

MAR 26 2014

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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NOT FOR PUBLICATION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

In re:)	BAP No.	CC-13-1370-KuPaTa
)		
ROARK MONTGOMERY MERRILL,)	Bk. No.	11-52820
)		
Debtor.)	Adv. No.	12-01111
)		
)		
PATRIC J. KELLY; EDWARD)		
ROUPINIAN; ARLENE ROUPINIAN,)		
)		
Appellants,)		
)		
v.)	MEMORANDUM*	
)		
ROARK MONTGOMERY MERRILL,)		
)		
Appellee.)		
)		

Argued and Submitted on February 20, 2014
at Pasadena, California

Filed - March 26, 2014

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

Honorable Gregg W. Zive, Bankruptcy Judge, Presiding

Appearances: Robert Schachter of Hitchcock, Bowman & Schachter
argued for appellants Patric J. Kelly, Edward
Roupinian and Arlene Roupinian; David Brian Lally
argued for appellee Roark Montgomery Merrill.

Before: KURTZ, PAPPAS and TAYLOR, 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.

1 **INTRODUCTION**

2 Patric J. Kelly, Edward Roupinian and Arlene Roupinian
3 (collectively, "Lenders") obtained a state court judgment against
4 Roark Montgomery Merrill for roughly \$160,000 based on Merrill's
5 personal guaranty of a third party's debt. After Merrill filed
6 bankruptcy, the Lenders commenced an adversary proceeding seeking
7 to except the judgment debt from discharge under 11 U.S.C.
8 § 523(a)(2)(B).¹ After trial, the bankruptcy court entered
9 judgment in favor of Merrill and against the Lenders. The
10 bankruptcy court held that it would not except the judgment debt
11 from discharge because any reliance by the Lenders in Merrill's
12 written financial representations was unreasonable. The Lenders
13 filed this appeal.

14 We cannot conclude on the record before us that the
15 bankruptcy court's ultimate finding of no reasonable reliance was
16 illogical, implausible or without support in the record. In
17 addition, even though the bankruptcy court did not make an
18 explicit finding on the Lenders' actual reliance, based on the
19 entire record, and especially on the court's comments after
20 trial, we are convinced that the bankruptcy court implicitly
21 found that the Lenders did not actually rely on Merrill's
22 financial representations before entering into the underlying
23 lending transaction.

24 Because the bankruptcy court's reasonable reliance and
25 actual reliance findings were not clearly erroneous, we AFFIRM

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¹Unless specified otherwise, all chapter and section
references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532.

1 its decision declaring the judgment debt dischargeable.

2 **FACTS**

3 The Lenders from time to time lent money to third parties
4 through a company known as California Western Financial
5 Investments Inc. ("Cal. Western"). Cal. Western was a mortgage
6 brokerage firm that would find individual investors, like the
7 Lenders, willing to fund real estate secured loans for individual
8 borrowers.

9 In 2006, Cal. Western arranged for the Lenders to make a
10 "hard money loan"² to Daniel and Sandra Levy in the principal
11 amount of \$254,600, to fund the construction of a residence on
12 vacant land located in San Jacinto, California. Before making
13 the loan, the Lenders insisted on receiving a guaranty of the
14 Levys' loan obligations from Merrill. Apparently, Cal. Western
15 advised the Lenders that Merrill had a financial stake in the
16 land and its development and that he would be willing execute a
17 guaranty in order to induce the Lenders to make the loan to the
18 Levys.

19 The record is quite thin regarding what documents the
20 Lenders received and reviewed in advance of funding the Levy
21 loan. In fact, the sole document the Lenders testified to
22

23 ²One bankruptcy court has described a "hard money loan" as a
24 loan "too risky to meet the criteria of a bank or other
25 conventional lender, typically involving loan fees and interest
26 rates substantially higher than those charged by conventional
27 lenders." Rigby v. Mastro (In re Mastro), 465 B.R. 576, 585
28 (Bankr. W.D. Wash. 2011). It also has been said that hard money
lenders specialize "in short term real estate bridge loans to
borrowers who are unable to access conventional financing due to
creditworthiness and other high risk factors." In re WN Truck
Stop, L.L.C., 2011 WL 65928 (Bankr. N.D. Tex. 2011).

1 receiving from Merrill in advance of funding the loan was a form
2 loan application containing Merrill's financial information. It
3 is undisputed that the Lenders "requested and required" Merrill
4 to submit the loan application. Joint Pretrial Order and
5 Stipulation (June 18, 2013) at p. 3. But it also is undisputed
6 that the Lenders only received an unsigned and undated version of
7 that application.

8 It is less than clear what the Lenders did with Merrill's
9 loan application once they received it. Two of the Lenders,
10 Kelly and Roupinian,³ testified at trial. Their direct testimony
11 was presented by declaration. They both stated in their trial
12 declarations, in a conclusory manner, that they relied on
13 Merrill's loan application and that the financial information in
14 the loan application was an "important fact" they considered
15 before making the loan. Kelly Decl. (Aug. 2, 2013) at ¶¶ 36, 37,
16 43; Roupinian Decl. (Aug. 2, 2013) at ¶¶ 35, 36, 42. During
17 redirect examination, Kelly went even further and testified as
18 follows:

19 Q: What caused you to finally make the loan?

20 A: Mr. Merrill's application.

21 Q: And the information provided in his application?

22 A: Yes.

23 Trial Tr. (June 19, 2013) at 140:14-18.

24 On the other hand, there is no evidence in the record that
25 the Lenders verified any of the information set forth on

26
27 ³Our references to "Roupinian" refer solely to
28 Mr. Roupinian. The record indicates that Ms. Roupinian did not
actively participate in the trial.

1 Merrill's loan application, such as by obtaining and reviewing a
2 credit report or Merrill's tax returns. This seems odd, given
3 that Kelly was a veteran attorney who had prior experience
4 serving as a foreclosure trustee and who felt comfortable enough
5 with the topic of mortgage loan origination to volunteer his
6 opinion during cross-examination concerning how loan applications
7 typically are prepared and processed. As for Roupinian, he
8 testified to having many years of experience as a mechanical
9 engineer, as an account executive for various brokerage firms,
10 and as a real property investor on behalf of his family trust,
11 including his investment in over thirty loans through Cal.
12 Western.

13 Notwithstanding their stated reliance on Merrill's financial
14 information in deciding to make the Levy loan, neither Kelly nor
15 Roupinian insisted on receiving a signed and dated version of
16 Merrill's form loan application before they funded the loan.
17 According to Roupinian's testimony, he did not even notice that
18 Merrill's loan application was not signed.

19 After the Levys defaulted on the loan, the Lenders sued
20 Merrill in the Los Angeles County Superior Court (Case No.
21 NC052256) and, in May 2011, obtained a judgment after trial for
22 \$158,511. Merrill never satisfied any portion of the judgment
23 and commenced his chapter 7 bankruptcy case several months later,
24 in October 2011.

25 In January 2012, the Lenders commenced an adversary
26 proceeding against Merrill seeking to except the judgment debt
27 from discharge under § 523(a)(2)(B), in essence alleging that
28 Merrill's loan application constituted a false written financial

1 statement. In relevant part, the Lenders alleged that the loan
2 application misrepresented the aggregate value of Merrill's real
3 estate assets, the aggregate amount of equity Merrill had in
4 those assets and the amount of monthly income Merrill was
5 earning.

6 After a one-day bench trial, the bankruptcy court held that
7 the judgment debt was dischargeable. The court found that
8 Merrill's loan application contained knowing and material
9 misrepresentations regarding his financial condition that he made
10 with the intent to deceive in order to induce the Lenders to
11 enter into the loan. The court further found that, as a
12 proximate result of Merrill's misrepresentations, the Lenders
13 incurred damages in the amount of Merrill's judgment debt.

14 As set forth in the bankruptcy court's findings, Merrill's
15 loan application represented that he had total real estate assets
16 worth nearly \$7 million, when in reality his real estate assets
17 were worth only \$4.5 million. In light of the stated \$3 million
18 in secured debt encumbering his real property, instead of having
19 nearly \$4 million in equity, the court explained, Merrill
20 actually had only \$1.5 million in equity.

21 Meanwhile, as for income, the court pointed out that,
22 according to the loan application, Merrill earned \$186,265 per
23 month, which would amount to earnings of over \$2.2 million per
24 year. However, based on Merrill's testimony and his 2005 tax
25 return, the court found that he in reality was earning closer to
26 \$31,000 per month, or \$372,000 per year.

27 None of these findings are challenged on appeal, inasmuch as
28 Merrill did not file a cross-appeal from the bankruptcy court's

1 decision. Instead, the Lenders' appeal focuses on the court's
2 finding that the Lenders did not reasonably rely on the financial
3 information contained in Merrill's loan application.

4 The bankruptcy court made a number of subsidiary findings
5 regarding the reasonable reliance issue. These subsidiary
6 findings reflect: (1) that the court recognized there was
7 evidence supporting both sides of that issue, (2) that the court
8 weighed the conflicting evidence and (3) that the court chose to
9 give varying weight to its subsidiary findings in making its
10 ultimate finding regarding reasonable reliance.

11 For instance, there were several subsidiary findings
12 concerning the terms contained in Merrill's guaranty. Some of
13 these terms indicated that the Lenders were not relying on
14 Merrill's financial information while others indicated precisely
15 the opposite. Ultimately, however, the bankruptcy court
16 determined that the guaranty was not a red flag and, while poorly
17 drafted, was on the whole intended to provide the Lenders with
18 additional comfort and assurance that the Levys' loan obligations
19 would be satisfied one way or another. In essence, the
20 bankruptcy court found the guaranty to be more of a red herring
21 than a red flag.

22 Similarly, the court commented on the overall strangeness of
23 Merrill's involvement in the property and in the loan
24 transaction. The court considered it strange, even suspicious,
25 that, if Merrill really had as much equity and income as his loan
26 application reflected, why would he invest \$100,000 in the Levys'
27 property and be willing to sign the guaranty to support the
28 Levys' financing efforts, but at the same time be unwilling or

1 unable to directly loan the Levys the necessary funds to complete
2 the property development? On the one hand, this led the court to
3 state: "[t]hat should have raised some questions about the
4 accuracy of [Merrill's] financial information." Findings of Fact
5 and Conclusions of Law After Trial (July 22, 2013) at 6:21-22.
6 On the other hand, the court also stated that the overall
7 strangeness of Merrill's involvement in the transaction was not a
8 red flag and did not create any duty for the Lenders to
9 investigate before they could reasonably rely on Merrill's
10 financial information. Ultimately, the bankruptcy court's
11 reasonable reliance finding did not hinge on this factor.

12 Instead, in finding no reasonable reliance, the court
13 focused on three things: (1) on the fact that Merrill's loan
14 application was unsigned and undated; (2) on the fact that
15 Merrill inflated the value of his real property assets by roughly
16 \$2.5 million; and (3) on the fact that his stated income was
17 obviously false, especially in light of the size of the
18 investment at issue. According to the court, these three facts
19 were red flags that should have led the lenders to conduct at
20 least some inquiry into Merrill's financial information. One
21 thing the lenders easily could have done, the court noted, was
22 obtain and review Merrill's 2005 tax return. If they had done
23 so, the court further noted, they would have discovered that the
24 net income reported on the tax return was a small fraction of
25 what Merrill had stated in his loan application.

26 As the bankruptcy court put it, the Lenders did not offer
27 any evidence that they did anything to attempt to verify
28 Merrill's true financial condition and instead chose to accept

1 Merrill's loan application on its face. Given the red flags and
2 the complete absence of any investigation into Merrill's
3 financial representations, the court reasoned, the Lenders had
4 failed to meet their burden of proof to establish that they had
5 reasonably relied on Merrill's loan application.

6 On July 22, 2013, the bankruptcy court entered its judgment
7 declaring the judgment debt dischargeable, and on August 2, 2013,
8 the Lenders timely appealed.

9 JURISDICTION

10 The bankruptcy court had jurisdiction pursuant to 28 U.S.C.
11 §§ 1334 and 157(b) (2) (I). We have jurisdiction under 28 U.S.C.
12 § 158.

13 ISSUE

14 Did the bankruptcy court err when it declared Merrill's
15 judgment debt dischargeable?

16 STANDARDS OF REVIEW

17 In nondischargeability appeals, we review the bankruptcy
18 court's fact findings under the clearly erroneous standard and
19 its legal conclusions de novo. Oney v. Weinberg
20 (In re Weinberg), 410 B.R. 19, 28 (9th Cir. BAP 2009), aff'd,
21 407 Fed.Appx. 176 (9th Cir. 2010). In addition, we review de
22 novo "mixed questions" of fact and law that require
23 consideration of legal concepts and the exercise of judgment
24 about the values that animate governing legal principles. Id.

25 Whether the Lenders reasonably relied on Merrill's financial
26 information is a question of fact subject to the clearly
27 erroneous standard. Siriani v. Nw. Nat'l Ins. Co.
28 (In re Siriani), 967 F.2d 302, 307 (9th Cir. 1992); Gosney v. Law

1 (In re Gosney), 205 B.R. 418, 421 (9th Cir. BAP 1996). A finding
2 of fact is clearly erroneous if it is "illogical, implausible, or
3 without support in the record." Retz v. Samson (In re Retz),
4 606 F.3d 1189, 1196 (9th Cir. 2010). We may not reverse simply
5 because we would have decided the factual issue differently. See
6 Anderson v. City of Bessemer City, N.C., 470 U.S. 564, 573
7 (1985). And when a finding of fact is based on credibility
8 determinations, we must give even greater deference to the
9 bankruptcy court's finding, because the bankruptcy court as the
10 trier of fact is in the best position to assess the credibility
11 of witnesses. See id. at 575.

12 We can affirm on any ground supported by the record. See
13 Black v. Bonnie Springs Family Ltd. P'ship (In re Black),
14 487 B.R. 202, 211 (9th Cir. BAP 2013) (citing Shanks v. Dressel,
15 540 F.3d 1082, 1086 (9th Cir. 2008)).

16 **DISCUSSION**

17 To prevail on their § 523(a)(2)(B) claim, the Lenders needed
18 to establish by a preponderance of evidence each of the following
19 elements:

- 20 (1) a representation of fact by the debtor,
- 21 (2) that was material,
- 22 (3) that the debtor knew at the time to be false,
- 23 (4) that the debtor made with the intention of
24 deceiving the creditor,
- 25 (5) upon which the creditor relied,
- 26 (6) that the creditor's reliance was reasonable, [and]
- 27 (7) that damage proximately resulted from the
28 representation.

Cashco Fin. Servs., Inc. v. McGee (In re McGee), 359 B.R.

1 764, 772 (9th Cir. BAP 2006) (quoting Candland v. Ins. Co. of N.
2 Am. (In re Candland), 90 F.3d 1466, 1469 (9th Cir. 1996)); see
3 also In re Siriani, 967 F.2d at 304.

4 Here, the bankruptcy court's decision hinged on its finding
5 that the Lenders did not prove the reasonable reliance element.
6 As this Panel recently stated, reasonable reliance is determined
7 "on a case-by-case basis in light of the totality of the
8 circumstances." Heritage Pac. Fin., LLC v. Machuca
9 (In re Machuca), 483 B.R. 726, 736 (9th Cir. BAP 2012) (citations
10 omitted). And a "prudent person test" is used to make the
11 reasonable reliance assessment. Id. That test requires the
12 bankruptcy court to examine "whether the creditor exercised the
13 same degree of care expected from a reasonably prudent person
14 entering into the same type of business transaction under similar
15 circumstances." Id.

16 At the same time, the Ninth Circuit Court of Appeals has
17 been reluctant to impose a fixed duty to investigate on lenders
18 as a prerequisite to their reasonably relying on a borrower's
19 financial representations. See In re Candland, 90 F.3d at 1471;
20 Lansford v. La Trattoria, Inc. (In re Lansford), 822 F.2d 902,
21 904 (9th Cir. 1987). And this Panel similarly has been reluctant
22 to impose such a duty to investigate on defrauded creditors.
23 See Gertsch v. Johnson & Johnson, Fin. Corp. (In re Gertsch),
24 237 B.R. 160, 170 (9th Cir. BAP 1999) ("[A]lthough a creditor is
25 not entitled to rely upon an obviously false representation of
26 the debtor, this does not require him or her to view each
27 representation with incredulity requiring verification.").

28 As for red flags, we have been careful to avoid broadly

1 calling any transaction peculiarity a red flag, so as to not
2 inadvertently impose an investigation standard beyond that which
3 the Ninth Circuit might require. See In re Gertsch, 237 B.R. at
4 170-71.

5 With these legal principles in mind, we turn to the Lenders'
6 argument on appeal that the bankruptcy court committed reversible
7 error when it found no reasonable reliance. In essence, the
8 Lenders contend that the "red flags" the bankruptcy court found
9 were not really red flags; they were not obviously false
10 misrepresentations regarding Merrill's financial condition, nor
11 did these so-called red flags demonstrate that Merrill's
12 financial statement was inherently unreliable. As a result, the
13 Lenders reason, they had no duty to verify Merrill's financial
14 information before they could rely on it.

15 There are at least two significant flaws in the Lenders'
16 argument. First, it places undue emphasis on the bankruptcy
17 court's red flag findings and improperly de-emphasizes the larger
18 question of whether, under the totality of circumstances, a
19 reasonably prudent lender facing similar circumstances would have
20 funded the Levy loan without doing anything to attempt to verify
21 Merrill's financial information. And second, it does not
22 reference, let alone address, the appropriate standard of review
23 we must apply: the clearly erroneous standard of review.⁴

24 The real question the Lenders have asked us to decide is
25

26 ⁴In their opening appeal brief, the Lenders twice conceded
27 that reasonable reliance is a question of fact, but also twice
28 misstated the applicable standard of review as the abuse of
discretion standard.

1 whether the bankruptcy court clearly erred when it found that,
2 under all of the facts and circumstances presented, a reasonably
3 prudent lender would have made at least some effort to verify
4 Merrill's financial information.⁵ And, under the clearly
5 erroneous standard of review, we could not overturn this finding
6 unless it was illogical, implausible, or without support in the
7 record. See In re Retz, 606 F.3d at 1196.

8 This is the onerous appellate burden the Lenders needed to
9 satisfy. The Lenders attempted to meet this burden by pointing
10 to Smith v. Lachter (In re Smith), 242 B.R. 694, 702 (9th Cir.
11 BAP 1999) as an example of an appeal in which this Panel upheld
12 the bankruptcy court's reasonable reliance finding under somewhat
13 similar circumstances. See id. But there is a critical
14 distinction between In re Smith and the appeal currently before
15 us. Unlike here, the bankruptcy court in In re Smith found that
16 the plaintiff reasonably relied on the debtor's financial
17 information. As such, to the extent In re Smith is pertinent to
18 our resolution of this appeal, it stands for the proposition that
19 this Panel will not reverse a bankruptcy court's finding of
20 reasonable reliance if it is "plausible and supported by
21 substantial evidence." Id. As In re Smith also put it: "[w]here
22 there are two permissible views of the evidence, the factfinder's
23 choice between them cannot be clearly erroneous." Id. at 700.

24
25
26
27 ⁵The Lenders have not contested on appeal the bankruptcy
28 court's finding that they did nothing to verify Merrill's
financial information.

1 Accord, Anderson, 470 U.S. at 574.⁶

2 In this case, while we may or may not agree with each and
3 every subsidiary finding the bankruptcy court made, there was
4 still sufficient evidence in the record to support the bankruptcy
5 court's ultimate finding of no reasonable reliance and, on the
6 whole, that finding was not illogical or implausible. In the
7 parlance of Anderson, having reviewed the "entire evidence," we
8 are not "left with the definite and firm conviction that a
9 mistake has been committed" regarding the bankruptcy court's
10 ultimate finding of no reasonable reliance. Id. at 573 (citing
11 United States v. U.S. Gypsum Co., 333 U.S. 364, 395 (1948)).

12 Put another way, any error the bankruptcy court might have
13 made in its red flag findings was harmless error. And we must
14 ignore harmless error. See Van Zandt v. Mbunda (In re Mbunda),
15 484 B.R. 344, 355 (9th Cir. BAP 2012).

16 More importantly, even if we were to hold that the
17 bankruptcy court's no reasonable reliance finding was clearly
18 erroneous, we would nonetheless affirm the bankruptcy court's
19 decision on an alternate ground. Having reviewed the entire
20 record and all of the court's findings and conclusions, we are
21 convinced that the bankruptcy court also found that the Lenders
22 did not actually rely on Merrill's financial information.

23 _____
24 ⁶At oral argument, the Lenders also referenced the following
25 unpublished BAP decisions that reached the same result as
26 In re Smith: Tovar v. Heritage Pac. Fin., LLC (In re Tovar),
27 2012 WL 3205252 (9th Cir. BAP 2012); and Kempf v. Hitachi Capital
28 Am. Corp. (In re Kempf), 2012 WL 603805 (9th Cir. BAP 2012). For
the same reason we find that In re Smith does not support the
Lenders' position on appeal, we also find In re Tovar and
In re Kempf do not support that position.

1 As an appellate court, we must construe the bankruptcy
2 court's findings of fact favorably, such that any doubt as to
3 what the bankruptcy court meant is resolved in favor of upholding
4 rather than invalidating the bankruptcy court's judgment. See
5 Brock v. Big Bear Market No. 3, 825 F.2d 1381, 1384 (9th Cir.
6 1987) (citing Wells Benz, Inc. v. United States ex rel. Mercury
7 Elec. Co., 333 F.2d 89, 92 (9th Cir. 1964)). As a result,
8 "whenever, from facts found, other facts may be inferred which
9 will support the judgment, such inferences will be deemed to have
10 been drawn." Id. Accord, Caterino v. United States, 794 F.2d 1,
11 6 n.2 (1st Cir. 1986); Grover Hill Grain Co. v. Baughman-Oster,
12 Inc., 728 F.2d 784, 793 (6th Cir. 1984); Brown v. Lykes Bros.
13 S.S. Co., Inc., 484 F.2d 61, 62 n.4 (5th Cir. 1973); Triangle
14 Conduit & Cable Co. v. Federal Trade Commission, 168 F.2d 175,
15 179 (7th Cir. 1948), aff'd sub nom., Clayton Mark & Co. v.
16 Federal Trade Commission, 336 U.S. 956 (1949); Clyde Equipment
17 Co. v. Fiorito, 16 F.2d 106, 107 (9th Cir. 1926).

18 While the bankruptcy court here did not make an explicit
19 finding concerning the Lenders' actual reliance, it did state as
20 follows:

21 And I think what happened here is that -- the paperwork
22 being done, they fund the loan, and they're comfortable
23 with that. But when the transaction goes sour, then
24 everybody begins to take a hard look at the documents
they paid little or no attention to when they entered
into the transaction.

25 Tr. Trans. (June 20, 2013) at 20:11-16. Taking into
26 consideration all of the court's other findings, and the entirety
27 of the record, we construe this statement as an implicit finding
28 that the Lenders did not actually rely on Merrill's financial

1 information.

2 As explained in In re Siriani, 967 F.2d at 304, and
3 In re McGee, 359 B.R. at 772, actual reliance is a separate and
4 independent element that a creditor must plead and prove to
5 support its § 523(a)(2)(B) claim. And as this Panel recently
6 opined, there can be no reasonable reliance unless the creditor
7 first proves actual reliance. See Heritage Pac. Fin., LLC v.
8 Montano (In re Montano), 501 B.R. 96, 115 (9th Cir. BAP 2013).

9 Importantly, whereas reasonable reliance is determined under
10 an objective standard and focuses on what a hypothetical prudent
11 person would do under similar circumstances, see In re Machuca,
12 483 B.R. at 736-37, the actual reliance inquiry necessarily is
13 subjective and focuses on the state of mind of the creditor -
14 what he or she actually considered to be important in deciding to
15 enter into the transaction in which the misrepresentation
16 occurred. See AT&T Universal Card Servs. v. Mercer
17 (In re Mercer), 246 F.3d 391, 412-13 & n.24 (5th Cir. 2001)
18 (indicating that actual reliance inquiry focuses on whether
19 misrepresentation was a substantial factor in influencing the
20 creditor to act); RESTATEMENT (SECOND) OF TORTS §§ 537, 546 (same).

21 In this case, all of the circumstances the bankruptcy court
22 considered in rendering its reasonable reliance finding, other
23 than its red flag findings, were sufficient to support a finding
24 of no actual reliance. In other words, under the specific
25 circumstances of this case, the absence here of any activity by
26 the Lenders upon receipt of Merrill's unsigned and undated loan
27 application, other than their funding of the Levy loan, was
28 sufficient to support the reasonable inference that the Lenders'

