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NOT FOR PUBLICATION

SUSAN M SPRAUL, CLERK
U.S. BKCY. APP. PANEL
OF THE NINTH CIRCUIT

UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT

In re:) BAP No. CC-11-1317-CaPaMk
)
 PETER DAVID KEMPF,) Bk. No. 8:09-bk-16783-TA
)
 Debtor.) Adv. No. 8:09-AP-01661-TA
 _____)
)
 PETER DAVID KEMPF,)
)
 Appellant,)
)
 v.) **MEMORANDUM**¹
)
 HITACHI CAPITAL AMERICA CORP.,)
)
 Appellee.)
 _____)

Argued and Submitted on January 19, 2012
at Pasadena, California

Filed - February 14, 2011

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

Honorable Theodor C. Albert, Bankruptcy Judge, Presiding

Appearances: Allan Leguay of the Law Offices of Allan Leguay,
argued on behalf of Appellant Peter David Kempf;
Frank T. Pepler of DLA Piper (US), LLP, argued on
behalf of Appellee Hitachi Capital America
Corporation.

Before: CASE², PAPPAS, and MARKELL, Bankruptcy Judges.

¹This 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.

²Hon. Charles G. Case II, United States Bankruptcy Judge for
the District of Arizona, sitting by designation.

1 In this appeal, Debtor/Appellant Peter David Kempf ("Kempf")
2 argues that: (1) the bankruptcy court erred in deciding that
3 Creditor/Appellee Hitachi Capital America Corporation's
4 ("Hitachi") amended complaint (the "First Amended Complaint"), on
5 which trial was held, related back to its initial complaint that
6 initiated the action (the "Original Complaint"); (2) this Panel
7 should review the bankruptcy court's factual findings de novo;
8 and (3) the bankruptcy court erred in concluding that Hitachi
9 reasonably relied on Kempf's fraudulent financial statement in
10 extending credit to Kempf's business, CardioCura Capital West,
11 LLC ("CardioCura"), thereby excepting Hitachi's claim based on
12 Kempf's guaranty from discharge under section 523(a)(2)(B) of the
13 Bankruptcy Code³. For the reasons below, we AFFIRM.

14 I. Facts

15 Kempf was the principal and owner of CardioCura, a start-up
16 mobile CT business, and Hitachi is an equipment lessor. In
17 January 2006, CardioCura, through Kempf, signed a \$1,400,000
18 lease financing proposal for a mobile Phillips CT device that
19 included a proposed limited personal guaranty from Kempf (the
20 "Guaranty").

21 In February 2006, Hitachi prepared a transaction analysis
22 that analyzed CardioCura's: (1) feasibility; (2) working capital,
23 including Kempf's \$300,000 contribution; (3) projected gross and

24 ³Unless specified otherwise, all "Chapter" and "Section"
25 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532, all
26 "Rule" references are to the Federal Rules of Bankruptcy
27 Procedure, Rules 1001-9037, all "Civil Rule" references are to
28 the Federal Rules of Civil Procedure, 1-86, and all "Evidence
Rule" references are to the Federal Rules of Evidence, Rules 101-
1103.

1 net revenue; (4) risks; and (5) credit enhancements, including
2 Kempf's \$600,000 Guaranty (later increased to \$736,538). Kempf
3 also provided Hitachi with his and his wife's: (1) 2003 and 2004
4 joint tax returns; and (2) a joint personal financial statement
5 (the "Financial Statement"), that indicated the Kempfs' net worth
6 to be \$4,207,084, including a \$2,699,188 investment known as the
7 Angel Trust (the "Trust"). While the tax returns suggest that
8 Kempf's wife is the sole beneficiary of the Trust, no such
9 reference is made on the Financial Statement. It was undisputed
10 at trial that Kempf had no right of access to the assets of, or
11 income from, the Trust.

12 Hitachi lent CardioCura \$1,440,000 on March 16, 2006 (the
13 "Loan"), and CardioCura executed a master equipment lease (the
14 "Lease") on March 22, 2006. The Lease went into default in
15 August 2007, and Hitachi obtained a California state court
16 judgment against CardioCura for \$1,410,635.37 and Kempf for
17 \$736,538.

18 Kempf filed his Chapter 7 petition on July 7, 2009; his
19 schedules made no reference to the Trust. Hitachi timely filed
20 an adversary proceeding to determine the state court judgment's
21 dischargeability.

22 In its Original Complaint, Hitachi relied on section
23 523(a)(2)(A), claiming that Kempf obtained the Loan through
24 fraud. Hitachi's First Amended Complaint, filed December 31,
25 2009, included a second claim for relief based on section
26 523(a)(2)(B), claiming that Kempf obtained the Loan through use
27 of a false financial statement. Hitachi argued that Kempf
28 knowingly misrepresented his net worth because he knew that he

1 held no interest in the Trust, which constituted a major
2 percentage of his purported net worth. Kempf filed a motion to
3 dismiss the First Amended Complaint arguing that it did not
4 relate back to the Original Complaint under Civil Rule 15,
5 incorporated in Rule 7015, and therefore was untimely. The
6 bankruptcy court denied the motion.

7 At trial, the bankruptcy court found that Kempf knew that
8 neither Kempf nor the community had an interest in the Trust and
9 that including it in the Financial Statement was a false
10 representation that he and the community did have such an
11 interest. The bankruptcy court noted that Kempf was a
12 sophisticated businessman and knew that it was highly unlikely
13 that Hitachi would lend him capital for a start-up business if he
14 did not include the Trust as part of his net worth. It also
15 noted that no evidence was presented to suggest that the issue
16 was "red-flagged" for review regarding Kempf's Financial
17 Statement. The bankruptcy court found that: (1) the Financial
18 Statement as written was materially false; (2) Kempf had a duty
19 to make the status of the Trust clear; (3) Kempf intended to
20 deceive Hitachi when he prepared and submitted the Financial
21 Statement, which showed a higher net worth than in reality; and
22 (4) Hitachi reasonably relied on Kempf's Financial Statement in
23 extending credit to him. The bankruptcy court entered judgment
24 in favor of Hitachi on June 9, 2011, holding Hitachi's state
25 court judgment against Kempf non-dischargeable under section
26 523(a)(2)(B). Kempf filed a timely appeal from the judgment on
27 June 21, 2011.

28

1 **II. Jurisdiction**

2 The bankruptcy court had jurisdiction over this core
3 proceeding pursuant to 28 U.S.C. §§ 1334 and 157(b)(1)(I). This
4 Panel has appellate jurisdiction pursuant to 28 U.S.C. § 158.

5 **III. Issues**

6 Did Hitachi's First Amended Complaint relate back to the
7 facts alleged in its Original Complaint under Civil Rule 15, as
8 made applicable by Rule 7015?

9 What standard of review should the Panel apply to the
10 factual findings in this case?

11 Did Hitachi reasonably rely on Kempf's fraudulent financial
12 statement as required under section 523(a)(2)(B)?

13 **IV. Standards of Review**

14 We review a bankruptcy court's statutory construction and
15 conclusions of law, including interpretation of Bankruptcy Code
16 provisions, de novo. Einstein/Noah Bagel Corp. v. Smith (In re
17 BCE W., L.P.), 319 F.3d 1166, 1170 (9th Cir. 2003); see Hoopai v.
18 Countrywide Home Loans, Inc. (In re Hoopai), 369 B.R. 506, 509
19 (9th Cir. BAP 2007), aff'd in part, vacated in part, rev'd in
20 part, 581 F.3d 1090 (9th Cir. 2009); USAA Fed. Sav. Bank v.
21 Thacker (In re Taylor), 599 F.3d 880, 887-88 (9th Cir. 2010).

22 We review the bankruptcy court's factual findings, including
23 a finding that a creditor reasonably relied upon false financial
24 statements, under the clearly erroneous standard. Fed. R. Bankr.
25 P. 8013; see Hughes v. Lawson (In re Lawson), 122 F.3d 1237, 1240
26 (9th Cir. 1997); Hansen v. Moore (In re Hansen), 368 B.R. 868,
27 875 (9th Cir. BAP 2007); Candland v. Ins. Co. of N. Am. (In re
28 Candland), 90 F.3d 1466, 1469 (9th Cir. 1996); see also Mendez v.

1 Salven (In re Mendez), 367 B.R. 109, 113 (9th Cir. BAP 2007);
2 Clear Channel Outdoor, Inc. v. Knupfer (In re PW, LLC), 391 B.R.
3 25, 32 (9th Cir. BAP 2008). A factual finding is clearly
4 erroneous if the appellate court, after reviewing the record, has
5 a firm and definite conviction that a mistake has been committed.
6 Anderson v. City of Bessemer City, N.C., 470 U.S. 564, 573-74
7 (1985); see Mendez, 367 B.R. at 113. If two views of the
8 evidence are possible, the trial judge's choice between them
9 cannot be clearly erroneous. Anderson, 470 U.S. at 573-75; see
10 Hansen, 368 B.R. at 874-75.

11 Whether an amended complaint relates back to the date of the
12 original under Civil Rule 15 is a legal question that is reviewed
13 de novo. Dominquez v. Miller (In re Dominquez), 51 F.3d 1502,
14 1509-10 (9th Cir. 1995); see also Magno v. Rigsby (In re Magno),
15 216 B.R. 34, 37-38 (9th Cir. BAP 1997).

16 **V. Discussion**

17 A. Relation Back of Hitachi's First Amended Complaint to 18 the Original Complaint

19 Kempf moved to dismiss Hitachi's First Amended Complaint on
20 the grounds that the second claim for relief did not relate back
21 to the Original Complaint and therefore was time-barred under
22 Rule 4007(c). He claimed that the First Amended Complaint did
23 not arise out of the same conduct, transaction, or occurrence set
24 forth in the Original Complaint because it "outlined a new set of
25 facts and legal theories involving a previously unmentioned Angel
26 Trust . . . and completely new allegations under Section
27 523(a)(2)(B) of the Bankruptcy Code." Aplt ER p. 28.

28 Hitachi argued that its Original and First Amended

1 Complaints both relate to Kempf's intentional, willful, wanton,
2 and/or negligent signing of the Lease and Guaranty with no intent
3 to repay the Loan. It argued that Counts I and II both arise out
4 of the same underlying Loan transaction to CardioCura and Kempf's
5 inducement of Hitachi to enter into the Loan by fraud.
6 Additionally, Hitachi noted that it only discovered evidence
7 relating to Count II after Kempf admitted in his adversary
8 proceeding deposition to having no property rights in the Trust.
9 Therefore, Hitachi claimed that it was "disingenuous for Debtor
10 to claim that Hitachi's further allegations of fraud, **which**
11 **Debtor concealed from Hitachi . . .** prejudices this bankruptcy
12 discharge." Aple. ER 232 (emphasis in original). The bankruptcy
13 court denied Kempf's motion.

14 An amendment to a pleading relates back to the date of the
15 original pleading when it asserts a claim or defense that arose
16 out of the same conduct, transaction, or occurrence set out in
17 the original. See Fed. R. Civ. P. 15(c)(1)(B); Fed. R. Bankr. P.
18 7015. This link will be found when the claim to be added is
19 likely to be proven by the same kind of evidence that would be
20 used to support the original pleading. Magno, 216 B.R. at 39;
21 see Dominguez, 51 F.3d at 1510. The relation back doctrine is
22 liberally applied, and its basic criterion is whether the
23 original complaint gave the defendant enough notice of the nature
24 of the plaintiff's claim so that he should not have been
25 surprised by the amplification of the allegations. Santamarina
26 v. Sears, Roebuck & Co., 466 F.3d 570, 573 (7th Cir. 2006); see
27 Miller v. Am. Heavy Lift Shipping, 231 F.3d 242, 248 (6th Cir.
28 2009); Tiller v. Atl. Coast line R. Co., 323 U.S. 574, 581

1 (1945); Rural Fire Prot. Co. v. Hepp, 366 F.2d 355, 362 (9th Cir.
2 1966). Thus, if one can fairly perceive some relationship
3 between what was pleaded in the original and amended complaints,
4 the amended complaint will relate back. Gelling v. Dean (In re
5 Dean), 11 B.R. 542, 545 (9th Cir. BAP 1981).

6 Hitachi's Original Complaint alleged fraud and
7 misrepresentation under section 523(a)(2)(A) relating to Kempf's
8 promise to pay his Guaranty. The First Amended Complaint added
9 allegations under section 523(a)(2)(B) stating that Kempf
10 fraudulently included a high asset entity in his Financial
11 Statement in order to induce Hitachi to lend to CardioCura.
12 While Hitachi's First Amended Complaint includes an additional
13 claim for relief, both complaints concern Kempf's alleged
14 fraudulent misrepresentations made to secure the Lease and will
15 likely be proven by the same kind of evidence - the Lease,
16 statements Kempf made to secure the Lease, documents relating to
17 Lease, etc. Kempf even admits that "the two complaints share the
18 fact that they arise out of the same [L]ease transaction." Aplt.
19 Br. 25.

20 Because both Hitachi's Original and First Amended Complaints
21 are based upon events and circumstances surrounding Kempf's
22 execution and delivery of the Lease and Guaranty with no
23 intention of repayment, the Original Complaint gave Kempf enough
24 notice about the nature of Hitachi's claim so that he would not
25 be surprised by the additional allegations in the First Amended
26 Complaint. Thus, the bankruptcy court did not err in holding
27 that Hitachi's First Amended Complaint related back to the
28 Original Complaint under Civil Rule 15(c)(1)(B).

1 B. The standard under which this Panel will review the
2 bankruptcy court's factual findings

3 It is a well-known rule in the federal courts generally, and
4 the Ninth Circuit specifically, that findings of fact are
5 reviewed on appeal under a clearly erroneous standard. See
6 Lawson, 122 F.3d at 1240; Hansen, 368 B.R. at 874-75; Candland,
7 90 F.3d at 1469; see also Mendez, 367 B.R. at 113; PW, LLC,
8 391 B.R. at 32. Kempf contends that because the bankruptcy court
9 was presented with uncontested facts and did not make credibility
10 determinations, the facts should be reviewed de novo since the
11 "evidentiary palate" here is identical to that of summary
12 judgment.

13 In support of this argument, Kempf cites to In re Burdge,
14 where the panel applied de novo review because the facts were
15 undisputed. AT&T Universal Card Servs. v. Burdge (In re Burdge),
16 198 B.R. 773, 776 (9th Cir. BAP 1996). The Burdge panel noted
17 that factual findings are reviewed under the clearly erroneous
18 standard and legal conclusions are reviewed de novo; and it
19 concluded that because there were no facts in dispute, the only
20 issue was a question of law to be reviewed de novo. Burdge,
21 198 B.R. at 776. Burdge, therefore, does not stand for the
22 proposition that both facts and law may be reviewed de novo but
23 merely reasserts the established legal rule that legal
24 conclusions are reviewed de novo. Id.

25 While Kempf is correct that summary judgment determinations
26 are reviewed de novo, this case is not remotely similar to a
27 summary judgment case because there were a number of facts in
28 dispute and credibility determinations were made. See Padfield

1 v. AIG Life Ins. Co., 290 F.3d 1121, 1124 (9th Cir. 2002); Turtle
2 Rock Meadows Homeowners Ass'n. v. Slyman (In re Slyman), 234 F.3d
3 1081, 1085 (9th Cir. 2000).

4 A review of the record reveals a number of factual disputes.
5 Even with only Hitachi's witness, Donald O. Link, present at
6 trial, the trial ran for approximately five hours and included a
7 thorough cross and re-cross examination of Mr. Link by Kempf's
8 counsel, which was quite hostile at times. During Mr. Link's
9 cross-examination, Kempf's attorney asked whether CardioCura's
10 business plan was the reason Hitachi entered into the Lease and
11 Guaranty. Mr. Link disagreed with this conclusion stating that
12 Hitachi entered the Lease because it approved the structure of
13 the transaction. While Mr. Kempf's counsel tried to elicit from
14 Mr. Link that the Trust was important for the transaction's
15 approval, Mr. Link pointed out that Kempf's representations on
16 his Financial Statement as a whole, and not necessarily only the
17 representations of the Trust, were important in the transaction.

18 At another point in the cross-examination, Kempf's attorney
19 tried to impeach Mr. Link by arguing that he presented
20 conflicting facts in his deposition as compared to his trial
21 testimony regarding his exposure to the transaction at issue.
22 Even the bankruptcy court noted that Kempf's counsel was making
23 "a very questionable assertion" from Mr. Link's declaration, his
24 testimony, and documents entered into evidence that the Trust was
25 the most important element in Hitachi's agreement to extend
26 credit to CardioCura. Hr'g Tr. 53:23.

27 A simple review of the record establishes that many facts
28 were in dispute and that the bankruptcy court was left with a

1 number of credibility determinations after the cross, redirect,
2 and re-cross examination of the only witness. Therefore, clearly
3 erroneous is the correct standard of review with respect to the
4 bankruptcy court's factual findings.

5 C. The level of reliance required by creditors for section
6 523(a)(2)(B) non-dischargeability complaints

7 Kempf argues that the bankruptcy court erred by absolving
8 Hitachi of any duty to make even a minimal inquiry or
9 investigation, stating that reasonable reliance requires the
10 application of a community standard of conduct. See Field v.
11 Mans, 516 U.S. 59, 70-71 (1995). Hitachi argues that Kempf
12 ignores the plethora of facts that demonstrate its reasonable
13 reliance, which included: (1) investigating Kempf's financial
14 status; (2) preparing a transaction analysis; and (3) ordering a
15 separate background report on Kempf that did not show any reason
16 for alarm.

17 At trial, Hitachi based its non-dischargeability theory on
18 section 523(a)(2)(B), which reads in pertinent part:

19 (a) A discharge under . . . this title does
20 not discharge an individual debtor from any
21 debt - (2) for money, property, services, or
22 an extension, renewal, or refinancing of
23 credit, to the extent obtained by - (B) use of
24 a statement in writing -(I) that is materially
25 false; (ii) respecting the debtor's . . .
financial condition; (iii) on which the
creditor to whom the debtor is liable for such
money, property, services, or credit
reasonably relied; and (iv) that the debtor
caused to be made or published with intent to
deceive[.]

26 11 U.S.C. § 523(a)(2)(B) (2010); see Field, 516 U.S. at 64. This
27 code section requires "reasonable reliance," a term that courts
28 can apply without additional help and is determined on a case-by-

1 case basis. Candland, 90 F.3d at 1471; Gertsch v. Johnson &
2 Johnson (In re Gertsch), 237 B.R. 160, 170 (9th Cir. BAP 1999);
3 Deutsche Fin. Serv. Corp. v. Osborne (In re Osborne), 257 B.R.
4 14, 21 (Bankr. C.D. Cal. 2000). When there is evidence of
5 materially fraudulent statements, little investigation is
6 required for a creditor to have reasonably relied on the debtor's
7 representations. Gertsch, 237 B.R. at 170; see Gosney v. Law
8 (In re Gosney), 205 B.R. 418, 421 (9th Cir. BAP 1996); Candland,
9 90 F.3d at 1471; La Trattoria, Inc. v. Lansford (In re Lansford),
10 822 F.2d 902, 904 (9th Cir. 1987).

11 Lenders do not have to hire detectives before they are found
12 to have reasonably relied upon the debtor's false financial
13 statements. Gertsch, 237 B.R. at 170; see, e.g., Candland,
14 90 F.3d at 1471; Ashley v. Church (In re Ashley), 903 F.2d 599,
15 604-05 (9th Cir. 1990). The mere fact that a creditor could have
16 performed a more thorough investigation or could have avoided its
17 loss by independently attempting to verify the information
18 contained in the debtor's financial statement is no defense in a
19 proceeding to except the debt from discharge. See Merch. Bank of
20 Cal. v. Oh (In re Oh), 278 B.R. 844, 856 (Bankr. C.D. Cal. 2002).

21 With respect to "red-flags," a creditor is not entitled to
22 rely on obviously false representations; but, minor clues of
23 falsity in a debtor's financial statement, which on the whole had
24 a complete and reliable appearance, do not make a creditor's
25 reliance unreasonable for dischargeability purposes, where the
26 statements asserted that debtors owned significant property which
27 they did not actually own. Gosney, 205 B.R. at 420-21; Gertsch,

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1 237 B.R. at 170; see also Siriani v. Nw. Nat'l Ins. Co. (In re
2 Siriani), 967 F.2d 302, 307 (9th Cir. 1992).

3 The standard in the Ninth Circuit for "reasonable reliance"
4 does not require adherence to any particular list of factors;
5 rather, as Candland and Gertsch make clear, the bankruptcy court
6 is to make its determination on a case-by-case basis in light of
7 the totality of the circumstances. See Candland, 90 F.3d at
8 1471; Gertsch, 237 B.R. at 170.

9 Thus, we will only reverse the bankruptcy court's decision
10 if, after reviewing the entire record, we have a firm and
11 definite conviction that a mistake has been committed. See
12 Anderson, 470 U.S. at 573; Mendez, 367 B.R. at 113; see also
13 Eugene Parks Law Corp. Defined Benefit Pension Plan v. Kirsh
14 (In re Kirsh), 973 F.2d 1454, 1456 (9th Cir. 1992); Candland,
15 90 F.3d at 1469. If, however, two views of the evidence are
16 possible, the trial judge's choice between them cannot be clearly
17 erroneous. Anderson, 470 U.S. at 573-75; see Hansen, 368 B.R. at
18 874-75.

19 There is sufficient evidence in the record upon which to
20 affirm the bankruptcy court's decision that Hitachi reasonably
21 relied on Kempf's fraudulent financial statements consistent with
22 the applicable Ninth Circuit legal standard. In reviewing this
23 evidence, the bankruptcy court found that Hitachi was deliberate
24 and careful in considering whether to extend credit to Kempf,
25 because of: (1) the lengthy transaction analysis it prepared;
26 (2) the exchange of emails between Kempf and Hitachi; and (3) the
27 background report on Kempf, which the court found showed little
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1 or no reason for alarm. Finally, it noted that there was nothing
2 in the record to suggest that Hitachi did not adhere to its
3 normal business practices. With regards to the Trust, the
4 bankruptcy court found that it was not so obvious to discern the
5 truth as to who owned the Trust because while the tax returns did
6 indicate that Julie Kempf is the only owner, this information was
7 "buried some 18 pages into the returns." Aplt. ER 139.
8 Furthermore, it concluded that there was no evidence to suggest
9 that the tax returns were submitted for the purposes of verifying
10 ownership instead of simply establishing historical earning
11 capacity.

12 Thus, we affirm the bankruptcy court's decision that Hitachi
13 reasonably relied upon the financial statement in extending
14 credit to CardioCura and Kempf.

15 **VI. Conclusion**

16 For the reasons set forth, the judgment of the bankruptcy
17 court is AFFIRMED.
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