfy the misrepresentation element when there is a duty to disclose). Rose's failure to advise Collins of these key facts evinced an intent to deceive. Although not mentioned in the memorandum decision, that Rose personally benefitted by receiving $25,000 from Collins' investment also supports his intent to deceive.[9] In re Hultquist, 101 B.R. 180, 184 (9th Cir. BAP 1989) (bankruptcy court found that debtor intended to deceive his employer in order to receive a bonus and salary increase); see also In re Ashley, 903 F.3d 599, 604 (9th Cir. 1990) (debt nondischargeable when the debtor did not receive loan proceeds but received benefit due to his financial interest in the borrower).

On the justifiable reliance element, the bankruptcy court found that Collins was not put on notice that Gibraltar, as the payee under the check and the transferee of one of the deeds was the "real" borrower, rather than the note signatories Rose and Illuminardi. Collins testified that he believed that "whatever the Note said, that's who [he] was going after." Trial Tr. at 113:23-24 (May 27, 2010). That Collins parted with $100,000 of a

[9]An appellate court can affirm on any basis supported by the record. In re Heilman, 430 B.R. 213, 216 (9th Cir. BAP 2009).

recent inheritance to make the loan supports the court's finding that Rose's fraud proximately caused Collins' damages. Cossu, 410 F.3d at 596 (identifying damages as an element to be proven).

Rose does not directly contest that these findings were supported by substantial evidence. Rather, he contends that because the evidence was uncontested that McDaniels was Collins' agent, and because he told McDaniels about his inability to pay the Note and the title problems, this knowledge should be imputed to Collins. Rose claims Collins' vicarious knowledge of these facts prevented Collins from carrying his burden of proof.

Because the transaction occurred in California, its state law determines to what extent an agency relationship existed, and whether McDaniels' knowledge should be imputed to Collins. In re Nelson, 761 F.2d 1320, 1322 (9th Cir. 1985); see also Tsurukawa v. Nikon Precision, Inc. (In re Tsurukawa), 287 B.R. 515, 524-27 (9th Cir. B.A.P. 2002)(applying California agency law to impute knowledge and find a wife liable for the husband's fraud). Under California law, knowledge of an agent within the scope of its authority is generally imputed to the principal. Cal. Civ. Code § 2332 (Deering 2011)("both principal and agent are deemed to have notice of whatever either has notice of"); Sinatra v. National Enquirer, Inc., 854 F.2d 1191, 1201 (9th Cir. 1988). This imputed knowledge can serve to prove an element of the plaintiff's affirmative case and also as a defense in proper circumstances. Cf. People v. Zimmer, 23 Cal. App. 2d 581, 585 (1937) (defendants cannot escape liability by asserting that knowledge of the bank's employees of misappropriated funds was

1 knowledge of the bank).[10]

2 As we explain below, we conclude that the bankruptcy court
3 did not err in finding a lack of an actual or ostensible agency
4 relationship between Collins and McDaniels, and that McDaniels'
5 "mere facilitor" role was an insufficient basis to impute
6 McDaniels' knowledge to Collins.

7 B. The Bankruptcy Court Properly Found McDaniels Was Not
8 Collins' Agent.

9 The existence of an agency or ostensible authority is a
10 question of fact for the trial court. Penthouse International,
11 Ltd. v. Barnes, 792 F.2d 943, 947 (9th Cir. 1986); In re Wingo,
12 89 B.R. 54, 59 n. 7 (9th Cir. BAP 1988); Burr v. Capital Reserve
13 Corp., 71 Cal. 2d 983, 995 (1969); Inglewood Teachers Ass'n v.
14 Public Employment Relations Bd., 227 Cal. App. 3rd 767, 780 (2nd
15 Dist. 1991). California law provides for two forms of agency -
16 actual and ostensible. Cal. Civ. Code §§ 2298-2300 (Deering
17 2011). California law does not presume an agency relationship,
18 and the individual alleging one has the burden of proving its
19 existence. Inglewood Teachers Ass'n v. Public Employment
20 Relations Bd., 227 Cal. App. 3rd at 780; K. King & G. Shuler
21 Corp. v. King, 259 Cal. App. 2d 383, 393 (2nd Dist. 1968). Rose,

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23 [10]The imputation of knowledge is limited in certain
circumstances, such as where the agent serves as a dual agent or
24 has adverse interests. See e.g. Cal. Civ. Code § 2306 (Deering
2011); People v. Park, 87 Cal. App. 3d 550, 566 (1st Dist.
25 1978)(dual agent); People v. Zimmer, 23 Cal. App. 2d 581, 585
(1937)(same); Aycock v. Carr, 105 Cal. App. 675, 678 (3rd Dist.
26 1930)(adverse interests). The bankruptcy court did not determine
McDaniels was a dual agent or that he had adverse interests.
27 Since the bankruptcy court also did not find McDaniels was
Collins' agent, and this is sufficient to support the judgment,
28 these limits to the imputation of knowledge need not be addressed
here.

as the party asserting an agency relationship between Collins and McDaniels, bore the burden of proof on this issue. Id.

1. The Evidence Supports No Actual Agency.

An actual agency relationship arises in California by agreement. Tomerlin v. Canadian Indem. Co., 61 Cal. 2d 638, 643 (1964) (record contained substantial evidence that insurance company engaged attorney to represent it in litigation). This agency relationship has the following characteristics: (1) An agent holds by agreement a power to alter the legal relations between the principal and third persons and between the principal and himself; (2) an agent is a fiduciary with respect to matters within the scope of the agency; and (3) a principal has the right to control the conduct of the agent with respect to matters entrusted to him. Each of these elements must be present. Alvarez v. Felker Mfg. Co., 230 Cal. App. 2d 987, 999 (1st Dist. 1964)(finding no agency relationship between manufacturer and distributor due to lack of any evidence that the distributor's conduct was controlled by the manufacturer, that the distributor owed fiduciary duties to the manufacturer, or was obligated to act in the manufacturer's exclusive interest).

There was no evidence at trial that McDaniels was actually retained to serve as Collins' agent. Rose never asked Collins if McDaniels had agreed to be Collins' agent, or raised other questions with Collins regarding an agency relationship with McDaniels, and McDaniels did not testify. There was no other evidence that Collins controlled McDaniels' conduct, or that McDaniels owed fiduciary duties to Collins. Alvarez, 230 Cal. App. 2d at 999 (lack of fiduciary duties precluded agency

finding).

Rather, the evidence supports the bankruptcy court's finding that McDaniels was only a facilitator[11] for all of the parties, a more minor role than that of a formal agent with fiduciary responsibilities. McDaniels was brought to the table by Illuminardi and Rose, and his efforts to deliver the funds and exchange documents helped both sides. Given his dual role, the evidence does not support that McDaniels acted as a fiduciary for Collins. Garlock Sealing Techs., LLC v. NAK Sealing Techs. Corp., 148 Cal. App. 4th 937, 965 (3d Dist. 2007); modified and rehearing denied 2007 Cal. App. LEXIS 590 (Cal. App. 3d Dist., Apr. 17, 2007)(agency found where evidence supported fiduciary duties). Even though the bankruptcy court did not make specific findings on the elements of actual agency, its declination to find an agency relationship between McDaniels and Collins was supported by the record and was not clear error.

2. The Evidence Supports No Ostensible Agency.

The bankruptcy court also did not err in finding that McDaniels was not Collins' ostensible agent. Ostensible agency arises by estoppel when "the principal intentionally, or by want of ordinary care, causes a third person to believe another to be his agent who is not really employed by him." Cal. Civ. Code § 2300 (Deering 2011). The three requirements for a principal to be bound by the actions of its ostensible agent were identified

[11] A facilitator is "one that facilitates; *especially*: one that helps to bring about an outcome (as learning, productivity, or communication) by providing indirect or unobtrusive assistance, guidance, or supervision." Merriam-Webster, http://www.merriam-webster.com/dictionary/facilitator.

in Associated Creditors' Agency, Inc. v. Davis, 13 Cal. 3d 374, 399 (1975): 1) the person dealing with the agent must reasonably believe in the agent's authority, 2) the belief must be generated by the act or neglect of the principal, and 3) the third party in relying on the agent's apparent authority must not be guilty of negligence.

To satisfy these elements, the party attempting to rely on ostensible agency is "bound at his peril" to ascertain from the principal the fact and extent of the agency. Id. at 401. Reliance on the assumed agent's representations alone will not bind the principal. Cal. Civ. Code § 2317 (Deering 2011) ("Ostensible authority is such as a principal, intentionally or by want of ordinary care, causes a third person to believe the agent to possess."); Harris, 87 Cal. at 528 (superintendent had no ostensible authority to hire a broker, when there was no evidence of any communications to the broker from the corporation regarding the superintendent's authority to engage in actions outside his regular duties); Boren v. State Personnel Board, 37 Cal. 2d 634, 643 (1951) (ostensible agency not found when no representations of principal giving the agent authority).

Here too, despite conflicting evidence, and the lack of specific findings on the elements of ostensible agency, the bankruptcy court's determination that McDaniels was not Collins' agent was not clearly erroneous. Rose never spoke to Collins at all, much less to validate McDaniels' agency authority, until after the deal was done. Rose's unconfirmed assumption that McDaniels would explain to Collins the problems with the loan was undertaken at his peril, and the bankruptcy court properly

rejected Rose's assertion of ostensible agency without this confirmation. Ernst v. Searle, 218 Cal. 233, 240 (1933) (ostensible agency not found where the third party relied upon an assumption of agency in a property transaction); Harris, 87 Cal. at 528; Boren, 37 Cal 2d at 985.

3. Legal Conclusions are Not Evidence of Agency.

Rose argues that the bankruptcy court erred in not finding agency due to various witnesses' and counsel's use of the word "agent" during the trial. Specifically, Collins inquired of Illuminardi, why Illuminardi would sign a deed without having title to the collateral. In response, Illuminardi referred to McDaniels as Collins' agent.[12] Collins then did not object.

Collins' failure to object may leave this testimony in the record, even though a lay witness may not generally testify as to a legal conclusion. Evangelista v. Inlandboatmen's Union of Pacific, 777 F.2d 1390, 1398 n. 3 (9th Cir 1985). This lay witness testimony is not determinative of the agency issue, however. The bankruptcy court had discretion to weigh it against the other evidence in the record, and we do not find error in its legal conclusion. In re Hashim, 379 B.R. 912, 924-25 (9th Cir. BAP 2007) (particular deference should be given to bankruptcy court's findings on credibility of witnesses and inferences drawn from the evidence).

Rose also relies on several non-testimony statements in contending that McDaniels was Collins' agent. These include

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[12][ILLUMINARDI]: The deed was transferred to me along with the loan documents to you all at the same time to your agent. Trial Tr. at 83:1-2 (May 27, 2010)(emphasis added).

Collins' wife's opening statement, questions from Rose's counsel in which McDaniels is referred to as Collins' agent, and a statement made by the bankruptcy court to Collins when ruling on an evidentiary objection that "it appears that your accountant (McDaniels) was your agent." Trial Tr. at 69:2-4 (May 27, 2010).

Statements of counsel are not evidence and should not be considered as such by the bankruptcy court. Exeter Bancorporation, Inc. v. Kemper Securities Group, 58 F.3d 1306, 1312 n. 5 (8th Cir. 1995) (statement of counsel not evidence); Mallory v. Wallace (In re Wallace), 298 B.R. 435, 441 (10th Cir. BAP 2003)(opening statement is not testimony); In re Osborne, 257 B.R. 14, 19-20 (Bankr. C.D. Cal. 2000). Nor can the bankruptcy court's statement, made in the middle of trial and before all the evidence was heard, be considered a binding finding that McDaniels was Collins' agent. Such a statement is not the law of the case in which the issue was decided explicitly in a previous disposition, Rebel Oil Co. v. Atlantic Richfield Co., 146 F.3d 1088, 1093 (9th Cir. 1998), and Rose cites no authority as to why it should be binding.

The bankruptcy court's determination that McDaniels was not Collins' agent, either actual or ostensible, is not clearly erroneous.

II. THE BANKRUPTCY COURT DID NOT ABUSE ITS DISCRETION IN DENYING THE MOTION FOR RECONSIDERATION.

The bankruptcy court has wide discretion in deciding whether to reconsider its own judgment or orders. A motion for reconsideration should not be granted absent highly unusual circumstances. Orange St. Partners v. Arnold, 179 F.3d 656, 665

(9th Cir. 1999). Amendment or alteration of a judgment pursuant to Fed. R. Civ. P. 59(e) is appropriate only if the trial court (1) is presented with newly discovered evidence that was not available at the time of the original hearing, (2) committed clear error or made an initial decision that was manifestly unjust, or (3) there is an intervening change in controlling law. Zimmerman, 255 F.3d at 740. A motion for reconsideration is not permitted to rehash the same arguments made the first time or to simply express an opinion that the bankruptcy court was wrong; or, to assert new legal theories or new facts that could have been raised at the initial hearing. In re Greco, 113 B.R. 658, 664 (D. Haw. 1990), aff'd and remanded, Greco v. Troy Corp., 952 F.2d 406 (9th Cir. 1991). A party that fails to introduce facts cannot introduce them later by claiming that they constitute "newly discovered evidence" unless they were previously unavailable. Zimmerman, 255 F.3d at 740; Sch. Dist. No. 1J v. AcandS, Inc., 5 F.3d 1255, 1263 (9th Cir. 1993).

Rose claimed that the agency finding in the judgment should be reconsidered under Fed. R. Civ. P. 59(e), incorporated by reference in Rule 9023, because the judgment was a mistake by not imputing McDaniels' knowledge to Collins. Rose also sought to present new evidence to prove McDaniels was Collins' agent. The bankruptcy court rejected both grounds, ruling that Rose's material omission of his inability to pay the Note, and of the title problems with the Property, were facts only he knew. It also noted that the evidence more supported McDaniels being an agent for the other side of the transaction, rather than for Collins, although it did not decide this issue. The bankruptcy

court did not err in denying the motion for reconsideration. Greco, 113 B.R. at 664.

The bankruptcy court also rejected Rose’s claim that McDaniels’ testimony was new evidence, since McDaniels should have been called as a witness when the matter came to trial. Zimmerman, 255 F.3d at 740. Rose was bound to his trial decision not to question Collins about his relationship with McDaniels, or to call McDaniels as his witness. Id.

The bankruptcy court’s findings on the issue of agency were not a mistake and it was justified in denying Rose another chance to present additional evidence of agency. Its decision not to reconsider the nondischargeability judgment was not error.

CONCLUSION

The bankruptcy court’s factual findings supporting the elements of § 523(a)(2)(A), and declining to find an agency relationship and impute McDaniels’ knowledge to Collins, were not clearly erroneous. Its exercise of its discretion not to reconsider its judgement was not abusive. We therefore AFFIRM the bankruptcy court’s judgment.