

DEC 11 2014

NOT FOR PUBLICATION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. AZ-13-1519-DJuKi
)	
GARY E. HIRTH,)	Bk. No. 10-39593
)	
Debtor.)	Adv. No. 11-00474
)	
_____)	
GARY E. HIRTH,)	
)	
Appellant,)	
)	
v.)	MEMORANDUM¹
)	
PEGGY DONOVAN; DAVID)	
DONOVAN,)	
)	
Appellees.)	
_____)	

Submitted Without Oral Argument
on November 20, 2014

Filed - December 11, 2014

Appeal from the United States Bankruptcy Court
for the District of Arizona

Honorable Daniel P. Collins, Chief Bankruptcy Judge, Presiding

Appearances: Allan D. NewDelman and Roberta J. Sunkin of ALLAN
D. NEWDELMAN, P.C. on brief for appellant; Edwin
B. Stanley of SIMBRO & STANLEY, PLC on brief for
appellees.

Before: DUNN, JURY AND KIRSCHER, Bankruptcy Judges.

¹ 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 The debtor, Gary Hirth, appeals the bankruptcy court's order
2 granting summary judgment in favor of Peggy and David Donovan on
3 their § 523(a)(2)(A) claim.² While this appeal was pending, the
4 debtor passed away. For the reasons set forth below, we AFFIRM.

5 **FACTS**³

6 The debtor owned and controlled Aruba Holdings, Ltd. ("Aruba
7 Holdings"), a corporation that handled real estate investments.
8 Neither the debtor nor Aruba Holdings held real estate licenses.

9 Through Aruba Holdings, the debtor acquired approximately
10 40 acres of unimproved land in Coconino County, Arizona
11 ("Tract"). The Tract was part of a development known as Moqui
12 Ranchettes. The debtor divided the Tract into four 10-acre
13 parcels, one of which he sold to the Donovans in November 2004
14 ("Property").⁴

15 Under Arizona law, sellers of real property are required to
16 disclose to prospective buyers all known material facts about the
17 real property being sold. To this end, sellers must fill out a
18

19
20 ² Unless otherwise indicated, all chapter and section
21 references are to the federal Bankruptcy Code, 11 U.S.C. §§ 101-
22 1532, and all "Rule" references are to the Federal Rules of
23 Bankruptcy Procedure, Rules 1001-9037. All "Evidence Rule"
24 references are to the Federal Rules of Evidence, Rules 101-1003.

25 ³ We have taken a number of facts from the joint pre-hearing
26 statement submitted by the debtor and the Donovans in the
27 adversary proceeding.

28 ⁴ According to the joint pre-hearing statement, the debtor,
Aruba Holdings and the Donovans entered into the sale agreement
on November 10, 2004. Aruba Holdings conveyed the parcel to the
Donovans by warranty deed, which they recorded on November 8,
2004.

1 form titled, "Vacant Land/Lot Seller's Property Disclosure
2 Statement" ("SPDS"). The SPDS lists more than 160 questions and
3 directions that purport to help sellers make these disclosures.

4 The debtor filled out the SPDS and provided a copy of it to
5 the Donovans. Out of the 160 plus questions and directions
6 listed in the SPDS, the following three are relevant to this
7 appeal:

- 8 1) Is the Property located in an unincorporated area of
the county?
- 9 2) If yes, and five or fewer parcels of land other than
subdivided land are being transferred, the Seller must
10 furnish the Buyer with a written Affidavit of
Disclosure ["Affidavit"] in the form required by law.
- 11 3) To your knowledge, is the Property within a
subdivision approved by the Arizona Department of Real
12 Estate?

13 Because he answered "yes" to the first question, the debtor
14 executed the Affidavit. In the Affidavit, the debtor represented
15 under penalty of perjury that the sale of the Property met "the
16 requirements of A.R.S. § 11-809 regarding land divisions."⁵ He

17
18 ⁵ Since the time the debtor executed the Affidavit on
19 September 13, 2004, A.R.S. § 11-809 has been amended; the current
20 version of A.R.S. § 11-809 addresses public works project
21 planning, not the requirements for approval of land divisions.
We thus refer to the 2004 version of A.R.S. § 11-809.

22 A.R.S. § 11-809 provided, in relevant part:

23 A. The board of supervisors of each county may adopt
24 ordinances and regulations pursuant to this section for
25 staff review and approval of land divisions of five or
26 fewer lots, parcels or fractional interests, any of
27 which is ten acres or smaller in size. The county may
not deny approval of any land division that meets the
28 requirements of this section. If review of the request
is not completed within thirty days after receiving the

(continued...)

1 answered "no" to the third question.

2 After they purchased the Property, the Donovans discovered
3 that the legal requirements for land division had not been met
4 and an approved subdivision plat from the county had not been
5 obtained for the Property. As a result, they were unable to
6 obtain building permits for the Property.

7 Meanwhile, the Arizona Department of Real Estate ("ADRE")
8 commenced an investigation into certain alleged violations of
9 state land acquisition, division and transfer/sale laws by the
10 debtor and Aruba Holdings, among others. Its investigation
11 culminated in a consent order ("Consent Order"), dated
12 February 5, 2008, binding the debtor and Aruba Holdings, along
13 with other parties.

14 The Consent Order set forth factual findings and legal
15 conclusions concerning the debtor and Aruba Holdings' violations
16 of state land division laws. It outlined the division of the
17

18 ⁵(...continued)
19 request, the land division is considered to be
20 approved. At its option, the board of supervisors may
21 submit a ballot question to the voters of the county to
22 allow the voters to determine the application of
23 subsections B and C to qualifying land divisions in
24 that county.

25 . . .
26 F. It shall be unlawful for a person or group of
27 persons acting in concert to attempt to avoid the
28 provisions of this section or the subdivision laws of
this state by acting in concert to divide a parcel of
land into six or more lots or sell or lease six or more
lots by using a series of owners or conveyances. This
prohibition may be enforced by any county where the
division occurred or by the state real estate
department pursuant to title 32, chapter 20.

1 Tract through various transfers, including the sale of the
2 Property to the Donovans.

3 Citing A.R.S. § 32-2181(D), the Consent Order then stated
4 that the debtor and Aruba Holdings tried to circumvent state
5 subdivision laws by acting in concert with others to divide the
6 land within Moqui Ranchettes by using a series of owners and/or
7 conveyances.⁶ Specifically, the Consent Order stated that the
8 debtor and Aruba Holdings "planned, arranged, adjusted, agreed on
9

10 ⁶ The 2004 version of A.R.S. § 32-2181 provided, in relevant
11 part:

12 A. Before offering subdivided lands for sale or lease,
13 the subdivider shall notify the commissioner in writing
14 of the subdivider's intention. The notice shall
15 contain

16
17 D. It is unlawful for a person or group of persons
18 acting in concert to attempt to avoid the provisions of
19 this article by acting in concert to divide a parcel of
20 land or sell subdivision lots by using a series of
21 owners or conveyances or by any other method which
22 ultimately results in the division of the lands into a
23 subdivision or the sale of subdivided land. The plan
24 or offering is subject to the provisions of this
25 article. Unlawful acting in concert pursuant to this
26 subsection with respect to the sale or lease of
27 subdivision lots requires proof that the real estate
28 licensee or other licensed professional knew or with
the exercise of reasonable diligence should have known
that property which the licensee listed or for which
the licensee acted in any capacity as agent was
subdivided land subject to the provisions of this
article.

E. A creation of six or more lots, parcels or
fractional interests in improved or unimproved land,
lots or parcels of any size is subject to this article
except when

1 and settled" between themselves and others "acting together
2 pursuant to some design or scheme" to subdivide the land in such
3 a way as to circumvent the state land division laws.

4 The debtor signed the Consent Order on his and Aruba
5 Holdings' behalf. The Consent Order provided that, by signing
6 it, he admitted to the factual findings and legal conclusions set
7 forth therein and agreed to be bound by it. He also agreed to
8 waive his rights to an administrative hearing and to appeal the
9 factual findings and legal conclusions set forth in the Consent
10 Order.

11 The debtor further consented to entry of the Consent Order.
12 He also acknowledged that his and Aruba Holdings' acceptance of
13 the Consent Order "[was] to settle the specific allegations by
14 the [ADRE] in this matter and [did] not preclude any other agency
15 or officer of this State, or subdivision thereof, from
16 instituting other civil or criminal proceedings as may be
17 appropriate in the future." Id. at 101-02. The debtor did not
18 challenge the Consent Order.

19 On March 31, 2008, the debtor and Aruba Holdings entered
20 into a settlement agreement ("Settlement Agreement") with the
21 Donovans. The Settlement Agreement set forth several recitals,
22 including:

- 23 1) [The Donovans] purchased their lot in reliance upon
24 representations made by the [debtor and Aruba Holdings]
25 that Moqui Ranchettes had been legally subdivided, that
26 all the legal requirements for land division had been
27 met, and that building permits could be obtained for
28 immediate construction of homes;
- 2) After purchasing the [Property, the Donovans]
learned that the legal requirements for land division
had not been met and an approved subdivision plat from
Coconino County had not been obtained. Consequently,
[the Donovans] have been denied building permits, have

1 incurred costs, and have been denied the use and
2 enjoyment of their [Property] as anticipated since the
3 date of purchase; and
4 3) [The debtor and Aruba Holdings] den[ied] knowingly
5 engaging in any wrongdoing with respect to the sale of
6 the [Property to the Donovans].

7 The Settlement Agreement further provided that the debtor and the
8 Donovans agreed that the recitals were "true, correct and not
9 subject to dispute."

10 Under the Settlement Agreement, the debtor and Aruba
11 Holdings were to obtain subdivision status for the Property
12 within 24 months. If the debtor and Aruba Holdings were unable
13 to obtain subdivision status within 18 months, they were required
14 to pay the Donovans \$5,000, plus an additional \$5,000 each month
15 thereafter, up to 180 days maximum, until the debtor and Aruba
16 Holdings obtained subdivision status for the Property. If the
17 debtor and Aruba Holdings were unable to obtain subdivision
18 status for the Property within 24 months, the Donovans could
19 choose to sell the Property back to the debtor and Aruba
20 Holdings.

21 Alternatively, the Donovans could choose to continue
22 receiving \$5,000 per month, up to an additional 6 months past the
23 24-month period, until the debtor and Aruba Holdings obtained
24 subdivision status. If the debtor and Aruba Holdings failed to
25 obtain subdivision status for the Property within the 24-month
26 period through their acts or omissions, the Donovans retained all
27 rights and causes of action against the debtor and Aruba Holdings
28 for any and all damages arising out of their purchase of the
Property or breach of the Settlement Agreement.

When the debtor and Aruba Holdings failed to perform under

1 the Settlement Agreement, the Donovans initiated a state court
2 action against them on May 3, 2010. The Donovans alleged in
3 their state court complaint that the debtor and Aruba Holdings
4 breached the Settlement Agreement by failing to make all payments
5 when due, to timely obtain subdivision status for the Property
6 and to repurchase the Property from the Donovans.

7 On December 2, 2010, the state court issued a judgment
8 ("State Court Judgment") against the debtor on the Donovans'
9 motion for summary judgment. Under the State Court Judgment, the
10 Donovans were awarded a total of \$174,866.80 (which included
11 attorney's fees and costs) plus interest. The Donovans also were
12 to reconvey the Property to the debtor once they received payment
13 from him on the State Court Judgment.

14 On December 12, 2010, the debtor filed his chapter 7
15 bankruptcy petition. On March 14, 2011, the Donovans filed a
16 complaint seeking to except the State Court Judgment from
17 discharge under § 523(a)(2)(A).

18 The Donovans referenced the State Court Judgment in their
19 complaint. They then went on to allege that the debtor knowingly
20 and falsely represented that the Property was subdivided properly
21 with the intent to induce them to purchase it. The Donovans
22 asserted that they reasonably relied on the debtor's
23 misrepresentation when they purchased the Property. As a result
24 of the debtor's misrepresentation, they incurred damages.

25 After the debtor filed his answer, the Donovans moved for
26 summary judgment ("Summary Judgment Motion"). They contended
27 that no genuine issues of material fact existed because they had
28 established all of the necessary elements of § 523(a)(2)(A).

1 The Donovans relied on the Consent Order to establish the
2 debtor's knowledge of the falsity of his representation about the
3 subdivision status of the Property and his intent to deceive
4 them.⁷ They asserted that the debtor admitted in the Consent
5 Order that he acted with reckless disregard for the truth of the
6 representation about the subdivision status of the Property.
7 Specifically, he admitted in the Consent Order that he acted in
8 concert with others to subdivide land within Moqui Ranchettes by
9 using a series of owners and/or conveyances in an attempt to
10 circumvent state land division laws. The Donovans further
11 contended that the debtor could not collaterally attack the
12 Consent Order as to these two elements because he consented to
13 its factual findings and legal conclusions and waived all rights
14 to challenge them on appeal.

15 The debtor opposed, arguing that genuine issues of material
16 fact existed as to these two elements because his admissions in
17 the Consent Order did not rise to the level of knowledge and
18 intent required under § 523(a)(2)(A). He claimed that his
19 admissions in the Consent Order merely involved a general
20 negligence standard; at most, the admissions showed that the
21 debtor "knew or with the exercise of reasonable diligence should
22 have known" that the Property was subject to A.R.S. § 32-2181(D).
23 The debtor's admissions in the Consent Order did "not support a
24 finding that [his] actions constitute[d] reckless disregard,
25 which requires an extreme departure from the standards of

26
27 ⁷ We only focus on two of the five elements of
28 § 523(a)(2)(A) as the debtor does not contest on appeal the
bankruptcy court's determinations on the other three elements.

1 ordinary care and more than simple or even inexcusable neglect.”
2 In support of his opposition to the Summary Judgment Motion, the
3 debtor submitted his own statement of facts, which included
4 copies of the Affidavit and the SPDS and a portion of a
5 transcript of the February 28, 2012 deposition of Mr. Donovan.
6 (At his deposition, Mr. Donovan testified that he thought that
7 the Affidavit indicated that the Property was buildable.)
8 Notably, the debtor did not provide any declarations in support
9 of his opposition to the Summary Judgment Motion.

10 At the August 8, 2013 hearing on the Summary Judgment
11 Motion, the bankruptcy court told counsel for the Donovans and
12 the debtor that it wished to focus on their arguments concerning
13 intent.

14 Counsel for the Donovans contended that the Consent Order
15 had preclusive effect as to the debtor’s intent under
16 § 523(a) (2) (A). He focused on the Consent Order, asserting
17 that again is an administrative proceeding in an agreed
18 order that the [debtor] agreed to all those findings of
19 fact and agreed that they would not be disputed in a
court or any tribunal. And that include[d] this Court,
Judge.

20 Tr. of Aug. 8, 2013 hr’g, 5:11-15. Counsel for the Donovans
21 proceeded to highlight the factual findings in the Consent Order
22 that established that the debtor acted “in a conspiracy with the
23 other land owners to illegally subdivide the property.” Tr. of
24 Aug. 8, 2013 hr’g, 6:17-18. He emphasized that the debtor had
25 admitted to these factual findings.

26 Counsel for the Donovans also pointed out that A.R.S. § 32-
27 2181(D) contained the elements of knowledge and intent necessary
28 for a § 523(a) (2) (A) claim in that it provides that a person

1 violates the statute if he knew or had reason to know that he was
2 subdividing lands illegally.⁸ Counsel for the Donovans again
3 stressed that the debtor had agreed to this statement in the
4 Consent Order. Counsel for the Donovans concluded that,

5 by admitting to his violation of [A.R.S. § 32-2181(D)]
6 since [A.R.S. § 32-2181(D)] has a specific knowledge
7 standard in it and that knowledge standard meets the
8 standards of [§] 523(a)(2)(A)], then that again means
9 that there is no - it - no issue of fact on his
10 fraudulent intent because it's now an adjudicated fact
11 under the ADRE consent order.

12 Tr. of Aug. 8, 2013, 8:4-9.

13 Counsel for the debtor countered that the debtor's
14 statements in the Consent Order did not satisfy the elements of
15 intent and knowledge under § 523(a)(2)(A). Specifically, counsel
16 for the debtor argued that the standards for intent and knowledge
17 in A.R.S. § 32-2181(D) were not the same as those in

18 § 523(a)(2)(A). A.R.S. § 32-2181(D) requires that a person "knew
19 or with the exercise of reasonable diligence should have known of
20 the problems with the subdivision" Tr. of Aug. 8, 2013,
21 12:4-5. However, within the Ninth Circuit, fraudulent intent

22 must involve more than simple or even inexcusable
23 negligence. It requires such an extreme departure from
24 the standards of ordinary care that it presents a
25 danger of misleading those who rely on the truth of the
26 representation.

27 Tr. of Aug. 8, 2013 hr'g, 12:10-14. Counsel for the debtor
28 argued that because the two standards for intent under A.R.S.

29 ⁸ Counsel for the debtor and the Donovans both seemed to
30 conflate the knowledge and intent elements in their arguments
31 before the bankruptcy court and before us. The bankruptcy court
32 also appeared to have merged these two elements in its analysis.
33 We have tried to distinguish to the extent possible the arguments
34 and analysis concerning each of these two elements.

1 § 32-2181(D) and § 523(a)(2)(A) were not the same, a genuine
2 issue of material fact existed. He contended that the Settlement
3 Agreement, the State Court Judgment and the Consent Order did not
4 conclusively establish that the debtor acted with fraudulent
5 intent.

6 The bankruptcy court asked counsel for the debtor that if it
7 were to conduct a trial, what evidence would he submit that was
8 not already before it? Counsel for the debtor answered that he
9 would present evidence of the debtor's transactions and the way
10 in which the sale occurred through witness testimony.

11 Counsel for the debtor acknowledged that he did not provide
12 an affidavit of the debtor in his opposition to the Summary
13 Judgment Motion. Counsel for the debtor believed that he did not
14 need to provide an affidavit because he thought that the Donovans
15 failed to show in the Summary Judgment Motion that no genuine
16 issue of material fact existed. He contended that it was

17 up to this Court to listen to the testimony, listen to
18 witness testimony, establish credibility and determine
19 whether [the debtor] either intended to defraud the
20 Donovans or acted - you know his conduct was reckless
21 and that it involved more than simple or even
inexcusable neglect or negligence. And it had to be an
extreme departure from the standards of ordinary care.
And that's what testimony we'd put on.

22 Tr. of Aug. 8, 2013 hr'g, 13:6-12.

23 Counsel for the debtor further explained that he did not
24 "put forth a lot of evidence of what [the debtor's] intent [was]
25 because [the Donovans] haven't shown his intent." Tr. of Aug. 8,
26 2013 hr'g, 19:18-19. He claimed that

27 [the] documents don't prove [the debtor] committed
28 fraud. Those documents show [the debtor] knew or he
should've known, simple as that. And to [counsel for

1 the debtor] fraud carries a much higher burden. And
2 until, you know, the moving party presents sufficient
3 evidence that there was no genuine issue of material
4 fact, and they are entitled to a judgment as a matter
of law, we don't have an obligation to put forth, you
know, contradictory evidence of intent

5 Tr. of Aug. 8, 2013 hr'g, 19:20-25, 20:1-2. Counsel for the
6 debtor informed the bankruptcy court that if the matter went to
7 trial, he would present witness testimony as to the elements of
8 intent and knowledge under § 523(a)(2)(A).

9 Counsel for the Donovans returned that, when he opposed the
10 Summary Judgment Motion, the debtor should have "step[ped] up
11 with admissible evidence to the [bankruptcy court] and put it in
12 the record and not speculate upon what the evidence might or
13 might not be at a later date." Tr. of Aug. 8, 2013 hr'g,
14 14:7-10. But counsel for the Donovans asserted that such
15 evidentiary presentation would have been futile, given that the
16 Consent Order had issue preclusive effect. Counsel for the
17 Donovans further countered that the Consent Order included
18 sufficient language concerning intent; he argued that it
19 contained "intent-type language." Tr. of Aug. 8, 2013 hr'g,
20 20:25.

21 He also argued that the Consent Order included sufficient
22 language concerning knowledge in that it confirmed that the
23 debtor had "agree[d], planned, and he schemed." Tr. of Aug. 8,
24 2013 hr'g, 22:3. The Consent Order cited A.R.S. § 32-2181(D)
25 which "has got the specific level of knowledge and intent that is
26 involved." Tr. of Aug. 8, 2013 hr'g, 22:4-5. Counsel for the
27 Donovans argued that "knowing that it's wrong or having good
28 reason to know it's wrong, that clearly meets the standard of

1 reckless disregard [which is] not a negligence standard as . . .
2 suggested [by the debtor." Tr. of Aug. 8, 2013 hr'g, 22:8-11.

3 At the conclusion of argument at the hearing, the bankruptcy
4 court took the Summary Judgment Motion under advisement. On
5 September 18, 2013, the bankruptcy court issued an order granting
6 summary judgment ("Summary Judgment Order") in favor of the
7 Donovans. The bankruptcy court set forth its factual findings
8 and legal conclusions in the Summary Judgment Order.

9 The bankruptcy court essentially incorporated in the Summary
10 Judgment Order the factual findings set forth in the Settlement
11 Agreement and the Consent Order. It also referenced the
12 Affidavit, pointing out that the debtor represented in the
13 Affidavit that the Property was subdivided properly. The
14 bankruptcy court mentioned that the debtor and Aruba Holdings
15 breached the Settlement Agreement by failing to make liquidated
16 damages payments and refusing to repurchase the Property. It
17 also noted that the debtor and Aruba Holdings consented to the
18 factual findings and legal conclusions in the Consent Order. The
19 bankruptcy court highlighted the language in the Consent Order
20 that stated that the debtor and Aruba Holdings, through their
21 conduct, "acted in concert to divide parcels of land within Moqui
22 Ranchettes, as defined by A.R.S. § 32-2101(1) and in violation of
23 A.R.S. § 32-2181(D)."

24 The bankruptcy court excepted the State Court Judgment from
25 discharge under § 523(a)(2)(A). With respect to the elements of
26 knowledge and intent, it determined that the Consent Order
27 established that 1) the debtor knew or with the exercise of
28 reasonable diligence should have known that the representation

1 about the subdivision of the Property was false, and 2) he made
2 the representation with reckless indifference or disregard for
3 its truth. The bankruptcy court based its determination on the
4 Consent Order, pointing out that it was binding on the debtor.

5 The Consent Order stated that the debtor acted in concert to
6 violate A.R.S. § 32-2181(D), which requires that "the real estate
7 licensee or other licensed professional knew or with the exercise
8 of reasonable diligence should have known that the property which
9 the licensee listed or for which the licensee acted in any
10 capacity as agent was subdivided land subject to [the statute]."
11 Citing Cal. State Emps. Credit Union No. 6 v. Nelson
12 (In re Nelson), 561 F.2d 1342 (9th Cir. 1977), and Houtman v.
13 Mann (In re Houtman), 568 F.2d 651 (9th Cir. 1978), the
14 bankruptcy court determined that, within the Ninth Circuit,
15 "making a false statement with reason to know of its falsity
16 suffices to demonstrate fraudulent intent."

17 The bankruptcy court reasoned that "the 'know or should have
18 known' standard [in A.R.S. § 32-2181(D)] is akin to [the]
19 recklessness [standard in § 523(a)(2)(A)]." Within the Ninth
20 Circuit, the "reckless disregard" standard requires that the
21 debtor have "reckless indifference to his actual circumstances"
22 when he made the representation. Here, the bankruptcy court
23 determined, at the time he executed the Affidavit averring that
24 the Property was subdivided properly, the debtor knew or should
25 have known that it was false. But the debtor recklessly
26 disregarded the truth by going forward in signing the Affidavit.
27 The bankruptcy court concluded that the debtor could not present
28 credible evidence showing that he was negligent when the

1 Affidavit stated that the Property was subdivided properly. Id.

2 The debtor timely appealed the Summary Judgment Order.
3 However, while this appeal was pending, the debtor passed away.

4 **JURISDICTION**

5 The bankruptcy court had jurisdiction under 28 U.S.C.
6 §§ 1334 and 157(b) (2) (I). We have jurisdiction under 28 U.S.C.
7 § 158, subject to the jurisdictional issue below.

8 **ISSUES**

9 (1) In granting summary judgment to the Donovans, did the
10 bankruptcy court err in giving issue preclusive effect to the
11 Consent Order?

12 (2) In granting summary judgment to the Donovans, did the
13 bankruptcy court err in determining that they had established the
14 debtor's knowledge of the falsity of the representation and his
15 intent to deceive under § 523(a) (2) (A)?

16 **STANDARDS OF REVIEW**

17 We review de novo the bankruptcy court's grant of summary
18 judgment. Diamond v. Kolcum (In re Diamond), 285 F.3d 822, 826
19 (9th Cir. 2002). The question of whether a claim is excepted
20 from discharge presents mixed issues of law and fact, which we
21 also review de novo. Id. (citing Peklar v. Ikerd (In re Peklar),
22 260 F.3d 1035, 1037 (9th Cir. 2001)). Under de novo review, we
23 review the bankruptcy court's decision independently, giving no
24 deference to its determinations. First Avenue West Building, LLC
25 v. James (In re Onecast Media, Inc.), 439 F.3d 558, 561 (9th Cir.
26 2006).

27 ///

28 ///

1 **DISCUSSION**

2 A. Constitutional mootness

3 As a preliminary matter we note the potential that this
4 appeal is moot. We cannot exercise jurisdiction over a moot
5 appeal. Felster Publ'g v. Burrell (In re Burrell), 415 F.3d 994,
6 998 (9th Cir. 2005). If an appeal becomes moot while it is
7 pending before us, we must dismiss it. U.S. v. Pattullo
8 (In re Pattullo), 271 F.3d 898, 900 (9th Cir. 2001).

9 A moot case is one where the issues presented are no longer
10 live, and no case or controversy exists. Burrell, 415 F.3d at
11 998. See also City Ctr. W., LP v. Am. Modern Home Ins. Co.,
12 749 F.3d 912, 913 (9th Cir. 2014) (“Constitutional mootness
13 doctrine is grounded in the Article III requirement that federal
14 courts may only decide actual ongoing cases or controversies.”)
15 (quoting Prier v. Steed, 456 F.3d 1209, 1212 (10th Cir. 2006)).
16 The test for mootness is whether an appellate court still can
17 grant effective relief to the appealing party if it decides the
18 merits in his favor. Burrell, 415 F.3d at 998. “Federal courts
19 may hear a dispute only when its resolution ‘will have practical
20 consequences to the conduct of the parties.’” City Ctr. W., LP,
21 749 F.3d at 913 (quoting Columbian Fin. Corp. v. BancInsure,
22 Inc., 650 F.3d 1372, 1376 (10th Cir. 2011)).

23 On appeal, the debtor sought to vacate the Summary Judgment
24 Order and remand to the bankruptcy court so that it could conduct
25 a trial on the Donovans’ § 523(a)(2)(A) claim where he could
26 present evidence as to his knowledge and intent. Counsel for the
27 debtor admitted that he did not provide much evidence in support
28 of the debtor’s opposition to the Summary Judgment Motion because

1 he believed that the Donovans failed to bear their burden of
2 proof to demonstrate that no genuine issues of material fact
3 existed. But, as he explained at the hearing, counsel for the
4 debtor planned to provide witness testimony at trial.

5 However, as we noted earlier, the debtor has passed away; he
6 cannot provide any testimony at trial, either in person or by
7 affidavit, as to his knowledge and intent. We also wonder: What
8 other evidence can the debtor's estate provide to support his
9 position? Given that he is deceased, the debtor cannot locate
10 and provide any additional documentation.

11 If the bankruptcy court simply is going to review the same
12 documents already submitted by the Donovans in support of their
13 Summary Judgment Motion, how will the result be any different?
14 What effective relief can we grant to the debtor in these
15 circumstances? However, potential mootness issues aside,
16 considering this appeal on its merits, we affirm for the
17 following reasons.

18 B. Consent Order as Evidentiary Admission

19 On appeal, the debtor asserts that the bankruptcy court
20 erred in giving the Consent Order issue preclusive effect because
21 the Consent Order did not meet certain due process requirements.
22 He maintains that, in order for an administrative order to have
23 issue preclusive effect, the following conditions must have been
24 satisfied: 1) the administrative agency acted in a judicial
25 capacity; 2) the administrative agency resolved the disputed
26 factual issues before it; and 3) the parties involved had an
27 adequate opportunity to litigate. The debtor argues that none of
28 these conditions were met when the debtor entered into the

1 Consent Order.

2 Specifically, the debtor argues that: the ADRE did not prove
3 its case, even admitting that it only “believed” it had
4 sufficient grounds to prove its case; no administrative law judge
5 actually oversaw the proceedings; and the underlying allegations
6 charged by the ADRE had not been litigated. The debtor further
7 contends that the Donovans submitted no evidence to show that he
8 had a full and fair opportunity to litigate the findings and
9 conclusions in the Consent Order.

10 As noted above, the bankruptcy court applied issue
11 preclusion to the Consent Order. However, we apply a different
12 principle: we construe the Consent Order as including statements
13 against interest (a.k.a., admissions against interest).⁹

14 “Relevant admissions of a party, whether consisting of oral
15 or written assertions . . . , are admissible when offered by an
16 opponent.” Hon. Barry Russell, Bankruptcy Evidence Manual,
17 Vol. 2, § 801.12 (2013 ed.). Admissions constitute substantive
18 evidence. Id. However, “as is the case with most evidence, an
19 admission under Rule 801 is generally not conclusive. It is
20 entitled to whatever weight the trier of fact gives it.” Id.
21 See also, e.g., In re Harris, 279 B.R. 254, 264 (9th Cir. BAP
22 2002) (Klein, J., dissenting) (determining that “every fact [the
23 debtor’s lawyer] asserted that could be used to support a finding
24 of ‘substantial abuse’ [under § 707(b)] is a non-hearsay

25
26 ⁹ Evidence Rule 801(d)(2) provides, in relevant part, that a
27 statement is not hearsay if it “is offered against a party and is
28 (A) the party’s own statement, in either an individual or a
representative capacity”

1 evidentiary admission under Rule 801(d)(2).”) (citation omitted).

2 Here, the debtor explicitly admitted to the factual findings
3 and legal conclusions in the Consent Order and agreed to be bound
4 by them. He also agreed to waive his rights to an administrative
5 hearing and to appeal the factual findings and legal conclusions
6 set forth in the Consent Order. Moreover, the debtor did not
7 provide evidence to counter the admissions he made in the Consent
8 Order. As the trier of fact, the bankruptcy court could and did
9 give the Consent Order due weight in making its determination.
10 It did not err in doing so.

11 C. Knowledge and intent under § 523(a)(2)(A)

12 Summary judgment is appropriate “‘if the pleadings,
13 depositions, answers to interrogatories and admissions on file,
14 together with the affidavits, if any, show that there is no
15 genuine issue as to any material fact and that the moving party
16 is entitled to a judgment as a matter of law.’” Ilko v. Cal.
17 State Bd. of Equalization (In re Ilko), 651 F.3d 1049, 1052 (9th
18 Cir. 2011) (quoting Celotex Corp. v. Catrett, 477 U.S. 317, 322
19 (1986)). “An issue is ‘genuine’ only if there is a sufficient
20 evidentiary basis on which a reasonable fact finder could find
21 for the nonmoving party, and a dispute is ‘material’ only if it
22 could affect the outcome of the suit under the governing law.”
23 Barboza v. New Form, Inc. (In re Barboza), 545 F.3d 702, 707 (9th
24 Cir. 2008) (citation omitted). The moving party bears the burden
25 of showing that no genuine issue of material fact exists. Id.
26 The bankruptcy court must view all evidence in the light most
27 favorable to the nonmoving party. Id.

28 “In response to a properly submitted summary judgment

1 motion, the burden shifts to the [nonmoving] party to set forth
2 specific facts showing that there is a genuine issue for trial.
3 The nonmoving party may not rely on denials in the pleadings but
4 must produce specific evidence, through affidavits or admissible
5 discovery material, to show that the dispute exists." Id.
6 (citations and internal quotation marks omitted).

7 The bankruptcy court cannot grant summary judgment based on
8 its assessment of the credibility of the evidence presented. Id.
9 (quoting Agosto v. INS, 436 U.S. 748, 756 (1978)). At the
10 summary judgment stage, the bankruptcy court cannot weigh the
11 evidence and determine the truth of the matter. Id. (quoting
12 Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 (1986)). It
13 must limit itself to determining whether there is a genuine issue
14 for trial. Barboza, 545 F.3d at 707 (quoting Anderson, 477 U.S.
15 at 249).

16 Under § 523(a)(2)(A), a bankruptcy court may except from
17 discharge any debt for money, property, services or credit
18 obtained by false pretenses, a false representation or actual
19 fraud. To prevail on a claim under § 523(a)(2)(A), a creditor
20 must establish the following five elements: 1) misrepresentation,
21 fraudulent omission or deceptive conduct by the debtor;
22 2) knowledge of the falsity or deceptiveness of the debtor's
23 statement or conduct; 3) an intent to deceive; 4) justifiable
24 reliance by the creditor on the debtor's statement or conduct;
25 and 5) damage to the creditor proximately caused by its reliance
26 on the debtor's statement or conduct. Turtle Rock Meadows
27 Homeowners Ass'n v. Slyman (In re Slyman), 234 F.3d 1081, 1085
28 (9th Cir. 2000). The creditor must prove each element of

1 § 523(a)(2)(A) by a preponderance of the evidence. Grogan v.
2 Garner, 498 U.S. 279, 287 (1991).

3 On appeal, the debtor contends that the bankruptcy court
4 erred in granting summary judgment because two elements under
5 § 523(a)(2)(A) had not been met. Specifically, he argues that
6 the Donovans failed to meet their burden of proof to establish
7 the elements of knowledge and intent.

8 1. Knowledge of falsity and intent to deceive

9 When analyzing knowledge and intent, reckless disregard for
10 the truth of the representation or reckless indifference to the
11 debtor's actual circumstances may support a § 523(a)(2)(A) claim.
12 Arm v. A. Lindsay Morrison, M.D., Inc. (In re Arm), 175 B.R. 349,
13 354 (9th Cir. BAP 1994) (citations omitted). See also Houtman v.
14 Mann (In re Houtman), 568 F.2d 651, 656 (9th Cir. 1978),
15 overruled in part on other grounds by Grogan v. Garner, 498 U.S.
16 279 (1991) (holding that "either actual knowledge of the falsity
17 of a statement, or reckless disregard for its truth, satisfies
18 the scienter requirement for nondischargeability of a debt under
19 § 17(a)(2) [predecessor to § 523(a)(2)(A)]."); Gertsch v. Johnson
20 & Johnson Fin. Corp. (In re Gertsch), 237 B.R. 160, 167-68 (9th
21 Cir. BAP 1999) (quoting Houtman, 568 F.2d at 656). Within the
22 Ninth Circuit, the phrase "reckless indifference to his actual
23 circumstances" is used interchangeably with the phrase "reckless
24 disregard for the truth of a representation." Advanta Nat'l Bank
25 v. Kong (In re Kong), 239 B.R. 815, 826 (9th Cir. 1999) (citations
26 omitted). Both the knowledge and intent elements under
27 § 523(a)(2)(A) may be established by circumstantial evidence and
28 inferences drawn from a course of conduct. See Tallant v.

1 Kaufman (In re Tallant), 218 B.R. 58, 66 (9th Cir. BAP 1998).

2 When determining the knowledge element, “[a] representation
3 may be fraudulent, without knowledge of its falsity, if a person
4 making it is conscious that he has merely a belief in its
5 existence and recognizes that there is a chance, more or less
6 great, that the fact may not be as it is represented.” Gertsch,
7 237 B.R. at 168 (quoting Restatement (Second) of Torts § 526
8 cmt. e (1977) (internal quotation marks omitted)). In such
9 circumstances, the person makes the representation “without
10 [believing] in its truth or recklessly, careless of whether it is
11 true or false.” Kong, 239 B.R. at 827 (quoting Restatement
12 (Second) of Torts § 526 cmt. e).

13 When determining the intent element, recklessness alone does
14 not equate to fraudulent intent; it is probative of intent only.
15 See Khalil v. Developers Sur. & Indem. Co. (In re Khalil),
16 379 B.R. 163, 174 (9th Cir. BAP 2007). Reckless conduct must
17 involve more than simple or inexcusable negligence. Kong,
18 239 B.R. at 826. “The essential point is that there must be
19 something about the adduced facts and circumstances which suggest
20 that the debtor intended to defraud creditors of the estate.”
21 Khalil, 379 B.R. at 175 (quoting Garcia v. Coombs (In re Coombs),
22 193 B.R. 557, 565-66 (Bankr. S.D. Cal. 1996) (internal quotation
23 marks omitted)). That is, “the focus must be on ‘the totality of
24 the circumstances and whether they create the overall impression
25 of a deceitful debtor.’” Nwas Okla., Inc. v. Kraemer
26 (In re Kraemer), 2011 WL 3300360 at * 6 (9th Cir. BAP 2011)
27 (quoting Wolf v. McGuire (In re McGuire), 284 B.R. 481, 493
28 (Bankr. D. Colo. 2002)).

1 a. Knowledge of falsity

2 The debtor argues that there is no evidence that he knew or
3 had reason to know that the Property was not subdivided properly
4 at the time he sold it to the Donovans. He claims that the
5 factual findings in the Consent Order are not determinative as to
6 his knowledge concerning the subdivision of the Property because
7 the issue had not been actually litigated. Instead, the debtor
8 simply signed the Consent Order following negotiations with the
9 ADRE. He further contends that nothing in the Settlement
10 Agreement indicated that the debtor knew that the statement
11 regarding the requirements of A.R.S. § 11-809 in the Affidavit
12 was incorrect.

13 The debtor complains that there is no evidence showing that
14 he knew or should have known that the Property was not subdivided
15 properly. The Donovans provided the SPDS, the Affidavit and the
16 Consent Order as evidence demonstrating the debtor's knowledge of
17 the falsity of his representation concerning the Property's
18 subdivision status. And the debtor did not proffer his own
19 evidence to counter the Donovans' evidence.

20 Although the debtor denied "knowingly engaging in any
21 wrongdoing with respect to the sale of the [Property]" in the
22 Settlement Agreement, he nonetheless showed reckless disregard
23 for the truth of his representation about the Property's
24 subdivision status. This reckless disregard is discernable in
25 his inconsistent statements in the SPDS and the Affidavit. In
26 the SPDS, the debtor represented that, to his knowledge, the
27 Property was not within a subdivision approved by the ADRE. But
28 in the Affidavit, he stated, under penalty of perjury, that the

1 sale of the Property met "the requirements of A.R.S. § 11-809
2 regarding land divisions." (Mr. Donovan even testified at his
3 deposition that he thought the Affidavit indicated that the
4 Property was buildable.) These inconsistent statements show that
5 the debtor was careless as to whether the Property was subdivided
6 properly. The debtor's careless disregard for the truth of the
7 representation regarding the Property's subdivision status
8 satisfies the knowledge element under § 523(a)(2)(A). Based on
9 the evidence before it, the bankruptcy court did not err in
10 deciding in the Donovans' favor on the knowledge element under
11 § 523(a)(2)(A).

12 b. Intent to deceive

13 The debtor further contends that there is no evidence
14 demonstrating that he intended to deceive the Donovans at the
15 time he sold the Property to them. He stresses that there is no
16 independent evidence that he fraudulently or recklessly made the
17 inaccurate statement about the Property's subdivision status in
18 the Affidavit to induce the Donovans to purchase the Property.

19 However, the debtor did not provide any evidence of his own,
20 through affidavit or other admissible discovery material, showing
21 that he lacked intent to deceive under § 523(a)(2)(A), even
22 though he bore the production burden in his opposition to the
23 Summary Judgment Motion. See Barboza, 545 F.3d at 707. If he
24 had evidence (including his own declaration or affidavit) to
25 raise a genuine issue of material fact as to his intent, the
26 debtor should have presented it to the bankruptcy court. He
27 presented no such evidence.

28 The debtor also argues that the bankruptcy court erroneously

1 relied on "an incorrect interpretation of state law [i.e., A.R.S.
2 § 32-2181(D)] and the non-litigated findings contained in the
3 Consent Order to establish that [the debtor] intended to deceive
4 the Donovans when he filled out the [Affidavit]." Appellant's
5 Opening Brief at 25.

6 For the first time on appeal, the debtor argues that the
7 intent element in A.R.S. § 32-2181(D) does not apply to him. He
8 points out that A.R.S. § 32-2181(D) specifically provides that,

9 Unlawful acting in concert pursuant to this subsection
10 with respect to the sale or lease of subdivision lots
11 requires proof that the real estate licensee or other
12 licensed professional knew or with the exercise of
13 reasonable diligence should have known that property
14 which the licensee listed or for which the licensee
15 acted in any capacity as agent was subdivided land
16 subject to this article.

17 According to the debtor, under A.R.S. § 32-2181(D), only
18 real estate licensees or other licensed professionals are subject
19 to the intent element. The debtor maintains that he is not a
20 real estate licensee or other licensed professional. Because the
21 intent element under A.R.S. § 32-2181(D) only applies to real
22 estate licensees, which he is not, the bankruptcy court erred in
23 relying on the Consent Order to find that the debtor
24 intentionally deceived the Donovans within the meaning of
25 § 523(a)(2)(A).

26 We deem this argument waived because the debtor did not
27 raise it before the bankruptcy court. O'Rourke v. Seaboard Sur.
28 Co. (In re E.R. Fegert, Inc.), 887 F.2d 955, 957 (9th Cir. 1989).
Moreover, even if he raised this argument before the bankruptcy
court, whether or not the debtor was a real estate licensee is
immaterial. The debtor explicitly admitted and agreed to be

1 bound by the findings in the Consent Order, including the finding
2 that he conspired with others (at least one of whom held a real
3 estate salesperson's license) to violate A.R.S. § 32-2181(D).

4 Further, as we explained above, the debtor showed reckless
5 disregard for the truth of his representation concerning the
6 Property's subdivision status based on his inconsistent
7 representations in the Affidavit and the SPDS. The bankruptcy
8 court thus did not err in granting summary judgment in the
9 Donovans' favor on the intent element under § 523(a)(2)(A).

10 **CONCLUSION**

11 For the foregoing reasons, we AFFIRM.

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