

MAR 12 2012

NOT FOR PUBLICATION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. AZ-11-1504-DJuPa  
)  
BRENDA KAY NARADA and ) Bk. No. 10-06316-RTBP  
TY ESTUS NARADA, )  
) Adv. Pro. No. 10-01163-RTBP  
Debtors. )

BRENDA NARADA,  
Appellant,

v.

MEMORANDUM<sup>1</sup>

UNITED STATES OF AMERICA,  
Social Security  
Administration,  
Appellee.

Argued and Submitted on February 24, 2012  
at Phoenix, Arizona

Filed - March 12, 2012

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

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

Appearances: Ty Narada argued for Appellant Brenda Narada;  
William C. Solomon argued for Appellee United  
States of America, Social Security Administration

Before: DUNN, JURY and PAPPAS, Bankruptcy Judges.

<sup>1</sup> This disposition is not appropriate for publication.  
Although it may be cited for whatever persuasive value it may  
have, FRAP 32.1, it has no precedential value. See 9th Cir. BAP  
Rule 8013-1.

1 The debtors, Brenda and Ty Narada (the "Naradas"), appeal  
2 the summary judgment order in favor of the United States on  
3 behalf of the Commissioner of Social Security ("SSA") excepting a  
4 debt of Brenda Narada ("Brenda") from discharge pursuant to  
5 11 U.S.C. §§ 523(a)(2) and (a)(6) and the bankruptcy court's  
6 subsequent denial of the Naradas' motion for relief from  
7 judgment.<sup>2</sup> We VACATE and REMAND to the bankruptcy court for  
8 further proceedings.

9 Factual Background

10 The Naradas filed a chapter 7 bankruptcy petition on  
11 March 10, 2010, in the District of Arizona.

12 On June 25, 2010, the SSA timely filed an adversary  
13 proceeding ("Adversary Proceeding") complaint ("Complaint")  
14 against Brenda to except a debt from discharge pursuant to  
15 §§ 523(a)(2)(A) and (a)(6). Specifically, the SSA alleged in the  
16 Complaint that through misrepresentations and material omissions,  
17 Brenda had obtained a total of \$24,575 in Supplemental Security  
18 Income disability benefits payments for which she was ineligible.  
19 The SSA's claims arose from Brenda's alleged receipt of an  
20 ownership interest in a motel property located in Ash Fork,  
21 Arizona ("Motel Property") on or about August 1999. The SSA's  
22 records apparently showed that Brenda had repaid \$1,467.30,  
23 leaving a balance owing of \$23,107.70 that the SSA sought to

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24  
25 <sup>2</sup> Unless otherwise indicated, all chapter and section  
26 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532, and  
27 all "Rule" references are to the Federal Rules of Bankruptcy  
28 Procedure, Rules 1001-9037. The Federal Rules of Civil Procedure  
are referred to as "Civil Rules," and the Federal Rules of  
Evidence are referred to as "FRE."

1 except from Brenda's discharge.

2 Ty Narada ("Ty"), who is not an attorney, filed a response  
3 ("Response") to the Complaint in behalf of Brenda by letter on  
4 July 21, 2010.<sup>3</sup> In the Response, Ty denied that Brenda had  
5 acquired any ownership interest in the Motel Property. He also  
6 denied that Brenda had "defrauded the system." He further  
7 alleged that "Brenda was threatened with imprisonment if she did  
8 not sign the 'Statement of Claimant or Other Person' being  
9 submitted by SSA as evidence against her." (Emphasis in  
10 original.) He further alleged that Brenda was a "special needs  
11 individual incapable of defending herself."

12 1. Filing of Summary Judgment Motion and Supporting Documents

13 On or about December 1, 2010, the SSA filed a motion for  
14 summary judgment ("Summary Judgment Motion") in the Adversary  
15 Proceeding. The Summary Judgment Motion was supported by a  
16 Statement of Facts that, in turn, relied upon 1) a memorandum and  
17 report of the Office of the Inspector General of the SSA, dated  
18 September 27, 2004 ("Investigation Report"), and 2) Statements of  
19 Claimant or Other Person signed by Brenda and her then husband,  
20 George Bannister ("George"), agreeing to repay overpayments of  
21 supplemental Social Security income benefits, each dated  
22 September 22, 2004. The Investigation Report and the referenced  
23 statements are attached as exhibits to the statement of facts but  
24 are not authenticated by affidavit or declaration.

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26 <sup>3</sup> Since Arizona is a community property state, Ty is very  
27 interested in the disposition of this appeal because a portion of  
28 his earnings may be subject to execution to satisfy the debt to  
SSA if its claim is excepted from Brenda's discharge.

1 In the Investigation Report, the SSA's Office of the  
2 Inspector General, Office of Investigations ("OI") reported the  
3 following: In 1992, George and Brenda applied for and  
4 subsequently began receiving Social Security income benefits.  
5 The addresses used by George and Brenda were a street address and  
6 post office address, both of which were for the "Copperstate  
7 Motel." In February 1998, the Yavapai County Police Department  
8 received an anonymous tip that George and Brenda owned and  
9 operated the Copperstate Motel, which triggered the OI  
10 investigation.

11 Following a preliminary investigation as to the ownership of  
12 the Copperstate Motel, on March 13, 1998, the OI sent an SSI  
13 Notice of Appointment to George and Brenda advising them that  
14 they were scheduled for a "review" regarding their SSI  
15 eligibility, which would entail a telephone interview(s). On  
16 March 26, 1998, SSA Claims Representative Donna Learned called  
17 the telephone number provided by George, and when George  
18 answered, conducted the interview. George advised that he and  
19 Brenda lived in a house and paid rent to his sister, Vicky Davis.  
20 He further stated that neither he nor Brenda worked or received  
21 any income other than their SSI benefits. He confirmed that  
22 neither he nor Brenda "had their names on any deeds or mortgages,  
23 nor did they have any interest in any life estates or any un-  
24 probated estates." Based on the interview, there were no  
25 indications that George was ineligible for SSI income benefits.

26 Approximately fifteen minutes later, Ms. Learned called the  
27 same telephone number with a follow-up question. Brenda answered  
28 the telephone and said "Copperstate." The follow-up question was

1 whether their daughter, Tammy Bannister ("Tammy"), contributed to  
2 the household. Brenda responded that Tammy worked but did not  
3 contribute to the household because she was attending school.  
4 Ms. Learned then inquired of Brenda why she answered the  
5 telephone "Copperstate?" Brenda stated that "it was a motel  
6 where she and George lived, however they did not work there.  
7 Brenda also said that Vicky Davis owns the Copperstate Motel."

8 On March 30, 1998, George and Brenda went to the SSA's  
9 Prescott, Arizona District Office and provided the following  
10 information to Ms. Learned: Tammy had inherited the Copperstate  
11 Motel from George's mother, Doris Bannister, when she died in  
12 1994. "Tammy was unable to acquire the property until she was  
13 twenty-one (21) years old, so the [Motel Property] stayed in the  
14 deceased's name." There was a mortgage on the Motel Property  
15 that Vicky Davis paid from the Copperstate Motel business account  
16 "(however Brenda stated that Vicky has Brenda sign the check to  
17 the mortgage company). George and Brenda do not read very well,  
18 and they have trouble completing forms and reading or writing  
19 letters. Due to this they rely on Vicky and Ron Davis to assist  
20 them." George and Brenda apparently stated that they paid rent  
21 of \$450 each month to Vicky and Ron Davis, who did the books for  
22 the Copperstate Motel. However, George and Brenda stated that  
23 they received no wages or proceeds from income of the Copperstate  
24 Motel and that they only answered the telephone. George and  
25 Brenda provided Ms. Learned with a copy of Doris Bannister's  
26 will. Vicky Davis subsequently advised the OI in writing that  
27 she was not the landlord for the residence located on the Motel  
28 Property.

1           Thereafter, OI investigated the Copperstate Motel situation  
2 further, and among other information, located a classified  
3 advertisement on the internet listing the Copperstate Motel for  
4 sale for \$200,000 and advising any interested parties to call  
5 George and Brenda for details. Yavapai County Recorder's Office  
6 records reflect that Doris Bannister died in approximately  
7 May 1994, and following probate, a deed of distribution reflected  
8 that title to the Motel Property was held equally among Brenda,  
9 George and Tammy.<sup>4</sup>

10           On September 22, 2004, the OI conducted a further in-person  
11 interview of George and Brenda at the SSA Prescott, Arizona  
12 District Office. After the OI officer disclosed the results of  
13 its investigation to date, George and Brenda provided the  
14 following information, among other things, to the OI officer:

15           In approximately August 1999, George, Brenda and Tammy  
16 received equal interest in the [Motel Property].  
17 George and Brenda failed to report this acquisition to  
18 the SSA, as they were required. From about August 1999  
19 through September 2004, George and Brenda participated  
20 in activities at the Copperstate Motel which could have  
21 been considered work by the SSA. George and Brenda ran  
22 the [Copperstate Motel] for Tammy, who was attending  
college in north Phoenix, Arizona. George and Brenda  
also failed to report this activity to the SSA, which  
they were required. George and Brenda also admitted to  
attempting to sell the Copperstate Motel for  
approximately \$200,000 for gainful purpose. George and  
Brenda understood that they should have reported the  
aforementioned information to the SSA, and they were

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24           <sup>4</sup> There is an error in the Investigation Report with respect  
25 to the Motel Property title following probate: On page 5, the  
26 Investigation Report states that under the deed of distribution,  
27 the Motel Property "was equally distributed among George, Doris,  
28 and Tammy Bannister." In their Further Submissions, the Naradas  
included an actual copy of the distribution deed, dated  
October 16, 1999, transferring title as 1/3 each tenants in  
common to George, Brenda and Tammy.

1 willing to pay any money back to the SSA which they  
2 ineligibly received. George and Brenda provided a  
3 sworn and signed statement regarding the above  
information.

4 OI concluded that George and Brenda each received an approximate  
5 total of \$24,575 in SSI benefits for which they were ineligible.

6 George and Brenda each signed an SSA Statement of Claimant  
7 or Other Person on September 22, 2004, stating the following:

8 I agree to repay the overpayment on Supplemental  
9 Security Income benefit from my on going SSI benefit  
amount till it is repaid.

10 2. Further Filings and Proceedings on the Summary Judgment  
11 Motion

12 The bankruptcy court issued an Order Setting Briefing  
13 Schedule ("Scheduling Order") for the Summary Judgment Motion on  
14 December 2, 2010. Counsel for the SSA prepared and served on the  
15 Naradas a Notice of Hearing ("Hearing Notice"), scheduling a  
16 hearing on the Summary Judgment Motion for February 18, 2011.  
17 The Hearing Notice included a copy of the Scheduling Order. The  
18 Scheduling Order advised the parties that they were subject to  
19 the requirements of Rule 9013-1(g)<sup>5</sup> of the bankruptcy court's  
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21 <sup>5</sup> Local Rule 9013-1(g) provides, in relevant part:

22 (g) Motions for Summary Judgment. In any  
23 administrative case, contested matter or adversary  
24 proceeding, any motion for summary judgment shall set  
25 forth separately from the memorandum of law, and in  
26 full, the specific facts on which movant relies in  
27 support of the motion. The specific facts shall be set  
28 forth in serial fashion, not in narrative form. As to  
each fact, the statement shall refer to a specific  
portion of the record where the fact may be found

(continued...)

1 local rules ("Local Rule 9013-1(g)"), meaning that each party was  
2 required to file a separate statement of facts and a memorandum  
3 of points and authorities supporting its position "as set forth  
4 in the Rule." The Naradas' responsive memorandum in opposition  
5 to the Summary Judgment Motion was due no later than 30 days  
6 after service of the Summary Judgment Motion. The Order Setting  
7 Briefing Schedule further advised that, "Failure to timely file a  
8 responsive memorandum shall constitute consent to the granting of  
9 the motion." The SSA calculated the deadline for the Naradas'  
10 response in opposition to the Summary Judgment Motion under the  
11 Scheduling Order as January 3, 2011.

12 The Naradas did not submit any opposition to the Summary  
13 Judgment Motion by the deadline in the Scheduling Order.  
14 However, on January 28, 2011, Ty filed copies of three letters  
15 (collectively, "Letters") with the bankruptcy court in behalf of  
16 Brenda that he served on counsel for the SSA: The first letter,  
17 and the only one of the three that reflects a signature by Ty,  
18 appears to be a discovery request to the SSA.

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21 <sup>5</sup>(...continued)  
22 (i.e., affidavit, deposition, etc.). Any party  
23 opposing summary judgment must comply with the  
24 foregoing in setting forth the specific facts,  
25 including those facts which establish a genuine issue  
26 of material fact precluding summary judgment. . . .  
27 Unless otherwise set forth in the Rules, the Local  
28 Rules, or in an order of the court, . . . the party  
opposing or responding to a motion for summary judgment  
shall have thirty days after service within which to  
serve and file a responsive memorandum; the moving  
party shall have 15 days after service of the  
responsive memorandum to serve and file a reply.



1           The second letter, dated January 11, 2011, and addressed to  
2 the bankruptcy court, includes Ty's statements as to the results  
3 of his investigations with regard to the issues raised in the  
4 Summary Judgment Motion. With respect to ownership of the Motel  
5 Property, Ty states the following:

6           Brenda's name did not appear on any of the original  
7 transactions, but was added in a corrective deed in  
8 April of 2007. I initially believed that the deed had  
9 been forged to implicate Brenda, since we had been  
married for two years by that time. Brenda's daughter  
informed me that the corrective deed is legitimate.  
(Emphasis added.)

10 He further states that Brenda's daughter would testify that  
11 Brenda received no proceeds from the sale of the Motel Property.  
12 In addition, he alleges that in 2004, Brenda "was threatened with  
13 imprisonment if she did not sign a promissory note that [SSA was]  
14 using as evidence against her." Ty admits that he was not  
15 present at the time, but "Brenda called me to describe what  
16 happened: An armed officer was going to take her to prison if she  
17 didn't 'sign a paper.'"

18           The third letter, which is signed neither by Ty nor Brenda  
19 and is addressed to "Whom it may concern," although it appears in  
20 context to be addressed to SSA's counsel, includes further  
21 factual statements relating to the legitimacy of Brenda's claim  
22 for Social Security benefits and her alleged lack of any interest  
23 in the Motel Property.

24           On or about February 11, 2011, within the 15-day period for  
25 filing replies to responses opposing motions for summary judgment  
26 under Local Rule 9013-1(g), SSA filed a Motion for Summary  
27 Disposition ("Disposition Motion"), requesting that the Summary  
28 Judgment Motion be granted based on Brenda's failure to respond

1 to the motion by the deadline required in the Scheduling Order  
2 and her resulting consent to the granting of the Summary Judgment  
3 Motion, as provided in the Scheduling Order. In the Disposition  
4 Motion, the SSA noted the late filing of the Letters on  
5 January 28, 2011, but argued that none of the Letters sufficed as  
6 a response in opposition to the Summary Judgment Motion, as they  
7 set forth nothing more than unsupported statements of Ty, who was  
8 not married to Brenda during the period in question. However,  
9 the SSA noted that the January 11, 2011 letter to the bankruptcy  
10 court stated that a deed listing Brenda as an owner of the Motel  
11 Property was "legitimate" according to her daughter.

12       Thereafter, for reasons that we cannot fathom, counsel for  
13 the SSA submitted an order, purportedly based on the Disposition  
14 Motion, providing that the Adversary Proceeding "is hereby  
15 dismissed with prejudice, with each party to bear its own costs  
16 and attorneys' fees," which the bankruptcy court promptly entered  
17 on February 16, 2011.

18       However, recognizing their fatal error, on February 17,  
19 2011, counsel for the SSA filed a motion to vacate the erroneous  
20 order previously submitted and submitted a new form of order  
21 granting the Summary Judgment Motion in its entirety. On  
22 February 17, 2011, the bankruptcy court entered orders vacating  
23 the previously entered dismissal order and granting the Summary  
24 Judgment Motion. Accordingly, the hearing scheduled for  
25 February 18, 2011, was taken off the calendar.

26 3. The Naradas' Motion for Relief from the Summary Judgment  
27 Order

28       On March 3, 2011, the Naradas filed a Motion to Review (Rule

1 59) and Motion for Relief (Rule 60) ("Relief Motion"), requesting  
2 the bankruptcy court to grant them relief from the order granting  
3 the Summary Judgment Motion, arguing that they did present an  
4 opposition to the Summary Judgment Motion in the Letters and that  
5 Brenda did not obtain Social Security benefits by fraud, and she  
6 never had an ownership interest in the Motel Property. The SSA  
7 filed a response to the Relief Motion, arguing that, in fact,  
8 Brenda did not file a timely response to the Summary Judgment  
9 Motion, but in any event, the Letters did not raise a genuine  
10 issue of material fact sufficient to justify vacating the summary  
11 judgment order.

12 On April 27, 2011, the bankruptcy court held a hearing  
13 ("Initial Hearing") on the Relief Motion at which counsel for the  
14 SSA and both of the Naradas were present. At the Initial  
15 Hearing, Brenda was not put under oath, but she stated that  
16 although she cleaned rooms and did some paperwork with respect to  
17 the Motel Property, she "never really was in charge of it." Tr.  
18 of April 27, 2011 hr'g, 3:1-3. In response to the bankruptcy  
19 court's questions regarding her signing the Statement of Claimant  
20 or Other Person, Brenda stated that, "the officer was there at  
21 the social security place, told me I had to agree everything what  
22 they said and I had to sign the papers that he filled [sic]. If  
23 I didn't, I would go to jail." She denied that the Statement of  
24 Claimant or Other Person that she signed was true and correct.  
25 In further response to the bankruptcy court's questions, Brenda  
26 stated that she did not have a lawyer and was not getting legal  
27 advice from anybody.

28 After hearing Brenda's statements, the bankruptcy court

1 strongly urged the Naradas to obtain legal advice and if possible  
2 have a lawyer representing them at a continued hearing on the  
3 Relief Motion. The bankruptcy court then continued the hearing  
4 to July 22, 2011.

5 On July 13, 2011, the bankruptcy court received further  
6 written submissions (the "Further Submissions") from Ty in behalf  
7 of Brenda. In his cover letter enclosing the Further  
8 Submissions, Ty reiterated the allegations stated in the Response  
9 that Brenda is a special needs person, whose "speech and learning  
10 disability renders her incapable of adequately defending  
11 herself." As noted earlier, the Further Submissions included a  
12 copy of a deed of distribution from Doris Bannister's probate,  
13 dated October 16, 1999, vesting title to the Motel Property in  
14 George, Brenda and Tammy as 1/3 tenants in common.

15 The continued hearing ("Final Hearing") on the Relief Motion  
16 was held on July 22, 2011, as scheduled, with the Naradas and  
17 counsel for the SSA in attendance. At the Final Hearing, Ty  
18 advised the bankruptcy court that the Naradas had been unable to  
19 obtain counsel and that they had submitted all of their evidence  
20 to the bankruptcy court for consideration. In response, counsel  
21 for the SSA argued that nothing submitted by the Naradas raised  
22 any genuine issue of material fact that would justify vacating  
23 the order granting the Summary Judgment Motion. Counsel for the  
24 SSA consequently urged that the Relief Motion be denied. The  
25 bankruptcy court then took the matter under advisement.

26 On August 30, 2011, the bankruptcy court entered a Minute  
27 Entry/Order ruling that based on the parties' arguments and  
28 submissions with respect to the Relief Motion, "the court is not

1 convinced that the judgment that has been entered was erroneously  
2 entered by the court or that other reasons were presented that  
3 warrant the vacating of that judgment." On September 12, 2011,  
4 the bankruptcy court entered an order denying the Relief Motion.  
5 The Naradas timely appealed.

#### 6 Jurisdiction

7 The bankruptcy court had jurisdiction pursuant to 28 U.S.C.  
8 §§ 1334 and 157(b)(2)(I), and we have jurisdiction under 28  
9 U.S.C. § 158.<sup>6</sup>

#### 10 Issue

11 Did the bankruptcy court err in entering a summary judgment  
12 order excepting Brenda's debt to the SSA from her discharge in  
13 chapter 7?<sup>7</sup>

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15 <sup>6</sup> We note that although the bankruptcy court docket reflects  
16 that a "Judgment" was signed on February 17, 2011 (Docket No.  
17 20), the parties' excerpts of record include only the order  
18 granting the Summary Judgment Motion on that date and no separate  
19 judgment. Under Civil Rule 56, generally a separate document  
20 embodying a final judgment that is distinct from the order  
21 granting a motion for summary judgment should be entered. See  
22 Rule 9021. However, if in fact a separate judgment in favor of  
23 the SSA has not been entered in the Adversary Proceeding, the  
24 parties here have waived that requirement by treating the order  
25 granting the Summary Judgment Motion as a final judgment. See  
26 Casey v. Albertson's Inc., 362 F.3d 1254, 1256-59 (9th Cir.  
27 2004), cert. denied, 543 U.S. 870 (2004).

28 <sup>7</sup> The Naradas actually list four issues for consideration in  
the "Statement of Issues" in Appellants' Brief, the first of  
which is covered by the question stated above. The second issue,  
we assume raised by Ty, is the unfairness of the impact of  
Arizona's community property laws on Ty and his children in the  
event that Brenda's debt to the SSA is excepted from her  
discharge. This issue was not raised before the bankruptcy court  
(continued...)



1 Hinkson, 585 F.3d 1247, 1261-62 (9th Cir. 2009) (en banc).  
2 First, we consider de novo whether the bankruptcy court applied  
3 the correct legal standard to the relief requested. Id. Then,  
4 we review the bankruptcy court's fact findings for clear error.  
5 Id. at 1262 & n.20. We must affirm the bankruptcy court's  
6 findings unless we conclude that they are "(1) 'illogical,'  
7 (2) 'implausible,' or (3) without 'support in inferences that may  
8 be drawn from the facts in the record.'" Id.

### 9 Discussion

#### 10 1. Summary Judgment Standards

11 Granting a motion for summary judgment is appropriate only  
12 if there is no genuine dispute as to any material fact, and the  
13 moving party is entitled to judgment as a matter of law. Civil  
14 Rule 56(a); Rule 7056; State Farm Mut. Auto Ins. Co. v. Davis,  
15 7 F.3d 180, 182 (9th Cir. 1993). "Material facts" are such facts  
16 as may affect the outcome of a case under governing law.  
17 Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). A  
18 dispute concerning a material fact is "genuine" only if there is  
19 sufficient evidence to justify a finding in favor of the non-  
20 moving party. Id. However, all justifiable inferences from the  
21 evidence presented are to be considered in favor of the non-  
22 moving party. Id. at 255.

#### 23 2. The Evidence before the Bankruptcy Court

24 Section 523(a)(2)(A) excepts from a debtor's discharge any  
25 debt for money obtained by false pretenses, a false  
26 representation, or actual fraud. In order to meet its burden to  
27 except a debt from discharge under § 523(a)(2)(A), a creditor  
28 must establish each of five elements by a preponderance of the

1 evidence.

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

9 Turtle Rock Meadows Homeowners Ass'n v. Slyman (In re Slyman),  
10 234 F.3d 1081, 1085 (9th Cir. 2000). However, recognizing the  
11 reality that few debtor defendants are likely to admit to  
12 defrauding their creditors, "fraudulent intent may be established  
13 by circumstantial evidence, or by inferences drawn from a course  
14 of conduct." Devers v. Bank of Sheridan, Mont. (In re Devers),  
15 759 F.2d 751, 753-54 (9th Cir. 1985). See also First Beverly  
16 Bank v. Adeeb (In re Adeeb), 787 F.2d 1339, 1343 (9th Cir. 1986).

17 In the Complaint, the SSA alleged that Brenda had obtained  
18 \$24,575 in Supplemental Security Income disability benefits  
19 payments for which she was ineligible as a result of material  
20 omissions and misrepresentations with respect to an ownership  
21 interest in the Motel Property and George and Brenda's use of the  
22 Motel Property for "substantial gainful activity" from  
23 approximately September 1999 to September 2004. The only  
24 evidence submitted by the SSA in support of the Summary Judgment  
25 Motion was the Investigation Report and the Statements of  
26 Claimant or Other Person signed by George and Brenda on  
27 September 22, 2004. However, neither the Investigation Report  
28 nor the statements were authenticated or identified by affidavit  
or declaration, which is a condition precedent to their  
admissibility as evidence under FRE 901(a).

In deciding a motion for summary judgment, a bankruptcy



1 court only can consider admissible evidence.

2 A trial court can only consider admissible evidence in  
3 ruling on a motion for summary judgment. See [Civil  
4 Rule] 56(e); Beyene v. Coleman Sec. Servs., Inc., 854  
5 F.2d 1179, 1181 (9th Cir. 1988). Authentication is a  
6 "condition precedent to admissibility," and this  
7 condition is satisfied by "evidence sufficient to  
8 support a finding that the matter in question is what  
9 its proponent claims." [FRE] 901(a). We have  
10 repeatedly held that unauthenticated documents cannot  
be considered in a motion for summary judgment. See  
Cristobal v. Siegel, 26 F.3d 1488, 1494 (9th Cir.  
1994); Hal Roach Studios, Inc. v. Richard Feiner & Co.,  
Inc., 896 F.2d 1542, 1550-51 (9th Cir. 1989); Beyene,  
854 F.2d at 1182; Canada v. Blain's Helicopters, Inc.,  
831 F.2d 920, 925 (9th Cir. 1987); Hamilton v. Keystone  
Tankship Corp., 539 F.2d 684, 686 (9th Cir. 1976).

11 Orr v. Bank of America, NT & SA, 285 F.3d 764, 773 (9th Cir.  
12 2002) (emphasis added).

13 In addition, the Investigation Report is hearsay,<sup>8</sup> and there  
14 is nothing in the record to establish that it would be admissible  
15 in evidence under an exception to the general rule that hearsay  
16 evidence is not admissible.<sup>9</sup> See FRE 802.

17 Consequently, no admissible evidence was submitted in  
18 support of the Summary Judgment Motion, and on that basis, it was  
19 error for the bankruptcy court to grant the motion in spite of  
20 the Naradas' ineffective response, in light of the requirements  
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22  
23 <sup>8</sup> Under FRE 801(c), "hearsay" is defined as "a statement,  
24 other than one made by the declarant while testifying at the  
25 trial or hearing, offered in evidence to prove the truth of the  
matter asserted."

26 <sup>9</sup> The exception for "public records and reports" under FRE  
27 803(8) may apply with respect to the Investigation Report, but  
28 that is a matter we leave to the bankruptcy court for  
consideration following remand.

1 of the Scheduling Order and Local Rule 9013-1(g).<sup>10</sup> We conclude  
2 in these circumstances that the order granting the Summary  
3 Judgment Motion should be vacated, and the Adversary Proceeding  
4 should be remanded to the bankruptcy court for further  
5 proceedings. Accordingly, any issues with respect to the Relief  
6 Motion are moot.

7 Conclusion

8 For the foregoing reasons, we VACATE the summary judgment  
9 order and REMAND to the bankruptcy court for further appropriate  
10 proceedings.

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<sup>10</sup> At oral argument, counsel for the SSA admitted that even  
27 considering the content of the Investigation Report, there was  
28 insufficient evidence to meet the burden of proof on each element  
to support a judgment in favor of the SSA on its § 523(a)(6)  
claim.