NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL

OF THE NINTH CIRCUIT

In re:	BAP No. AZ-11-1076-MyDKi
ALEXANDER J. MARICONDA,	Bk. No. 09-15602-RTB
Debtor.	Adv. No. 09-01415-RTB
BRETT MCFADDEN,	
Appellant,	
v.	**M E M O R A N D U M**[1]
ALEXANDER J. MARICONDA,	
Appellee.	

Argued and Submitted on July 22, 2011
at Phoenix, Arizona

Filed - August 3, 2011

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

Honorable Redfield T. Baum, Sr., Bankruptcy Judge, Presiding

Appearances: Dean W. O'Connor of Sallquist, Drummond & O'Connor, P.C. argued for Appellant, Brett McFadden
Becky Cholewka of Cholewka Law argued for Appellee, Alexander J. Mariconda

Before: MYERS,[2] DUNN, and KIRSCHER, Bankruptcy Judges.

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

[2] The Hon. Terry L. Myers, Chief Bankruptcy Judge for the District of Idaho, sitting by designation.

Appellant Brett McFadden ("McFadden") commenced an adversary proceeding against chapter 7[3] debtor Alexander Mariconda ("Mariconda") seeking a determination that his claim against Mariconda was excepted from discharge under § 523(a)(2)(A), (4), and (19). The bankruptcy court ruled in favor of Mariconda on all counts. McFadden appealed, challenging the bankruptcy court's rejection of his § 523(a)(2)(A) and (4) claims for relief, and asserting for the first time that his claim against Mariconda is excepted from discharge under § 523(a)(6). We AFFIRM.

I. FACTS

In September 2007, Mariconda, a realtor, contacted McFadden, a hard money lender, about a possible loan.[4] In his initial correspondence with McFadden, sent on September 10, 2007, Mariconda proposed a $20,000 loan with a one-year term, to be paid off with the proceeds from the anticipated sale of Mariconda's personal residence in Scottsdale, Arizona. As security for the loan, Mariconda offered McFadden a second mortgage on a property he owned located at 1755 W. Rustic Timbers Lane #114, Prescott, Arizona ("Rustic Property"). Mariconda followed up the next day with a "memo" which provided information concerning Mariconda's residence, the Rustic Property, and a second property in Prescott located at 1210 Timber Point North ("Timber Property"). Therein,

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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.

[4] Though an insurance agent by trade, McFadden occasionally made short-term personal loans. McFadden had made one such loan to Mariconda in the early 1990's, after which the two remained business acquaintances.

Mariconda represented that he owed $289,000 on the Rustic Property and $197,000 on the Timber Property, and that the values of those properties were $425,000 and $300,000, respectively. He also indicated that he owed $927,000 on his Scottsdale home, which he intended to list for sale at $1,150,000. The memo also contained additional details regarding the terms of the proposed loan.

On September 12, 2007, Mariconda signed a promissory note in favor of McFadden for $20,000, plus interest. Under the terms of the note, interest was to accrue at two percent per month beginning on September 15, 2007, Mariconda would begin making monthly, interest-only payments of $400 on April 15, 2008, and pay the remaining balance, with interest, on September 15, 2008, or upon the sale of the Timber Property or his Scottsdale residence, whichever occurred first. In the event Mariconda paid off the loan before September 15, 2008, he was required to pay McFadden a minimum of six months' interest, equaling $2,400. As security for the note, Mariconda conveyed to McFadden a deed of trust covering the Rustic and Timber Properties ("Trust Deed"), with Chicago Title Insurance Company ("Chicago Title") as the named trustee. The parties agreed that Mariconda would have the Trust Deed recorded. Despite their agreement, Mariconda never recorded the Trust Deed.

Mariconda began making interest payments on the loan in April 2008. However, he was unsuccessful in attempts to sell his Scottsdale residence, eventually surrendering it to a lender who was secured in the property in July 2008. Shortly thereafter, Mariconda ceased making payments to McFadden.

Roughly one year later, on July 7, 2009, Mariconda filed a

voluntary petition for relief under chapter 7. Initially, Mariconda did not list McFadden as a creditor in his bankruptcy schedules, though he later amended his schedules to add McFadden, but as an unsecured creditor. In his schedule of secured creditors (Schedule D), Mariconda listed a second mortgage on both the Rustic and Timber Properties – one for $45,000 in favor of Richard and Margaret Mercure (the "Mercures"), and the other for $26,451 in favor of Falso Solutions. The Mercure mortgage stemmed from two separate loans of $30,000 and $15,000, made in April 2007 and July 2007, both of which were secured by deeds of trust on the Rustic Property. Those deeds of trust were never recorded. The Falso Solutions mortgage on the Timber Property secured a $25,000 loan to Mariconda, also made before McFadden's September 2007 loan. The Falso Solutions mortgage was recorded.

On October 27, 2009, McFadden initiated an adversary proceeding against Mariconda. The complaint, as amended, sought a determination that his claim against Mariconda was excepted from discharge under § 523(a)(2)(A), (4), and (19).

While the adversary proceeding was pending, the first priority lien holders on the Rustic and Timber Properties foreclosed on their deeds of trust and sold those properties by trustee's sale, having obtained relief from the automatic stay in Mariconda's underlying bankruptcy case. The Timber Property was sold on April 2, 2010, for $232,535.79. The Rustic Property was sold on June 28, 2010.[5]

[5] The only evidence in the record concerning the sale of the Rustic Property is a March 22, 2010, "Notice of Trustee's Sale" for June 28, 2010. The record is devoid, however, of any evidence regarding the particulars of that sale, including the purchase price.

McFadden's claims were tried before the bankruptcy court on September 21, 2010. The court heard testimony from McFadden and Mariconda. After the submission of post-trial briefing, on November 23, 2010, the court entered a decision wherein it concluded that McFadden had not proven (1) the existence of a false representation made by Mariconda, (2) justifiable reliance on McFadden's part, or (3) resulting damages to McFadden – elements McFadden was required to prove to prevail on his § 523(a)(2)(A) claims.[6] The court further concluded that no fiduciary relationship existed between Mariconda and McFadden for purposes of § 523(a)(4).

Based on these reasons, the bankruptcy court entered an order on February 1, 2011, denying McFadden's claims for nondischargeability under § 523(a)(2)(A) and (4), and closing the adversary proceeding.[7]

McFadden timely appealed the bankruptcy court's order on February 11, 2011.

II. JURISDICTION

The bankruptcy court had jurisdiction under 28 U.S.C. §§ 1334

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[6] Although in its decision and order the bankruptcy court did not identify under which subsection, (A) or (B), of § 523(a)(2) it analyzed McFadden's claims, instead referring to § 523(a)(2) generally, McFadden only pleaded a claim under § 523(a)(2)(A) in his amended complaint. Additionally, a review of the elements addressed by the court in its decision, in particular the element of justifiable reliance, suggests an analysis under § 523(a)(2)(A).

[7] Because the February 1 order did not address McFadden's § 523(a)(19) claim, an apparent oversight by the bankruptcy court, the Panel granted a limited remand to allow the parties to seek an order from the bankruptcy court disposing of that claim. On May 12, 2011, the bankruptcy court entered an order denying the § 523(a)(19) claim. McFadden does not challenge that order.

and 157(b)(2)(I). The Panel has jurisdiction under 28 U.S.C. § 158.

III. ISSUES

1. Whether the bankruptcy court erred in denying McFadden's claims for exception from discharge under § 523(a)(2)(A) and (4).

2. Whether McFadden may assert for the first time on appeal that his claim against Mariconda is excepted from discharge under § 523(a)(6).

IV. STANDARDS OF REVIEW

The question of dischargeability of a debt presents mixed issues of fact and law, which the court of appeals and the BAP review de novo. Honkanen v. Hopper (In re Honkanen), 446 B.R. 373, 378 (9th Cir. BAP 2011) (citing Miller v. United States, 363 F.3d 999, 1004 (9th Cir. 2004)).

Pure factual findings made in the context of the dischargeability analysis are reviewed for clear error. Peklar v. Ikerd (In re Peklar), 260 F.3d 1035, 1037 (9th Cir. 2001). Clear error exists when, on the entire evidence, the reviewing court is left with the definite and firm conviction that a mistake was committed. Oney v. Weinberg (In re Weinberg), 410 B.R. 19, 28 (9th Cir. BAP 2009).

The Panel may affirm the bankruptcy court's decision on any ground fairly supported by the record. Wirum v. Warren (In re Warren), 568 F.3d 1113, 1116 (9th Cir. 2009).

V. DISCUSSION

A. The bankruptcy court did not err in denying McFadden's claims for exception to discharge under § 523(a)(2)(A).

At trial, McFadden identified three representations by

Mariconda he believed supported a claim for relief under § 523(a)(2)(A). The first was Mariconda's written representation in the September 10, 2007, memo that he was "looking" for a loan to be secured by a "second" on the Rustic Property. The second statement was Mariconda's written representations in the September 11, 2007, memo that the amounts of existing indebtedness secured by the Rustic and Timber Properties were $289,000 and $197,000, respectively. The third was Mariconda's oral assurance that he would record McFadden's Trust Deed on the Rustic and Timber Properties.

The bankruptcy court concluded that McFadden had not established a false representation regarding Mariconda's written representations. The bankruptcy court further found that McFadden had not justifiably relied on Mariconda's promise to record the Trust Deed, and that McFadden had failed to prove he suffered damages as a result of his reliance on that promise. Mariconda asserts that the bankruptcy court erred in making these findings.

1. The bankruptcy court did not err in finding that Mariconda's representations regarding the Rustic and Timber Properties were not false representations.

Under § 523(a)(2)(A), the debt of an individual debtor "for money, property, services, or an extension, renewal, or refinancing of credit" is not dischargeable if obtained by "false pretenses, a false representation, or actual fraud, other than a statement respecting the debtor's or an insider's financial condition." Thus, to prevail on a claim under § 523(a)(2)(A), a creditor must establish five elements by a preponderance of the evidence:

(1) misrepresentation, fraudulent omission or deceptive

conduct by the debtor; (2) knowledge of the falsity or deceptiveness of his statement or conduct; (3) an intent to deceive; (4) justifiable reliance by the creditor on the debtor's statement or conduct; and (5) damage to the creditor proximately caused by its reliance on the debtor's statement or conduct.

Harmon v. Kobrin (In re Harmon), 250 F.3d 1240, 1246 (9th Cir. 2001) (quoting Turtle Rock Meadows Homeowners Ass'n v. Slyman (In re Slyman), 234 F.3d 1081, 1085 (9th Cir. 2000)); accord Weinberg, 410 B.R. at 35.

The bankruptcy court's determinations that Mariconda's written statements were not false representations are factual findings that we review for clear error. See Am. Express Travel Servs. Co. v. Vinhnee (In re Vinhnee), 336 B.R. 437, 443 (9th Cir. BAP 2005). Accordingly, we must affirm if the record contains evidence supporting the bankruptcy court's findings.

The court found that Mariconda's representation concerning a "second" on the Rustic Property was not a false representation because at the time of McFadden's loan to Mariconda there was only one recorded lien on the Rustic Property. Therefore McFadden's Trust Deed would have given him a second position lien on the property had it been properly recorded, notwithstanding the existence of the Mercures' previously executed, unrecorded deed of trust covering that same property.

The bankruptcy court's conclusions find support in the record. Mariconda testified that the Mercures' deed of trust on the Rustic Property was not recorded, and that there was only one recorded lien on the property when he received the $20,000 loan

from McFadden. Trial Tr. 95:6-8, 15-17, Sept. 21, 2010. McFadden testified that his concern was that any value in the Rustic Property over and above the first priority lien be available to secure his loan. Trial Tr. 22:7-15. The evidence indicates that it was. Had the Trust Deed been recorded, McFadden would have in fact held a second position lien on the Rustic Property. See A.R.S. § 33-412(A); In re Le Sueur's Fiesta Store, Inc., 40 B.R. 160, 162 (Bankr. D. Ariz. 1984) (instruments affecting real property are valid against subsequent purchasers or creditors without notice only if recorded in the county recorder's office).

Similarly, the record also contains sufficient evidence to support the finding that Mariconda's representations in the September 11 memo regarding the indebtedness secured by the Rustic and Timber Properties were not false or fraudulent. The $289,000 figure provided by Mariconda accurately reflected the first priority lien on the Rustic Property which would have had priority over McFadden's Trust Deed. As for the Timber Property, Mariconda acknowledged in his testimony that he omitted the $25,000 second mortgage in favor of Falso Solutions when he represented that the indebtedness on that property was $197,000. Trial Tr. 95:18-25. However, he also testified that the omission was inadvertent, and that he alerted McFadden to the existence of the second mortgage on that property before he and McFadden executed the loan documents on September 12. Trial Tr. 95:18-24, 96:1-5, 106:7-13. Though McFadden testified that Mariconda never informed him of the Falso Solutions second mortgage, Trial Tr. 59:21-24, the court could reasonably conclude, based on Mariconda's testimony and the evidence as a whole, that Mariconda did not fraudulently omit the

second mortgage – a required showing under the first element of § 523(a)(2)(A).

Because the record contains evidence to support findings that Mariconda's September 10 and 11 memos did not contain false representations or fraudulent omissions, we conclude that the bankruptcy court did not err in denying McFadden's § 523(a)(2)(A) claims arising from Mariconda's written statements.

2. The bankruptcy court did not err in denying McFadden's § 523(a)(2)(A) claim arising from Mariconda's promise to record the deed of trust.

We turn now to Mariconda's representation that he would record the Trust Deed – the third statement identified by McFadden. Although the record presents factual issues regarding Mariconda's intent when he represented to McFadden that he would record the Trust Deed,[8] the bankruptcy court did not address that element in its decision. Instead, the court found that McFadden had not established that his reliance on Mariconda's statement was justifiable or that he suffered damages based on that reliance.

a. Justifiable reliance.

Justifiable reliance looks to "the qualities and characteristics of the particular plaintiff, and the circumstances of the particular case, rather than of the application of a community standard of conduct to all cases." Field v. Mans, 516 U.S. 59, 71 (1995) (quoting Restatement (Second) of Torts

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[8] See Barrack v. McCrary (In re Barrack), 217 B.R. 598, 606 (9th Cir. BAP 1998) ("A promise made with a positive intent not to perform or without a present intent to perform satisfies § 523(a)(2)(A).") (quoting Rubin v. West (In re Rubin), 875 F.2d 755, 759 (9th Cir. 1989)). Mariconda's testimony was that he intended to have the Trust Deed recorded, and that on one occasion he attempted to do so, though unsuccessfully. Trial Tr. 99:4-19.

§ 545A cmt. b (1976)). Under the justifiable reliance standard, "it is only where, under the circumstances, the facts should be apparent to one of the victim's knowledge and intelligence from a cursory glance, or he has discovered something which should serve as a warning that he is being deceived, that he is required to make an investigation of his own." Id. at 71-72 (quoting W. Prosser, Law of Torts § 108, p. 718 (4th ed. 1971)).

Whether a creditor justifiably relied upon false statements is a question of fact we review under a clearly erroneous standard. Candland v. Ins. Co. Of N. Am. (In re Candland), 90 F.3d 1466, 1469 (9th Cir. 1996).

Here, the evidence indicates that, while McFadden's initial reliance on Mariconda's representation may have been justified, his continued reliance on that statement after discovering the Trust Deed remained unrecorded months after the loan transaction was not. According to his testimony, McFadden asked on several occasions, before Mariconda filed bankruptcy and before the senior lien holders foreclosed, concerning the Trust Deed and whether it had been recorded. Trial Tr. 33:22-25, 34:5-11, 66:11-16. Mariconda's failure to record the Trust Deed despite McFadden's repeated inquiries over several months should have served as a warning to McFadden that he could no longer rely on Mariconda's representation that he would record the Trust Deed.

These facts support an inference that McFadden's continued reliance on Mariconda to record the Trust Deed was not justifiable. We therefore perceive no clear error in the bankruptcy court's finding.

b. Damages.

As an additional ground for denying McFadden's § 523(a)(2)(A) claim the bankruptcy court also found that McFadden had failed to prove that he was damaged as a result of his reliance on Mariconda's promise to record the Deed. To prevail on a § 523(a)(2)(A) claim, a creditor must prove that he sustained loss and damage as the proximate result of his reliance on the debtor's representations. Britton v. Price (In re Britton), 950 F.2d 602, 604 (9th Cir. 1991).

Under Arizona law, "conjecture or speculation" cannot provide the basis for an award of damages. Felder v. Physiotherapy Assocs., 158 P.3d 877, 885 (Ariz. Ct. App. 2007) (quoting Gilmore v. Cohen, 386 P.2d 81, 82 (Ariz. 1963)). The evidence must establish a right to damages. However, once the right to damages is established, uncertainty as to the amount of damages does not preclude recovery if the evidence makes "an approximately accurate estimate" possible. Felder, 158 P.3d at 885 (citing Lewis v. N.J. Riebe Enters., Inc., 825 P.2d 5, 18 (Ariz. 1992)).

McFadden argues that he was damaged because he did not receive notice of the sales of the Rustic and Timber Properties, notice he would have received had the Trust Deed been properly recorded. As a result, he contends, he was deprived of the opportunity to participate in the sale process by exercising his right to acquire the senior lien holders' interests or further advertising the sales to maximize the purchase prices of the properties, as well as the ability to foreclose on his interests in the properties before Mariconda's bankruptcy.

McFadden is correct – as a lien holder of record he would

have been entitled to notice of the trustee's sales of the Rustic and Timber Properties. See A.R.S. § 33-809(B) (requiring trustee to provide notice of trustee's sale to each person who, at the time of recording of the notice of sale, appears on the records of the county recorder as having an interest in the trust property). Lack of notice concerning the trustee's sales, however, does not itself constitute an actual, quantifiable damage.

McFadden failed to present evidence that would allow the trial court to establish the value, if any, of his lost opportunity. The record is bereft of any evidence to show that McFadden would have been able to recoup his interests in the Rustic and Timber Properties had he been able to participate in the sales. Even if he were able to buy out the senior lien holders, McFadden presented no evidence to show that the values of the properties were sufficient, or would be at some point, to create value in his junior interests. Similarly, there is no evidence regarding the economic impact further advertising by McFadden would have had on the trustee's sales, or what portion of any such impact would have inured to him.

Therefore, the only basis for establishing the damages alleged by McFadden is speculation and conjecture concerning the state of the real estate market in Prescott, Arizona, and the benefit additional advertising, of some unspecified nature, would have had on the sales. Such speculation cannot provide the basis for proving damages as it does not make "an approximately accurate estimate" possible.

Furthermore, Mariconda's failure to record did not deprive McFadden of his ability to foreclose on his interests in the

properties prior to Mariconda filing bankruptcy. Although the lack of recording rendered McFadden's Trust Deed ineffective and inferior as to subsequent bona fide purchasers and encumbrance holders, it remained valid and binding as between McFadden and Mariconda. See A.R.S. § 33-412. The record indicates there were no subsequent lien holders on the Rustic and Timber Properties. Thus McFadden could have foreclosed on his Trust Deed any time between Mariconda's default on the promissory note and the bankruptcy filing and he would have been in a position equal to the one he would have held had Mariconda actually recorded the Trust Deed.

Because McFadden did not present evidence sufficient to prove that he was damaged by his reliance on Mariconda's promise to record the Trust Deed, we find that the bankruptcy court did not err in finding McFadden did not satisfy that element of his § 523(a)(2)(A) claim.

B. The bankruptcy court did not err in denying McFadden's claim for exception to discharge under § 523(a)(4).

Section 523(a)(4) excepts from discharge a debt "for fraud or defalcation while acting in a fiduciary capacity." The broad, general definition of "fiduciary" under nonbankruptcy law is inapplicable in the bankruptcy context. Cal-Micro, Inc. v. Cantrell (In re Cantrell), 329 F.3d 1119, 1125 (9th Cir. 2003); Honkanen, 446 B.R. at 378. To fall within the narrow definition of "fiduciary" under § 523(a)(4), "the fiduciary relationship must be one arising from an express or technical trust that was imposed before and without reference to the wrongdoing that caused the debt as opposed to a trust ex maleficio, constructively imposed

because of the act of wrongdoing from which the debt arose." Honkanen, 446 B.R. at 378-79 (citations omitted).

Although the definition of fiduciary is governed by federal law, the Ninth Circuit has relied in part on state law to ascertain whether the requisite trust relationship exists. Cantrell, 329 F.3d at 1125; Lewis v. Scott (In re Lewis), 97 F.3d 1182, 1185 (9th Cir. 1996). To establish the trust relationship required by § 523(a)(4), the applicable state law must clearly define fiduciary duties and identify trust property. Honkanen, 446 B.R. at 379 (citing Runnion v. Pedrazzini (In re Pedrazzini), 644 F.2d 756, 759 (9th Cir. 1981)). "The mere fact that state law puts two parties in a fiduciary-like relationship does not necessarily mean it is a fiduciary relationship within 11 U.S.C. § 523(a)(4)." Id.

McFadden argues that the Trust Deed on the Rustic and Timber Properties constituted an express trust which gave rise to a fiduciary relationship. Yet the Trust Deed, on its face, did not create a fiduciary relationship between Mariconda and McFadden. Rather, its purpose was to convey to Chicago Title the power of sale of the properties, to be held in trust for McFadden as security for his loan. See A.R.S. § 33-807(A). Any fiduciary duties arising from the Trust Deed thus rested on Chicago Title as trustee, not Mariconda.

Alternatively, McFadden contends that the Trust Deed itself was the trust res, which Mariconda held in trust for McFadden's benefit. However, McFadden has not directed us to, nor have we been able to locate independently, any Arizona statute or case law that renders a borrower-debtor in an arm's length transaction who

agrees to record a mortgage or deed of trust the fiduciary of the lender-creditor. Under Arizona law, mere trust in another's competence or integrity, when in the context of an arm's length relationship, is insufficient to create a fiduciary relationship even in the broad, general sense. See Standard Chartered PLC v. Price Waterhouse, 945 P.2d 317, 335 (Ariz. App. 1997).

Therefore, we conclude, as the bankruptcy court did, that McFadden's claim is not excepted from discharge by § 523(a)(4) because Mariconda was not acting in a "fiduciary capacity" when he failed to record the Trust Deed.

C. McFadden is not permitted to raise a § 523(a)(6) claim for the first time on appeal.

On appeal, McFadden asserts for the first time that his claim against Mariconda is excepted from discharge by § 523(a)(6).[9] Section 523(a)(6) excepts from an individual debtor's discharge any debt "for willful and malicious injury by the debtor to another entity or to the property of another entity."

As a general rule, we will not consider issues or arguments raised for the first time on appeal, though we have discretion to do so in exceptional circumstances. El Paso City of Texas v. Am. W. Airlines, Inc. (In re Am. W. Airlines, Inc.), 217 F.3d 1161, 1165 (9th Cir. 2000); United Student Funds, Inc. v. Wylie (In re

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[9] While the title to a subsection in the parties' joint pretrial statement referred to "§ 523(a)(2), (4), and/or (6)," the reference to § 523(a)(6) appears to have been a typographical error. The body of that subsection addresses claims asserted under § 523(a)(2)(A) and (B), (a)(4), and (a)(19), consistent with McFadden's amended complaint. Other than this singular instance, there is no mention of § 523(a)(6) in the amended complaint, joint pretrial statement, September 21, 2010, trial transcript, or McFadden's post-trial brief.

Wylie), 349 B.R. 204, 213 (9th Cir. BAP 2006). We may exercise this discretion (1) to prevent a miscarriage of justice; (2) when a change in law raises a new issue while an appeal is pending; and (3) when the issue is purely one of law that does not depend on the factual record, or the factual record has been fully developed. Baccei v. United States, 632 F.3d 1140, 1149 (9th Cir. 2011). None of these exceptions apply to this case.

McFadden contends that the § 523(a)(6) issue is a legal one that may be decided by this Panel based on the factual record developed before the bankruptcy court. However, the question of nondischargeability of a debt under § 523(a)(6) presents a mixed question of law and fact. Murray v. Bammer (In re Bammer), 131 F.3d 788, 791–92 (9th Cir. 1997). Indeed, "[w]hether an actor behaved wilfully and maliciously is ultimately a question of fact reserved for the trier of fact." Banks v. Gill Distrib. Ctrs., Inc. (In re Banks), 263 F.3d 862, 869 (9th Cir. 2001) (citing Wheeler v. Laudani, 783 F.2d 610, 615 (6th Cir. 1986)). Consideration of the § 523(a)(6) claim at this stage would prejudice Mariconda's ability to present factual evidence relevant to any decision regarding the willful and malicious elements of § 523(a)(6).

McFadden had ample opportunity to assert a § 523(a)(6) claim in the adversary proceeding, yet he failed to do so. Because this case does not present exceptional circumstances warranting consideration of his claim for the first time on appeal, we decline to address it.

VI. CONCLUSION

For the reasons set forth above, we AFFIRM.