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

NOT FOR PUBLICATION

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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.)	MEMORANDUM¹
)	
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.

1 Appellant Brett McFadden ("McFadden") commenced an adversary
2 proceeding against chapter 7³ debtor Alexander Mariconda
3 ("Mariconda") seeking a determination that his claim against
4 Mariconda was excepted from discharge under § 523(a)(2)(A), (4),
5 and (19). The bankruptcy court ruled in favor of Mariconda on all
6 counts. McFadden appealed, challenging the bankruptcy court's
7 rejection of his § 523(a)(2)(A) and (4) claims for relief, and
8 asserting for the first time that his claim against Mariconda is
9 excepted from discharge under § 523(a)(6). We AFFIRM.

10 I. FACTS

11 In September 2007, Mariconda, a realtor, contacted McFadden,
12 a hard money lender, about a possible loan.⁴ In his initial
13 correspondence with McFadden, sent on September 10, 2007,
14 Mariconda proposed a \$20,000 loan with a one-year term, to be paid
15 off with the proceeds from the anticipated sale of Mariconda's
16 personal residence in Scottsdale, Arizona. As security for the
17 loan, Mariconda offered McFadden a second mortgage on a property
18 he owned located at 1755 W. Rustic Timbers Lane #114, Prescott,
19 Arizona ("Rustic Property"). Mariconda followed up the next day
20 with a "memo" which provided information concerning Mariconda's
21 residence, the Rustic Property, and a second property in Prescott
22 located at 1210 Timber Point North ("Timber Property"). Therein,
23

24
25 ³ Unless otherwise indicated, all chapter, section, and rule
26 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532, and
27 to the Federal Rules of Bankruptcy Procedure, Rules 1001-9037.

28 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.

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

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

23 Mariconda began making interest payments on the loan in April
24 2008. However, he was unsuccessful in attempts to sell his
25 Scottsdale residence, eventually surrendering it to a lender who
26 was secured in the property in July 2008. Shortly thereafter,
27 Mariconda ceased making payments to McFadden.

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

1 voluntary petition for relief under chapter 7. Initially,
2 Mariconda did not list McFadden as a creditor in his bankruptcy
3 schedules, though he later amended his schedules to add McFadden,
4 but as an unsecured creditor. In his schedule of secured
5 creditors (Schedule D), Mariconda listed a second mortgage on both
6 the Rustic and Timber Properties - one for \$45,000 in favor of
7 Richard and Margaret Mercure (the "Mercures"), and the other for
8 \$26,451 in favor of Falso Solutions. The Mercure mortgage stemmed
9 from two separate loans of \$30,000 and \$15,000, made in April 2007
10 and July 2007, both of which were secured by deeds of trust on the
11 Rustic Property. Those deeds of trust were never recorded. The
12 Falso Solutions mortgage on the Timber Property secured a \$25,000
13 loan to Mariconda, also made before McFadden's September 2007
14 loan. The Falso Solutions mortgage was recorded.

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

19 While the adversary proceeding was pending, the first
20 priority lien holders on the Rustic and Timber Properties
21 foreclosed on their deeds of trust and sold those properties by
22 trustee's sale, having obtained relief from the automatic stay in
23 Mariconda's underlying bankruptcy case. The Timber Property was
24 sold on April 2, 2010, for \$232,535.79. The Rustic Property was
25 sold on June 28, 2010.⁵

26
27 ⁵ The only evidence in the record concerning the sale of the
28 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.

1 McFadden's claims were tried before the bankruptcy court on
2 September 21, 2010. The court heard testimony from McFadden and
3 Mariconda. After the submission of post-trial briefing, on
4 November 23, 2010, the court entered a decision wherein it
5 concluded that McFadden had not proven (1) the existence of a
6 false representation made by Mariconda, (2) justifiable reliance
7 on McFadden's part, or (3) resulting damages to McFadden -
8 elements McFadden was required to prove to prevail on his
9 § 523(a)(2)(A) claims.⁶ The court further concluded that no
10 fiduciary relationship existed between Mariconda and McFadden for
11 purposes of § 523(a)(4).

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

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

18 **II. JURISDICTION**

19 The bankruptcy court had jurisdiction under 28 U.S.C. §§ 1334
20

21 ⁶ Although in its decision and order the bankruptcy court
22 did not identify under which subsection, (A) or (B), of
23 § 523(a)(2) it analyzed McFadden's claims, instead referring to
24 § 523(a)(2) generally, McFadden only pleaded a claim under
25 § 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).

26 ⁷ Because the February 1 order did not address McFadden's
27 § 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
28 May 12, 2011, the bankruptcy court entered an order denying the
§ 523(a)(19) claim. McFadden does not challenge that order.

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

3 III. ISSUES

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

6 2. Whether McFadden may assert for the first time on appeal
7 that his claim against Mariconda is excepted from discharge under
8 § 523(a)(6).

9 IV. STANDARDS OF REVIEW

10 The question of dischargeability of a debt presents mixed
11 issues of fact and law, which the court of appeals and the BAP
12 review de novo. Honkanen v. Hopper (In re Honkanen), 446 B.R.
13 373, 378 (9th Cir. BAP 2011) (citing Miller v. United States, 363
14 F.3d 999, 1004 (9th Cir. 2004)).

15 Pure factual findings made in the context of the
16 dischargeability analysis are reviewed for clear error. Peklar v.
17 Ikerd (In re Peklar), 260 F.3d 1035, 1037 (9th Cir. 2001). Clear
18 error exists when, on the entire evidence, the reviewing court is
19 left with the definite and firm conviction that a mistake was
20 committed. Oney v. Weinberg (In re Weinberg), 410 B.R. 19, 28
21 (9th Cir. BAP 2009).

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

25 V. DISCUSSION

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

28 At trial, McFadden identified three representations by

1 Mariconda he believed supported a claim for relief under
2 § 523(a)(2)(A). The first was Mariconda's written representation
3 in the September 10, 2007, memo that he was "looking" for a loan
4 to be secured by a "second" on the Rustic Property. The second
5 statement was Mariconda's written representations in the
6 September 11, 2007, memo that the amounts of existing indebtedness
7 secured by the Rustic and Timber Properties were \$289,000 and
8 \$197,000, respectively. The third was Mariconda's oral assurance
9 that he would record McFadden's Trust Deed on the Rustic and
10 Timber Properties.

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

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

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

(1) misrepresentation, fraudulent omission or deceptive

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

7 Harmon v. Kobrin (In re Harmon), 250 F.3d 1240, 1246 (9th Cir.
8 2001) (quoting Turtle Rock Meadows Homeowners Ass'n v. Slyman (In
9 re Slyman), 234 F.3d 1081, 1085 (9th Cir. 2000)); accord Weinberg,
10 410 B.R. at 35.

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

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

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

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

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

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

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

8 **2. The bankruptcy court did not err in denying McFadden's**
9 **§ 523(a)(2)(A) claim arising from Mariconda's promise to**
record the deed of trust.

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

18 **a. Justifiable reliance.**

19 Justifiable reliance looks to "the qualities and
20 characteristics of the particular plaintiff, and the circumstances
21 of the particular case, rather than of the application of a
22 community standard of conduct to all cases." Field v. Mans,
23 516 U.S. 59, 71 (1995) (quoting Restatement (Second) of Torts

24
25 ⁸ See Barrack v. McCrary (In re Barrack), 217 B.R. 598, 606
26 (9th Cir. BAP 1998) ("A promise made with a positive intent not to
27 perform or without a present intent to perform satisfies
28 § 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.

1 § 545A cmt. b (1976)). Under the justifiable reliance standard,
2 "it is only where, under the circumstances, the facts should be
3 apparent to one of the victim's knowledge and intelligence from a
4 cursory glance, or he has discovered something which should serve
5 as a warning that he is being deceived, that he is required to
6 make an investigation of his own." Id. at 71-72 (quoting W.
7 Prosser, Law of Torts § 108, p. 718 (4th ed. 1971)).

8 Whether a creditor justifiably relied upon false statements
9 is a question of fact we review under a clearly erroneous
10 standard. Candland v. Ins. Co. Of N. Am. (In re Candland),
11 90 F.3d 1466, 1469 (9th Cir. 1996).

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

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

28

1 **b. Damages.**

2 As an additional ground for denying McFadden's § 523(a)(2)(A)
3 claim the bankruptcy court also found that McFadden had failed to
4 prove that he was damaged as a result of his reliance on
5 Mariconda's promise to record the Deed. To prevail on a
6 § 523(a)(2)(A) claim, a creditor must prove that he sustained loss
7 and damage as the proximate result of his reliance on the debtor's
8 representations. Britton v. Price (In re Britton), 950 F.2d 602,
9 604 (9th Cir. 1991).

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

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

28 McFadden is correct - as a lien holder of record he would

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

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

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

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

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

12 Because McFadden did not present evidence sufficient to prove
13 that he was damaged by his reliance on Mariconda's promise to
14 record the Trust Deed, we find that the bankruptcy court did not
15 err in finding McFadden did not satisfy that element of his
16 § 523(a)(2)(A) claim.

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

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

1 because of the act of wrongdoing from which the debt arose.”

2 Honkanen, 446 B.R. at 378-79 (citations omitted).

3 Although the definition of fiduciary is governed by federal
4 law, the Ninth Circuit has relied in part on state law to
5 ascertain whether the requisite trust relationship exists.
6 Cantrell, 329 F.3d at 1125; Lewis v. Scott (In re Lewis), 97 F.3d
7 1182, 1185 (9th Cir. 1996). To establish the trust relationship
8 required by § 523(a)(4), the applicable state law must clearly
9 define fiduciary duties and identify trust property. Honkanen,
10 446 B.R. at 379 (citing Runnion v. Pedrazzini (In re Pedrazzini),
11 644 F.2d 756, 759 (9th Cir. 1981)). “The mere fact that state law
12 puts two parties in a fiduciary-like relationship does not
13 necessarily mean it is a fiduciary relationship within 11 U.S.C.
14 § 523(a)(4).” Id.

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

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

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

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

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

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

18 As a general rule, we will not consider issues or arguments
19 raised for the first time on appeal, though we have discretion to
20 do so in exceptional circumstances. El Paso City of Texas v. Am.
21 W. Airlines, Inc. (In re Am. W. Airlines, Inc.), 217 F.3d 1161,
22 1165 (9th Cir. 2000); United Student Funds, Inc. v. Wylie (In re

24 ⁹ While the title to a subsection in the parties' joint
25 pretrial statement referred to "§ 523(a)(2), (4), and/or (6)," the
26 reference to § 523(a)(6) appears to have been a typographical
27 error. The body of that subsection addresses claims asserted
28 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.

1 Wylie), 349 B.R. 204, 213 (9th Cir. BAP 2006). We may exercise
2 this discretion (1) to prevent a miscarriage of justice; (2) when
3 a change in law raises a new issue while an appeal is pending; and
4 (3) when the issue is purely one of law that does not depend on
5 the factual record, or the factual record has been fully
6 developed. Baccei v. United States, 632 F.3d 1140, 1149 (9th Cir.
7 2011). None of these exceptions apply to this case.

8 McFadden contends that the § 523(a)(6) issue is a legal one
9 that may be decided by this Panel based on the factual record
10 developed before the bankruptcy court. However, the question of
11 nondischargeability of a debt under § 523(a)(6) presents a mixed
12 question of law and fact. Murray v. Bammer (In re Bammer),
13 131 F.3d 788, 791-92 (9th Cir. 1997). Indeed, "[w]hether an actor
14 behaved wilfully and maliciously is ultimately a question of fact
15 reserved for the trier of fact." Banks v. Gill Distrib. Ctrs.,
16 Inc. (In re Banks), 263 F.3d 862, 869 (9th Cir. 2001) (citing
17 Wheeler v. Laudani, 783 F.2d 610, 615 (6th Cir. 1986)).

18 Consideration of the § 523(a)(6) claim at this stage would
19 prejudice Mariconda's ability to present factual evidence relevant
20 to any decision regarding the willful and malicious elements of
21 § 523(a)(6).

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

27 VI. CONCLUSION

28 For the reasons set forth above, we AFFIRM.