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NOT FOR PUBLICATION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

In re:	)	BAP No.	EC-13-1346-KuJuTa
	)		
SYED S. CHOWDAURY,	)	Bk. No.	11-38996
	)		
Debtor.	)	Adv. No.	11-02724
	)		
_____	)		
NITIN SHAH,	)		
	)		
Appellant,	)		
	)		
v.	)	<b>MEMORANDUM*</b>	
	)		
SYED S. CHOWDAURY,	)		
	)		
Appellee.	)		
_____	)		

Argued and Submitted on May 15, 2014  
at Sacramento, California

Filed - June 30, 2014

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

Honorable Robert S. Bardwil, Bankruptcy Judge, Presiding

Appearances: William Steven Shumway argued for appellant Nitin Shah; Aaron Christopher Koenig argued for appellee Syed S. Chowdaury.

Before: KURTZ, JURY 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 Pursuant to 11 U.S.C. § 523(a)(2)(A),<sup>1</sup> Creditor Nitin Shah  
3 commenced nondischargeability litigation against debtor Syed S.  
4 Chowdaury alleging that Chowdaury fraudulently induced Shah to  
5 enter into an extension, renewal or refinancing of credit.

6 After trial, the bankruptcy court ruled against Shah. The  
7 court found that Chowdaury did not make any misrepresentation or  
8 false promise at or before the time Shah lent money to Chowdaury,  
9 nor did Chowdaury intend to deceive Shah at the time Shah lent  
10 the money. The bankruptcy court also ruled against Shah on the  
11 alternate basis that Shah had failed to demonstrate justifiable  
12 reliance.

13 Because Shah presented no evidence that Chowdaury's conduct  
14 proximately caused Shah to incur any damages, We AFFIRM.

15 **FACTS**

16 Chowdaury owned and operated two hotel properties in Lake  
17 Tahoe, California, known as the Monaco Hotel and the Lone Pine  
18 Inn.<sup>2</sup> In 2003, Chowdaury was experiencing financial difficulties  
19 and needed funds to pay back taxes and to make repairs to his  
20 Lake Tahoe properties. Chowdaury approached his local bank,  
21 which declined to lend him the money, but his banker put him in  
22 touch with Shah, who agreed to loan money to Chowdaury. Between  
23 roughly March and October of 2003, Shah made a series of advances  
24 to Chowdaury, which totaled somewhere between \$219,000 and

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

28 <sup>2</sup>Chowdaury also is known by the name of Syed Ali. For ease  
of reference, he is always referred to herein as Chowdaury.

1 \$257,000. Shah made these 2003 advances without any formal loan  
2 documentation, nor was there any clear agreement or understanding  
3 on how or when Chowdaury would repay the loan.

4 In April 2004, Chowdaury still needed additional money.  
5 According to Shah, he refused to lend Chowdaury any additional  
6 money unless Chowdaury signed a promissory note covering the 2003  
7 advances. The note Chowdaury signed, dated April 8, 2004,  
8 provided for 10% interest and a principal amount of \$205,000.  
9 However, the note also provided that the principal amount would  
10 be "substantiated by cancelled check copies & other papers."

11 Straight Note (April 8, 2004) at p. 1.

12 The note also contained three potentially-conflicting  
13 provisions regarding repayment. The printed form of the note  
14 stated that the note was payable on demand. But an  
15 interlineation on the face of the note stated: "Note will be paid  
16 on Refinance of Monaco Hotel & Lone Pine Inn Refinance (Lake  
17 Tahoe, Ca)," and a second intelineation stated: "Monaco Hotel  
18 will fund the Note upon Refinance." Id.

19 Apparently, Shah never loaned any additional money to  
20 Chowdaury after Chowdaury signed the note. As for Chowdaury,  
21 before signing the note, he made payments on account of the 2003  
22 advances totaling \$14,000. However, after signing the note,  
23 Chowdaury never made any further payments to Shah.

24 Chowdaury subsequently refinanced his Lake Tahoe properties,  
25 but he did not repay Shah. In 2009, after Shah learned of the  
26 refinancing transactions, he filed a lawsuit against Chowdaury in  
27 the Alameda County Superior Court. In 2011, while the state  
28 court lawsuit was pending, Chowdaury commenced his chapter 7

1 bankruptcy case, and Shah commenced an adversary proceeding  
2 seeking to except Chowdaury's indebtedness from discharge under  
3 § 523(a)(2)(A).<sup>3</sup>

4 Shah's operative pleading, his second amended complaint,  
5 focused on the 2003 advances. Shah alleged that, with the intent  
6 to fraudulently induce Shah to make the 2003 advances, Chowdaury  
7 falsely represented his intent regarding the use of the loan  
8 proceeds and regarding repayment of the loan. Shah's statement  
9 of facts in his unilateral pretrial statement was consistent with  
10 the allegations set forth in his second amended complaint.  
11 However, during trial, Shah's focus shifted from the 2003  
12 advances to the 2004 note. According to Shah, at the time  
13 Chowdaury executed the 2004 note, Chowdaury falsely represented  
14 that he would repay the 2003 advances when he refinanced his Lake  
15 Tahoe properties.

16 By the end of the trial, Shah's legal theory of recovery had  
17 fully evolved to focus exclusively on the repayment  
18 misrepresentation allegedly made at the time the 2004 note was  
19 signed, as reflected in counsel's closing argument. Indeed,  
20 Shah's counsel explicitly confirmed that the actionable  
21 misrepresentation occurred at the time the 2004 note was signed  
22 and not at the time of the 2003 advances:

23 THE COURT: Does your client assert that Mr. Chowdaury  
24 made the representation that your client would be  
25 repaid upon the refinance of the Tahoe properties at  
any time before the note was signed, and that was April

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26 <sup>3</sup>The complaint ambiguously alleged that the debt was  
27 nondischargeable under § 523(a), but Shah clarified at the time  
28 of trial that his nondischargeability claim was based on  
§ 523(a)(2)(A).

1 of 2004?

2 MR. SHUMWAY: No. This is the transaction. This is  
3 the event. That the renegotiation of the debt, the  
obligation of 13 the debt -

4 THE COURT: At this point in time.

5 MR. SHUMWAY: -- created this situation at this point in  
6 time and this was how we were going to get repaid.

7 Tr. Trans. (May 13, 2013) at 93:7-16.

8 Shah's trial testimony and Chowdaury's trial testimony  
9 differed considerably regarding the nature and purpose of the  
10 2004 note. Whereas Shah attempted to characterize the 2004 note  
11 as a refinancing of the 2003 advances, Chowdaury claimed that the  
12 2004 note was meant to address new advances that Shah had agreed  
13 to make but never made.

14 The bankruptcy court orally announced its findings of fact  
15 and conclusions of law at the conclusion of the trial. The court  
16 stated that it found both Shah and Chowdaury generally credible.  
17 The court acknowledged inconsistencies in their respective  
18 accounts of their business transactions, but it attributed these  
19 inconsistencies to the very loose and informal manner in which  
20 they transacted business. With respect to the purpose and nature  
21 of the 2004 note, the court nonetheless concluded that Shah's  
22 explanation of the note was more credible than Chowdaury's.

23 At the same time, the court rejected Shah's characterization  
24 of the 2004 note as a refinancing of the 2003 advances. Instead,  
25 the court determined that the 2004 note was merely a written  
26 memorialization of Chowdaury's indebtedness for the 2003

1 advances.<sup>4</sup>

2 In addition, the bankruptcy court found that, prior to the  
3 execution of the 2004 note, Chowdaury never made any  
4 representation or promise, false or otherwise, regarding how the  
5 2003 advances would be repaid. The court further found that  
6 Chowdaury did not intend to deceive Shah at the time Shah made  
7 the 2003 advances.

8 According to the bankruptcy court, Shah also failed to  
9 demonstrate justifiable reliance. The court based this finding  
10 on the following facts: (1) the loose and informal manner in  
11 which Shah advanced funds to Chowdaury; (2) Shah's awareness of  
12 Chowdaury's financial problems in general and more specifically  
13 Chowdaury's problems operating the Lake Tahoe properties;  
14 (3) Shah's knowledge that Chowdaury was unable to obtain a loan  
15 from a conventional lender or other third parties; and (4) Shah's  
16 failure to require Chowdaury to produce any financial information  
17 before Shah made the 2003 advances.

18 On June 6, 2013, the bankruptcy court entered judgment  
19 against Shah and in favor of Chowdaury on Shah's  
20 nondischargeability claim. Shah timely filed his notice of  
21 appeal on June 19, 2013.

## 22 JURISDICTION

23 The bankruptcy court had jurisdiction pursuant to 28 U.S.C.  
24 §§ 1334 and 157(b)(2)(I). We have jurisdiction under 28 U.S.C.

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26 <sup>4</sup>Shah's complaint allegations and his trial testimony  
27 generally are consistent with the bankruptcy court's  
28 determination that the note was a mere memorialization and not a  
refinancing. In any event, this determination is not critical to  
our analysis and resolution of this appeal.

1 § 158.

2 **ISSUE**

3 Did the bankruptcy court commit reversible error when it  
4 ruled against Shah on his § 523(a)(2)(A) claim?

5 **STANDARDS OF REVIEW**

6 In appeals from exception to discharge actions, we review  
7 the bankruptcy court's findings of fact under the clearly  
8 erroneous standard and its conclusions of law de novo. Oney v.  
9 Weinberg (In re Weinberg), 410 B.R. 19, 28 (9th Cir. BAP 2009),  
10 aff'd, 407 Fed.Appx. 176 (9th Cir. 2010).

11 A fact finding is not clearly erroneous unless it is  
12 "illogical, implausible, or without support in the record." Retz  
13 v. Samson (In re Retz), 606 F.3d 1189, 1196 (9th Cir. 2010).

14 We may affirm on any ground supported by the record. Shanks  
15 v. Dressel, 540 F.3d 1082, 1086 (9th Cir. 2008).

16 **DISCUSSION**

17 In order to prove that its claim should be excepted from  
18 discharge under § 523(a)(2)(A), a creditor must establish that it  
19 was induced to provide "money, property or services" or to enter  
20 into "an extension, renewal or refinancing of credit" by means of  
21 "false pretenses, a false representation, or actual fraud."  
22 § 523(a)(2)(A); see also Ghomeshi v. Sabban (In re Sabban),  
23 600 F.3d 1219, 1222 (9th Cir. 2010). In turn, the creditor can  
24 establish fraud by demonstrating: (1) that the debtor made  
25 misrepresentations, (2) that the debtor knew the  
26 misrepresentations were false at the time they were made,  
27 (3) that the debtor made them with the intent to deceive the  
28 creditor, (4) that the creditor justifiably relied on the

1 misrepresentations, and (5) that, as a proximate cause of the  
2 creditor's reliance, the creditor was harmed. Id.;

3 In re Weinberg, 410 B.R. at 35.

4 Shah has not argued, either during trial or on appeal, that  
5 Chowdaury made any actionable misrepresentations at the time Shah  
6 made the 2003 advances. Instead, Shah argues that the debt  
7 should be excepted from discharge because Chowdaury made a false  
8 promise - that he would repay the 2003 advances upon refinance of  
9 the Lake Tahoe properties - at the time he executed the 2004  
10 note.<sup>5</sup>

11 Shah's argument is fatally flawed. The record establishes  
12 (and the bankruptcy court in essence found) that Chowdaury did  
13 not induce Shah to do anything to his detriment on account of the  
14 2004 promise to repay. Shah claims that, because Chowdaury  
15 executed the note and promised therein to repay the debt upon the  
16 refinance of the Lake Tahoe properties, Shah agreed to forbear  
17 from attempting to collect on the debt until Chowdaury refinanced  
18 the Lake Tahoe properties. There are three problems with this  
19 claim. First, the record does not support it. On its face, the  
20 note Chowdaury executed states that it is payable "on demand."  
21 While the note also states that it will be repaid upon refinance  
22 of the Lake Tahoe properties, it is far from clear that the note  
23 prohibited Shah from immediately demanding repayment or from  
24 initiating a collection action if the debt was not repaid upon

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26 <sup>5</sup>A false promise is a type of misrepresentation that can  
27 support an exception to discharge under § 523(a)(2)(A), provided  
28 that all of the § 523(a)(2)(A) elements are established. See  
McCrary v. Barrack (In re Barrack), 217 B.R. 598, 606-07 (9th  
Cir. BAP 1998).



1 demand. Nor is there anything else in the record indicating  
2 that, until the Lake Tahoe properties were refinanced, Shah was  
3 prohibited from demanding payment of the debt or from initiating  
4 collection activities.

5 Second, even if Shah did affirmatively agree to forbear from  
6 collecting on the debt pending the refinance of the Lake Tahoe  
7 properties, the record indicates that Chowdaury neither induced  
8 nor solicited this agreement to forbear. Rather, based on the  
9 evidence adduced at trial, Shah unilaterally decided to forbear.  
10 Presumably, he agreed to forbear because he realized that this  
11 was his only realistic hope of collecting on the debt. A  
12 creditor's unilateral decision to forbear is not actionable under  
13 § 523(a)(2)(A) unless the debtor induced that forbearance by  
14 making a false representation. See FO-Farmer's Outlet, Inc. V.  
15 Daniell (In re Daniell), 2013 WL 5933657, at \*\*9-10 (9th Cir. BAP  
16 2013).

17 And third, even if Chowdaury did induce Shah to forbear from  
18 collecting on the debt, Shah presented no evidence that  
19 Chowdaury's promise to repay proximately caused Shah to incur  
20 damages. In order to prevail on a § 523(a)(2)(A) claim based on  
21 the creditor's forbearance, the creditor must prove, among other  
22 things, that at the time of the forbearance, "it had valuable  
23 collection remedies." Cho-Hung Bank v. Kim (In re Kim), 163 B.R.  
24 157, 161 (9th Cir. BAP 1994), aff'd and adopted, 62 F.3d 1511  
25 (9th Cir. 1995); see also Stevens v. Nw. Nat'l Ins. Co.  
26 (In re Siriani), 967 F.2d 302, 305 (9th Cir. 1992) (same holding  
27 in the context of § 523(a)(2)(B)). The creditor also must prove  
28 that "those remedies lost value" during the time of forebearance.

1 In re Kim, 163 B.R. at 161. In short, the creditor proves  
2 proximate causation and damages only to the extent it shows that  
3 its remedies lost value during the forbearance period. Id.

4         Simply put, even if we were to accept Shah's claim that he  
5 was induced to forbear from collecting on Chowdaury's debt based  
6 on Chowdaury's allegedly false promise to repay the debt upon the  
7 refinancing of the Lake Tahoe properties, Shah still would lose  
8 this appeal because Shah presented no evidence at trial  
9 indicating that he had valuable collection remedies that he lost  
10 as a result of his forbearance.

11         Shah also cannot prevail on appeal because he did not  
12 adequately address in his opening appeal brief the bankruptcy  
13 court's alternate grounds for its judgment - its finding that  
14 Shah did not justifiably rely on Chowdaury's promise to repay.  
15 Shah's appeal brief devotes only one paragraph to the bankruptcy  
16 court's justifiable reliance finding. In that single paragraph,  
17 Shah marshals a handful of facts, some of which are not even in  
18 the record, which might have permitted the bankruptcy court to  
19 find justifiable reliance. But Shah has not demonstrated on  
20 appeal that no reasonable factfinder could have found an absence  
21 of justifiable reliance on the record presented. "Where there  
22 are two permissible views of the evidence, the factfinder's  
23 choice between them cannot be clearly erroneous." Anderson v.  
24 City of Bessemer City, N.C., 470 U.S. 564, 574 (1985).

25         Put another way, Shah has failed to demonstrate that the  
26 bankruptcy court's finding regarding justifiable reliance was  
27 "illogical, implausible, or without support in the record."  
28 In re Retz, 606 F.3d at 1196. Accordingly, we cannot say that

1 the court's finding of no justifiable reliance was clearly  
2 erroneous.

3 **CONCLUSION**

4 For the reasons set forth above, we AFFIRM the bankruptcy  
5 court's judgment.

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