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

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UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT

In re:)	BAP No.	WW-11-1486-KiJuH
)		
ERIC G. CARLSON,)	Bk. No.	10-47408
)		
Debtor.)	Adv. No.	10-04412
_____)		
)		
CARSON TAYLOR,)		
)		
Appellant,)		
)		
v.)	MEMORANDUM¹	
)		
ERIC G. CARLSON,)		
)		
Appellee.)		
_____)		

Argued and Submitted on March 23, 2012,
at Seattle, Washington

Filed - May 22, 2012

Appeal from the United States Bankruptcy Court
for the Western District of Washington

Honorable Brian D. Lynch, Bankruptcy Judge, Presiding

Appearances: _____
David Clement Smith, Esq. argued for appellant,
Carson Taylor; Deirdre P. Glynn Levin, Esq. of
Keller Rohrback LLP argued for appellee, Eric G.
Carlson.

Before: KIRSCHER, JURY, and HOLLOWELL, Bankruptcy Judges.

¹ This disposition is not appropriate for publication.
Although it may be cited for whatever persuasive value it may have
(see Fed. R. App. P. 32.1), it has no precedential value. See 9th
Cir. BAP Rule 8013-1.

1 Appellant, Carson Taylor ("Taylor"), appeals a judgment from
2 the bankruptcy court determining that the debt owed to him by Eric
3 G. Carlson ("Debtor") was dischargeable. We AFFIRM.

4 **I. FACTUAL BACKGROUND AND PROCEDURAL HISTORY**

5 **A. Events leading up to the nondischargeability action.**

6 The following facts are largely undisputed. Taylor moved to
7 Centralia, Washington in September 2007. At that time, he was
8 employed as a funeral director of a mortuary operated by Daniel
9 LaPlante ("LaPlante"). Upon Taylor's arrival to Centralia,
10 LaPlante made arrangements for Taylor to rent a house from Dolores
11 McMurphy ("McMurphy"), a local elderly woman known to be someone
12 of wealth. McMurphy was in her early 80's at the time Taylor
13 began renting her house in Centralia; Taylor was approximately 36.
14 During this time, McMurphy was living alone in another house in a
15 different city.

16 LaPlante introduced Taylor to the Debtor in late 2007 or
17 early 2008, and the two men became friends. At that time, the
18 Debtor had lived in the Centralia area for about 15 years. In or
19 about February 2008, McMurphy decided to sell her home and move
20 into the rental house with Taylor. Her home sold for \$285,000.
21 The Debtor helped McMurphy and Taylor with the move. Around this
22 same time, Taylor and McMurphy went to see McMurphy's attorney,
23 Paul Dugaw ("Dugaw"), about an alleged theft by her prior
24 caregivers.

25 In June 2008, McMurphy transferred her bank accounts into
26 joint accounts with Taylor. Later that same month, McMurphy
27 signed a durable power of attorney ("POA") naming Taylor as her
28 attorney in fact. The POA was not prepared by Dugaw, McMurphy's

1 known attorney; rather, it was prepared by attorney Brian Kelly,
2 who apparently had no other involvement with McMurphy or her case
3 against the prior caregivers. Also in June 2008, McMurphy
4 transferred title of all of her real property holdings by
5 quitclaim deed out of her name and into joint tenancy with right
6 of survivorship with Taylor.

7 In June/July 2008, Taylor and the Debtor began discussing the
8 possibility of a loan for use in Debtor's business. In 2008, the
9 Debtor owned and operated two entities, Archimedes Group
10 International, Inc. ("AGI") and College Enrollment Services
11 ("CES"), which were in the business of placing foreign students in
12 colleges and universities in the United States. The Debtor had
13 been in the foreign student placement business for over 20 years,
14 15 of which he was in business for himself. After closing his
15 previous business Academic Exchange of America in 2007, the Debtor
16 went forward with his new business plan with AGI and CES, in which
17 he worked with colleges in the U.S., particularly community
18 colleges to place foreign students under a visa program sponsored
19 by the State Department. In his early marketing efforts, the
20 Debtor was able to convince 12 community colleges to pay him
21 \$10,000 each to begin recruiting foreign students to place with
22 their college, and to pay him additional funds for those students
23 he placed.

24 In addition to operating AGI and CES, the Debtor was (and
25 still is) managing a local medical office for a physician named
26 Dr. Floyd Smith ("Dr. Smith"). The Debtor's job duties include
27 procurement, staff management, payables, and handling other
28 office-related matters. Coincidentally, Dr. Smith is McMurphy's

1 physician.

2 On July 24, 2008, Taylor wrote the Debtor a check for
3 \$300,000 from the McMurphy/Taylor joint checking account. Three
4 days later on July 27, the Debtor signed a promissory note he
5 prepared, payable to Taylor and effective as of July 24, 2008.
6 The loan was unsecured, provided 6% interest, called for monthly
7 payments of the accruing interest on the first day of each month
8 starting August 1, 2008, and payment of the principal and any
9 remaining interest was due in one year on August 1, 2009. It is
10 undisputed that the funds came from McMurphy. It is also
11 undisputed McMurphy was earning only 2% interest on the funds in a
12 certificate of deposit and that the Debtor offered to pay a
13 significantly higher interest rate of 6%. Coincidentally, the
14 \$300,000 loan was approximately the same amount McMurphy realized
15 in proceeds from selling her home in February 2008.

16 The Debtor made payments to Taylor on the loan from August
17 2008 to January 2009. Although the check for the loan was written
18 from the joint McMurphy/Taylor account, Taylor deposited each of
19 the monthly interest payments from the Debtor into an account in
20 Taylor's name only. After receiving the loan, the Debtor traveled
21 extensively worldwide trying to recruit students for his new
22 venture. Despite his efforts, the business did not succeed, which
23 he attributed to the meltdown of the world economy.

24 The Debtor sent a last check and letter to Taylor in August
25 2009 asking Taylor to extend the maturity date of the loan.
26 Taylor did not agree to the extension and responded by filing a
27 complaint in his own name against the Debtor in state court on
28 August 20, 2009, for breach of contract. In his deposition taken

1 during the state court action, Taylor was unable to answer any
2 questions about his relationship with McMurphy because an
3 investigation by Adult Protective Services ("APS") was pending
4 against him. When asked about his friendship with the Debtor,
5 Taylor testified that they ceased being friends in September 2008,
6 just two months after the loan:

7 Q: And what happened in September?

8

9 A: We were in a relationship. I found he was hooking
10 up with people on online porn, and I didn't want
somebody like that in my life.

11 Taylor Dep. (Mar. 24, 2010) at 34:8-17.

12 In May 2010, Taylor obtained a summary judgment in the state
13 court action for approximately \$330,000, which included the
14 principal balance on the note, interest, attorney's fees and
15 costs. The Debtor filed a chapter 7² bankruptcy on September 9,
16 2010.

17 **B. The nondischargeability action.**

18 In December 2010, Taylor filed a nondischargeability
19 complaint seeking to except his debt from discharge under
20 § 523(a)(2). A one-day trial was set for July 20, 2011.

21 On July 11, 2011, Taylor's new counsel, retained just six
22 weeks prior, filed a motion to continue the trial date, which was
23 heard expeditiously on July 13, 2011. Taylor contended a
24 continuance was warranted because the Debtor had failed to respond
25 to certain discovery requests made in April 2011 by Taylor's
26

27 ² Unless specified otherwise, all chapter, code and rule
28 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532, and
the Federal Rules of Bankruptcy Procedure, Rules 1001-9037. The
Federal Rules of Civil Procedure are referred to as "FRCP."

1 former counsel for tax returns, bank statements, and other
2 financial documents. The Debtor opposed the continuance. At oral
3 argument, Taylor explained he was attempting to obtain a copy of
4 the financial statement he claimed the Debtor showed him prior to
5 making the loan, which supported his claim under § 523(a)(2)(B).
6 Debtor's counsel agreed to turn over the requested financial
7 documents by the end of the day.

8 The court orally denied the motion to continue. It reasoned
9 that Taylor's former counsel was complicit with the production
10 problem since he failed to ever file a motion to compel and, in
11 any event, the Debtor was making a considerable effort to try to
12 respond. The court noted that if Taylor believed the documents to
13 be nonresponsive, he could return and ask for further disclosure.
14 No order was entered on the motion to continue.

15 Also on July 13, 2011, the Debtor filed a motion in limine
16 seeking to exclude the following evidence at trial: (1) either
17 Taylor's or the Debtor's sexual preference or orientation;
18 (2) Taylor's transgender surgical procedures; (3) Taylor's and the
19 Debtor's one-time sexual relationship; (4) statements by the state
20 court judge not part of the record; (5) the Wells Fargo adversary
21 complaint and the Debtor's settlement with same; (6) Taylor's
22 statements about the contents of the financial statement he
23 claimed the Debtor showed him prior to the loan; (7) documents or
24 witness testimony not disclosed; and (8) alleged oral statements
25 the Debtor made to Taylor about his financial affairs.

26 On July 19, 2011, the Debtor filed an amended motion in
27 limine seeking to exclude only two things - Taylor's statements
28 about the contents of the financial statement he claimed the

1 Debtor showed him prior to the loan, and the alleged oral
2 statements the Debtor made to Taylor about his financial affairs.

3 Taylor opposed the amended motion in limine. On the morning
4 of trial, the parties submitted a stipulated order agreeing to
5 exclude the following: (1) either parties' sexual preference or
6 orientation; (2) either parties' physical or mental health, or any
7 medical, surgical, or mental health related treatments or
8 procedures; (3) either parties' sexual relationship or
9 relationships with others; (4) statements by the state court judge
10 not contained in the record; (5) the Wells Fargo adversary
11 complaint and settlement; and (6) documents or witness testimony
12 not disclosed.

13 The one-day trial proceeded on July 20, 2011. The Debtor and
14 Taylor were the only witnesses. Although McMurphy was present in
15 the courtroom and Taylor had identified her as a witness, Taylor
16 announced at the beginning of trial that he would not be calling
17 her as a witness.

18 Taylor testified that he, the Debtor, and McMurphy did the
19 loan transaction at the kitchen table of the home shared by him
20 and McMurphy. Taylor claimed that when the Debtor approached him
21 for the \$300,000 loan, he had told Taylor that he received this
22 same amount every year via a line of credit from Security State
23 Bank ("Security") to run his business. Taylor testified that,
24 prior to the loan, the Debtor promised that if at any time
25 McMurphy needed the money sooner than the agreed one-year term, he
26 could obtain a loan from Security and pay it back. Taylor further
27 testified the Debtor told him he would be able to repay the loan
28 because his business had made a \$2 million profit the previous

1 year, and he saw no reason for a decline. Taylor also testified
2 that when he asked the Debtor about whether an attorney should
3 handle the loan transaction, the Debtor responded that lawyers
4 just created work for themselves, were unnecessary, and they did
5 not need one. As for any documentation, Taylor testified that
6 prior to signing the note, the Debtor showed him a 2007-2008
7 income statement proving his businesses' \$2 million profit.
8 Taylor said that he relied on all of these statements prior to
9 giving the Debtor the loan.³

10 When asked why the promissory note was in his name only,
11 Taylor testified that the Debtor suggested drafting the note that
12 way due to McMurphy's age, and that he had told Taylor it would be
13 easier for him to pursue collection without her name on it.
14 Taylor also testified that the Debtor had suggested the idea of
15 opening a savings account in Taylor's name for depositing the loan
16 interest payments so he could easily determine the loan's
17 profitability.

18 Taylor testified that the Debtor suggested executing the POA
19 for McMurphy because the Debtor believed Dugaw was after
20 McMurphy's money to replace \$400,000 he had allegedly lost in a
21 hedge fund deal with his son. According to Taylor, the situation

22 _____
23 ³ Although not included in the record, Taylor read into the
24 record at trial a portion of an affidavit from McMurphy that was
filed in the state court action:

25 The loan to Eric Carlson was done with my prior knowledge and
26 permission. With my prior knowledge and permission, Carson
27 Taylor has collected monthly payments from Eric Carlson and
has deposited the payments into our originating joint
account, as well as other accounts held in Carson Taylor's
name only.

28 Trial Tr. (July 20, 2011) at 37:15-20.

1 caused McMurphy to be distrustful of Dugaw, "[a]nd it kind of made
2 us feel alone and vulnerable with APS, because they turned on me
3 instead of the caregiver who stole from her." Trial Tr. at 29:18-
4 21. Taylor further testified that he was familiar with McMurphy's
5 financial situation by early 2008, but that he did not give the
6 Debtor any of this information. However, Taylor said that just
7 days before the loan, the Debtor had told him that he met with
8 Dugaw to discuss McMurphy's financial situation. Taylor also
9 claimed that Dugaw had billed McMurphy for his consultation with
10 the Debtor.

11 When asked about the quitclaim deed transferring all of
12 McMurphy's real property into joint tenancy with Taylor, Taylor
13 testified that the Debtor told him and McMurphy to do it "to hide
14 Dolores's money so that lawyers wouldn't get it, like Paul Dugaw,
15 who was after her to replace the hedge fund." Trial Tr. at 67:18-
16 68:1. Taylor claimed he did not know exactly what a quitclaim
17 deed would accomplish and that he had to call the Debtor from the
18 title company to get instruction on how to fill it out.

19 The Debtor then testified as an adverse witness for Taylor.
20 He testified that he never spoke with McMurphy about borrowing
21 money for his business; he spoke only with Taylor. The Debtor
22 said that Taylor was looking for a way to earn more interest on
23 McMurphy's recent home sale proceeds, so he offered to pay Taylor
24 6% interest on a loan for his new business. The Debtor denied
25 telling Taylor any specifics about his financial condition, but he
26 did admit telling Taylor that he had lines of credit with
27 Security, that he had them for the past 12 years, and that his new
28 business would generate sufficient funds to pay the loan and make

1 a profit. The Debtor denied telling Taylor that he could access
2 the lines of credit to pay back the debt if needed; the lines of
3 credit had already been exhausted by that time.

4 The Debtor testified that at the time of the loan he had no
5 knowledge of Taylor's POA for McMurphy, and he denied having
6 anything to do with it. When asked if he was concerned about
7 McMurphy's name being on the check but not on the promissory note,
8 the Debtor testified that he knew "that there had been a history
9 of Ms. McMurphy handing out money to people around town for
10 various reasons, in amounts larger than this, that promissory
11 notes had not been given to her or to her agent," and that he
12 "felt that it was appropriate to draft a promissory note." Trial
13 Tr. at 90:20-91:2. The Debtor was never asked about whether it
14 was his idea to leave McMurphy's name off of the promissory note,
15 or whether he instructed Taylor and McMurphy to execute the
16 quitclaim deed to protect McMurphy from Dugaw.

17 Counsel then questioned the Debtor about an email from him to
18 Dugaw dated July 15, 2008, just nine days before the loan, which
19 was entered as Exhibit P-2. Prior to reviewing the email, the
20 Debtor described Dugaw as a "friend and a neighbor" and claimed
21 that Dugaw was attempting to help McMurphy at that time, but that
22 McMurphy was uncomfortable with the situation. Trial Tr. at
23 104:22-23. In paragraph two of the email, the Debtor states to
24 Dugaw: "Dolores has shared with me very specifically what she has
25 been trying to direct you to do." Id. at 105:6-8. When asked
26 what McMurphy was trying to "direct" Dugaw to do, the Debtor said
27 he could not recall the specifics and could not answer the
28 question. The Debtor claimed the email was regarding the APS

1 investigation and Dugaw's involvement with that, and also with
2 McMurphy's involvement or having been seen as a patient at
3 Dr. Smith's office. Counsel went on to read Debtor's email to
4 Dugaw: "'Carson is doing a great job with her, and it is a match
5 made in heaven. Too many professionals seem to be circling like
6 buzzards working to get their share. I challenge you to rise
7 above it and not overdo, as you sometimes have a tendency to do.'" Id.
8 at 107:14-20. Upon questions regarding the meaning of this
9 statement, the Debtor now was not sure if Dugaw was ever
10 McMurphy's attorney, knowing only that they had met a couple of
11 times to discuss her financial affairs.

12 Counsel continued reading the Debtor's email: "'Despite how
13 you or I would operate, Dolores and Carson have come to their own
14 agreement, which they are comfortable with. I know the attorney
15 in you wants to be involved. But that is due to out [sic] fact
16 that you want to also charge. And I can tell you that there is no
17 indication that they need any other services.'" Id. at 108:7-13.
18 To this, the Debtor responded that during this time Dugaw was
19 suggesting McMurphy's monthly bills and payments of those bills be
20 run through his office, but he thought that was unnecessary. Upon
21 counsel's question of whether the Debtor was having conversations
22 with McMurphy about her financial situation in July 2008, he again
23 denied speaking to McMurphy about his loan prior to the
24 transaction, but he admitted having conversations with her about
25 her desire to remain independent and how she and Taylor were a
26 good match for living together. When pressed further about
27 inserting himself in McMurphy's financial affairs, the Debtor
28 responded: "'Well, during that time there was much talk from

1 various people about wanting to represent Ms. McMurphy in a way
2 that would put them in a position to be able to probate her estate
3 upon her eventual death. And Mr. Dugaw was among one of those
4 people. And I thought at that time that that was a bit self-
5 serving.'" Id. at 109:20-110:5.

6 Finally, to explain the exhausted line of credit with
7 Security, the Debtor testified that he had been involved in a
8 lawsuit a few years prior to the loan transaction with Taylor, and
9 that he had used the line of credit in May 2008 to pay off a
10 \$120,000 settlement.

11 The Debtor then moved for a directed verdict.⁴ In denying
12 the motion as to Taylor's § 523(a)(2)(A) claim, the bankruptcy
13 court noted to Taylor's counsel:

14 COURT: If I understand it, the (a)(2)(B), if there ever was
15 an (a)(2)(B) claim, I don't think it's been made out.
16 I don't have -- you haven't laid the proper
17 foundation for a statement in writing. So I think
18 (a)(2)(B), to the extent it existed and was a basis,
19 is gone. . . . To the extent (a)(2)(B), I don't
20 know -- Mr. Smith, are you even arguing (a)(2)(B)?

21 COUNSEL: I gave it my best shot, Your Honor, but I do not
22 believe that I can proceed forward in that manner
23 effectively at this time.

24 COURT: Well, (a)(2)(B) is dismissed, and (a)(2)(A) can
25 proceed based on the testimony I've heard so far.

26 Id. at 126:17-22; 127:23-128:5.

27 The Debtor then proceeded to testify extensively about his
28 business venture, his efforts to increase profits, and why it did
not succeed. The Debtor denied producing any kind of financial

29 ⁴ Although the parties referred to it as a motion for
30 "directed verdict," in federal court this procedure is more
31 properly known as a motion for judgment on partial findings under
32 Rule 7052(c).

1 statement to Taylor prior to the loan transaction. The Debtor
2 testified that perhaps he could have run such a document from
3 QuickBooks, but he never produced anything to give to Taylor. The
4 Debtor denied ever telling Taylor that he expected his business to
5 generate millions of dollars in revenue.

6 Taylor was then called as a rebuttal witness. Although the
7 court had dismissed his § 523(a)(2)(B) claim, Taylor again
8 testified that the Debtor showed him a 2007-2008 income statement
9 prior to the loan transaction. Upon a hearsay objection to the
10 line of questioning, which was overruled, the bankruptcy court
11 noted that testimony about the document would be admissible only
12 if the Debtor had prepared it, and Taylor had offered no evidence
13 to that extent. Taylor proceeded to testify that the Debtor had
14 told him he created the financial statement on QuickBooks, and
15 that the document purported to show that the Debtor's business in
16 the year prior had a \$2 million profit. Taylor testified that the
17 Debtor had shown the financial statement to both him and McMurphy
18 at the kitchen table during the loan transaction.

19 After hearing closing argument from the parties, the
20 bankruptcy court took the matter under advisement. The court
21 issued its findings of fact and conclusions of law on August 23,
22 2011, finding that Taylor had failed to show justifiable reliance
23 for his claim under § 523(a)(2)(A), and that he failed to provide
24 sufficient evidence to support a claim under § 523(a)(2)(B). A
25 judgment in favor of the Debtor on both claims was entered on
26 August 24, 2011. Taylor timely appealed.

27 **II. JURISDICTION**

28 The bankruptcy court had jurisdiction under 28 U.S.C.

1 §§ 157(b)(2)(I) and 1334. We have jurisdiction under 28 U.S.C.
2 § 158.

3 **III. ISSUES**

4 1. Did the bankruptcy court err in finding that Taylor failed to
5 prove the debt was nondischargeable under § 523(a)(2)(A)?

6 2. Did the bankruptcy court err in finding that Taylor failed to
7 provide sufficient evidence to support a claim under
8 § 523(a)(2)(B)?

9 **IV. STANDARDS OF REVIEW**

10 In claims for nondischargeability, the Panel reviews the
11 bankruptcy court's findings of fact for clear error and
12 conclusions of law de novo, and applies de novo review to "mixed
13 questions" of law and fact that require consideration of legal
14 concepts and the exercise of judgment about the values that
15 animate the legal principles. Oney v. Weinberg (In re Weinberg),
16 410 B.R. 19, 28 (9th Cir. BAP 2009).

17 The determination of intent to defraud, justifiable reliance,
18 and proximate causation are questions of fact reviewed for clear
19 error. Eugene Parks Law Corp. Defined Benefit Pension Plan v.
20 Kirsh (In re Kirsh), 973 F.2d 1454, 1456 (9th Cir. 1992)
21 (justifiable reliance); First Beverly Bank v. Adeeb (In re Adeeb),
22 787 F.2d 1339, 1342 (9th Cir. 1986)(intent); Rubin v. West (In re
23 Rubin), 875 F.2d 755, 758 (9th Cir. 1989)(proximate causation).
24 If two views of the evidence are possible, the trial judge's
25 choice between them cannot be clearly erroneous. Hansen v. Moore
26 (In re Hansen), 368 B.R. 868, 875 (9th Cir. BAP 2007). A finding
27 is clearly erroneous if it is illogical, implausible, or without
28 support in the record. United States v. Hinkson, 585 F.3d 1247,

1 1261 (9th Cir. 2009)(en banc).

2 Denials of motions for trial continuances are reviewed for
3 abuse of discretion. United States v. Wilkes, 662 F.3d 524, 543
4 (9th Cir. 2011). A trial court abuses its discretion only if
5 denial of the continuance was arbitrary or unreasonable. Id. The
6 moving party must establish that prejudice resulted from the
7 denial of the continuance. Id.

8 V. DISCUSSION

9 **A. The bankruptcy court did not err when it determined that
10 Taylor failed to prove a claim under § 523(a)(2)(A).**

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

12 Section 523(a)(2)(A) provides that, "A discharge under ...
13 this title does not discharge an individual debtor from any debt
14 (2) for money, property, services, or an extension, renewal or
15 refinancing of credit, to the extent obtained by (A) false
16 pretenses, a false representation, or actual fraud, other than a
17 statement respecting the debtor's or an insider's financial
18 condition."

19 To prevail on a claim under § 523(a)(2)(A), a creditor must
20 establish five elements: (1) the debtor made representations;
21 (2) that at the time he knew were false; (3) that he made them
22 with the intention and purpose of deceiving the creditor; (4) that
23 the creditor relied on such representations; and (5) that the
24 creditor sustained the alleged loss and damage as the proximate
25 result of the debtor's misrepresentations. Ghomeshi v. Sabban
26 (In re Sabban), 600 F.3d 1219, 1222 (9th Cir. 2010). The creditor
27 bears the burden of proving all five of these elements by a
28 preponderance of the evidence. Id. In order to strike a balance

1 between allowing debtors a fresh start and preventing a debtor
2 from retaining the benefits of property obtained by fraudulent
3 means, exceptions to discharge under § 523(a)(2)(A) are construed
4 strictly against creditors and in favor of debtors. Id.

5 **2. The bankruptcy court's findings.**

6 In its findings, the bankruptcy court observed that despite
7 the conflicting testimony, it was clear the Debtor made himself
8 quite involved with McMurphy's financial affairs, and his July 15,
9 2008 email to Dugaw was particularly telling. The court observed
10 that even though the Debtor and Dugaw were apparently friends and
11 neighbors, his email to Dugaw "at various times ingratiates,
12 persuades, compliments, criticizes, threatens and conciliates with
13 Dugaw. . . . Dugaw was obviously concerned about Taylor's
14 relationship with McMurphy and [the Debtor] strives to convince
15 him that, first, it is [a] 'match made in heaven,' and second, it
16 is not his business." Findings of Fact and Conclusions of Law
17 (Aug. 23, 2011) at 3:22-26. The Debtor had also attached to the
18 email some of McMurphy's medical records from Dr. Smith, whose
19 practice the Debtor manages in addition to his businesses. We do
20 not have the attachments in the record. Nonetheless, other than
21 mentioning the medical records, the bankruptcy court did not
22 speculate about why they were attached, or how the Debtor obtained
23 McMurphy's private medical records, or why the Debtor was
24 disclosing her records to Dugaw, or what business McMurphy's
25 medical condition was to the Debtor.

26 The bankruptcy court also observed that although Taylor had
27 maintained at trial he was acting on behalf of McMurphy regarding
28 the loan, he admitted putting the Debtor's loan payments into an

1 account in his name only. The court did not find persuasive
2 Taylor's inexplicable claim that the Debtor had advised him to
3 open an account in his individual name, not joint, so that Taylor
4 could see how much money he was earning for McMurphy.

5 **a. Misrepresentations and intent to deceive.**

6 Based on the totality of the circumstances, the bankruptcy
7 court concluded that a fraud had been perpetrated and that the
8 Debtor was at least part of it. The court determined that the
9 Debtor's alleged statements about his businesses' income or about
10 his line of credit with Security were not oral statements of
11 financial condition falling under the exception to § 523(a)(2)(A),
12 as he had argued, because representations about sources of income
13 that could be looked to for repayment are not statements of
14 financial condition. We agree. See Barnes v. Belice (In re
15 Belice), 461 B.R. 564, 577-78 (9th Cir. BAP 2011)(adopting
16 "narrow" view of interpreting the term "statement respecting the
17 debtor's financial condition" under § 523(a)(2)(A) and holding
18 that such statements "are those that purport to present a picture
19 of the debtor's overall financial health."). In any event, the
20 Debtor has not cross-appealed that finding.

21 The court found that at the time of the loan the Debtor "was
22 in difficult financial straits, having used up his line of credit
23 with [Security] to settle a lawsuit. He saw an opportunity to
24 obtain control over an elderly woman's finances, and ultimately
25 received \$300,000, money he needed to finance his new venture."
26 Findings of Fact and Conclusions of Law at 7:7-9. The court
27 questioned why McMurphy was not the plaintiff in the action, and
28 it further struggled with where Taylor fit into the story:

1 Was he duped by [the Debtor], as he strove to suggest?
2 Or is he trying to justify his actions after the fact as
3 McMurphy's fiduciary, especially given the investigation
4 by [APS]? Was this a scheme hatched by [the Debtor] and
5 Taylor to take advantage of an elderly woman? Or is this
6 lawsuit simply a matter of Taylor seeking retribution
7 from [the Debtor] after their personal relationship fell
8 apart?

9 Id. at 7:9-15.

10 **b. Justifiable reliance, causation, and damages.**

11 Despite finding the Debtor had made misrepresentations, the
12 bankruptcy court found that Taylor ultimately failed to prove he
13 relied on these misrepresentations in making the loan, much less
14 that his reliance was justifiable. Based on the evidence, the
15 court found that Taylor would have made the loan to the Debtor
16 regardless of the alleged misrepresentations. Ultimately, "Taylor
17 failed to prove that [the Debtor] perpetrated a fraud on Taylor."

18 Id. at 8:5-6. The court expressed concern over the fact that
19 Taylor and the Debtor failed to call any other witnesses and, more
20 importantly, that:

21 Taylor stipulated not to produce evidence on a range of
22 topics which one might expect to raise if one really felt
23 himself the victim of a fraud. The Court was left
24 largely with unsubstantiated representations by Taylor
25 about what [the Debtor] told him, which [the Debtor] in
26 turn denied. What light would Mr. Dugaw, or Mr. LaPlante
27 or Mr. Kelly have shed on the story? The questions
28 remain unanswered.

29 Id. at 8:8-12.

30 **3. Taylor failed to prove the debt was nondischargeable
31 under § 523(a)(2)(A).**

32 Taylor argues on appeal that nothing in the facts suggest he
33 was part of a conspiracy to defraud McMurphy, nor was any evidence
34 presented by either party indicating that he was somehow involved

1 in the fraud. We disagree. As the plaintiff pursuing a
2 nondischargeability action for fraud, Taylor, for obvious reasons,
3 would not present any direct evidence showing his involvement in
4 the fraud. The Debtor, trying to ensure the debt was discharged,
5 also had no interest in presenting any direct evidence of a
6 conspiracy with Taylor to defraud McMurphy. However,
7 circumstantial evidence abounds to supports the bankruptcy court's
8 suspicion that Taylor was involved.

9 First, Taylor obtained POA over a wealthy, elderly woman he
10 knew for a matter of months. Immediately after obtaining the POA,
11 McMurphy's bank accounts were transferred into joint accounts with
12 Taylor, and McMurphy quitclaimed all of her real property into
13 joint tenancy with Taylor. Within another month, Taylor was
14 lending \$300,000 of McMurphy's money to a man with whom he was
15 having an intimate relationship and had known for only a short
16 time. Taylor was also depositing the Debtor's loan payments into
17 a savings account held solely in Taylor's name. Although Taylor
18 claimed he did this at the Debtor's behest, the Debtor never
19 corroborated Taylor's story. The Debtor also denied having
20 anything to do with obtaining the POA, and he was never asked
21 about whether he advised Taylor as to how to fill out the
22 quitclaim deed. The Debtor also never corroborated Taylor's
23 incredible story that only Taylor's name should be on the note due
24 to McMurphy's age and for ease of collection. Notably, if
25 McMurphy had passed away within the note's one-year term, the
26 personal representative of her estate could have pursued a
27 collection action against the Debtor just as easily as Taylor.

28 Next, the Debtor's email to Dugaw shows that Taylor was

1 allowing the Debtor to fend off Dugaw's inquiries about McMurphy's
2 suspicious new circumstances. Taylor never explained why the
3 Debtor needed to discuss McMurphy's financial affairs with Dugaw,
4 or why Dugaw would discuss her private affairs with the Debtor, if
5 the alleged meeting at Dugaw's office even took place.
6 Presumably, some or all of this activity raised the suspicions of
7 APS, and Taylor is now (or at least was) under investigation by
8 that agency.

9 Finally, and what is most telling about Taylor's possible
10 involvement with the fraud against McMurphy, is that no other
11 witnesses were called, and Taylor's counsel at the last moment
12 decided not to call McMurphy to the stand. Neither party offered
13 affidavits from McMurphy, Dugaw, Kelly, LaPlante, or Dr. Smith.
14 The stipulated order on the motion in limine raises more questions
15 about Taylor's possible involvement.

16 Taylor also contends the bankruptcy court's findings indicate
17 an erroneous belief that he lacked standing to bring the
18 nondischargeability action. Taylor is referring to the court's
19 statement: "Unfortunately and inexplicably, McMurphy is not the
20 plaintiff in this action." Findings of Fact and Conclusions of
21 Law at 7:9-10. Although the Debtor had raised standing as an
22 affirmative defense in his answer, he never raised this issue in
23 any pretrial motions, trial briefing, or at trial. Presumably,
24 this defense was therefore waived. In any event, nothing in the
25 bankruptcy court's findings questions Taylor's standing. If the
26 court believed Taylor lacked standing, it seems unlikely the
27 matter would have gone to trial. We interpret the court's
28 statement about McMurphy to mean that she was the victim of the

1 Debtor's fraud, and perhaps Taylor's as well, and that she would
2 have been a more suitable plaintiff in a nondischargeability
3 action against the Debtor due to Taylor's potential involvement.
4 Clearly, in the bankruptcy court's opinion, the circumstantial
5 evidence against Taylor, the only plaintiff in this case,
6 prevented him from successfully proving that he was defrauded by
7 the Debtor.

8 Based on this record, we cannot conclude that the bankruptcy
9 court's findings are illogical, implausible, or without support in
10 the record. Due to the suspicious nature of the case, the court
11 simply could not conclude that Taylor was duped by the Debtor.
12 Accordingly, we affirm the judgment determining Taylor had failed
13 to prove the debt was nondischargeable under § 523(a)(2)(A).

14 **B. The bankruptcy court did not err when it determined Taylor
15 failed to prove a claim under § 523(a)(2)(B).**

16 **1. Section 523(a)(2)(B).**

17 Section 523(a)(2)(B) excepts from discharge a debt obtained
18 by the debtor by "use of a statement in writing (i) that is
19 materially false; (ii) respecting the debtor's . . . financial
20 condition; (iii) on which the creditor to whom the debtor is
21 liable . . . reasonably relied; and (iv) that the debtor caused to
22 be made or published with intent to deceive." The Ninth Circuit
23 has restated the elements of § 523(a)(2)(B) as seven factors:
24 "(1) a representation of fact by the debtor, (2) that was
25 material, (3) that the debtor knew at the time to be false,
26 (4) that the debtor made with the intention of deceiving the
27 creditor, (5) upon which the creditor relied, (6) that the
28 creditor's reliance was reasonable, [and] (7) that damage

1 proximately resulted from the representation." Candland v. Ins.
2 Co. of N. Am. (In re Candland), 90 F.3d 1466, 1469 (9th Cir.
3 1996). The creditor must prove these elements by a preponderance
4 of the evidence. Grogan v. Garner, 498 U.S. 279, 291 (1991).

5 **2. The bankruptcy court's findings.**

6 The bankruptcy court concluded that Taylor presented
7 insufficient evidence in either his case-in-chief or in rebuttal
8 to meet his burden of proof on the elements of this claim. It
9 found that Taylor's testimony about what the Debtor's alleged
10 financial statement contained was "vague and minimal." Findings
11 of Fact and Conclusions of Law at 6:16-17. Specifically, the
12 court found that Taylor failed to establish the document's
13 existence, or show (1) what the statement contained, (2) that the
14 contents were material and false, and (3) that he relied upon it
15 in making the loan.

16 **3. Taylor failed to prove a claim under § 523(a)(2)(B).**

17 At trial, Taylor's counsel indicated he was no longer
18 pursuing the § 523(a)(2)(B) claim, conceding that he lacked
19 sufficient evidence to support it. As such, Taylor may not have
20 preserved this claim for appeal.

21 To the extent Taylor did preserve the issue, his opening
22 brief fails to even recite the elements for a claim under
23 § 523(a)(2)(B). He also fails to argue how the bankruptcy court
24 erred with respect to any of its factual findings on this issue.
25 Even though Taylor was unable to produce a copy of the financial
26 statement he alleged the Debtor showed him prior to the loan, the
27 court nonetheless allowed his testimony establishing the existence
28 of the document and its contents. All Taylor said about the

1 alleged document in rebuttal was that the Debtor had told him he
2 created the document on QuickBooks, which is suspect considering
3 the Debtor had just testified that he created many of his
4 financial documents on QuickBooks, and that the document reflected
5 a \$2 million profit for the Debtor's business. Taylor could not
6 even provide the name of the company for which the document
7 purported to show profitably. Taylor had also testified that the
8 Debtor had shown the document to him and McMurphy at the kitchen
9 table during the loan transaction. If true, and knowing that his
10 claim was in jeopardy, why did Taylor choose to not submit an
11 affidavit from McMurphy or to not call her as a witness to
12 corroborate his story? Based on the evidence presented, we see no
13 error by the bankruptcy court in determining that Taylor failed to
14 establish a claim under § 523(a)(2)(B).

15 Taylor's only real dispute regarding this claim is that the
16 bankruptcy court should have granted his request for a
17 continuance.⁵ Other than merely stating that "Mr. Taylor believed
18 he would be prejudiced by the Court not allowing such a
19 continuance," Taylor's opening brief fails to present any argument
20 or authority in support of his position that the bankruptcy court
21 abused its discretion in denying the continuance. He also failed
22 to present the matter as an issue on appeal or provide a proper

23
24 ⁵ Neither party raised the issue that no order was ever
25 entered denying Taylor's continuance request. Thus, the
26 bankruptcy court's ruling on the matter was likely interlocutory.
27 However, that interlocutory ruling "merged" into the final
28 judgment determining the debt dischargeable and dismissing the
adversary proceeding and is therefore an appealable issue. See
United States v. Real Prop. Located at 475 Martin Lane, Beverly
Hills, Cal., 545 F.3d 1134, 1141 (9th Cir. 2008)(under merger rule
interlocutory orders entered prior to the judgment merge into the
judgment and may be challenged on appeal).

1 standard of review in violation of Rule 8010(a)(1)(C). As a
2 result, this issue has been waived. In re Sedona Inst., 220 B.R.
3 74, 76 (9th Cir. BAP 1998)(matters on appeal not specifically and
4 distinctly argued in appellant's opening brief are waived).

5 Accordingly, we conclude the bankruptcy court did not abuse
6 its discretion in denying Taylor's motion to continue trial, and
7 we affirm the judgment determining that Taylor had failed to prove
8 a claim under § 523(a)(2)(B).

9 **VI. CONCLUSION**

10 Based on the foregoing reasons, we AFFIRM.

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