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NOT FOR PUBLICATION

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

UNITED STATES BANKRUPTCY APPELLATE PANEL  
OF THE NINTH CIRCUIT

5	In re:	)	BAP No. CC-12-1452-TaKuKi
		)	
6	ZINOVIIY BERSHADSKIY,	)	Bk. No. SV 10-25466-AA
		)	
7	Debtor.	)	Adv. No. SV 11-01477-AA
		)	
8	ZINOVIIY BERSHADSKIY,	)	
		)	
9	Appellant,	)	
		)	
10	v.	)	MEMORANDUM*
		)	
11	RODEO REALTY, INC.,	)	
		)	
12	Appellee.	)	
		)	

Submitted Without Oral Argument\*\*  
September 19, 2013

Filed - October 15, 2013

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

Honorable Alan M. Ahart, Bankruptcy Judge, Presiding

Appearances: Appellant Zinoviy Bershadskiy, pro se, on brief;  
Mark M. Sharf of Merritt, Hagen & Sharf LP, on  
brief, for Appellee Rodeo Realty, Inc.

Before: TAYLOR, KURTZ, and KIRSCHER, Bankruptcy Judges.

\*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.

\*\*In an order entered on May 24, 2013, the Panel determined  
that this matter was suitable for disposition without oral  
argument. Fed. R. Bankr. P. 8012; 9th Cir. BAP Rule 8012-1.



1 cancellation is requested." Complaint, Adv. Dkt. #1, Ex. A.;  
2 Decl. Yelena Pavlova, Adv. Dkt. #44, Ex. A. Paragraph 1A  
3 provided, in relevant part, that:

4 Should [Rodeo Realty] procure a purchaser ready,  
5 willing, and able to purchase the above property at the  
6 above price and terms, or at a price accepted by  
7 [Appellant], [Appellant] shall pay [Rodeo Realty] a fee  
8 of 5% of such listing or sales price plus \$250.  
9 [Appellant] shall pay [Rodeo Realty] a like fee should  
10 the property be sold, transferred, exchanged, or leased  
11 during the term of this listing, by any source  
12 including [Appellant], or within six months after the  
13 expiration of this contract to any person with whom  
14 [Rodeo Realty] has had any communications prior to the  
15 termination of the listing term provided that said  
16 [Rodeo Realty's] sub-agent shall have notified  
17 [Appellant] of such communication verbally, or in  
18 writing, within 10 days after the termination of the  
19 listing term. [Rodeo Realty] is entitled to said fee  
20 whether any escrow resulting from such offer closes  
21 during or after the expiration of the listing term.

22 Id. The Listing further provided, at paragraph 1C, that:

23 "Should [Appellant] (a) withdraw the property from sale, . . .  
24 [Appellant], nonetheless, shall pay [Rodeo Realty] a fee equal to  
25 the percentage of the listing price as stated in paragraph 1  
26 above."<sup>3</sup> Id.

27 Sometime after August 19, 2010, Appellant requested  
28 cancellation of the Listing, and Rodeo Realty agreed. On  
December 9, 2010, Appellant filed a voluntary bankruptcy petition  
under chapter 11. The case ultimately was converted to a case

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<sup>3</sup> These quoted provisions of the Listing are substantially  
consistent with the provisions set forth in the copy of the  
Listing attached to Appellant's Opening Brief. The only point of  
difference is the commission percentage. In the copy of the  
Listing attached to the Complaint, the inserted handwritten  
number is a "5." In the copy attached to Appellant's Opening  
Brief, the inserted number appears to be a "3" with the initials  
"ZB" handwritten above it and on top of text in the form.

1 under chapter 7, and Rodeo Realty filed a timely  
2 nondischargeability complaint.

3 In the complaint, Rodeo Realty alleged that Appellant  
4 committed fraud when he falsely represented that he was taking  
5 the Property off the market, when, in fact, he intended to sell  
6 it to a Rodeo Realty registered buyer. Rodeo Realty alleged  
7 damages of 5% of the sales price, plus \$250, as provided under  
8 the Listing, as a proximate result of Appellant's fraudulent  
9 conduct. Rodeo Realty sought a nondischargeable judgment in the  
10 amount of the lost commission pursuant to § 523(a)(2),<sup>4</sup> as well  
11 as punitive damages and attorney's fees.<sup>5</sup>

12 Appellant, originally represented by counsel, filed a motion  
13 to dismiss the complaint which the bankruptcy court denied.  
14 Appellant thereafter substituted himself in place of counsel and  
15 filed documents docketed as an answer. The answer consists of a  
16 one-paragraph undated letter to the judge from Appellant and  
17 copies of various correspondence. In the letter, Appellant  
18 denied fraud. Approximately eight months later, Rodeo Realty  
19 filed and served its motion for summary judgment (hereinafter,  
20 "MSJ") along with a memorandum of points and authorities, four  
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22 <sup>4</sup> Rodeo Realty failed to expressly set forth in its  
23 complaint whether it sought relief under subsection (a)(2)(A) or  
24 (a)(2)(B) of § 523, and the Judgment, likewise, references only  
25 § 523(a)(2). Nonetheless, when viewed in context, it is clear  
26 that Rodeo Realty sought nondischargeability based on alleged  
27 actual fraud under § 523(a)(2)(A) and not based on use of a  
28 materially false statement in writing "respecting the debtor's or  
an insider's financial condition," under § 523(a)(2)(B).

<sup>5</sup> The complaint included a second cause of action for  
nondischargeability under § 523(a)(6), which we do not further  
mention here as the bankruptcy court entered the Judgment solely  
on § 523(a)(2)(A).

1 declarations, a request for judicial notice, and a separate  
2 statement of uncontroverted facts. The Notice of Motion gave  
3 notice to Appellant that failure to file and serve papers in  
4 opposition to the MSJ could be deemed consent to the relief  
5 sought therein.

6 The evidence submitted by Rodeo Realty in support of the MSJ  
7 included the following:

8 1. A declaration by Yelena Pavlova, a licensed real estate  
9 agent at Rodeo Realty who was the primary contact with  
10 Appellant, because, like Appellant, she was fluent in  
11 Russian. She attached an authenticated copy of the Listing.  
12 Ms. Pavlova declared under penalty of perjury that she  
13 showed the Property to Abraham Bak and later to his wife and  
14 daughter, within 24 to 48 hours of initial contact on  
15 August 15, 2010. Thereafter she had multiple telephone  
16 conversations with Mr. Bak. She offered, as corroboration,  
17 copies of her cellphone records and identified the  
18 respective contact numbers. She met with Mr. Bak on  
19 August 31, 2010 to discuss a proposed sale of the Property  
20 at \$900,000, and later that day with Appellant to discuss  
21 Mr. Bak's expression of interest, which caused Appellant to  
22 authorize a reduction of the listing price to \$999,950 to  
23 encourage an offer from Mr. Bak.

24 Ms. Pavlova stated that her co-agent, Marc Tahler, and  
25 she received a fax from Appellant's daughter Marina Fox on  
26 September 8, 2010 requesting that Rodeo Realty cancel its  
27 Listing. She attached a copy of the fax as an exhibit to  
28 her declaration. She stated that she confirmed by telephone

1 with Appellant that his daughter was properly acting on his  
2 behalf, and on September 9, 2010, Rodeo Realty canceled the  
3 Listing. Rodeo Realty sent a letter dated September 9,  
4 2010, specifically identifying Mr. and Mrs. Bak as potential  
5 buyers, and another letter on September 14, 2010. Copies of  
6 the two letters were attached to Ms. Pavlova's declaration  
7 as exhibits. Ms. Pavlova also stated that at no time did  
8 Appellant or anyone on his behalf disclose that Appellant  
9 decided to sell the Property to Mr. Bak without Rodeo  
10 Realty's assistance.

11 Finally, Ms. Pavlova attached as an exhibit to her  
12 declaration a copy of a Grant Deed executed by Appellant on  
13 November 2, 2010, deeding the Property to the Baks. The  
14 Grant Deed was recorded on November 5, 2010. She learned  
15 from the Multiple Listing Service database, which she stated  
16 to be a source regularly relied upon by agents, that the  
17 Property was sold for \$940,000. Ms. Pavlova stated that the  
18 commission due and owing to Rodeo based on the sale, was  
19 \$47,000 (5%) plus \$250.

20 2. A declaration by Marc Tahler, under penalty of perjury,  
21 who is a licensed salesperson at Rodeo Realty. Mr. Tahler  
22 stated that he attended the meeting with Ms. Pavlova and  
23 Mr. Bak on August 31, 2010 to discuss a possible offer to  
24 purchase the Property and later the meeting with Appellant  
25 that resulted in an authorized reduction in the listing  
26 price.

27 Mr. Tahler stated that he received a telephone call  
28 from Appellant's daughter Marina Fox on September 6 or 7,

1 2010 during which she "pretended that her father had  
2 requested that the Listing Agreement be canceled two weeks  
3 earlier." Tahler Decl., Adv. Dkt. #34 at 2:14-16. He  
4 stated that he informed Ms. Fox that her father made no such  
5 request. Mr. Tahler then corroborated Ms. Pavlova's  
6 statement that they received the fax from Ms. Fox on  
7 September 8, 2010 requesting cancellation of the Listing  
8 with no disclosure, at any time by anyone, that Appellant  
9 had decided to sell the Property to Mr. Bak without  
10 assistance from Rodeo Realty. Mr. Tahler sent the letters  
11 on September 9, 2010 and September 14, 2010 (to correct the  
12 spelling), identifying Mr. Bak as a potential buyer  
13 protected under the Listing.

14 3. The Declaration of Mark M. Sharf, as Rodeo Realty's  
15 counsel, regarding the deposition testimony of Appellant  
16 taken on April 30, 2012, attached to which is a copy of the  
17 reporter's transcript. Mr. Sharf stated that Appellant had  
18 refused to comply with the Notice of Deposition requirement  
19 that he produce his telephone records regarding  
20 communications between Appellant and Mr. Bak, and others,  
21 for the months of August through December. In addition,  
22 Mr. Sharf pointed out that Appellant testified that  
23 Appellant's daughter also refused to produce her telephone  
24 records.

25 Mr. Sharf also reviewed the Appellant's Statement of  
26 Financial Affairs in his bankruptcy case and noted that  
27 Appellant failed to disclose the sale of the Property, which  
28 would have been required by an accurate answer to

1 Question 10.<sup>6</sup>

2 In Rodeo Realty's Memorandum of Points and Authorities,  
3 Rodeo Realty argued that Appellant obtained cancellation of the  
4 Listing by not disclosing his negotiations to sell to Mr. Bak,  
5 and did so intentionally to avoid paying a commission. It  
6 provided evidence that within 60 days after the Listing was  
7 cancelled, the Property was deeded to the Baks. It also argued  
8 that as part of the deception, Appellant and his daughter falsely  
9 represented that Appellant canceled the Listing before the  
10 September 8, 2010 fax. Rodeo Realty argued that Appellant  
11 concealed the sale transaction from Rodeo Realty as well as from  
12 the bankruptcy court, his creditors, and the chapter 7 trustee by  
13 answering "none" to Question 10 of the Statement of Financial  
14 Affairs, refusing to testify regarding the net proceeds from the  
15 sale, and refusing to produce his telephone records regarding  
16 contacts with Mr. Bak. Rodeo Realty finally argued that the  
17 bankruptcy court could infer Appellant's knowledge and fraudulent  
18 intent from the number of fabrications, the "rush to fire Rodeo  
19 Realty when a serious buyer was located, proximity of the sale to  
20 the cancellation of the listing agreement, combined with the  
21 continuing concealment of the sale" in the bankruptcy case filed  
22 shortly thereafter. MSJ, Adv. Dkt. #40 at 10.

23 Appellant filed nothing in opposition.

24 The bankruptcy court waived appearances at the hearing on  
25 the MSJ and entered the Judgment on August 16, 2012. Appellant

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27 <sup>6</sup> Rodeo Realty also filed a Request to Take Judicial Notice  
28 of Appellant's bankruptcy filings, and in particular the  
Appellant's non-disclosure of the sale of the Property.



1 timely filed the notice of appeal on August 28, 2012.

2 **JURISDICTION**

3 The bankruptcy court had jurisdiction pursuant to 28 U.S.C.  
4 §§ 1334 and 157(b)(2)(I). We have jurisdiction under 28 U.S.C.  
5 § 158(a)(1).

6 **ISSUES**

7 Did the bankruptcy court err when it granted Rodeo Realty's  
8 MSJ and entered the Judgment against Appellant?

9 **STANDARD OF REVIEW**

10 We review de novo the bankruptcy court's decision to grant  
11 summary judgment. Boyajian v. New Falls Corp. (In re Boyajian),  
12 564 F.3d 1088, 1090 (9th Cir. 2009); Lopez v. Emergency Serv.  
13 Restoration, Inc. (In re Lopez), 367 B.R. 99, 103 (9th Cir. BAP  
14 2007). Viewing the evidence in the light most favorable to the  
15 non-moving party (i.e., Appellant), we determine whether the  
16 bankruptcy court correctly found that there are no genuine issues  
17 of material fact and that the moving party is entitled to  
18 judgment as a matter of law. Jesinger v. Nev. Fed. Credit Union,  
19 24 F.3d 1127, 1130 (9th Cir. 1994); Gertsch v. Johnson & Johnson  
20 Fin. Corp. (In re Gertsch), 237 B.R. 160, 165 (9th Cir. BAP  
21 1999).

22 **DISCUSSION**

23 A. Waiver of Claims and Arguments

24 Rodeo Realty argues that Appellant waived all factual and  
25 legal arguments by failing to raise them before the bankruptcy  
26 court in response to the MSJ. This argument has some merit.

27 As an appellate court, "We are [] concerned only with the  
28 record before the trial judge when his decision was made."

1 Kirschner v. Uniden Corp. of Am., 842 F.2d 1074, 1077 (9th Cir.  
2 1988) (internal quote and citation omitted). Evidence not  
3 admitted by the bankruptcy court is not part of the record and  
4 cannot be considered in this appeal. Id. at 1077-1078.

5 In Appellant's Opening Brief he states one issue to be  
6 reviewed:

7 Whether the bankruptcy code section 523(a)(2) applies  
8 given that there is evidence of substantial fraud,  
9 misrepresentation and deceit on the part of Plaintiff  
10 Rodeo with regard to its legal action and the evidence  
it has provided in support of its action, to collect  
its purported real estate sales commission.

11 Apl't Opening Brief at 5. He argues, without any citation to the  
12 record, that Rodeo Realty engaged in misrepresentations designed  
13 to trick Appellant into believing that Appellant owed a  
14 commission for the sale of the Property, whereas Appellant sold  
15 the Property to a neighbor who found the Property himself without  
16 the aid of Rodeo Realty. Appellant denies that Rodeo Realty's  
17 agents ever showed the Property to the buyer, much less prior to  
18 cancellation of the Listing, and he argues that Rodeo Realty  
19 doctored the Listing, converting the commission fee from 2% to  
20 5%. Appellant presented none of these alleged factual  
21 contentions to the bankruptcy court.

22 We are cognizant of our duty to ensure that pro se litigants  
23 do not lose their right to a determination of the merits due to  
24 ignorance of a technical procedural requirement.<sup>7</sup> We, however,  
25 must limit our consideration to the record before the bankruptcy  
26 court. United States v. Kitsap Physicians Serv., 314 F.3d 995,

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27  
28 <sup>7</sup> See Balistreri v. Pacifica Police Dep't, 901 F.2d 696,  
699 (9th Cir. 1986).

1 999 (9th Cir. 2002). Appellant waived his factual arguments by  
2 failing to file any response to the MSJ, and he cannot create  
3 disputed issues of fact by presenting them here in the first  
4 instance. Nevertheless, we will examine the record to determine  
5 if any basis for reversal is clearly evident,<sup>8</sup> as our de novo  
6 review necessarily includes determination as to whether Rodeo  
7 Realty is entitled to judgment as a matter of law.

8 B. Motion to Dismiss<sup>9</sup>

9 Before we consider the merits of the MSJ, we briefly note  
10 Appellant's contention that the dispute between the parties was a  
11 simple breach of contract claim that should have been dismissed  
12 at the outset of the Adversary Proceeding, pursuant to  
13 Appellant's motion to dismiss under Civil Rules 9(b) and  
14 12(b)(6). Appellant did not include the denial of his motion to  
15 dismiss as an issue in his Opening Brief, nor did he file a  
16 Statement of Issues on Appeal. Nor does Appellant present in his  
17 Opening Brief any substantive argument that addresses the  
18 bankruptcy court's denial of the motion to dismiss. Appellant's  
19 sole statement, however, that the dispute is nothing more than  
20 breach of contract, goes directly to the merits of whether Rodeo  
21 Realty met its burden of proof on summary judgment and  
22 established its entitlement to judgment, as a matter of law,  
23 based on fraud. We conclude that it did, and we address this

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25 <sup>8</sup> It is error to grant summary judgment simply because the  
26 opponent failed to oppose. N. Slope Borough v. Rogstad  
(In re Rogstad), 126 F.3d 1224, 1227 (9th Cir. 1997).

27 <sup>9</sup> "[A]n appeal from the final judgment draws in question  
28 all earlier non-final orders and all rulings which produced the  
judgment." Munoz v. Small Bus. Admin., 644 F.2d 1361, 1364, 1363  
(9th Cir. 1981).

1 issue hereafter.

2 C. The MSJ

3 Summary judgment is governed by Rule 7056. Rule 7056,  
4 incorporating Civil Rule 56(c), states that summary judgment  
5 "shall be rendered forthwith if the pleadings, depositions,  
6 answers to interrogatories, and admissions on file, together with  
7 the affidavits, if any, show that there is no genuine issue as to  
8 any material fact and that the moving party is entitled to  
9 judgment as a matter of law." The burden of establishing that  
10 there is no genuine issue of material fact lies with the moving  
11 party. Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986).

12 In order to establish that a debt is nondischargeable under  
13 section 523(a)(2)(A), a creditor must establish five elements by  
14 a preponderance of the evidence:

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

20 Turtle Rock Meadows Homeowners Ass'n v. Slyman (In re Slyman),  
21 234 F.3d 1081, 1085 (9th Cir. 2000); Ghomeshi v. Sabban  
22 (In re Sabban), 384 B.R. 1, 5 (9th Cir. BAP 2008). Based on our  
23 de novo review of the record before the bankruptcy court, we  
24 conclude that no genuine issue as to any material fact exists,  
25 that Rodeo Realty carried its burden of proof on each of the five  
26 elements of § 523(a)(2)(A), and that Rodeo Realty is entitled to  
judgment as a matter of law.

27 Through the declaratory evidence offered by Ms. Pavlova and  
28 Mr. Tahler and corroborating cellphone records, Rodeo Realty

1 established that it identified Mr. Bak as a potential purchaser  
2 during the term of the Listing. The denial contained in the  
3 answer is insufficient to create a triable issue of fact on this  
4 point; Appellant had to come forward with evidence of specific  
5 facts in the face of Rodeo Realty's case. Both of Rodeo Realty's  
6 declarants testified that when Appellant sought to cancel the  
7 Listing, within days of introduction to Mr. Bak as an interested  
8 buyer, he failed to disclose that he was in negotiations to sell  
9 the Property to Mr. Bak. The testimony that Appellant never  
10 advised Rodeo Realty of the sale, which closed less than 60 days  
11 after cancellation of the Listing, is also undisputed, as is the  
12 fact that the following month Appellant filed his chapter 7  
13 bankruptcy, again without disclosing the closed sale transaction.

14 An omission of a material fact can constitute a false  
15 representation actionable under section 523(a)(2)(A). Citibank  
16 (S.D.), N.A. v. Eashai (In re Eashai), 87 F.3d 1082, 1088-89 (9th  
17 Cir. 1996). However, there must be a duty to disclose. Id.  
18 Here, Appellant entered into a business transaction with Rodeo  
19 Realty that included a provision allowing cancellation subject to  
20 payment of the agreed commission if Appellant later sold the  
21 Property to a registered buyer. Under such circumstances,  
22 Appellant had a duty to disclose to Rodeo Realty the  
23 post-cancellation sale and intent to sell the Property. See  
24 Apte v. Japra (In re Apte), 96 F.3d 1319, 1324 (9th Cir. 1996).  
25 The fraudulent omissions related to this sale as well as the  
26 affirmative misrepresentation that he was taking the Property off  
27 the market satisfy the first element necessary for  
28 section 523(a)(2)(A) relief.

1 Further, Rodeo Realty's evidence establishes both  
2 Appellant's knowledge of the falsity and deceptiveness of his  
3 statements and omissions and his intent to deceive. Appellant  
4 signed a contract, knew its terms as he requested cancellation,  
5 knew that he sold his own home, and knew that he did not tell  
6 Rodeo Realty about the sale. Few debtor defendants are likely to  
7 admit defrauding their creditor, therefore, "fraudulent intent  
8 may be established by circumstantial evidence, or by inferences  
9 drawn from a course of conduct." Devers v. Bank of Sheridan,  
10 Mont. (In re Devers), 759 F.2d 751, 753-54 (9th Cir. 1985).  
11 Alexander & Alexander of Wash., Inc. v. Hultquist  
12 (In re Hultquist), 101 B.R. 180, 183 (9th Cir. BAP 1989). Here,  
13 the circumstantial evidence - Appellant's sale of the Property to  
14 Mr. Bak: a registered potential buyer; the timing of the  
15 cancellation: days after introduction to Mr. Bak; the timing of  
16 the sale: shortly after cancelling the Listing; the sales price  
17 of \$940,000: almost exactly the amount of the agreed reduced list  
18 price, less the 5% commission that Appellant agreed to pay to  
19 Rodeo Realty; Appellant's failure to disclose the sale in his  
20 Statement of Financial Affairs in his chapter 7 bankruptcy  
21 initiated a month after closing; and Appellant's refusal to  
22 supply phone records in discovery - only supports the inference  
23 that Appellant knowingly intended to prevent Rodeo Realty from  
24 collecting its commission.

25 The evidence also supports a finding of justifiable  
26 reliance. First, justifiable reliance turns on a person's  
27 knowledge under the particular circumstances. In re Eashai,  
28 87 F.3d at 1090. Here, there is no evidence that Rodeo Realty

1 had any knowledge of Appellant's fraud or even an ability to  
2 detect fraud or reason to look for it. Reliance can be presumed  
3 where the fraud primarily involves omissions. Binder v.  
4 Gillespie, 184 F.3d 1059, 1064 (9th Cir. 1999).

5 The only question that then remains is the amount of damages  
6 proximately caused by Appellant's non-disclosure. Rodeo Realty's  
7 evidence establishes that Appellant's intentional failure to  
8 disclose the sale effectively prevented it from protecting its  
9 rights to collect the commission owed. Without knowledge of the  
10 pending sale, Rodeo Realty could not put a demand into escrow and  
11 could not lien the proceeds if the demand were refused. And,  
12 without knowledge of the transaction, Rodeo Realty could not  
13 bring an action to collect. Free from oversight, as a result of  
14 his deceit, Appellant promptly put sale proceeds beyond Rodeo  
15 Realty's control and filed bankruptcy. Appellant testified in  
16 his deposition that he gave some of the sale proceeds to his  
17 daughters and spent the balance, proximately causing Rodeo Realty  
18 damages in the amount of the commission it could otherwise have  
19 collected. Here, Rodeo Realty's damages flowed cleanly from  
20 Appellant's fraud. The only evidence establishes that this is  
21 not a mere breach of contract case and that Appellant is not an  
22 honest but unfortunate debtor entitled to discharge.

23 The bankruptcy court entered judgment in an amount  
24 consistent with the undisputed evidence in Ms. Pavolva's  
25 declaration that the Property sold for \$940,000, and that it was  
26 damaged in the amount of the contract commission fee of 5% plus  
27 \$250. The Judgment, entered in the amount of the earned  
28

1 commission,<sup>10</sup> is well-supported by substantial evidence.  
2 Appellant failed to present any evidence to the contrary, and we  
3 determine that we cannot make any justifiable inferences to the  
4 contrary.

5 Therefore, we conclude that the bankruptcy court did not  
6 commit error and that Rodeo Realty is entitled to summary  
7 judgment, as a matter of law.

8 **CONCLUSION**

9 For all the reasons set forth above, we AFFIRM the  
10 bankruptcy court's summary judgment in favor of Rodeo Realty.  
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24 <sup>10</sup> Although Rodeo Realty also sought punitive damages, it  
25 is clear from the record that the bankruptcy court did not award  
26 punitive damages. And, although the Judgment also allowed Rodeo  
27 Realty to request attorney's fees and costs and we located on the  
28 docket an entered order that allowed fees and costs to Rodeo  
Realty, Appellant has not sought review of that order in this  
appeal and we, thus, do not address the appropriateness of an  
attorney's fees award under the circumstances of this Adversary  
Proceeding.