

DEC 18 2013

NOT FOR PUBLICATION

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

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UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT

In re:)	BAP Nos.	CC-13-1124-TaDKi
)		CC-13-1125-TaDKi*
RICARDO PONCE,)		
)	Bk. Nos.	10-43605
Debtor.)		10-41996
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In re:)	Adv. Nos.	11-01067
)		11-01022
JOSE LUIS PONCE, JR.,)		
)		
Debtor.)		
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JOSE AQUINO,)		
)		
Appellant,)		
)		
v.)	MEMORANDUM**	
)		
RICARDO PONCE,)		
Appellee.)		
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* While not formally consolidated, these two related adversary proceedings were heard by the bankruptcy court at the same time and were considered together. This memorandum applies to both appeals, and the clerk is directed to file a copy of this memorandum in each appeal.

** 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 JOSE AQUINO,)
2 Appellant,)
3 v.)
4 JOSE LUIS PONCE, JR.,)
5 Appellee.)
6 _____)

7 Submitted Without Oral Argument
8 on November 21, 2013

9 Filed - December 18, 2013

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

12 Honorable Meredith A. Jury, Bankruptcy Judge, Presiding

13
14 Appearances: Appellant Jose Aquino, pro se, on brief; Dennis M.
15 Assuras, Esq. on brief for appellees Ricardo Ponce
and Jose Luis Ponce, Jr.

16
17 Before: TAYLOR, DUNN, and KIRSCHER, Bankruptcy Judges.

18 **INTRODUCTION**

19 Brothers Jose Luis Ponce ("Jose Luis") and Ricardo Ponce
20 ("Ricardo" and jointly hereafter, "Debtors")¹ each filed
21 chapter 7² bankruptcy petitions. Jose Aquino ("Aquino")
22 subsequently filed adversary proceedings alleging that debts owed
23 to him by each of the Debtors were nondischargeable based on,
24 _____

25 ¹ As the Debtors bear the same family name, we will refer to
26 them by their given names. We intend no disrespect by such
informality.

27 ² Unless otherwise indicated, all chapter and section
28 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532.

1 among other grounds, § 523(a)(2)(A). The bankruptcy court tried
2 the proceedings together and found that neither Jose Luis nor
3 Ricardo committed fraud in regards to the Aquino debt. Aquino
4 appeals from these judgments. We AFFIRM the bankruptcy court.

5 **FACTS**

6 The Debtors³ owned a mixed martial arts business, Adrenaline
7 FC, LLC (hereafter, "Adrenaline"). At some point, Aquino and the
8 Debtors discussed a business venture in which Aquino would invest
9 \$150,000 in order to help the Debtors keep Adrenaline open. The
10 discussion covered each person's role in the company; the Debtors
11 stated they would do "everything that needs to be done. . . ."
12 Hr'g. Tr. (hereafter, "Transcript") (Mar. 4, 2013) at 6:10. The
13 Debtors also represented that Hector Ramirez (hereafter,
14 "Ramirez") would be involved in, among other things, Adrenaline's
15 management.

16 Jose Luis filed a chapter 7 bankruptcy case on October 1,
17 2010. Shortly thereafter, Adrenaline commenced its own chapter 7
18 bankruptcy case. Ricardo subsequently filed his chapter 7
19 bankruptcy case on October 18, 2010.

20 Aquino filed adversary proceedings against Jose Luis and
21 Ricardo alleging, among other things, that certain debts owed to
22 him were nondischargeable under § 523(a)(2)(A). The adversary
23 complaints⁴ ("Complaints") alleged that the Debtors, on behalf of
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25 ³ Apparently, the Debtors have a family relationship with
26 Aquino.

27 ⁴ The adversary complaints in both cases are exactly the
28 same, with the exception of the Debtors' names and the adversary
proceeding numbers.

1 Adrenaline, borrowed approximately \$150,000 from Aquino. The
2 Complaints also alleged that the Debtors each personally
3 guaranteed repayment of the loans.⁵ Aquino asserted that he and
4 the Debtors also entered into a Partnership Agreement (hereafter,
5 "Agreement").

6 The Joint Pre-trial Report and Order (hereafter, "JPTO")
7 listed the issues of fact to be determined at trial as, among
8 others, whether the Debtors made knowingly false representations
9 in order to acquire the investment from Aquino and whether Aquino
10 justifiably relied upon the Debtors' statements. The JPTO listed
11 the sole issue of law to be determined at trial as whether the
12 debts owed to Aquino were dischargeable.⁶

13 After a joint trial, the bankruptcy court stated that in
14 order to find for Aquino, it needed to find that the evidence
15 weighed in Aquino's favor 51%/49%. Under this metric, it ruled
16 for the Debtors.

17 The bankruptcy court found that due to the fractured
18 familial relationship between Aquino and the Debtors, none of the
19 parties were particularly credible witnesses. It accorded
20 greater weight to the Debtors' testimony, however. It then
21 determined that Aquino did not prove that Debtors made false
22

23 ⁵ In the Complaints, Aquino asserts that the debts resulted
24 from loans. In the Transcript, Aquino testifies that the debts
25 arose in connection with an investment.

26 ⁶ Although the Complaints included other § 523 claims, the
27 JPTO only referenced the § 523(a)(2)(A) claim. The Transcript
28 also reflects that the bankruptcy court referred to "justifiable
reliance." Therefore, we assume that the bankruptcy court
rendered its decision only as to that claim.

1 representations. It also determined that Aquino could not have
2 justifiably relied on the Debtors' statements.

3 The bankruptcy court subsequently entered judgments
4 ("Judgments") in favor of the Debtors.⁷ Aquino timely appealed.⁸

5 **JURISDICTION**

6 The bankruptcy court had jurisdiction under 28 U.S.C.
7 §§ 1334 and 157(b)(2)(I). We have jurisdiction over this appeal
8 pursuant to 28 U.S.C. § 158.

9 **ISSUE**

10 Did the bankruptcy court identify and apply the correct
11 standard of proof in determining the § 523(a)(2)(A) issues?

12 **STANDARD OF REVIEW**

13 In reviewing a bankruptcy court's dischargeability
14 determination, we review its findings of fact for clear error and
15 its conclusions of law de novo. Oney v. Weinberg
16 (In re Weinberg), 410 B.R. 19, 28 (9th Cir. BAP 2009).

17 **DISCUSSION**

18 On appeal, Aquino argues that the bankruptcy court erred in
19 its application of the preponderance of the evidence standard.
20 Based on Aquino's pro se status, we liberally construe his
21 pleadings and other documents. See Nilsen v. Nielson (In re
22 Cedar Funding, Inc.), 419 B.R. 807, 816 (9th Cir. BAP 2009).

23 A bankruptcy court uses the preponderance of the evidence
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25 ⁷ The Judgments provided that the actions were dismissed on
26 the merits.

27 ⁸ Aquino filed the Notices of Appeal on March 18, 2013, but
28 the Judgments were entered on March 19, 2013. Thus, the Notices
of Appeal were timely. See Fed. R. Bankr. P. 8002(a).

1 standard when determining whether a debt is nondischargeable
2 under § 523(a). Grogan v. Garner, 498 U.S. 279, 291 (1991).
3 This standard requires the finder of fact to conclude that "the
4 proposition [is] more likely true than not. . ." in order to find
5 in favor of the creditor. United States v. Arnold & Baker Farms
6 (In re Arnold and Baker Farms), 177 B.R. 648 (9th Cir. BAP 1994).
7 The creditor, thus, has the burden of proof. Ghomeshi v. Sabban
8 (In re Sabban), 384 B.R. 1, 5 (9th Cir. BAP 2008), aff'd,
9 600 F.3d 1219 (9th Cir. 2010). The analysis is strictly
10 construed against the creditor and in favor of the debtor. Id.
11 (citation omitted).

12 Aquino argues that the bankruptcy court erred because,
13 rather than apply a "50.0001%" preponderance of the evidence
14 standard, it applied a 50%/50% standard. Aquino misunderstood
15 the bankruptcy court.

16 In its ruling, the bankruptcy court noted the difficulty in
17 assessing the credibility of the witnesses given the fractured
18 familial relationship and high emotions throughout the trial.
19 The bankruptcy court then commented that: "[i]f [it] were to
20 weigh here, it might be 50/50 and it might be people were excited
21 in investing in a business, and people heard what they thought
22 they heard and nobody lied." Transcript at 10:14-17. Aquino
23 focuses on the "50/50" comment.

24 The bankruptcy court, however, also stated that "[she would]
25 rule for the Defendant because [the] Plaintiff has the burden.
26 And, therefore, no matter how I [weighed] it for the Plaintiff to
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1 win, it [had] to be 51/49."⁹ Transcript at 10:12-14. Thus, it
2 is apparent that the bankruptcy court identified and applied the
3 correct standard of proof.

4 Aquino also argues that the bankruptcy court made
5 hypothetical and incomplete findings. He argues that the
6 bankruptcy court's decision should be remanded as a result. We
7 disagree.

8 We may remand a decision back to the bankruptcy court if
9 there are incomplete findings, but only if the findings are such
10 that we cannot ascertain the bankruptcy court's reasoning. See
11 First Yorkshire Holdings, Inc. v. Pacifica L 22, LLC (In re First
12 Yorkshire Holdings, Inc.), 470 B.R. 864, 871 (9th Cir. BAP 2012).
13 Here, the bankruptcy court fully explained the weight it gave to
14 the witnesses' testimony at trial and made various other
15 findings. Thus, its findings are ascertainable and neither
16 hypothetical nor incomplete.

17 Finally, we note that Aquino obliquely criticizes the
18 bankruptcy court's evidentiary rulings in his statement of issues
19 on appeal. He fails to explain this assertion in his opening
20 brief. Thus, he waives any particularized argument. See City of
21 Emeryville v. Robinson, 621 F.3d 1251, 1261 (9th Cir. 2010)
22 (appellate courts in this circuit "will not review issues which
23 are not argued specifically and distinctly in a party's opening
24 brief."). In any event, we discern no error in this regard. The
25 bankruptcy court enjoys substantial discretion in weighing

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27 ⁹ To the extent Aquino argues that the error lies in the use
28 of 51%/49% versus 50.0001%/49.0009% we disagree; this would be a
distinction without a difference.

1 evidence and making determinations as to credibility following a
2 trial. See Anderson v. City of Bessemer City, N.C., 470 U.S.
3 564, 573 (1985). The bankruptcy court did just that; it
4 sufficiently weighed the parties' evidence and determined the
5 witnesses' credibility in light of the testimony.

6 **CONCLUSION**

7 For the reasons set forth above, we AFFIRM.
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