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NOT FOR PUBLICATION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 Nos. CC-13-1421-KuBlPa
) CC-13-1466-KuBlPa
6 JOAN BORSTEN VIDOV and OLEG) (consolidated appeals)
VIDOV,)
7 Debtors.) Bk. No. 11-22121
) Adv. No. 12-01017
8 _____)
SOFIA MARSHAK,)
9 Appellant,)
10 v.) **MEMORANDUM***
))
11 JOAN BORSTEN VIDOV; OLEG)
12 VIDOV,)
13 Appellees.)
14 _____)

Argued and Submitted on June 26, 2014
at Pasadena, California

Filed - July 31, 2014

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

Honorable Maureen A. Tighe, Bankruptcy Judge, Presiding

Appearances: Marc Y. Lazo of Wilson Harvey Browndorf LLP argued
for appellant Sofia Marshak; Carlos Singer argued
for appellees Joan Borsten Vidov and Oleg Vidov.

Before: KURTZ, BLUMENSTIEL** and PAPPAS, 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.

**The Honorable Hannah L. Blumenstiel, Bankruptcy Judge for
the Northern District of California, sitting by designation.

1 **INTRODUCTION**

2 Appellant Sofia Marshak¹ entered into a settlement agreement
3 with the debtors Joan Borsten-Vidov and Oleg Vidov. Pursuant to
4 the settlement agreement, the Vidovs paid \$250,000 to Marshak and
5 her father. In exchange, Marshak conveyed to the Vidovs all
6 of her ownership interests in the businesses and real property
7 jointly owned by the parties. Marshak also released both the
8 Vidovs and the businesses from any claims arising out of any
9 matter or thing that occurred before the entry into the
10 settlement agreement.

11 Apparently unhappy with the results of the settlement
12 agreement and with the Vidovs' post-settlement conduct, Marshak
13 first sued the Vidovs in state court and later sued them in the
14 bankruptcy court, stating claims under 11 U.S.C. §§ 523(a)(2)(A)
15 and 523(a)(6).² The bankruptcy court granted summary judgment in
16 favor of the Vidovs, and Marshak appealed.

17 Because most of the alleged misrepresentations, concealment
18 and other misconduct Marshak complains of concern claims that
19 Marshak as a matter of law released, we conclude that Marshak
20 would not be able to establish at trial all of the elements for
21 an exception to discharge under either § 523(a)(2)(A) or

22
23 ¹Sofia Marshak is sometimes referred to in the record as
24 Sonia Marshak. For ease of reference, we refer to her herein
simply as Marshak.

25 ²Unless specified otherwise, all chapter and section
26 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532, and
27 all Rule references are to the Federal Rules of Bankruptcy
28 Procedure. All Civil Rule references are to the Federal Rules of
Civil Procedure, and all Evidence Rule references are to the
Federal Rules of Evidence.

1 § 523(a)(6). To the extent that the alleged misrepresentations,
2 concealment and other misconduct Marshak complains of do not
3 concern claims that Marshak released, the summary judgment record
4 establishes that Marshak did not offer any evidence from which a
5 rational trier of fact could find critical elements necessary to
6 support Marshak's nondischargeability claims.

7 Accordingly, we AFFIRM the bankruptcy court's summary judgment
8 ruling.

9 **FACTS**

10 For a time, Marshak, the Vidovs and others jointly owned
11 several businesses and a parcel of residential real property on
12 which some of those businesses were operated. The main business
13 was a drug abuse rehabilitation clinic. The parties purchased
14 real property on Corral Canyon Road in Malibu, California to
15 serve as the site of their clinic and formed a California limited
16 liability company, known as Corral Canyon Holdings, LLC
17 ("Holdings"), to hold title to the real property. After they
18 purchased the real property, Marshak and the Vidovs jointly
19 executed a grant deed conveying the real property to Holdings.
20 That grant deed was recorded on December 19, 2007, in the
21 Official Records of Los Angeles County, as Instrument Number
22 20072784253.

23 A brush fire caused significant damage to the real property,
24 but the parties had fire insurance coverage, so they made claims
25 against the insurance policy based on their fire-related losses.
26 Subsequently, a number of disagreements arose regarding the
27 management and finances of the businesses. In February 2009, the
28 parties entered into a settlement agreement, which the parties

1 intended to resolve all of their differences regarding the
2 companies, their finances, their operations, their assets and
3 their liabilities. For the most part, the events leading up to
4 the parties' disputes are not relevant to this appeal. On the
5 other hand, the settlement is pertinent to our resolution of this
6 appeal, so we examine it in detail.

7 With a few limited exceptions not relevant here, Marshak and
8 her father conveyed all of their interests in the businesses to
9 the Vidovs in exchange for cash payments in the aggregate amount
10 of \$250,000. These conveyances included the assignment of their
11 membership interests in Holdings. In a written assignment
12 document, which is attached to the settlement agreement, Marshak
13 conveyed all of her interest in Holdings and all of her interest
14 in the "income, profits, distributions, rights, capital, and
15 assets" of Holdings. The principal asset of Holdings was the
16 real property. To the extent Marshak might have retained any
17 direct interest in the real property after her execution and the
18 recording of the 2007 grant deed, she conveyed that interest to
19 Holdings by quitclaim deed at the time of the settlement.

20 The settlement agreement also contained general release
21 provisions. Of particular importance, Marshak released the
22 Vidovs and their businesses "from any and all claims, demands,
23 actions, causes of action . . . damages, obligations and
24 liabilities of every kind and nature whatsoever, whether known or
25 unknown, suspected or unsuspected," that Marshak "can, shall or
26 may have" against the Vidovs and their businesses "arising out of
27 . . . any matter . . . or thing whatsoever from the beginning of
28 time to the date of this agreement." Settlement Agreement

1 (Feb. 6, 2009) at ¶ 14.1.³

2 At the same time, the settlement excepted from the coverage
3 of the general release any obligations the Vidovs owed to Marshak
4 arising from the settlement itself, including but not limited to
5 the Vidov's promise to indemnify Marshak for any "Damages" (as
6 defined in the agreement) Marshak may incur as a result of any
7 breach of any debts or obligations of any of the businesses,
8 including but not limited to those debts and obligations listed
9 in schedules 3.4 or 6.2. Among the scheduled debts and
10 obligations were a \$1.95 million mortgage loan from Washington
11 Mutual Bank that helped finance the parties' purchase of the real
12 property, and a \$395,000 line of credit the parties also took out
13 against the property.

14 In spite of the settlement agreement attempting to resolve
15 all of their differences, it was not long before trouble arose
16 once again. In early 2011, Marshak and her father sued the
17 Vidovs and their businesses in the Los Angeles County Superior
18 Court (Case No. BC462013) alleging breach of the settlement
19 agreement and misappropriation of trade secrets.

20 Shortly thereafter, the Vidovs commenced their chapter 11
21 bankruptcy case, and Marshak filed her nondischargeability
22 complaint against them in January 2012. The operative pleading,
23 Marshak's second amended complaint, stated claims for relief

24
25 ³The settlement agreement also contained a provision in
26 which Marshak explicitly agreed that her release covered unknown
27 claims, as well as a standard form waiver of Marshak's rights
28 under Cal. Civil Code § 1542. The unknown claims provision also
contained an acknowledgment by Marshak that she had not relied on
any representations, warranties or promises not expressly set
forth in the settlement agreement.

1 based on §§ 523(a)(2)(A) and (a)(6). As alleged in the
2 complaint, Marshak accused the Vidovs of lying to her about the
3 fire insurance proceeds, of concealing when and how much in
4 proceeds they received from the insurer, and of misappropriating
5 the insurance proceeds. Marshak further accused the Vidovs of
6 misappropriating the loan proceeds from the \$395,000 line of
7 credit and of deliberately ruining her credit rating by not
8 paying the \$1.95 million mortgage.

9 The Vidovs filed a summary judgment motion. In relevant
10 part, the Vidovs asserted that all of the alleged
11 misrepresentations, omissions and other conduct were not
12 actionable under either § 523(a)(2)(A) or § 523(a)(6) as a result
13 of the the terms of the settlement agreement.

14 In her opposition to the summary judgment motion, Marshak in
15 essence explained that, based on her personal understanding of
16 and personal intent regarding the settlement agreement, she
17 expected that her exception to discharge claims survived both the
18 releases and the rights and interests she conveyed to the Vidovs.
19 In addition, Marshak interposed literally hundreds of evidentiary
20 objections to the declarations and documents the Vidovs had
21 offered in support of their summary judgment motion.

22 Without holding a hearing, the bankruptcy court granted the
23 Vidovs' summary judgment motion by order entered August 14, 2013.
24 The bankruptcy court cited multiple fatal defects in Marshak's
25 exception to discharge claims. Among other things, the
26 bankruptcy court generally agreed with the Vidovs' argument that
27 most of the claims could not be reconciled with the terms of the
28 settlement agreement.

1 As for Marshak's evidentiary objections, the bankruptcy
2 court held that both parties had adequately authenticated the
3 settlement agreement. And as for the remainder of the
4 objections, the bankruptcy court summarily overruled all of them
5 as either relating to non-essential matters or because they
6 really constituted legal argument going to the merits of the
7 dispute, which the court stated it had dealt with elsewhere to
8 the extent necessary to resolve the dispute.

9 Marshak filed two notices of appeal from the bankruptcy
10 court's summary judgment ruling, and this Panel consolidated
11 those two appeals by order entered October 7, 2013.

12 JURISDICTION

13 The bankruptcy court had jurisdiction pursuant to 28 U.S.C.
14 §§ 1334 and 157(b)(2)(I), and we have jurisdiction under
15 28 U.S.C. § 158.

16 ISSUE

17 Did the bankruptcy court err when it granted summary
18 judgment in favor of the Vidoys?

19 STANDARDS OF REVIEW

20 We review de novo the bankruptcy court's decision to grant
21 summary judgment. Boyajian v. New Falls Corp. (In re Boyajian),
22 564 F.3d 1088, 1090 (9th Cir. 2009). We may affirm on any ground
23 supported by the record. Cal. Franchise Tax Bd. v. Kendall
24 (In re Jones), 657 F.3d 921, 924 (9th Cir. 2011). In addition,
25 we must ignore harmless error. Van Zandt v. Mbunda
26 (In re Mbunda), 484 B.R. 344, 355 (9th Cir. BAP 2012).

27 DISCUSSION

28 Much of this appeal hinges on Marshak's assertions regarding

1 the fire insurance proceeds. In essence, Marshak asserts that
2 the Vidovs misappropriated the insurance proceeds, that they lied
3 to her about the amount and their use of the insurance proceeds,
4 and that they concealed the true facts regarding the insurance
5 proceeds.

6 All of these assertions are based upon a false premise -
7 that Marshak retained a personal right to receive from the Vidovs
8 a portion of the insurance proceeds. Marshak claims that her
9 personal right to receive a portion of the insurance proceeds
10 arose from three things: (1) the fact that she was named as one
11 of the insureds on the fire insurance policy; (2) the fire itself
12 and the losses incurred; and (3) the fact that the Vidovs were
13 obligated to send her a portion of the insurance proceeds upon
14 receipt. According to Marshak, the Vidovs' obligation to send
15 her a portion of the insurance proceeds upon receipt is evidenced
16 by certain 2007 and 2008 emails between her and Ms. Vidov. In
17 these emails, Marshak expressed her expectation that the Vidovs
18 would send her a portion of the insurance proceeds as soon as the
19 Vidovs received the insurance proceeds from the insurance
20 company.

21 For purposes of this appeal, we will assume the truth of the
22 facts that Marshak relies upon in support of her insurance
23 proceeds claim. Even if these facts are true, however, Marshak
24 released her insurance proceeds claim as a result of the release
25 she gave the Vidovs in the settlement agreement.

26 In construing the settlement agreement, we apply California
27 law because the settlement agreement contained a choice of law
28 provision specifying that the agreement would be governed by and

1 construed and enforced in accordance with California law. See
2 Veal v. Am. Home Mortg. Serv., Inc. (In re Veal), 450 B.R. 897,
3 906, 918 (9th Cir. BAP 2011) (applying Illinois law because the
4 subject agreement involved in the dispute - a mortgage -
5 contained a choice of law provision making Illinois law
6 applicable).

7 Under California law, the fundamental purpose of contract
8 interpretation is to give effect to the mutual, objective intent
9 of the parties as manifested in the parties' contract. Bank of
10 the West v. Super. Court, 2 Cal. 4th 1254, 1264 (1992); Founding
11 Members of the Newport Beach Country Club v. Newport Beach
12 Country Club, Inc., 109 Cal. App. 4th 944, 954, 956 (2003).

13 Interpretation of the contract is a question of law when that
14 interpretation is based on the clear and explicit language of the
15 contract itself, or when uncontroverted extrinsic evidence is
16 considered as an aid in interpreting the contract. See United
17 States v. 1.377 Acres of Land, 352 F.3d 1259, 1264 (9th Cir.
18 2003) (citing California law); see also Newport Beach Country
19 Club, Inc., 109 Cal. App. 4th at 955 ("When no extrinsic evidence
20 is introduced, or when the competent extrinsic evidence is not in
21 conflict, the appellate court independently construes the
22 contract.").

23 The release in the settlement agreement is a general release
24 and is broadly worded. On its face, the release covers all
25 claims and debts, of any nature whatsoever, that Marshak "can,
26 shall, or may have" against the Vidovs or their companies "by
27 reason of, arising out of, or which may hereafter be claimed to
28 arise out of . . . any matter, cause, or thing whatsoever from

1 the beginning of time to the date of the [settlement agreement].”
2 The facts on which Marshak relies in support of her insurance
3 proceeds claim all pre-date the settlement agreement (the
4 insurance coverage, the fire losses, and her understanding
5 regarding the Vidovs’ obligations concerning the proceeds).
6 Indeed, in her opposition papers and on appeal, Marshak has
7 admitted that her expectation regarding the insurance proceeds
8 already existed at the time she entered into the settlement
9 agreement. Consequently, Marshak released her insurance proceeds
10 claim as part of the settlement.⁴

11 We acknowledge that the Vidovs received some of the
12 insurance proceeds before the settlement agreement was entered
13 into and received some of them afterwards. This fact does not
14 change our analysis. That Marshak’s insurance proceeds claim had
15 not fully and completely matured at the time of the settlement
16 does not change the fact that all of the circumstances on which
17 the claim itself was based (the insurance coverage, the fire
18 losses, and Marshak’s understanding regarding the Vidovs’
19 obligations concerning the proceeds) all existed before the
20

21 ⁴To the extent Marshak contends that, by entering into the
22 settlement, she did not personally intend to release her claim to
23 a portion of the insurance proceeds, this intention does not
24 improve Marshak’s case. Marshak never offered any evidence
25 indicating that she ever expressed this intent as part of the
26 settlement documentation or during the settlement negotiations.
27 As a result, her undisclosed private intent regarding not
28 releasing her claim to a portion of the insurance proceeds cannot
be considered in construing the contract. See Newport Beach
Country Club, Inc., 109 Cal. App. 4th at 956, 960 (holding that
extrinsic evidence regarding a party’s private undisclosed intent
was immaterial in construing a contract under California contract
law, which adheres to the objective theory of contracts).

1 parties executed the settlement.

2 Even if we had any doubt (which we do not) regarding the
3 scope of the release and whether the parties expressed an
4 objective intent for the release to cover Marshak's insurance
5 proceeds claim, the Vidovs presented extrinsic evidence
6 demonstrating: (1) that Marshak was aware of the insurance
7 proceeds claim at the time she negotiated the settlement; and
8 (2) that Marshak manifested an intent for the settlement to cover
9 the insurance proceeds claim. This extrinsic evidence consisted
10 of paragraph 4 of the declaration of Robert L. Lawrence and
11 exhibit C attached thereto. Exhibit C was an emailed copy of a
12 letter dated January 25, 2009, from Marshak's counsel to the
13 Vidovs' counsel (Lawrence) regarding the then-pending settlement
14 between Marshak and the Vidovs. In relevant part, on page 4 of
15 exhibit C, Marshak's counsel advised the Vidovs' counsel of a
16 dispute regarding the amount of insurance proceeds already
17 received by the Vidovs and further expressed concern regarding
18 the Vidovs' potential future receipt of additional insurance
19 proceeds. This discussion of the insurance proceeds was set
20 forth in a section of the January 25, 2009 letter explicitly
21 dedicated to "the consequences of [the Vidovs'] failing to accept
22 [Marshak's settlement] offer."

23 The only rational interpretation of this extrinsic evidence
24 is that Marshak anticipated releasing any claim with respect to
25 the insurance proceeds as part of the settlement agreement.
26 Moreover, this extrinsic evidence is consistent with the plain,
27 broad language of the general release.

28 This extrinsic evidence was uncontroverted, and was relevant

1 and admissible for the purpose of interpreting the settlement
2 agreement. See Newport Beach Country Club, Inc., 109 Cal. App.
3 4th at 953-58 (holding that extrinsic evidence could be used to
4 help determine the meaning of an integrated contract, provided
5 that the extrinsic evidence "is relevant to prove a meaning to
6 which the language of the instrument is reasonably
7 susceptible."); see also Headlands Reserve, LLC v. Ctr. for
8 Natural Lands Mgmt., 523 F.Supp. 2d 1113, 1117, 1119, 1127 & n.6
9 (C.D. Cal. 2007) (holding that extrinsic evidence offered to
10 prove a meaning to which a fully integrated contract was
11 reasonably susceptible could be considered in interpreting a
12 contract under California law).

13 Marshak contends on appeal that the bankruptcy court should
14 have excluded the copy of the settlement agreement attached as an
15 exhibit to the Vidovs' summary judgment papers. According to
16 Marshak, the attached copy of the settlement agreement was
17 unauthenticated and violated the best evidence rule. See
18 Evidence Rules 901 and 1002. These arguments are spurious. In
19 both her opposition papers and on appeal, Marshak relied on
20 precisely the same copy of the settlement agreement to which she
21 raised authenticity and best evidence objections. Hence, these
22 evidentiary objections do not reflect a genuine concern as to
23 whether the copy of the agreement offered into evidence was
24 authentic and accurate; rather, they reflect an attempt to
25 prevail on summary judgment on an evidentiary technicality. "A
26 duplicate is admissible to the same extent as the original unless
27 a genuine question is raised about the original's authenticity or
28 the circumstances make it unfair to admit the duplicate."

1 Evidence Rule 1003 (emphasis added). Accord, United States v.
2 Smith, 893 F.2d 1573, 1579 (9th Cir. 1990).

3 Put another way, Marshak conceded away her authenticity and
4 best evidence objections by citing to and relying upon the same
5 copy of the settlement agreement to support her appeal and her
6 summary judgment opposition. See generally Alexander Dawson,
7 Inc. v. NLRB, 586 F.2d 1300, 1302-03 (9th Cir. 1978) (holding
8 that appellant effectively conceded that certain exhibits were
9 authentic); Tallant v. Kaufman (In re Tallant), 218 B.R. 58,
10 69-70 (9th Cir. BAP 1998) (appellant's admissions regarding
11 contents of writing satisfied any concerns arising from the best
12 evidence rule).⁵

13 Marshak also contends that the February 6, 2009 settlement
14 agreement, and the January 25, 2009 email letter to Robert
15 Lawrence, were confidential settlement communications and that
16 the bankruptcy court should have excluded them based on Evidence
17 Rule 408. Generally speaking, Evidence Rule 408 excludes
18 evidence related to settlements and compromises to the extent the
19 proponent seeks to offer the evidence to prove or disprove the
20 validity or the amount of the claim underlying the settlement or
21 compromise.

22 Marshak's reliance on Evidence Rule 408 is misplaced. It is
23 well established that this rule does not exclude evidence related
24

25 ⁵In her opposition papers, Marshak promised to provide to
26 the bankruptcy court, under seal, the original settlement
27 agreement. But there is nothing in the record indicating that
28 Marshak followed through and actually provided the original
settlement agreement or any other documents, under seal or
otherwise.

1 to a settlement when it is offered for the purposes of
2 interpreting or enforcing the settlement. See Advisory Committee
3 Notes accompanying 2006 amendments to Evidence Rule 408 (citing
4 Coakley & Williams v. Structural Concrete Equip., 973 F.2d 349,
5 353-54 (4th Cir. 1992)); see also Cates v. Morgan Portable Bldg.
6 Corp., 780 F.2d 683, 691 (7th Cir. 1985) ("Obviously a settlement
7 agreement is admissible to prove the parties' undertakings in the
8 agreement, should it be argued that a party broke the
9 agreement.").

10 Marshak raised one additional evidentiary objection to both
11 the February 6, 2009 settlement agreement and the January 25,
12 2009 email letter to Robert Lawrence. Marshak contended that
13 these documents were inadmissible because they contain hearsay
14 statements that the Vidovs offered to prove the truth of the
15 matter asserted. Marshak's hearsay objections cited Evidence
16 Rule 802, but they did not give any guidance as to which
17 particular statements in the documents were implicated by this
18 rule. This lack of specificity would have made it difficult if
19 not impossible for the bankruptcy court to meaningfully rule upon
20 these objections, except in some sort of general and summary
21 fashion. Nor did Marshak provide us with any greater specificity
22 when she pressed these evidentiary objections on appeal. By
23 itself, this absence of specificity would permit us to conclude
24 that she has forfeited these objections on appeal. Christian
25 Legal Soc'y v. Wu, 626 F.3d 483, 487-88 (9th Cir. 2010) ("We
26 review only issues [that] are argued specifically and distinctly
27 in a party's opening brief."); Brownfield v. City of Yakima,
28 612 F.3d 1140, 1149 n.4 (9th Cir. 2010) (same).

1 Even if we were to attempt some sort of review of Marshak's
2 hearsay objections, they appear meritless on their face. Many of
3 the statements in both documents would qualify as opposing party
4 admissions, which are explicitly excluded from the definition of
5 hearsay. See Evidence Rule 801(d)(2). To the extent they do not
6 qualify as party admissions, the statements contained in the
7 settlement and in the settlement negotiation letter generally
8 were not offered to prove the truth of any particular out-of-
9 court statement; rather, the documents were offered to prove the
10 terms and scope of the parties' settlement, which by Marshak's
11 own admission were set forth therein. Consequently, these
12 settlement documents can speak for themselves, and any question
13 regarding their accuracy or authenticity was not a matter of
14 concern under the rule against hearsay. See generally United
15 States v. Earle, 488 F.3d 537, 545 (1st Cir. 2007) (stating that
16 an authenticated document can speak for itself when it is
17 available to be examined in the court proceedings). Furthermore,
18 as we already have concluded above, Marshak's objections
19 regarding accuracy and authenticity were not genuine.

20 Accordingly, we reject all of the evidentiary objections
21 that Marshak raised in response to the February 6, 2009
22 settlement agreement and the January 25, 2009 email letter to
23 Robert Lawrence. Moreover, because Marshak's other evidentiary
24 objections would not and could not alter our analysis and
25 resolution of this appeal, any error of the bankruptcy court with
26 regard to these other evidentiary objections was harmless. See
27 In re Mbunda, 484 B.R. at 355.

28 Marshak further complains that the bankruptcy court applied

1 the incorrect legal standard in granting summary judgment against
2 her. Having reviewed the entirety of bankruptcy court's ruling,
3 we have not found any reversible error with respect to the
4 summary judgment standards the bankruptcy court applied.
5 Nonetheless, because we review summary judgment rulings de novo,
6 we will recite the general law applicable to summary judgment
7 proceedings, and we will then conduct our own application of that
8 law to the circumstances of this case.

9 Summary judgment is appropriate when there are no genuine
10 issues of material fact, and, when viewing the evidence most
11 favorably to the non-moving party, the movant is entitled to
12 prevail as a matter of law. Civil Rule 56 (made applicable in
13 adversary proceedings by Rule 7056); Celotex Corp. v. Catrett,
14 477 U.S. 317, 322-23 (1986). Material facts that would preclude
15 summary judgment are those which, under applicable substantive
16 law, may affect the outcome of the case. The substantive law
17 determines which facts are material. Anderson v. Liberty Lobby,
18 Inc., 477 U.S. 242, 248 (1986). All facts genuinely in dispute
19 must be viewed "in the light most favorable to the non-moving
20 party." Scott v. Harris, 550 U.S. 372, 380 (2007). And all
21 reasonable inferences that can be drawn in the non-moving party's
22 favor must be so drawn. Id. at 378.

23 Civil Rule 56 "mandates" that a trial court enter summary
24 judgment when, after adequate opportunity for discovery, the
25 adverse party fails to present evidence in response to a summary
26 judgment motion sufficient to establish the existence of an
27 essential element of that party's case, on which that party would
28 bear the burden of proof at trial. Celotex, 477 U.S. at 323. As

1 the Supreme Court in Celotex explained, "In such a situation,
2 there can be 'no genuine issue as to any material fact,' since a
3 complete failure of proof concerning an essential element of the
4 nonmoving party's case necessarily renders all other facts
5 immaterial." Id. at 322-23.

6 Marshak strenuously argues that, on summary judgment, the
7 burden is on the movant to demonstrate that it is entitled to
8 summary judgment. This much is true. But Marshak ignores the
9 fact that the Vidovs could satisfy their summary judgment burden
10 simply by identifying those portions of the record which
11 demonstrated the absence of a genuine issue of material fact as
12 to one or more elements on which Marshak would bear the burden of
13 proof at trial. Id. For summary judgment purposes, "[a]n issue
14 is 'genuine' only if there is sufficient evidence for a
15 reasonable fact finder to find for the non-moving party." Far
16 Out Productions, Inc. v. Oskar, 247 F.3d 986, 992 (9th Cir. 2001)
17 (emphasis added).

18 The Vidovs met their summary judgment burden here by
19 pointing to the February 6, 2009 settlement agreement and the
20 January 25, 2009 email letter to Robert Lawrence and explaining
21 how these documents negated essential elements of Marshak's
22 claims. See Celotex, 477 U.S. at 323.

23 In sum, even though Marshak was the non-moving party in the
24 summary judgment proceedings, because she would bear the ultimate
25 burden of proof at trial to establish all of the elements
26 necessary to support her nondischargeability claims, she needed
27 to make a showing sufficient to establish genuine issues of fact
28 with respect to those elements in order to survive the Vidovs'

1 summary judgment motion. Id.

2 In order to prevail at trial on her § 523(a)(2)(A) exception
3 to discharge claim, Marshak needed to prove by a preponderance of
4 the evidence the following five elements: (1) that the debtor
5 made material misrepresentations; (2) that the debtor knew the
6 misrepresentations were false at the time they were made;
7 (3) that the debtor made the misrepresentations with the
8 intention and purpose of deceiving the creditor; (4) that the
9 creditor justifiably relied on such misrepresentations; and
10 (5) that the creditor sustained a loss or injury as a proximate
11 result of the misrepresentations having been made. Ghomeshi v.
12 Sabban (In re Sabban), 600 F.3d 1219, 1222 (9th Cir. 2010); see
13 also Field v. Mans, 516 U.S. 59, 67-68 (1995) (explaining that
14 § 523(a)(2)(A) requires, among other things, intent, reliance and
15 materiality); Citibank (South Dakota) N.A. v. Lee (In re Lee),
16 186 B.R. 695, 697-98 (9th Cir. BAP 1995).

17 Here, in light of our construction of Marshak's release as
18 covering any entitlement of hers with respect to the insurance
19 proceeds, and in light of the uncontroverted fact that Marshak
20 transferred to the Vidovs all of her ownership interests with
21 respect to the real property and Holdings, the Vidovs had no
22 further obligation to Marshak on account of the insurance
23 proceeds once the parties entered into the settlement agreement.
24 As a result, none of the alleged misrepresentations, concealment
25 or other misconduct concerning the insurance proceeds that
26 Marshak emphasizes in her opening appeal brief could have
27 constituted a material misrepresentation or a material
28 concealment for purposes of § 523(a)(2)(A). See In re Tallant,

1 218 B.R. at 68 n.14 (indicating that a concealment of facts is
2 material for purposes of § 523(a)(2)(A) only if the concealment
3 pertained to some right or interest of the creditor). In the
4 same vein, the conduct complained of could not have proximately
5 caused Marshak to suffer any loss, injury or damages within the
6 meaning of § 523(a)(2)(A).

7 To the extent Marshak asserts that the Vidovs' alleged
8 misappropriation of the insurance proceeds constituted a debt
9 arising from a willful and malicious injury, that assertion
10 similarly is meritless. Even if we were to assume for summary
11 judgment purposes all of the other elements for an exception to
12 discharge under § 523(a)(6), the summary judgment record
13 demonstrated that Marshak would not be able to prove that the
14 Vidovs' alleged wrongful acts concerning the insurance proceeds
15 caused her any injury. In light of the settlement and the broad
16 terms of Marshak's release, Marshak could not possibly
17 demonstrate any injury from these acts because she relinquished
18 any interest in or entitlement to the insurance proceeds. Unless
19 the willful and malicious conduct leads to injury or damages,
20 there can be no exception to discharge under § 523(a)(6). See
21 Ormsby v. First Am. Title Co. of Nev. (In re Ormsby), 591 F.3d
22 1199, 1206 (9th Cir. 2010) ("A malicious injury involves (1) a
23 wrongful act, (2) done intentionally, (3) which necessarily
24 causes injury, and (4) is done without just cause or excuse."
25 (Emphasis added)).

26 Marshak briefly mentions in her opening appeal brief a few
27 other instances of alleged misconduct, unconnected to her
28 insurance proceeds claim. She argues that these other instances

1 of alleged misconduct independently justify an exception to
2 discharge. Each of these arguments lacks merit. In one
3 instance, Marshak contends that, after the settlement agreement
4 was entered into, the Vidovs lied to her about attempting to
5 negotiate a refinancing of the \$1.95 million mortgage, for which
6 Marshak was still liable to the bank. Marshak further contends
7 that this so-called refinancing actually was a loan modification
8 that potentially could have increased her continuing liability on
9 the mortgage. However, in the same paragraph, Marshak admits
10 that she did not believe the Vidovs and that she successfully
11 prevented the loan modification from occurring. Under these
12 facts as admitted by Marshak, there was no reliance and no
13 damages, so there could not have been a viable § 523(a)(2)(A)
14 claim arising therefrom.

15 In another instance, Marshak contends that the Vidovs
16 falsely promised in the settlement agreement, without any intent
17 to actually perform, that they were going to timely pay the \$1.95
18 million mortgage, so as to prevent any harm to Marshak's credit
19 rating. The only evidence Marshak cites in support of this
20 contention is her own declaration, which states in relevant part:

21 In January of 2011, I also learned that the Vidovs
22 deliberately destroyed my credit, by failing to pay the
23 mortgage on the Coral Canyon property, as they agreed
under the Settlement Agreement.

24 Marshak Decl. (April 25, 2013) at ¶ 19.

25 During our review of the settlement agreement and the
26 attached settlement documentation, we found no indication that
27 the Vidovs ever made a promise that they would timely pay the
28 mortgage so as to prevent any harm to Marshak's credit rating.

1 To the contrary, the settlement agreement provides for potential
2 defaults on the mortgage not by prohibition but instead by
3 indemnification.

4 As we already have explained, Marshak's subjective
5 undisclosed intentions regarding what she hoped to get out of the
6 settlement are immaterial for purposes of construing what the
7 parties actually agreed to. See Newport Beach Country Club,
8 Inc., 109 Cal. App. 4th at 956, 960. There was no evidence in
9 the summary judgment record indicating that Marshak ever
10 disclosed her expectation that the Vidovs would not default on
11 the mortgage and would not thereby damage her credit rating.
12 Consequently, there was no evidence of this promise for purposes
13 of Marshak's § 523(a)(2)(A) claim.⁶

14 The final instance of alleged misconduct that Marshak
15 addresses in her appeal brief concerns the Vidovs' alleged
16 misappropriation of the \$395,000 line of credit. It is difficult
17 to tell from Marshak's papers when she contends this alleged
18 misappropriation occurred. In any event, regardless of the
19 precise timing of this alleged misappropriation, this contention
20 also is meritless. To the extent Marshak claims that this
21 misappropriation occurred before she entered into the settlement
22 agreement, she released any claim in connection therewith. And

24 ⁶As a separate and independent basis for rejecting this
25 particular contention, any alleged harm to Marshak's credit
26 rating resulting from the Vidovs' alleged false promise to keep
27 current on the \$1.95 million mortgage likely is not actionable
28 under either § 523(a)(2)(A) or § 523(a)(6). See Cromer v. Cromer
(In re Cromer), 164 B.R. 680, 682-83 (Bankr. M.D. Fla. 1994)
(rejecting similar exception to discharge claims based on similar
conduct of the debtor).

1 to the extent Marshak claims that this misappropriation occurred
2 after the settlement agreement was entered into, she ceased to
3 have any interest in or entitlement to say how the Vidovs and
4 their businesses should have used the line of credit.

5 **CONCLUSION**

6 For the reasons set forth above, we AFFIRM the bankruptcy
7 court's summary judgment in favor of the Vidovs.

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