

OCT 07 2011

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

NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT

| | | | |
|----|------------------|---|---|
| 5 | In re: |) | BAP No. CC-11-1096-DKiPa |
| | |) | |
| 6 | GLENN S. THOMAS, |) | Bk. No. 09-38191-CB |
| | |) | |
| 7 | Debtor. |) | Adv. No. 10-01053-CB |
| | |) | |
| 8 | JUSTIN PARRISH, |) | |
| | |) | |
| 9 | Appellant, |) | |
| | |) | |
| 10 | v. |) | M E M O R A N D U M ¹ |
| | |) | |
| 11 | GLENN S. THOMAS, |) | |
| | |) | |
| 12 | Appellee. |) | |
| | |) | |

Submitted Without Argument on September 23, 2011
at Pasadena, California

Filed - October 7, 2011

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

Honorable Catherine E. Bauer, Bankruptcy Judge, Presiding

Appearances: Appellant Justin Parrish, pro se, on brief; Appellee
Glenn S. Thomas, pro se, on brief.

Before: DUNN, KIRSCHER, and PAPPAS, Bankruptcy Judges.

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

1 The bankruptcy court dismissed an adversary proceeding on the
2 basis that the creditor did not establish that the debt was incurred
3 by fraud for purposes of § 523(a)(2)(A).² While we have serious
4 concerns about the process by which the bankruptcy court reached its
5 conclusions, we AFFIRM, because based upon our review, any error by
6 the bankruptcy court did not affect the ultimate determination where
7 we agree that the creditor did not prove, by a preponderance of the
8 evidence on each of the required elements, that the debt was
9 incurred by fraud.

10 I. FACTS

11 Between April 29, 2008, and August 1, 2008, Justin Parrish
12 loaned Glenn S. Thomas and/or Mr. Thomas's business affiliates
13 \$198,120.38 in nine separate transactions. During the period
14 July 2008 through November 2008, Mr. Thomas made payments to
15 Mr. Parrish on the loans in an aggregate amount of \$9,120.00. In
16 May 2009, having received no further payments from Mr. Thomas,
17 Mr. Parrish sued Mr. Thomas in the Superior Court of California,
18 County of Orange ("State Court Suit"), alleging, inter alia, that
19 the debt Mr. Parrish was owed was the result of fraudulent conduct
20 by Mr. Thomas in obtaining the loans. The record does not reflect
21 whether judgment was entered against Mr. Thomas in the State Court
22 Suit.

23
24 ² Unless otherwise specified, all chapter and section
25 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532, and
26 all "Rule" references are to the Federal Rules of Bankruptcy
Procedure, Rules 1001-9037. "Civil Rule" references are to the
Federal Rules of Civil Procedure.

1 Mr. Thomas filed a voluntary chapter 7 petition on November 20,
2 2009. On January 28, 2010, Mr. Parrish filed an adversary
3 proceeding in the bankruptcy court seeking to have Mr. Thomas's
4 debt³ to him declared nondischargeable pursuant to § 523(a)(2).

5 Following the parties' unsuccessful attempt to mediate the
6 dispute, the bankruptcy court set the matter for trial ("Trial"),
7 utilizing an "Order Setting Trial Date and Establishing Procedures
8 for Conduct of Trial" ("Trial Procedures Order"). As relevant to
9 the appeal before this Panel, the Trial Procedures Order

10 (a) mandated the presentation of direct testimony by declaration,
11 (b) established the procedure for marking, assembling, and lodging
12 exhibits with the bankruptcy court, and (c) clarified that unless
13 the parties were prepared to stipulate the exhibits into evidence,
14 bona fide objections were reserved and the issue of admissibility
15 was deferred until an exhibit was offered into evidence.⁴ The Trial

16 _____
17 ³ An individual named Robert Vance also was involved in some
18 of these transactions. The complaint in the adversary proceeding
19 named Mr. Vance as a defendant. The bankruptcy court dismissed
20 Mr. Vance from the adversary proceeding both because he was not the
21 debtor in the case in which the adversary proceeding was filed, and,
22 more importantly, because he was a debtor in a case in the Eastern
23 District of California, with the consequence that the automatic stay
24 precluded Mr. Parrish from including Mr. Vance as a defendant in his
25 adversary proceeding against Mr. Thomas.

26 ⁴ Specifically, paragraph B.3. of the Trial Procedures Order
states:

If a witness refers in [his] declaration to an exhibit to
be admitted into evidence, the exhibit must be identified
in the declaration by exhibit number or letter. The

(continued...)

1 Procedures Order set February 14, 2011, as the deadline for the
2 parties to submit written objections to the admission of exhibits to
3 opposing counsel, and required the parties to lodge the written
4 objections with the Courtroom Deputy no later than February 17,
5 2011. Finally, the Trial Procedures Order stated that evidentiary
6 objections would be adjudicated at the time an exhibit was offered
7

8 ⁴(...continued)

9 exhibit itself need not be attached to the witness's
10 declaration, but must be included in the exhibit binder
11 and marked for identification in accordance with Section C
12 of this order. Unless the parties stipulate to the
13 admittance of an exhibit, the foundation for admittance of
14 exhibits (other than for impeachment or rebuttal purposes)
must be established in the declaration. Exhibits
referenced in any declaration should be offered into
evidence when the declaration is offered into evidence.

15 Paragraph C.2. states:

16 All exhibits must be assembled in a binder and lodged with
17 the Courtroom Deputy by the deadline set forth in Section
18 D. Each such binder must include as its first page an
19 exhibit register. Parties are required to assemble an
original and four (4) copies of its exhibit binders.

20 Paragraph C.3. states:

21 At the commencement of trial, the parties must be prepared
22 to stipulate into evidence all exhibits that are
23 admissible for at least one purpose. Bona-fide objections
may be reserved, with the issue of admissibility deferred,
until the exhibit is offered into evidence.

24 Paragraph D.5. states in relevant part:

25 Evidentiary objections will be adjudicated at the time a
26 witness declaration or exhibit is offered into evidence.

1 into evidence.

2 A. Mr. Thomas's Motions

3 On January 28, 2011, Mr. Thomas filed a motion to dismiss the
4 adversary proceeding ("Dismissal Motion"), asserting that
5 Mr. Parrish had failed to comply with the Trial Procedures Order's
6 meet and confer requirement, which precluded the discussion and
7 resolution of evidentiary issues. Mr. Parrish opposed the Dismissal
8 Motion, asserting that Mr. Thomas had failed to cooperate in
9 preparing the case for trial. In his declaration in support of his
10 opposition, Mr. Parrish stated:

11 I am alleging that [Mr. Thomas] has defrauded me of
12 over \$150,000. Because I have brought this adversary
13 action [Mr. Thomas is] alleging that I am harassing [him].
[Mr. Thomas] and his business partner Robert M. Vance seem
to enjoy making fun of me and insulting me.

14 As a result of this, I am reluctant to meet with them
15 in person or take their telephone calls. I wrote
16 Mr. Thomas and advised [him] of our responsibilities under
the local rules. I asked him to stipulate to the
authenticity of documents. He pretended not to receive my
letter.

17 He then refused to stipulate to the authenticity of
18 any documents, all of which he and his partner produced,
19 and my checks, which he happily cashed. Very little
cooperation was needed in order to produce the Pretrial
Order. My efforts to comply with the [Trial Procedures
Order] are detailed in my Declaration currently on file.

20 On February 3, 2011, Mr. Thomas filed a motion to exclude
21 ("Exclusion Motion") the declaration testimony of all of
22 Mr. Parrish's witnesses except for Mr. Parrish himself. The
23 bankruptcy court set the Dismissal Motion and the Exclusion Motion
24 to be heard at the time of the Trial.

25 B. Mr. Parrish's Witness Declarations

26 Consistent with the Trial Procedures Order, On February 17,

1 2011, Mr. Parrish filed four witness declarations, the substance of
2 which we summarize below.

3 1. Declaration of Justin Parrish ("Parrish Declaration")

4 a. The Fiber Optic Job

5 Mr. Parrish testified that Mr. Thomas represented to him that
6 he and Mr. Vance had a large construction contract with QWEST to lay
7 39.5 miles of fiber optic cable in Northern California, when in fact
8 Mr. Thomas and Mr. Vance were only subcontractors on the fiber optic
9 job, and the work they were hired to do was "very minor."

10 Mr. Parrish further testified that Mr. Thomas and Mr. Vance
11 represented to him that they needed to borrow \$74,000.38 to purchase
12 heavy equipment to perform the fiber optic job, when in fact
13 (1) they did not need the equipment to perform the sub-contract,
14 (2) they never purchased the equipment, and (3) the Equipment Lease
15 and Purchase Agreement Mr. Thomas prepared in connection with the
16 loan was fraudulent.

17 Mr. Parrish testified that he was introduced to Mr. Thomas by a
18 mutual business associate, Dave Mesa, after Mr. Parrish told
19 Mr. Mesa that he had a home equity line of credit and that he wished
20 to loan out money from that credit line at a higher rate of interest
21 than would be owed on the credit line. Mr. Parrish testified that
22 at their first meeting, Mr. Thomas "explained to me that he was
23 involved in a large fiber optic job in Northern California, but that
24 he needed capital to land the job." Mr. Thomas did not immediately
25 accept Mr. Parrish's offer to loan him money at 15% interest. On
26 April 29, 2008, Mr. Thomas and Mr. Parrish talked about Mr. Thomas's

1 capital needs for the large fiber optic job in Northern California.
2 Mr. Thomas explained that he and Mr. Vance needed funding for the
3 fiber optic job but the banks were not lending. Mr. Thomas showed
4 Mr. Parrish a joint venture agreement ("Joint Venture Agreement")
5 between Mr. Thomas and Mr. Vance.⁵ The Parrish Declaration referred
6 to a copy of the Joint Venture Agreement as having been "marked as
7 Exhibit 1." It appeared to Mr. Parrish from the Joint Venture
8 Agreement that Mr. Thomas and Mr. Vance were both California
9 Licensed Contractors who had combined forces to do a large fiber
10 optic job.

11 Based upon (1) Mr. Thomas's representation that the joint
12 venture had a big job laying 39.5 miles of fiber optic cable,
13 (2) representations in the Joint Venture Agreement that
14 (a) described the sums of money that Mr. Thomas and Mr. Vance were
15 bringing to the joint venture, including Mr. Thomas's investment of
16 what Mr. Parrish asserts was "substantial sums of money" to finance
17 the project, and (b) recited that Mr. Thomas and Mr. Vance both were
18 licensed California contractors, and (3) the promises of Mr. Thomas
19 and Mr. Vance to repay any loans, Mr. Parrish decided to loan
20 Mr. Thomas and Mr. Vance money at 15% interest.

21 Mr. Parrish made the following loans, all at the request of Mr.
22 Thomas:

23

24 _____
25 ⁵ The Joint Venture Agreement stated that the exclusive
26 purpose of the joint venture was to be "[c]onstruction of 39.5 Qwest
Fiber job in Sacramento, Ca. Obtain AT&T ACAS Direct bidding
system."

- 1 • \$25,000 payable to the joint venture on April 29, 2008, so that
2 the joint venture could "get started." The Parrish Declaration
3 referred to a copy of this check as having been "marked as
4 Exhibit 2."
- 5 • \$25,000 payable to the joint venture on May 9, 2008, after Mr.
6 Thomas stated the joint venture had the big fiber optic job and
7 was getting started but needed additional funds to "get going."
8 The Parrish Declaration referred to a copy of this check as
9 having been "marked as Exhibit 3."
- 10 • \$60,446.43 payable to the joint venture on May 16, 2008, to
11 fund the purchase of items of heavy equipment identified in the
12 Equipment Lease. The Parrish Declaration referred to a copy of
13 the Equipment Lease as having been "attached as Exhibit 4."
14 The Parrish Declaration referred to a copy of this check "which
15 be [sic] offered as Exhibit 5." Mr. Thomas represented to Mr.
16 Parrish that the joint venture would purchase the equipment
17 identified in the Equipment Lease in Mr. Parrish's name and
18 that the titles to that equipment would be in the name of Mr.
19 Parrish, who then would lease the equipment to the joint
20 venture.
- 21 • \$13,554.75 payable to the joint venture on May 30, 2008, based
22 upon Mr. Thomas's representation that the joint venture needed
23 additional heavy equipment. The Parrish Declaration "offered
24 as Exhibit 6" a copy of this check. On May 30, 2008, Mr.
25 Thomas, Mr. Vance, and Mr. Parrish all signed an "Addendum to
26 Lease," which stated that the total lease amount was to be

1 \$74,000.38, with a monthly payment of \$3,360.85 to commence on
2 June 30, 2008. The Parrish Declaration "offered as Exhibit 7"
3 a copy of the Addendum to Lease.

4 • \$30,000 payable to the joint venture on June 25, 2008, based on
5 Mr. Thomas's representation that everything was going fine on
6 the fiber optic job but that the joint venture needed an
7 additional \$30,000 for "additional operating expenses." The
8 Parrish Declaration "presented as Exhibit 8" a copy of this
9 check. At the same time, Mr. Thomas presented Mr. Parrish with
10 an "Addendum to Joint Venture Agreement," which reflected that
11 \$80,000 was the amount "invested" by Mr. Parrish. The Parrish
12 Declaration "attached as Exhibit 13" a copy of the Addendum to
13 Joint Venture Agreement.

14 Mr. Parrish testified that he received payments of \$3,360 in
15 July 2008 and in August 2008, followed by three monthly payments in
16 the amount of \$800 each in September, October and November 2008.
17 Mr. Parrish received no further payments with respect to any of the
18 loans.

19 Mr. Parrish testified that he asked Mr. Thomas to send him the
20 titles to the equipment, but Mr. Thomas "kept putting me off."
21 After the payments stopped, Mr. Thomas told Mr. Parrish that the
22 government had "pulled the permits" on the fiber optic job for
23 environmental reasons and that it had been shut down. Mr. Thomas
24 provided Mr. Parrish a letter from Mr. Vance to substantiate the
25 explanation. The Parrish Declaration "offered as Exhibit 11" a copy
26 of Mr. Vance's letter to Mr. Thomas. Mr. Parrish further testified

1 that he first learned that the joint venture had not purchased the
2 equipment when Mr. Vance filed a bankruptcy petition in the Eastern
3 District of California. The Parrish Declaration "offered as Exhibit
4 10" a copy of Mr. Vance's Affidavit, which stated: "A decision was
5 made between myself, [Mr. Thomas] and [Mr. Parrish] to forego buying
6 the new equipment and utilize the funds we already had for that
7 purpose of keeping the job payrolls and material purchases going."

8 Mr. Parrish testified that he first learned that the fiber
9 optic job was only a subcontract when Mr. Thomas made the mandatory
10 disclosures in the adversary proceeding. Through discovery he also
11 learned that the joint venture had been "kicked off" the fiber optic
12 job.

13 b. "Personal" loans to Mr. Thomas

14 In addition to loans to the joint venture, Mr. Parrish also
15 made several loans to Mr. Thomas for his "personal projects," as
16 follow:

- 17 • \$17,500 as a personal loan on April 29, 2008. \$15,000 of this
18 amount was paid to Pacific Coast Construction and Electric
19 ("Pacific Coast"), Mr. Thomas's "dba";⁶ \$2,500 of this amount
20 was paid to Mr. Mesa at Mr. Thomas's request. This loan was to
21 be repaid by February 2009. Mr. Thomas offered as collateral
22 for this loan his custom Harley Davidson motorcycle. The
23 Parrish Declaration "offered as Exhibit 12" a copy of the
24

25 ⁶ The record reflects that this check actually was made
26 payable to Mr. Thomas.

1 promissory note. The Parrish Declaration "offered as Exhibit
2 13" a copy of Mr. Thomas's "pink slip" to the motorcycle.
3 Finally, the Parrish Declaration "offered as Exhibits 14 and
4 15" copies of the checks to "Pacific Coast" and to Mr. Mesa.
5 • \$6,000 to Mr. Thomas on May 23, 2008, for personal expenses.
6 Mr. Thomas stated he would be able to repay this loan from the
7 proceeds of a job he and Mr. Mesa were working on together.
8 This loan was to bear interest at 10% rather than 15% because
9 it was to be a short term loan. The Parrish Declaration
10 "offered as Exhibit 16" a copy of this check.
11 • \$6,000 to Mr. Thomas on June 30, 2008, for further operating
12 expenses for his business. Because Mr. Thomas represented that
13 he would be able to repay this loan "soon" from the proceeds of
14 a job he and Mr. Mesa were working on together, this loan also
15 bore interest at 10% rather than 15%. The Parrish Declaration
16 "offered as Exhibit 17" a copy of this check.
17 • \$14,620 to Pacific Coast on August 1, 2008, based on
18 (1) Mr. Thomas's statement that he needed that amount to post a
19 bond for a job in Beaumont, (2) Mr. Parrish's belief, as
20 suggested by Mr. Thomas's statements, that Mr. Mesa would be
21 involved in the Beaumont project, and (3) Mr. Thomas's promise
22 to repay the loan. The Parrish Declaration "offered as Exhibit
23 18" a copy of this check. Mr. Parrish learned in discovery
24 that Mr. Thomas never got this job; neither did Mr. Thomas
25 return the money that no longer was required for the bond. The
26 Parrish Declaration "offered as Exhibit 19" a copy of Mr.

1 Thomas's affidavit.

2 2. Declaration of Cory Wattenbarger ("Wattenbarger
3 Declaration")

4 Mr. Wattenbarger is a California Licensed Engineering
5 Contractor, whose testimony was offered as that of an expert
6 witness.⁷ Mr. Wattenbarger testified that Golden State Utilities,
7 not the joint venture, was the general contractor for the fiber
8 optic job. In response to a subpoena from Mr. Parrish, Golden State
9 Utilities provided a copy of its subcontract with the joint venture.
10 The services the joint venture was to perform under the subcontract
11 consisted of "digging out holes for . . . hand holes or manholes
12 with a backhoe and dump truck, installing the hand holes or manholes
13 and then replacing the dirt, asphalt or concrete when fully
14 installed." The purpose of the work was to connect individual
15 customers of QWEST to the main fiber optic line previously installed
16 by Golden State Utilities. The subcontract did not state an exact
17 quantity of work to be performed; instead it stated the amount of
18 work was "to be determined," and provided a unit price for each item
19 to be done.

20 Based on his review of "all of the materials"⁸ and upon his
21

22 ⁷ Mr. Parrish also filed a "qualification" declaration for
23 Mr. Wattenbarger, which does nothing more than detail
24 Mr. Wattenbarger's experience.

25 ⁸ Mr Wattenbarger testified that he had reviewed pre-trial
26 disclosures filed by both Mr. Thomas and Mr. Vance, Mr. Thomas's
bankruptcy petition and schedules, the Joint Venture Agreement, the
(continued...)

1 experience in supervising fiber optic jobs, Mr. Wattenbarger
2 testified that he believed Mr. Thomas's representation to
3 Mr. Parrish that the joint venture needed \$60,000 in capital to get
4 the job and keep it going was false. Mr. Wattenbarger testified
5 that to perform the subcontract, the joint venture would need
6 general liability insurance, workers' compensation insurance, and a
7 current contractor's license. It would need "[p]erhaps a few
8 thousand dollars to cover expenses such as diesel fuel." Under the
9 subcontract, the joint venture was required to supply HDPE pipe,
10 fiberglass manholes and hand holes, concrete manholes and fiber
11 optic cable. Mr. Wattenbarger speculated that "[d]epending upon
12 their credit at contractor warehouses, they probably could have
13 purchased these items on credit." Mr. Wattenbarger opined that the
14 joint venture would have needed only a very small sum to work on the
15 sub-contract. To support this opinion, Mr. Wattenbarger explained:

16 If [the joint venture] had all of the equipment it needed,
17 then it would need to supply diesel fuel to run the back
18 hoe, dump truck and an air compressor. [The joint
19 venture] was required to provide a four man crew. These
20 would be paid by wages, which payment could be delayed for
a week or two. [Golden State Utilities] would provide
progress payments and might advance job related costs to
Diamond Utilities as is common in the industry.

21 Wattenbarger Declaration at 5:10-15. (Emphasis added.) Mr.
22 Wattenbarger reiterated that to perform the subcontract, the joint
23

24 _____
25 ⁸(...continued)

26 Equipment Lease, Mr. Thomas's declaration of his direct testimony,
and documents produced by Golden State Utilities in response to a
subpoena from Mr. Parrish.

1 venture "absolutely needed a back hoe and dump truck and probably
2 needed an air compressor and jack hammer to hammer out concrete and
3 asphalt." He speculated that the joint venture "probably" had all
4 of this equipment and would not have to rent it.

5 With respect to the Equipment Lease, Mr. Wattenbarger testified
6 that performance of the subcontract would not require "those items
7 of heavy equipment." He testified that the joint venture would not
8 need the directional drill because "[a]ll of the work requiring
9 specialized drilling equipment had already been done by Golden State
10 Utilities." He further testified that the Vacmaster vacuum
11 excavator included in the Equipment Lease was not necessary because
12 a vacuum excavator is used for horizontal drilling, whereas the
13 joint venture would only need to dig vertical holes for the
14 placement of hand holes and manholes. While Mr. Wattenbarger
15 conceded that the joint venture might have need for an air
16 compressor as included in the Equipment Lease, his "best guess" was
17 that the joint venture "already owned one or rented one." With
18 respect to the Caterpillar track excavator included in the Equipment
19 Lease, Mr. Wattenbarger testified that the joint venture could
20 perform the subcontract without it, if the joint venture already had
21 a back hoe.

22 Mr. Wattenbarger testified that, based upon his review of
23 material with respect to the subcontract produced in discovery by
24 Golden State Utilities, Golden State Utilities terminated the
25 subcontract after the joint venture cut a large feeder fiber optic
26 cable while performing work on the subcontract. Golden State

1 Utilities then "back charged" the joint venture \$15,000 to make
2 repairs to the severed fiber optic cable. To substantiate this
3 testimony, Mr. Wattenbarger further testified that he had reviewed
4 Mr. Vance's bankruptcy schedules and that Mr. Vance had listed
5 Golden State Utilities as a creditor with a \$15,000 claim.

6 When asked for his opinion of the truth of Mr. Thomas's
7 representation to Mr. Parrish that he needed to borrow \$14,620 to
8 pay for a bond for one of his jobs, Mr. Wattenbarger prefaced his
9 testimony with the statement: "It is hard for me to say without
10 more information." He then speculated that the amount seemed high
11 for a bond, unless it was for a very large job. He concluded that
12 he had seen nothing in the materials produced by Mr. Thomas in
13 discovery to establish that Mr. Thomas had engaged in any large jobs
14 during 2008. On that basis, Mr. Wattenbarger opined that Mr. Thomas
15 had no reason or purpose to obtain a surety bond.

16 3. Declaration of Valean Watson ("Watson Declaration")

17 Mr. Watson had been a practicing attorney since 1979, and was
18 licensed to practice law in California. Mr. Watson opined that the
19 Joint Venture Agreement between Mr. Thomas and Mr. Vance was
20 prepared without the assistance of legal counsel, and he pointed out
21 numerous deficiencies in its terms. He further opined that although
22 an addendum to the Joint Venture Agreement refers to funds provided
23 by Mr. Parrish as amounts invested, the use of the term "invested"
24 did not make Mr. Parrish an investor. The Joint Venture Agreement
25 stated that "[t]he exclusive purpose of the Venture will be:
26 Construction of the 39.5 Qwest Fiber Job in Sacramento, CA." Based

1 on this clause, Mr. Watson opined that it "seem[ed] reasonable to
2 believe that [Mr. Thomas and Mr. Vance] were representing to
3 [Mr. Parrish] that they had a large, lucrative job and that they
4 obviously wanted him to believe that."

5 Mr. Watson similarly opined that the Equipment Lease had
6 serious deficiencies with respect to its terms, and that he would
7 have advised Mr. Parrish to avoid the transaction had he been
8 consulted prior to Mr. Parrish making the Equipment Loan.

9 Mr. Watson testified: "As for the overall force and effect of the
10 [Equipment Lease], I believe that it is unfortunate evidence that
11 [Mr. Thomas] sought to borrow a large sum of money from
12 [Mr. Parrish] without any reasonable intention of paying it back."

13 4. Declaration of Terry Magee ("Magee Declaration")

14 Mr. Magee was asked by Mr. Parrish to "validate" serial numbers
15 as described in the Equipment Lease. In order to do so, Mr. Magee
16 went to the local Ditch Witch dealer in Corona, California, on
17 January 24, 2011. With respect to the 2002 Ditch Witch JT920L
18 Directional Drill, the dealer had none in stock or on the premises.
19 Mr. Magee saw several trenchers and other specialized equipment
20 manufactured in 2002, and noted that the serial numbers "looked
21 nothing like the number represented in the [Equipment Lease]." The
22 serial numbers on the trailers for several items of Ditch Witch
23 products had serial numbers with a similar scheme as contained in
24 the Equipment Lease. Mr. Magee then concluded that the Ditch Witch
25 serial number in the Equipment Lease is for a trailer, not for a
26 Directional Drill or any other machinery.

1 Mr. Magee then went to the local Caterpillar dealer in Foothill
2 Ranch, California, where he inspected a 2007 Caterpillar 302.5 mini
3 excavator and noted its product ID number (CAT 302.5 CJGBB02509),
4 serial number (0141189), and arrangement number (2433064).

5 C. Mr. Thomas's Evidentiary Objections

6 On February 8, 2011, Mr. Parrish served his direct testimony
7 declarations on Mr. Thomas, together with his proposed exhibits and
8 proposed Unilateral Pre-Trial Order. On February 14, 2011,
9 Mr. Thomas objected to Mr. Parrish's proposed exhibits as follows:

10 Exhibit 1, the Joint Venture Agreement, because it was a
11 document between Mr. Thomas and Mr. Vance and had no
relevance to proof of fraud in the case;

12 Exhibit 4, the Equipment Lease, because it was not
13 relevant and was voided by an oral agreement between
Mr. Parrish and Mr. Thomas in 2008;

14 Exhibit 7, the Addendum to the Lease Agreement, because it
15 was not relevant and was voided by an oral agreement
between Mr. Parrish and Mr. Thomas in 2008;

16 Exhibit 9, the addendum to the Joint Venture Agreement,
17 because (1) it was a private document between Mr. Thomas
and Mr. Vance, (2) it had no relevance to proof of fraud
18 in the case, and (3) Mr. Parrish's interpretations of it
are not relevant where he was not a principle to the
agreement;

19 Exhibit 10, an Affidavit of Mr. Vance, because Mr. Vance
20 was not listed as a witness for Mr. Parrish and cannot
testify to its authenticity.

21
22 As previously noted, Mr. Thomas filed the Exclusion Motion. He
23 separately objected to Mr. Parrish's witness declarations in his
24 opposition to Mr. Parrish's proposed Unilateral Pre-Trial Order.

25 Mr. Thomas objected to the Wattenbarger Declaration on the
26 bases that (1) Mr. Parrish did not provide Mr. Thomas with an expert

1 witness report as required by Civil Rule 26, (2) Mr. Wattenbarger's
2 qualifications as an expert were suspect because Mr. Wattenbarger
3 received his licence from the California State License Board in June
4 of 2010, (3) Mr. Wattenbarger had no direct knowledge about the
5 case, and (4) Mr. Thomas had not had an opportunity to depose
6 Mr. Wattenbarger regarding any previous expert testimony he may have
7 given or how much Mr. Parrish was paying for his services.

8 Mr. Thomas objected to the Magee Declaration on the basis that
9 Mr. Magee had been acting as Mr. Parrish's legal counsel for the
10 past two years, had written all legal documents for Mr. Parrish in
11 the case to date, and held a law degree but could not pass the
12 California Bar Exam. Mr. Thomas asserted that Mr. Magee's testimony
13 about construction equipment serial numbers was "very suspect," and
14 said nothing about proof of fraud in the case.

15 Finally, Mr. Thomas objected to the Watson Declaration on the
16 basis that most of Mr. Watson's testimony concerned the intent
17 Mr. Thomas and Mr. Vance had in their minds when they wrote the
18 Joint Venture Agreement, something that Mr. Watson could not
19 possibly know.

20 D. The Trial

21 At the Trial, the bankruptcy court denied both the Dismissal
22 Motion and the Exclusion Motion. In ruling on the Exclusion Motion,
23 the bankruptcy court stated: "I'm going to err on the side of just
24 letting people talk . . . I'll . . . deny the motion to exclude the
25 proposed witnesses and [the testimony] will be worth whatever it is
26 worth." Tr. of Feb. 23, 2011 Trial at 4:1-5.

1 Mr. Thomas declined to cross examine Mr. Parrish's witnesses on
2 their declarations after the bankruptcy court explained that it was
3 Mr. Parrish's burden to prove his claim by a preponderance of the
4 evidence.

5 The record of the Trial reflects that a recess then was taken
6 at the request of the Clerk, in order to "distribute" the trial
7 exhibit books, an act which had been "overlooked" by the Clerk.
8 When the Trial resumed, neither the bankruptcy court nor the parties
9 made any reference to the trial exhibit books. Instead, the
10 bankruptcy court clarified that Mr. Thomas would not cross-examine
11 Mr. Parrish's witnesses on the submitted declarations. Mr. Thomas
12 then stated that he had no further testimony to offer on defense.

13 Thereafter, the following colloquy took place between the
14 bankruptcy court and Mr. Parrish:

15 THE COURT: It's your burden. So, now it's up to you.
16 What would you like to do now?

17 MR. PARRISH: We can hear all the witnesses.

18 THE COURT: You can't. Direct is only done by
19 declaration.

20 MR. PARRISH: Right, right. Okay.

21 THE COURT: Mr. Thomas does not want to cross examine.
22 So, they won't be on the stand.

23 MR. PARRISH: Okay. Well, I guess we'll - we could leave
24 it - I didn't expect this to be this quick.

25 THE COURT: All direct testimony is by declaration.

26 MR. PARRISH: I know.

THE COURT: All we do here is cross examination.

MR. PARRISH: Right. Well, if the witnesses don't - can't

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be heard now then -

THE COURT: Well, they were heard by declaration.

MR. PARRISH: Right, right. I guess I can just give it to your Honor then. I'm not sure where - I mean I can testify. I mean all of us but you're saying -

THE COURT: Did you do your direct testimony by declaration?

MR. PARRISH: Yes, I did.

THE COURT: And Mr. Thomas is not going to do any cross examination. That's how we do it.

MR. PARRISH: Okay. I know. I understand that. So, I guess the case is what it is then. So, you know, so I guess we leave it to your Honor to make a decision. I'm not sure what else to say. I can't provide any more than what the declarations say. So, that's it. We went to a lot of work on it.

THE COURT: Do you want to say anything? You can say anything further you'd like to say in argument, but the declarations are the direct testimony.

MR. PARRISH: Right, right. Basically, the feeling is that they basically solicited money from me under false pretenses, and they fully intended to declare bankruptcy. So, that's pretty much my summation. That covers most everything. There's a long list of exhibits that prove my point, as well as my expert - one of them is an expert witness testimonies [sic]. It's all in there. . . .

Tr. of Feb. 23, 2011 Trial at 6:10-7:25.

At the conclusion of argument, the bankruptcy court ruled:

These are very difficult cases to prove because unless frankly Defendant gets on the stand and admits - it gets that close. There has to be so much circumstantial evidence of intent to defraud or an omission that these are really difficult cases to prosecute. . . . Unfortunately for the Plaintiff, the - I don't see the level that we need in order to give a nondischargeability of the judgment because you have to prove by the preponderance of the evidence, and that's a fairly high standard.

1 You also have to prove - I'm going to go through the
2 elements, a representation known to be false with intent
3 to harm the creditor, justifiable reliance and proximate
4 cause. Based on what I've seen, I can't find all of those
5 have happened. So, I'm going to enter judgment in favor
6 of the Defendant. . . . I can't find that all those
7 elements from the In re Tallant case have been met. It is
8 a high burden of preponderance of the evidence.

9 Id. at 9:4-25.

10 Mr. Parrish expressed concern that the standard of proof was
11 higher than he had thought. To explain how difficult it is to prove
12 non-dischargeability, the bankruptcy judge recited the facts of the
13 only two non-dischargeable judgments she had obtained as a lawyer:

14 One was a doctor who was billing on dead people, billed
15 the government for work done on dead people. That was
16 pretty easy to prove because he knew they were dead and he
17 wasn't like a coroner. The other one was somebody on an
18 Indian reservation who was operating an illegal dump that
19 was killing people. It's one of those that the level is
20 so high it can be very difficult to get a
21 nondischargeability judgment.

22 Id. at 10:8-15.

23 In its Judgment After Trial ("Judgment") entered on February
24 24, 2011, the bankruptcy court stated:

25 Direct Testimony was presented by Declaration pursuant to
26 the [Trial Procedures Order]. The Defendant elected not
to cross-examine the Plaintiff's witnesses and the
Defendant did not provide any testimony or witnesses. The
parties also presented Exhibit Binders to the Court but
did not ask to submit any of the Exhibits into evidence.

27 . . .
28 The Court finds that Plaintiff did not meet the elements
29 of 11 U.S.C. § 523(a)(2) by a preponderance of the
30 evidence.

31 Mr. Parrish timely appealed the Judgment.

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II. JURISDICTION

The bankruptcy court had jurisdiction under 28 U.S.C. §§ 1334 and 157(b)(2)(I). We have jurisdiction under 28 U.S.C. § 158.

III. ISSUES

A. Whether the bankruptcy court made sufficient factual findings pursuant to Rule 7052.

B. Whether the bankruptcy court abused its discretion in not admitting Mr. Parrish's exhibits into evidence.

C. Whether the bankruptcy court erred in determining that Mr. Parrish did not prove by a preponderance of the evidence that his claim should be excepted from discharge under § 523(a)(2)(A).

IV. STANDARDS OF REVIEW

The question of dischargeability of a debt presents mixed issues of fact and law, which we 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)).

Whether there has been proof of an essential element of a cause of action under § 523(a)(2)(A) to except a debt from discharge is a factual determination reviewed for clear error. Anastas v. Am. Sav. Bank (In re Anastas), 94 F.3d 1280, 1283 (9th Cir. 1996). Clear error exists when, on the entire evidence, the reviewing court is left with a definite and firm conviction that a mistake was committed. Oney v. Weinberg (In Re Weinberg), 410 B.R. 19, 28 (9th Cir. BAP 2009).

We review the bankruptcy court's evidentiary rulings for abuse of discretion. Am. Exp. Related Servs. Co. v. Vinhee (In re

1 Vinhee), 336 B.R. 437, 443-44 (9th Cir. BAP 2005). Evidentiary
2 rulings will be reversed only if the error more likely than not
3 affected the verdict. Henry v. Lehman Commercial Paper, Inc. (In re
4 First Alliance Mortg. Co.), 471 F.3d 977, 998 (9th Cir. 2006). We
5 may affirm the bankruptcy court on any basis fairly supported by the
6 record. Wirum v. Warren (In re Warren), 568 F.3d 1113, 1116 (9th
7 Cir. 2009).

8 We apply a two-part test to determine whether the bankruptcy
9 court abused its discretion. United States v. Hinkson, 585 F.3d
10 1247, 1261-62 (9th Cir. 2009)(en banc). First, we consider de novo
11 whether the bankruptcy court applied the correct legal standard to
12 the relief requested. Id. Then, we review the bankruptcy court's
13 fact findings for clear error. Id. at 1262 & n.20. We must affirm
14 the bankruptcy court's fact findings unless we conclude that they
15 are "(1) 'illogical,' (2) 'implausible,' or (3) without 'support in
16 inferences that may be drawn from the facts in the record.'" Id. at
17 1262.

18 V. DISCUSSION

19 A discharge under section 727 . . . of [the Bankruptcy
20 Code] does not discharge an individual debtor from any
21 debt -

. . . .

22 (2) for money, property, services, or an extension,
23 renewal, or refinancing of credit, to the extent obtained
24 by -

(A) false pretenses, a false representation, or actual
fraud, other than a statement respecting the debtor's or
an insider's financial condition. . . .

25 Section 523(a)(2)(A). The elements for establishing that a debt is
26 nondischargeable under § 523(a)(2)(A) are well established by Ninth

1 Circuit authority.

2 The Ninth Circuit employs a five-part test for determining
3 when a debt is non-dischargeable under § 523(a)(2)(A). The
4 creditor must show: (1) that the debtor made the
5 representations; (2) that the debtor knew they were false;
6 (3) that the debtor made them with the intention and
7 purpose of deceiving the creditor; (4) that the creditor
8 relied on the statements; (5) that creditor sustained
9 damages as the proximate result of the representations.
10 In re Britton, 950 F.2d 602, 604 (9th Cir. 1991).

11 Cowen v. Kennedy (In re Kennedy), 108 F.3d 1015, 1018 n.2 (9th Cir.
12 1997). In particular, the reliance element is based on
13 "justifiable" reliance, that is, "whether the falsity of the
14 representation was or should have been readily apparent to the
15 individual to whom it was made." 4 Collier on Bankruptcy
16 ¶ 523.08[1][d] (Alan N. Resnick & Henry J. Sommer, eds., 16th ed.
17 2011). Mr. Parrish bore the burden of proving, by a preponderance
18 of the evidence, each of the elements of his claim for relief under
19 § 523(a)(2)(A). Grogan v. Garner, 498 U.S. 279, 291 (1991).

20 In its Judgment, the bankruptcy found that Mr. Parrish "[had
21 not met] the elements of § 523(a)(2)(A)] by a preponderance of the
22 evidence." On appeal, Mr. Parrish challenges this finding on three
23 grounds: (1) this "finding" of the bankruptcy court was not
24 specific as required pursuant to Rule 7052; (2) the bankruptcy court
25 abused its discretion when it failed to consider the exhibits
26 Mr. Parrish had presented at Trial; and (3) the bankruptcy court
erred when it determined Mr. Thomas's debt to Mr. Parrish was not
excepted from discharge.

25 I. The Bankruptcy Court's Findings

26 Civil Rule 52(a) provides: "In an action tried on the facts

1 without a jury or with an advisory jury, the court must find the
2 facts specially and state its conclusions of law separately." Civil
3 Rule 52 is applicable in bankruptcy adversary proceedings pursuant
4 to Rule 7052.

5 In this case, Mr. Parrish contends that the bankruptcy court's
6 findings were so limited that it is not clear what he failed to
7 prove. He also suggests that the bankruptcy court applied an
8 incorrectly high legal standard under the label "preponderance of
9 the evidence." We agree that the bankruptcy court's
10 characterization of Mr. Parrish's burden of proof as "very high,"
11 especially in light of the examples of extreme behavior which the
12 bankruptcy court cited as required to meet the preponderance of the
13 evidence standard in nondischargeability cases, raises great concern
14 as to whether the bankruptcy court applied the correct standard of
15 proof.

16 The burden of showing something by a "preponderance
17 of the evidence," the most common standard in the
18 civil law, "simply requires the trier of fact 'to
19 believe that the existence of a fact is more probable
20 than its nonexistence before [it] may find in favor
21 of the party who has the burden to persuade the
22 [jury] of the fact's existence.'" Concrete Pipe &
Prods. of Cal. v. Constr. Laborers Pension Trust for
S. Cal., 508 U.S. 602, 622, 113 S.Ct. 2264, 124
L.Ed.2d 539 (1993) (quoting In re Winship, 397 U.S.
358, 371-72, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970)
(Harlan, J., concurring) (citation omitted)).

23 Costa v. Desert Palace, Inc., 299 F.3d 838, 848 (9th Cir. 2002).

24 The manner of the bankruptcy court's colloquy with Mr. Parrish
25 calls into question whether the bankruptcy court construed the
26 preponderance of the evidence standard as something more onerous

1 than establishing that it was more probable than not that Mr. Thomas
2 had committed fraud. It is likely that in making its remarks, the
3 bankruptcy court meant to convey to Mr. Parrish only that proving
4 intent by circumstantial evidence is inherently difficult. However,
5 the bankruptcy court should have taken greater care in its
6 articulation of the evidentiary standard, particularly in a case
7 involving a pro se litigant, to ensure that it clearly stated what
8 that standard is. Had more care been taken in the articulation of
9 the standard of proof, Mr. Parrish may not have felt compelled to
10 appeal the ultimate result.

11 As a reviewing court, we find this appeal further complicated
12 by the extremely limited nature of the findings. In lieu of clear
13 findings, the bankruptcy court merely stated that Mr. Parrish did
14 not prove the elements, correctly identified by the bankruptcy
15 court, of a § 523(a)(2)(A) claim for relief by a preponderance of
16 the evidence. Under Ninth Circuit law, however, "where a full
17 understanding of the issues can be reached without the aid of
18 findings, this court is not required to remand the judgment because
19 of the district court's failure to comply fully with [Civil] Rule
20 52(a)." Alpha Distributing Co. of Ca. v. Jack Daniels Distillery,
21 454 F.2d 442, 453 (9th Cir. 1972). "The failure of the trial court
22 to comply with [Civil] Rule 52 . . . does not demand reversal 'if a
23 full understanding of the question presented may be had without the
24 aid of separate findings.'" Magna Weld Sales Co., Inc. v. Magna
25 Alloys & Research Pty. Ltd., 545 F.2d 668, 671 (9th Cir. 1976). We
26 ultimately are charged in this appeal to determine whether, on the

1 entire evidence, we are left with a definite and firm conviction
2 that the bankruptcy court erred in its determination that
3 Mr. Parrish failed to establish each element of a claim for relief
4 under § 523(a)(2)(A). Accordingly, we see no need to remand the
5 case to the bankruptcy court for further findings.

6 II. The Bankruptcy Court's Evidentiary Rulings

7 Before we can evaluate whether the evidence that was before the
8 bankruptcy court was sufficient to meet Mr. Parrish's burden of
9 proving his § 523(a)(2)(A) claim for relief by a preponderance of
10 the evidence, we first must address Mr. Parrish's issue that the
11 bankruptcy court abused its discretion in failing to admit his
12 exhibits into evidence.

13 Bankruptcy courts may require all testimony and evidence to be
14 submitted in writing prior to trial. Lee-Benner v. Gergely
15 (In re Gergely), 110 F.3d 1448, 1452 (9th Cir. 1997). In this case,
16 the Trial Procedures Order instructed the parties that "[e]xhibits
17 referenced in any declaration should be offered into evidence when
18 the declaration is offered into evidence."

19 Basic principles of evidence law require that a party offer an
20 exhibit into evidence if that exhibit is to be admitted. See
21 1 McCormick on Evidence § 51. Conversely, when a party fails to
22 offer an exhibit for admission, the exhibit fails to become
23 evidence. See In re Vargas, 396 B.R. 511, 519 (Bankr. C.D. Cal.
24 2008)("[Party] declined to move the admission of any of these
25 documents Thus, there is no evidence . . . before the
26 court."); In re Osborne, 257 B.R. 14, 21 (Bankr. C.D. Cal. 2000)("It

1 is well settled that neither statements of counsel, nor exhibits not
2 admitted into evidence, are evidence.").

3 The requirement that a party offer evidence is not an empty
4 ritual; it ensures that the opposing party will have an opportunity
5 to object to the proffered evidence, should he or she so choose.
6 See McCormick, supra. A party seeking to admit an exhibit into
7 evidence should "tender[] the exhibit to the judge by stating,
8 'Plaintiff offers this (document or object, describing it), marked
9 "Plaintiff's Exhibit No." for identification, into evidence as
10 Plaintiff's Exhibit No. 2.'" Id.

11 When a pretrial order establishes a procedure for the admission
12 of evidence, and a party fails to follow that procedure, we will not
13 find that the bankruptcy court abused its discretion in denying the
14 admission of evidence. In re Gergely, 110 F.3d at 1448; see, e.g.,
15 In re Herb Goetz & Marlen Horn Assoc., Inc., 120 F.3d 268 (9th Cir.
16 1997).

17 At the Trial, Mr. Parrish's four declarations were admitted as
18 direct testimony. In the Parrish Declaration, Mr. Parrish referred
19 to exhibits variously as being "marked," "attached," "offered," or
20 "presented." Mr. Parrish also submitted to the bankruptcy court
21 Exhibit Binders containing all exhibits referred to in the Parrish
22 Declaration.

23 The record reflects that Mr. Parrish was aware that Mr. Thomas
24 refused to stipulate to the admission of any of his exhibits. He
25 further was aware that Mr. Thomas had raised specific objections to
26 at least five of his exhibits. The Trial Procedures Order spelled

1 out what was necessary to get exhibits into evidence in that
2 situation. The burden was on Mr. Parrish to obtain a ruling on the
3 admission of his exhibits. It is clear from the record that he did
4 not understand that burden. At most, Mr. Parrish marked and
5 tendered the exhibits. The transcript of the Trial reflects that
6 Mr. Parrish never offered or asked to submit his exhibits into
7 evidence; nor did he make any other statements to that effect.

8 Typically, a litigant's failure to understand the process does
9 not translate into an abuse of discretion by the bankruptcy court
10 when exhibits are not admitted into evidence. Here, however, we
11 believe that the actions of the bankruptcy court contributed to the
12 confusion surrounding the admission of Mr. Parrish's exhibits.

13 The bankruptcy court considered the Dismissal Motion and the
14 Exclusion Motion together at the commencement of the Trial.
15 Mr. Parrish had opposed the dismissal motion, in part by complaining
16 about Mr. Thomas's refusal to cooperate by stipulating to the
17 authenticity of documents. In ruling on Mr Thomas's Exclusion
18 Motion, the bankruptcy court stated "I'm going to err on the side of
19 just letting people talk . . . I'll . . . deny the motion to exclude
20 the proposed witnesses and [the testimony] will be worth whatever it
21 is worth." With respect to the Dismissal Motion, the bankruptcy
22 judge stated only that "I'm going to deny that at this point." In
23 our view, particularly in light of what followed, Mr. Parrish
24 reasonably could have believed that all of his evidence had been
25 made a part of the record.

26 The Trial commenced immediately thereafter, and was

1 orchestrated by the bankruptcy court:

2 So, then we go onto the trial. We do have declarations
3 from the witnesses, and to the extent, Mr. Thomas, you
4 want to do any cross examination you can call them and
5 cross examine them.

6 Tr. of Feb. 23, 2011 Trial at 4:9-12. After the bankruptcy court
7 suggested that Mr. Thomas need not cross-examine Mr. Parrish's
8 witnesses ("frankly, you don't really have to do all that"), because
9 Mr. Parrish had the burden of proof, the bankruptcy court took a
10 recess to distribute the exhibit books. Once back on the record the
11 bankruptcy court made no reference to the fact that the exhibit
12 books had been "distributed" or what that meant.⁹ Instead, the
13 bankruptcy court explained only that "[i]t will be left with their
14 declarations." In light both of the manner in which the exhibit
15 books were handled and the fact that the Parrish Declaration
16 identified and relied on each exhibit in the exhibit books, we
17 believe that Mr. Parrish reasonably could have believed that in
18 stopping the Trial and distributing the exhibit books, the
19 bankruptcy court could effectively have been recognizing the
20 exhibits as part of the record at Trial.

21 In its final colloquy with Mr. Parrish, the bankruptcy court
22 stated "[a]ll we do here is cross examination," and "[y]ou can say
23 anything further you'd like to say in argument, but the declarations
24 are the direct testimony." As a pro se litigant, and in the context

25 ⁹ The bankruptcy court made no mention of the lack of
26 exhibits in the record until the day following the Trial when the
Judgment was entered.

1 of the extremely abbreviated nature of the proceedings, it is not
2 surprising that Mr. Parrish might have taken that statement
3 literally and believed as a consequence there was nothing more he
4 could do or needed to do to present his evidence.

5 On this record, we conclude that the bankruptcy court may have
6 abused its discretion, because the proceedings, as they unfolded,
7 did not alert Mr. Parrish that he was required to do more to have
8 his exhibits admitted into evidence. This conclusion does not
9 require that we reverse the bankruptcy court's Judgment, however,
10 because, in our de novo review of the record, including the
11 exhibits, we independently determine that Mr. Parrish did not meet
12 his burden of proof with respect to the elements of his
13 § 523(a)(2)(A) claim for relief.

14 III. Mr. Parrish Did Not Prove a § 523(a)(2)(A) Claim
15 for Relief By a Preponderance of the Evidence

16 The evidence before the bankruptcy court in support of
17 Mr. Parrish's claim for relief consisted entirely of the four
18 declarations. Mr. Parrish contends on appeal that the evidence
19 established: (1) that Mr. Thomas represented that he was carrying
20 out a large 39.5-mile fiber optic cable project; (2) that the
21 representation was necessarily false given the actual, much more
22 modest nature of the subcontract; (3) that Mr. Thomas had to know
23 that those representations were false, given his work on an actual,
24 more modest project; (4) by knowingly making false representations
25 prior to borrowing money, Mr. Thomas necessarily made the
26 representations with the intent to deceive Mr. Parrish and to

1 procure loans from him; and (5) Mr. Parrish justifiably relied on
2 Mr. Thomas's representations in deciding to make the loans, and was
3 damaged as a result. As we discuss below, Mr. Parrish's witness
4 declarations do not constitute adequate proof of at least some of
5 these assertions.

6 The Magee Declaration. It appears that Mr. Parrish may have
7 intended the testimony in the Magee Declaration to establish that
8 Mr. Thomas never intended to purchase the Ditch Witch Directional
9 Drill or the Caterpillar mini excavator even though Mr. Parrish
10 alleges Mr. Thomas borrowed funds specifically for that purpose.
11 Leaving aside the fact that the Equipment Lease never was admitted
12 into evidence, the Magee Declaration proves nothing other than that
13 Mr. Magee went to two equipment dealerships and looked at product
14 numbers and serial numbers. The Magee Declaration is good only to
15 establish what he saw. It does not provide evidence as to what the
16 product numbers and serial numbers mean in connection with the
17 equipment specified in the Equipment Lease. Useful evidence on this
18 point could have come from the equipment dealers themselves. If
19 Mr. Parrish wanted to prove that there is no such thing as a 2002
20 Ditch Witch JT920L Directional Drill with the serial number included
21 on the Equipment Lease, he should have provided the testimony of a
22 Ditch Witch representative, supported by appropriate documentary
23 evidence.

24 The Watson Declaration. Predominant in Mr. Watson's testimony
25 was his opinion that the Joint Venture Agreement and the Equipment
26 Lease prepared by Mr. Thomas were so legally deficient that they

1 could only have been created to induce Mr. Parrish to loan money to
2 Mr. Thomas. We agree with Mr. Thomas that while Mr. Watson may have
3 been able to testify as to his opinion of the legal sufficiency of
4 the Joint Venture Agreement and the Equipment Lease, there was no
5 basis upon which Mr. Watson could testify as to Mr. Thomas's intent
6 when Mr. Thomas created the documents. The Watson Declaration
7 provides no evidence on any element in the § 523(a)(2)(A) claim for
8 relief.

9 The Wattenbarger Declaration. Mr. Wattenbarger testified that
10 he had reviewed the joint venture's subcontract with Golden State
11 Utilities. Unfortunately, the bankruptcy court did not have an
12 opportunity to review the alleged subcontract. With respect to the
13 subcontract, not only did Mr. Parrish fail to "offer" it, or a copy
14 of it, into evidence, he neither marked it nor included it in his
15 Exhibit List. Federal Rule of Evidence 1002 provides: "To prove
16 the content of a writing . . . , the original writing . . . is
17 required, except as otherwise provided in these rules or by Act of
18 Congress." Federal Rule of Evidence 1003 provides that "[a]
19 duplicate is admissible to the same extent as an original unless
20 (1) a genuine question is raised as to the authenticity of the
21 original or (2) in the circumstances it would be unfair to admit the
22 duplicate in lieu of the original." Because the subcontract
23 existed, Mr. Wattenbarger's testimony concerning it constituted
24 hearsay. Even assuming that the bankruptcy court could consider
25 Mr. Wattenbarger's testimony with respect to the subcontract, that
26 testimony does not establish what it appears Mr. Parrish hoped that

1 it would.

2 First, to the extent that Mr. Parrish intended to establish
3 that Mr. Thomas never intended to repay the loans Mr. Parrish made
4 in reliance on the fiber optic job, Mr. Wattenbarger's testimony
5 does not prove that the proceeds from the subcontract would be
6 insufficient to repay the loans. Mr. Wattenbarger testified that
7 the subcontract did not state an exact quantity of work to be
8 performed; instead, it stated the amount of work was "to be
9 determined," and it provided a unit price for each item to be done.
10 There is no evidence anywhere in the record to suggest what the
11 ultimate scope of the subcontract was. In fact, Mr. Wattenbarger
12 testified, again without compliance with the Federal Rules of
13 Evidence regarding writings, that the subcontract ended not because
14 it expired by its terms, but because it was terminated unilaterally
15 by Golden State Utilities as the result of an alleged mishap by the
16 joint venture that caused substantial damage to the fiber optic
17 cable.

18 Second, to the extent that Mr. Parrish intended to establish
19 through Mr. Wattenbarger's testimony that Mr. Thomas misrepresented
20 the amount he needed to borrow to perform the subcontract,
21 Mr. Wattenbarger's testimony is speculative, even to the point of
22 guessing what equipment the joint venture owned. Mr. Wattenbarger's
23 opinion that Mr. Thomas did not need the amount borrowed also was
24 conditioned on unknown and often surprising assumptions, such as the
25 assumption that the joint venture could have obtained supplies on
26 credit at contractor warehouses, the joint venture could have

1 delayed wage payments to employees for a week or two, or that the
2 joint venture might receive job related costs in advance from Golden
3 State Utilities. Mr. Wattenbarger's implied suggestion that these
4 alternatives eliminated the joint venture's need for cash makes no
5 sense; at most, they would defer the joint venture's need for cash.

6 The Parrish Declaration. Through his testimony, Mr. Parrish
7 establishes that he sought out Mr. Thomas as someone who might want
8 to borrow money from him. Mr. Parrish wanted to make money on funds
9 he could access through his home equity credit line. Mr. Parrish
10 trusted Mr. Thomas because he trusted Mr. Mesa, the mutual business
11 associate who had suggested that Mr. Thomas might need a loan.

12 Mr. Parrish testified that in making the loans for the fiber optic
13 job he relied upon (1) the \$40,000 and equipment being contributed
14 by Mr. Thomas and Mr. Vance to the joint venture, (2) the fact that
15 both Mr. Thomas and Mr. Vance were licensed contractors, and (3) the
16 promises of Mr. Thomas and Mr. Vance to repay the loans.

17 In order to prevail on his § 523(a)(2)(A) claim for relief, Mr.
18 Parrish was required to prove each element articulated by Britton by
19 a preponderance of the evidence. In re Britton, 905 F.2d at 604.
20 The absence of proof of even one element is sufficient to defeat his
21 claim.

22 There is nothing in the Parrish Declaration that might
23 establish that Mr. Parrish justifiably relied on any representation
24 Mr. Thomas might have made that the joint venture was the general
25 contractor on the fiber optic job. Further, there is no evidence in
26 the record that Mr. Parrish justifiably relied upon any

1 representation Mr. Thomas may have made which might relate to the
2 value of the joint venture's work in connection with the fiber optic
3 job. Mr. Parrish was willing to loan nearly \$200,000 to a person
4 known to him through a mutual acquaintance, in part because he
5 trusted that mutual acquaintance. On that basis, the record does
6 not establish that it is more likely than not that Mr. Parrish
7 relied on any representation made by Mr. Thomas.

8 On the issue of intent, Mr. Parrish himself presented evidence
9 at Trial that would support a finding that Mr. Thomas intended to
10 repay the loans to Mr. Parrish. First, Mr. Thomas made payments,
11 albeit limited, over a period of five months. The partial
12 repayment of the loans supports an inference that Mr. Thomas
13 intended to repay Mr. Parrish, not defraud him. See Advanta Nat'l
14 Bank v. Kong (In re Kong), 239 B.R. 815, 822 (9th Cir. BAP 1999)
15 (citing Anastas v. Am. Savings Bank (In re Anastas), 94 F.3d 1280,
16 1287 (9th Cir. 1996)). Furthermore, according to Mr. Wattenbarger's
17 testimony, the joint venture lost the subcontract because it damaged
18 QWEST's fiber optic cable. That testimony likewise supports an
19 inference that rather than intending to defraud Mr. Parrish,
20 Mr. Thomas simply lost the ability to repay him.

21 Based upon our review of the record, and applying a
22 preponderance of the evidence standard, we are not left with a
23 definite and firm conviction that the bankruptcy court made a
24 mistake in determining that Mr. Parrish did not meet his burden of
25 proving his claim for relief under § 523(a)(2)(A). We find no
26 reversible error.

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VI. CONCLUSION

Mr. Parrish failed to carry his burden of proving by a preponderance of the evidence the elements required to support a judgment in his favor pursuant to § 523(a)(2)(A).

We AFFIRM.