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NOT FOR PUBLICATION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

5	In re:)	BAP Nos. CC-14-1185-PaTaD
)	CC-14-1258-PaTaD
6	MARK JENKINS and)	(Cross-Appeals)
	ROXANNA RAMEY,)	
7)	Bankr. No. 11-59152-ER
	Debtors.)	
8)	Adv. Proc. 12-01365-ER
9	MARK JENKINS,)	
)	
10	Appellant and)	
	Cross-appellee,)	
11)	
	v.)	MEMORANDUM¹
12)	
	ROBERT MITELHAUS,)	
13)	
	Appellee and)	
14	Cross-appellant.)	
15)	

Argued and Submitted on January 22, 2015
at Pasadena, California

Filed - February 20, 2015

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

Honorable Ernest M. Robles, Bankruptcy Judge, Presiding

Appearances: David Brian Lally argued for appellant/cross-appellee Mark Jenkins; Mark T. Young of Donahoe & Young LLP argued for appellee/cross-appellant Robert Mitelhaus.

Before: PAPPAS, TAYLOR and DUNN, 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 Chapter 7² debtors Mark Jenkins ("Jenkins") and Roxanna
2 Ramey ("Ramey" and together, "Debtors") appeal the judgment and
3 amended judgment of the bankruptcy court determining that
4 Jenkins' debt owed to creditor Robert Mitelhaus ("Mitelhaus") is
5 excepted from discharge under § 523(a)(4) and (a)(6). Mitelhaus
6 cross-appeals the amount of judgments and whether Ramey is also
7 liable for the debt that is excepted from discharge. We REVERSE
8 that portion of the judgments determining that Debtors' debt to
9 Mitelhaus is excepted from discharge under § 523(a)(4), AFFIRM
10 the judgments' determination that the debt is excepted from
11 Jenkins' discharge under § 523(a)(6), and AFFIRM the bankruptcy
12 court's determination of the amount of the nondischargeable debt
13 in the judgments and that Ramey is not liable for that exception
14 to discharge.

15 **FACTS**

16 Nutec Enterprises, Inc. ("Nutec") is a Nevada corporation
17 doing business as a real estate brokerage in California. Ramey
18 is its president, owns 100 percent of the shares of Nutec, and
19 acts as a real estate salesperson. Jenkins, her spouse, is vice-
20 president of Nutec and serves as its real estate broker.

21 On June 11, 2003, Nutec and Mitelhaus, a real estate
22 salesperson, entered into an Independent Contractor Agreement
23 (the "Contract"). Mitelhaus agreed to work for Nutec in exchange
24

25
26 ² Unless otherwise indicated, all chapter and section
27 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532, all
28 Rule references are to the Federal Rules of Bankruptcy Procedure,
Rules 1001-9037, and all Civil Rule references are to the Federal
Rules of Civil Procedure 1-86.

1 for payment of commissions for any real estate sold or leased
2 when he acted as agent for the buyer or seller. Mitelhaus worked
3 with Nutec from June 2003 through July 19, 2005, when Nutec
4 terminated the Contract.

5 Shortly after Nutec terminated its relationship with
6 Mitelhaus, KS Management, LLC ("KS") sued Nutec, Jenkins, and
7 Mitelhaus in connection with a lease transaction (the "KS
8 Lawsuit"). Mitelhaus alleges that he made a demand on Nutec to
9 defend him based on Nutec's errors and omissions insurance policy
10 but Nutec refused. In November 2005, Nutec tendered the defense
11 of the KS Lawsuit claim to its insurance carrier, which refused
12 the claim because it arose during a period when Nutec had allowed
13 the policy to lapse for failure to pay premiums. As a result,
14 Mitelhaus alleges that he was required to defend the KS Lawsuit
15 with his own resources, expending \$77,284.50 in attorney's fees
16 and costs in the process. KS ultimately dropped the lawsuit.

17 On December 21, 2007, Mitelhaus filed a complaint in state
18 court against Nutec, Jenkins, and Ramey for breach of contract,
19 breach of the covenant of good faith and fair dealing, common
20 counts, and fraud. Mitelhaus v. Nutec Enters., Inc., case no.
21 BC382703 (Los Angeles Superior Court). Among the damages sought
22 by Mitelhaus were withheld commissions in the amount of
23 \$71,202.38 for four commissions (the "Four Commissions") that he
24 alleged became payable to him after he was terminated; for other
25 withheld commissions of approximately \$66,000 relating to leases
26 regarding the Nasr property (the "Nasr Commissions"); for
27 Mitelhaus' costs of defending the KS Lawsuit ("KS Lawsuit Fees");
28 for a commission on the Nutec Office Lease ("Office Lease"); for

1 violation of labor laws; and for reimbursement of the insurance
2 premiums he paid to Nutec.

3 The parties jointly moved to submit the dispute to
4 arbitration, which the state court approved. An arbitration
5 hearing took place in July 2009 over three days. Nutec, Jenkins,
6 and Ramey were represented by counsel, as was Mitelhaus. Six
7 witnesses testified at the hearing. On July 20, 2009, the
8 arbitrator issued an Award of Arbitrator (the "Award"). Among
9 other things, the Award found and concluded that:

10 - Nutec had breached the Contract by withholding the Four
11 Commissions that were due to Mitelhaus. Mitelhaus was awarded
12 \$71,202.18 in damages for this breach.

13 - Mitelhaus did not present evidence on violations of the
14 Labor Code. No damages were awarded on this claim.

15 - Nutec did not commit fraud in withholding the insurance
16 premiums from Mitelhaus' compensation. The Award opined,
17 however, that "the Arbitrator finds the conduct [of Jenkins and
18 Ramey] to be deplorable, but not actionable." Mitelhaus was
19 awarded \$3,197 as a flat fee for reimbursement of his payments
20 (the "Flat Fee").

21 - Mitelhaus was awarded \$62,001.95 and \$15,282.55 for the
22 KS Lawsuit Fees.

23 - Mitelhaus was not entitled to a commission for the Office
24 Lease.

25 - Jenkins was personally liable for damages in the Award.

26 - Ramey was not the alter ego of Nutec as alleged by
27 Mitelhaus and, thus, was not liable for damages under the Award.

28 - Mitelhaus was the prevailing party and was entitled to

1 recover his attorney's fees and costs.

2 - Mitelhaus had waived his right to seek compensation for
3 the Nasr Commissions.

4 In sum, the arbitrator awarded Mitelhaus actual damages of
5 \$151,683.88,³ prejudgment interest of \$49,184.80, costs of
6 arbitration of \$12,750.00, and attorney's fees and costs of
7 \$80,742.94 against both Nutec and Jenkins.

8 On August 5, 2009, Mitelhaus filed an unopposed motion in
9 the Superior Court to confirm the Award. In a September 23, 2009
10 order granting this motion (the "State Court Judgment"), the
11 state court adjudged Jenkins and Nutec liable to Mitelhaus for
12 \$289,526.62.⁴ The State Court Judgment was not appealed.

13 On November 10, 2009, Nutec filed a petition for relief
14 under chapter 11. Its reorganization plan was confirmed on
15 September 10, 2010, and the bankruptcy case was closed on
16 March 25, 2011. Mitelhaus was scheduled as Nutec's largest
17 unsecured creditor for \$314,393.96, and the confirmed plan
18 proposed to pay him \$34,583.33. Apparently, no payments have
19 been received by Mitelhaus under the Nutec plan.

20 Debtors filed a petition under chapter 7 on November 30,
21

22
23 ³ The \$151,683.88 (the "Award") is composed of \$71,202.38
24 (Four Commissions) + \$3197.00 (Flat Fee) + \$62,001.95/\$15,282.55
(KS Lawsuit Fees).

25 ⁴ The \$289,526.62 awarded in the State Court Judgment is
26 composed of \$151,683.88 (the "Award") + \$49,184.80 (prejudgment
27 interest) + \$12,750 (arbitration fees) + \$80,742.94 (attorney
28 fees for arbitration) + \$1,540.00 (attorney fees for
confirmation) - \$6,375.00 (arbitration fees that Nutec reimbursed
to Mitelhaus before entry of the State Court Judgment).

1 2011. Their schedule F listed a debt of \$289,526.62 to Mitelhaus
2 arising from the State Court Judgment.

3 Mitelhaus filed an adversary complaint against Debtors on
4 March 8, 2012, asking the bankruptcy court to determine that the
5 State Court Judgment was excepted from discharge under
6 § 523(a)(4) and (a)(6).

7 Debtors answered the complaint and on November 13, 2012,
8 Mitelhaus filed a motion for summary judgment arguing that the
9 Award was preclusive as to all of the required elements for an
10 exception to discharge under both § 523(a)(4) and (a)(6). The
11 bankruptcy court denied the motion without a hearing on
12 February 4, 2013, principally because the arbitrator had not made
13 the findings concerning Debtors' intent required to establish an
14 exception to discharge under either § 523(a)(4) or (a)(6).

15 A three-day trial in the adversary proceeding was held in
16 October 2013. After taking the matter under advisement, the
17 bankruptcy court entered a Memorandum of Decision ("First
18 Memorandum") and Judgment ("First Judgment") on April 2, 2014.
19 Among the rulings made by the bankruptcy court were:

20 - Mitelhaus' debt was excepted from discharge as to Jenkins
21 under § 523(a)(4) based on larceny. In particular, the
22 bankruptcy court determined that Jenkins' withholding of the Four
23 Commissions from Mitelhaus constituted a felonious taking done
24 with the intent to deprive Mitelhaus of the commissions and,
25 therefore, was larceny.

26 - Mitelhaus' debt was also excepted from discharge pursuant
27 to § 523(a)(6) because Jenkins' had willfully and maliciously
28 withheld the Four Commissions.

1 - The attorney's fees and costs awarded in the arbitration
2 were also excepted from Jenkins' discharge.

3 - The State Court Judgment was dischargeable as to Ramey.

4 The First Judgment determined that \$163,057.32⁵ of the debt
5 evidenced by the State Court Judgment was excepted from Jenkins'
6 discharge under § 523(a)(4) and (a)(6).

7 On April 16, 2014, Mitelhaus filed a motion for
8 reconsideration under Civil Rule 59(e), incorporated in
9 Rule 9023. The motion asked the bankruptcy court to reconsider:
10 (1) whether the bankruptcy court was bound to deem the full
11 amount of the debt in the State Court Judgment nondischargeable;
12 (2) whether the attorney's fees awarded to Mitelhaus for the KS
13 Lawsuit were excepted from discharge; (3) whether the Nasr
14 Commissions should also be included in the debt excepted from
15 discharge; (4) whether Mitelhaus should recover prejudgment
16 interest on the State Court Judgment; and (5) whether Ramey
17 should also be liable on the debt.

18 Later that same day, Jenkins filed a notice of appeal of the
19 First Judgment. Under the rules, Jenkins' appeal was tolled
20 until entry of the bankruptcy court's decision on the
21 reconsideration motion. See Rule 8002(b).

22 The bankruptcy court entered a decision disposing of
23 Mitelhaus' reconsideration motion without a hearing on May 5,
24

25 ⁵ The \$163,057.32 is composed of \$71,202.38 (Four
26 Commissions) + \$6,375.00 (one-half of the arbitration fees) +
27 \$3,197 (Flat Fee) + \$80,742.94 (attorney fees for arbitration) +
28 \$1,540.00 (attorney fees for confirmation). The First Judgment
did not include any pre- or post-judgment interest on the State
Court Judgment.

1 2014 (the "Amended Memorandum"). The Amended Memorandum declined
2 to reconsider the amounts excepted from Jenkins' discharge in the
3 First Judgment under § 523(a)(4) and (a)(6) because, contrary to
4 the requirements of Civil Rule 59(e), the motion merely restated
5 arguments previously made by Mitelhaus and neither presented
6 newly discovered evidence nor established that any manifest error
7 of fact or law had been made. The court also denied the request
8 to reconsider its findings regarding the liability of Ramey. The
9 court, however, granted the request in the reconsideration motion
10 to add prejudgment interest of \$24,124.48 to the First Judgment
11 Award and, on its own initiative, added \$84,667.75 in post-
12 judgment interest as of April 2, 2014, with additional interest
13 to accrue at \$51.28 per day. In an Amended Judgment, the
14 bankruptcy court determined that a debt of \$271,849.55⁶ was
15 excepted from discharge under § 523(a)(4) and (a)(6) against
16 Jenkins only.

17 The reconsideration motion having thus been resolved by the
18 bankruptcy court, Mitelhaus filed a timely notice of cross-appeal
19 of the First Judgment and Amended Judgment on May 19, 2014.

20 **JURISDICTION**

21 The bankruptcy court had jurisdiction under 28 U.S.C.
22 §§ 1334 and 157(b)(2)(I). We have jurisdiction under 28 U.S.C.
23 § 158.

24
25
26 ⁶ The \$271,849.55 is composed of \$71,202.38 (Four
27 Commissions) + \$3,197.00 (Flat Fee) + \$24,124.48 (prejudgment
28 interest) + \$6,375.00 (one-half of arbitration fees) + \$80,742.94
(attorney fees for arbitration) + \$1,540.00 (attorney fees for
confirmation) + \$84,667.75 (post-judgment interest).

1 may apply in one of three circumstances: when a debtor engages
2 in fraud while acting in a fiduciary capacity, or when a debtor
3 commits an embezzlement or larceny.

4 In Mitelhaus' complaint in the adversary proceeding and in
5 his arguments to the bankruptcy court, he sought an exception to
6 discharge solely because, he alleged, Jenkins had committed
7 larceny for purposes of § 523(a)(4). In its decision, the
8 bankruptcy court explained the legal standard required to
9 establish larceny:

10 The Ninth Circuit has established that "[f]or purposes
11 of section 523(a)(4), a bankruptcy court is not bound
12 by the state law definition of larceny, but, rather,
13 may follow federal common law, which defines larceny as
14 a 'felonious taking of another's personal property with
15 intent to convert it or deprive the owner of the
16 same.'" In re Ormsby, 591 F.3d 1199, 1205 (9th Cir.
2010), citing 4 Collier on Bankruptcy ¶ 523.10[2] (15th
ed. 2008). "Felonious" for purposes of ¶ 523(a)(4) is
defined as "wrongful; . . . without excuse [or] color
of right." Ormsby, 591 F.3d at 1205 (citations
omitted).

17 First Memorandum at 5. Applying this standard, the bankruptcy
18 court reasoned that, by withholding the Four Commissions from
19 Mitelhaus, Jenkins had committed a "felonious taking" for
20 purposes of § 523(a)(4). We conclude that the bankruptcy court
21 incorrectly applied the Ormsby standard.

22 The full text of the discussion in In re Ormsby cited by
23 the bankruptcy court is as follows:

24 Section 523(a)(4) prevents discharge "for fraud or
25 defalcation while acting in a fiduciary capacity,
26 embezzlement, or larceny." 11 U.S.C. § 523(a)(4).
27 "For purposes of section 523(a)(4), a bankruptcy court
28 is not bound by the state law definition of larceny
but, rather, may follow federal common law, which
defines larceny as a 'felonious taking of another's
personal property with intent to convert it or deprive
the owner of the same.'" 4 Collier on Bankruptcy

1 ¶ 523.10[2] (15th ed. rev. 2008).⁴ [Note 4:] Felonious
2 is defined as "'proceeding from an evil heart or
3 purpose; malicious; villainous . . . Wrongful; (of an
4 act) done without excuse of color of right.'" Elliott
v. Kiesewetter (In re Kiesewetter), 391 B.R. 740, 748
(Bankr. W.D. Pa. 2008) (quoting Black's Law Dictionary
(8th ed. 2004)).

5 In re Ormsby, 591 F.3d at 1205 & n.4. As can be seen from this
6 excerpt, a "felonious taking" refers to a situation in which a
7 debtor comes into possession of property of another by unlawful
8 means; it does not refer to the subsequent withholding of
9 property from its alleged owner. This is made clear in the
10 Ormsby court's citation to Collier on this topic, which explains:

11 Larceny is the fraudulent and wrongful taking and
12 carrying away of the property of another with intent to
13 convert the property to the taker's use without the
14 consent of the owner. **As distinguished from**
15 **embezzlement, the original taking of the property must**
16 **be unlawful.** . . . Section 523(a)(4) excepts from
17 discharge debts resulting from the fraudulent
18 appropriation of another's property, whether the
19 appropriation was unlawful at the outset, and therefore
20 a larceny, or whether the appropriation took place
21 unlawfully after the property was entrusted to the
22 debtor's care, and therefore was an embezzlement.

23 4 COLLIER ON BANKRUPTCY ¶ 523.10[2] (Lawrence P. King, 15th ed. rev.
24 2008) (emphasis added).⁷ Simply put, for purposes of
25 § 523(a)(4), larceny only occurs when the debtor first comes into
26 unlawful possession of the property of another. Werner v.
Hoffman, 5 F.3d 1170, 1172 (8th Cir. 1993); Kaye v. Rose
(In re Rose), 934 F.2d 901, 904 (7th Cir. 1991).

27 The facts in Ormsby demonstrate that a larceny must be based
28 on the debtor's unlawful initial possession of property. Ormsby

27 ⁷ This text was retained intact in the most recent version
28 of this authority. 4 COLLIER ON BANKRUPTCY ¶ 523.10[2] (Alan N.
Resnick and Henry J. Sommer, eds. 16th ed. 2009).

1 owned a small real estate title company. A much larger title
2 company, FATCO, had developed extensive databases and
3 organization of title records that greatly simplified title
4 searches such as those Ormsby conducted. Ormsby contracted to
5 access the databases ("plants") developed for the period after
6 2000, but did not subscribe to access the plants for earlier
7 years. Ormsby hired McCaffrey, who had access to the earlier
8 plants and, through McCaffrey, obtained copies of the earlier
9 plants that Ormsby then wrongfully used in his title search
10 business. In characterizing the debtor's conduct, the Ormsby
11 court concluded,

12 When he started Inter-County, [Ormsby] purchased the
13 rights to use the title plant for 2000 until the
14 present, demonstrating that he was aware of the lawful
15 means of obtaining access to them. Rather than
16 purchasing the rights to the title plants for the
17 1900s, he hired McCaffrey away from a competing title
18 company and discussed with him the importance of the
19 title plants to a new title company. While McCaffrey
20 still had access to the plants that FATCO possessed,
21 Ormsby encouraged, cooperated, and assisted McCaffrey's
22 removal of the plants and their reproduction. Of
23 particular note, Ormsby sent the microfiche containing
24 the plants to a non-local copying service, likely to
25 avoid detection. Based on these facts found by the
26 state court, Ormsby's conduct constituted larceny
27 within the federal meaning of the term; accordingly
28 under section 523(a)(4), his debt cannot be discharged.

21 In re Ormsby, 591 F.3d at 1205-06.

22 Here, in contrast to Ormsby, the bankruptcy court determined
23 that Nutec had come into possession of the Four Commissions
24 lawfully:

25 Both Jenkins and Ramey testified that when a file for a
26 transaction was complete and reviewed, a commission
27 disbursement or CDA would be issued to escrow, which
28 would allow the agent to be paid directly by the escrow
29 company. . . . Ramey further testified that although
30 rare, some escrow companies did not accept CDAs. []
31 Consequently, in those circumstances, the escrow

1 company would pay all of the commissions directly to
2 Nutec, which presumably would then disburse the agent's
share.

3 This apparently is what happened with respect to
4 the [Four Commissions], because both Jenkins and Ramey
testified that Nutec received checks for these
transactions from escrow.

5 First Memorandum at 6 (emphasis added). Because the bankruptcy
6 court determined that the Four Commissions were paid to Nutec by
7 the escrow company apparently in compliance with that company's
8 policies, Nutec came into lawful possession of those commissions.
9 As a result, that Jenkins decided to withhold payment of the Four
10 Commissions to Mitelhaus, while perhaps wrongful, was not a
11 felonious taking for purposes of the federal standard for larceny
12 under § 523(a)(4).⁸ On this record, we conclude that the
13 bankruptcy court erred in determining that the \$71,202.38 debt
14 represented by the Four Commissions was excepted from discharge
15 as a larceny pursuant to § 523(a)(4).⁹

16 _____
17 ⁸ We need not speculate whether, on these facts, some other
18 basis than larceny would support an exception to discharge under
19 § 523(a)(4). Mitelhaus' complaint only sought exception to
20 discharge under the larceny provision of § 523(a)(4). Consistent
21 with this, the parties jointly stipulated in the Pre-trial
22 Stipulation that the bankruptcy court should consider an
23 exception to discharge under "11 U.S.C. §523(a)(4) because the
debt arose through larceny pursuant to 11 U.S.C. § 523(a)(4)."
In short, there is nothing in the record to indicate that the
bankruptcy court considered another ground for an exception under
§ 523(a)(4), nor do we.

24 ⁹ For similar reasons, we conclude that the bankruptcy court
25 erred in excepting from discharge under § 523(a)(4) the Flat Fee
26 of \$3,197. These premiums were paid by Mitelhaus to Nutec via
27 twenty-three deductions of \$139 from his commission earnings.
28 Mitelhaus has not argued, and there is nothing in the record
before us to establish, that Nutec came into unlawful possession
(continued...)

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II.

The bankruptcy court did not err in determining that the withholding of the Four Commissions was a debt excepted from discharge under § 523(a)(6).

A creditor bears the burden of proving that its claim is excepted from discharge under § 523(a)(6) by a preponderance of the evidence. Harmon v. Kobrin (In re Harmon), 250 F.3d 1240, 1246 (9th Cir. 2001); see also Grogan v. Garner, 498 U.S. 279, 284 (1991). Section 523(a)(6) provides: "(a) A discharge under 727 . . . of this title does not discharge an individual debtor from any debt - . . . (6) for willful and malicious injury by the debtor to another entity or to the property of another entity." Whether a particular debt is for willful and malicious injury by the debtor to another, or to the property of another, requires application of a two-pronged test: the creditor must prove that the debtor's conduct in causing the injuries was both willful and malicious. Barboza v. New Form, Inc. (In re Barboza), 545 F.3d 702, 711 (9th Cir. 2008) (requiring the application of a separate analysis for each prong of "willful" and "malicious").

To show that a debtor's conduct is willful requires proof that the debtor deliberately or intentionally injured the

⁹(...continued)
of the commissions from which these amounts were withheld. In addition, the Ninth Circuit has held that, to constitute larceny, federal common law larceny requires a taking of property without the consent of a party. United States v. Sellers, 670 F.2d 853, 854 (9th Cir. 1982); Van Zandt v. Mbunda (In re Mbunda), 2011 Bankr. LEXIS 2252, at *2 (Bankr. N.D. Cal. 2011), aff'd, 484 B.R. 344 (9th Cir. BAP 2012). Mitelhaus apparently consented to these deductions, and that Nutec failed to honor its commitment to use them to pay for insurance, even if intentional, was not a larceny under § 523(a)(4). See In re Mubunda, at *3.

1 creditor or the creditor's property, and that in doing so, the
2 debtor intended the consequences of his act, not just the act
3 itself. Kawaauhau v. Geiger, 523 U.S. 57, 60-61 (1998). The
4 debtor must act with a subjective motive to inflict injury, or
5 with a belief that injury is substantially certain to result from
6 the conduct. Id. For conduct to be malicious, the creditor must
7 prove that the debtor: (1) committed a wrongful act, (2) done
8 intentionally, (3) which necessarily causes injury, and (4) was
9 done without just cause or excuse. Id.

10 Whether a debtor's conduct is willful and malicious under
11 § 523(a)(6) is a question of fact reviewed for clear
12 error. Banks v. Gill Distrib. Ctrs., Inc. (In re Banks),
13 263 F.3d 862, 869 (9th Cir. 2001).

14 Finally, and importantly for our review in this case, "to be
15 excepted from discharge under § 523(a)(6) for breach of contract,
16 the breach of contract must be accompanied by some form of
17 'tortious conduct' that gives rise to 'willful and malicious
18 injury.'" In re Jercich, 238 F.3d at 1206.

19 The bankruptcy court found that Nutec, acting through
20 Jenkins, withheld the Four Commissions from Mitelhaus willfully
21 and maliciously. To satisfy the willfulness prong, the court
22 found that withholding the Four Commissions was not authorized
23 under Paragraph 8(E)(5) of the Contract, which permitted Nutec to
24 withhold payments from Mitelhaus solely to offset expenses
25 incurred related to those commissions. In this case, the offsets
26 that Nutec and Jenkins argued should be applied against the Four
27 Commissions were allegedly incurred as a result of the KS Lawsuit
28 and the Nasr Commissions leases; they did not arise out of the

1 deals that generated the Four Commissions. The bankruptcy court
2 concluded that this breach of contract evidenced Jenkins' belief
3 that, as a result of his actions, injury was substantially
4 certain to occur to Mitelhaus from the withholding of the Four
5 Commissions.

6 As to the malicious prong, the bankruptcy court found that
7 "the withholding of the Commissions was wrongful and intentional,
8 because it was not authorized by contract or otherwise." First
9 Memorandum at 8. In short, the bankruptcy court determined that
10 the debt arising from the Four Commissions was excepted from
11 discharge because Jenkins engaged in an intentional breach of
12 contract.

13 As noted above, for a breach of contract to constitute a
14 willful and malicious injury for purposes of § 523(a)(6), it must
15 be accompanied by some form of "tortious conduct" that gives rise
16 to "willful and malicious injury." In re Jercich, 238 F.3d at
17 1206. To determine if conduct is tortious, state law must be
18 consulted. In re Bailey, 197 F.3d 997, 1000 (9th Cir. 1999).

19 In California, tort recovery for breach of contract is
20 permitted only when "a defendant's conduct 'violates a
21 fundamental public policy of the state.'" Rattan v. United
22 Servs. Auto. Assoc., 84 Cal. App. 4th 715, 720 (2000). In an
23 analogous context, the California Court of Appeals has held that
24 "the prompt payment of wages due an employee is a fundamental
25 public policy" in California. Gould v. Md. Sound Indus., Inc.,
26 31 Cal. App. 4th 1137, 1142 (1995). The court observed,

27 Public policy has long favored the full and prompt
28 payment of wages due an employee. Wages are not
ordinary debts. Because of the economic position of

1 the average worker and, in particular, his family, it
2 is essential to the public welfare that he receive his
3 pay promptly. Thus, the prompt payment of wages serves
4 society's interest through a more stable job market, in
5 which its most important policies are safeguarded.

6 Id.

7 Under California law, sales commissions payable pursuant to
8 a contract are "wages." CAL. LABOR CODE § 200(a) ("Wages"
9 includes all amounts for labor performed by employees of every
10 description, whether the amount is fixed or ascertained by the
11 standard of time, task, piece, commission basis, or other method
12 of calculation."). DeLeon v. Verizon Wireless, LLC,
13 207 Cal.App.4th 800, 808 (2012) (citing CAL. LABOR CODE § 200);
14 Steinhebel v. L.A. Times Commc'ns, LLC, 126 Cal.App.4th 696,
15 704-05 (2005) (sales commissions are wages).

16 Here, the bankruptcy court found that Jenkins' actions in
17 withholding the Four Commissions from Mitelhaus were intentional
18 and malicious because they were "not authorized by contract or
19 otherwise." Such withholding necessarily caused injury to
20 Mitelhaus by depriving him of his compensation. Wilfully
21 depriving Mitelhaus of his compensation, when Nutec had the
22 ability to pay,¹⁰ was a tortious act. In re Jercich, 238 F.3d at

23 ¹⁰ Ramey testified that Nutec had the ability to pay
24 Mitelhaus the Four Commissions at the time they were withheld
25 from him:

26 Question: So there was no financial difficulty in
27 paying Mr. Mitelhaus. It was being retained as a
28 result of the lawsuit. . . .

Answer [Ramey]: I'm going to say due to the fact that
it was 2005 and we were doing well, that yes, we did
(continued...)

1 1207.

2 The bankruptcy court's findings that Jenkins committed a
3 willful and malicious injury to Mitelhaus by withholding the Four
4 Commissions from him were not clearly erroneous, and thus, the
5 bankruptcy court did not err in determining that the debt created
6 by Jenkins' conduct was excepted from discharge under
7 § 523(a)(6).

8 **III.**

9 **The arguments raised in the cross-appeal lack merit.**

10 In the cross-appeal, Mitelhaus asks us to review: (1) the
11 bankruptcy court's refusal to enter a summary judgment; (2) the
12 First Judgment and Amended Judgment because they did not include
13 amounts claimed by Mitelhaus for the Nasr Commissions; (3) and
14 the First Judgment and Amended Judgment because they did not deem
15 Ramey liable for the debt excepted from discharge.

16 A. The bankruptcy court did not err in denying
17 Mitelhaus' motion for summary judgment.

18 Mitelhaus appeals the bankruptcy court's denial of his
19 motion for summary judgment, arguing that he established that the
20 Award was excepted from discharge by virtue of the preclusive
21 findings made by the arbitrator. In raising this issue,
22 Mitelhaus apparently hopes to recover additional postpetition
23 interest on the nondischargeable debt. Reviewing it de novo, we
24 decline to disturb the bankruptcy court's decision.

25 ¹⁰(...continued)
26 not have a hardship, as far as a money hardship, to
27 pay.

28 Trial Tr. 151:13-24, October 2, 2013.

1 To determine the preclusive effect of a California state
2 court's findings in a judgment or order, the bankruptcy court
3 must first determine if issue preclusion is available under
4 California preclusion law. 28 U.S.C. § 1738 (the Full Faith and
5 Credit Statute); Marrese v. Am. Acad. of Orthopaedic Surgeons,
6 470 U.S. 373, 380 (1985). When state preclusion law controls,
7 the discretion to apply the doctrine is exercised in accordance
8 with state and federal law. Khaligh v. Hadegeh (In re Khaligh),
9 338 B.R. 817, 823 (9th Cir. BAP 2006), aff'd, 506 F.3d 956 (9th
10 Cir. 2007).

11 Under California law, the party asserting issue preclusion
12 has the burden of establishing the following "threshold"
13 requirements for its availability:

14 First, the issue sought to be precluded from relitigation
15 must be identical to that decided in a former proceeding.
16 Second, this issue must have been actually litigated in the
17 former proceeding. Third, it must have been necessarily decided
18 in the former proceeding. Fourth, the decision in the former
19 proceeding must be final and on the merits. Finally, the party
20 against whom preclusion is sought must be the same as, or in
21 privity with, the party to the former proceeding.

22 Harmon v. Kobrin (In re Harmon), 250 F.3d 1240, 1245 (9th Cir.
23 2001) (the "Harmon" factors). In addition to these five factors,
24 "[t]here is an equitable component to [issue preclusion]."
25 Direct Shopping Network v. James, 206 Cal.App.4th 1551, 1562
26 (2012). In other words, even where the five Harmon factors are
27 met, the doctrine is to be applied "only where such application
28 comports with fairness and sound public policy." Smith v.

1 ExxonMobil Oil Corp., 153 Cal.App.4th 1407, 1414 (2007).

2 As discussed above, both § 523(a)(4) and (a)(6) require a
3 showing that a debtor had the intent to commit the wrongful act.
4 The bankruptcy court reviewed the Award, which was later
5 confirmed by the State Court Judgment, and determined that the
6 arbitrator had not made the necessary findings concerning
7 Jenkins' intent to support an exception to discharge under
8 § 523(a)(4) or (a)(6). We agree with this conclusion.

9 Mitelhaus argues that the Award found the requisite bad
10 intent was established when the arbitrator decided that "Jenkins
11 orchestrated the plan to wrongfully withhold commissions from
12 Plaintiff as part of a plan or scheme to deprive Plaintiff of
13 those commissions without a lawful basis for doing so."
14 Rejecting Mitelhaus' contention, the bankruptcy court determined
15 that the arbitrator made this statement in the context of
16 determining Jenkins' liability for the acts of Nutec, and was not
17 making any determination regarding Jenkins' intent. The
18 bankruptcy court did not err in interpreting this cryptic finding
19 in the Award to be inadequate to establish that Jenkins acted
20 with the kind of intent required to establish larceny,
21 willfulness or maliciousness.

22 On cross-appeal, Mitelhaus also argues that the bankruptcy
23 court erred by not giving preclusive effect to the amount of the
24 State Court Judgment. In this argument, Mitelhaus apparently
25 misapprehends the function of the bankruptcy judge in applying
26 issue preclusion in the context of an exception to discharge
27 action.

28 Bankruptcy courts "have exclusive jurisdiction to determine

1 dischargeability of debts under §§ 523(a)(2) (fraud and
2 deception); (a)(4) (fiduciary fraud, embezzlement, or larceny);
3 and (a)(6) (willful and malicious injury to person or property)."
4 Ackerman v. Eber (In re Eber), 687 F.3d 1123, 1128 (9th Cir.
5 2012); § 523(c)(1). The effect of this rule is that "the
6 bankruptcy court is not confined to a review of the judgment and
7 record in the prior state-court proceedings when considering the
8 dischargeability of [a creditor's] debt." Brown v. Felsen,
9 442 U.S. 127, 129-30 (1979). As the Ninth Circuit has
10 instructed, "final judgments in state courts are not necessarily
11 preclusive in United States bankruptcy courts." Sasson v.
12 Sokoloff (In re Sasson), 424 F.3d 864, 872 (9th Cir. 2005). In
13 other words, while all federal courts have "broad discretion" in
14 a decision to apply issue preclusion based on a state court
15 judgment, Parklane Hosiery Co. v. Shore, 439 U.S. 322, 331
16 (1979), that discretion is particularly expansive in exceptions
17 to discharge under § 523(a)(2), (a)(4) and (a)(6). Rein v.
18 Providian Fin. Corp., 270 F.3d 895, 904 (9th Cir. 2001)
19 ("Bankruptcy Courts have exclusive jurisdiction over
20 nondischargeability actions brought pursuant to 11 U.S.C.
21 § 523(a)(2), (4), (6) and (15).").

22 Mitelhaus' position ignores that the Award and State Court
23 Judgment established that Jenkins was indebted to Mitelhaus for
24 multiple debts. Some of those debts, such as that for the Four
25 Commissions, were caused by Jenkins' wrongful conduct that may be
26 excepted from discharge. Other debts, including Jenkins'
27 liability for the KS Lawsuit Fees, were not. That the bankruptcy
28 court excluded the KS Lawsuit Fees awarded to Mitelhaus in the

1 State Court Judgment from the debts excepted from discharge was a
2 legitimate exercise of its responsibility to examine the nature
3 of each debt. Comer v. Comer (In re Comer), 723 F.2d 737, 740
4 (9th Cir. 1984) (holding that a bankruptcy judge should not "rely
5 solely on state court judgments when determining the nature of a
6 debt for purposes of dischargeability, if doing so would prohibit
7 the bankruptcy court from exercising its exclusive jurisdiction
8 to determine dischargeability."). Consequently, the bankruptcy
9 court did not err when it exercised its independent judgment and
10 determined that the KS Lawsuit Fees were in the nature of a debt
11 that would not be excepted from discharge.

12 B. The bankruptcy court did not err in excluding the KS
13 Lawsuit Fees and the Nasr Commissions from the
exception to discharge award.

14 In addition to arguing that the KS Lawsuit Fees should be
15 excepted from discharge as part of the Award and State Court
16 Judgment, on appeal Mitelhaus asserts that the KS Lawsuit Fees
17 should be excepted from discharge because they were recoverable
18 damages under the California "doctrine of the tort of another."

19 The tort of another doctrine holds that a person who
20 through the tort of another has been required to act in
21 the protection of his interests by bringing or
22 defending an action against a third person is entitled
to recover compensation for the reasonably necessary
loss of time, attorney's fees, and other expenditures
thereby suffered or incurred.

23 Prentice v. N. Am. Title Guar. Corp., 59 Cal.2d 618, 620 (1963).

24 Mitelhaus reasons that the withholding of insurance premiums
25 from Mitelhaus' compensation was a tort, and the costs of
26 defending the KS Lawsuit were therefore recoverable tort damages.
27 Of course, the sole basis for this conclusion was that the
28 bankruptcy court found the withholding was a larceny excepted

1 under § 523(a)(4). As explained above, however, we conclude that
2 the bankruptcy court erred in excepting the Flat Fee from
3 discharge under § 523(a)(4) because it was not a larceny.

4 The bankruptcy court considered Mitelhaus' tort of another
5 argument twice. In denying the reconsideration motion, the court
6 explained its reasoning why the KS Lawsuit Fees were not excepted
7 from discharge:

8 There was no showing that the KS [Lawsuit] Fees should
9 be nondischargeable pursuant to § 523(a)(4) or (a)(6).
10 In making that determination, the Court considered all
11 the evidence set forth at trial and concluded that
12 Plaintiff did not establish by a preponderance of the
13 evidence that the wrongful taking of the errors and
14 omissions insurance fees occurred prior to the
15 initiation of the KS Action.

16 Amended Memorandum at 7.

17 The bankruptcy court determined in weighing of the evidence
18 at trial that Mitelhaus had not established that Jenkins' alleged
19 wrongful taking of the insurance premiums occurred before the
20 KS Lawsuit Fees were incurred. We give deference to a trial
21 court's findings after trial. Rule 8013; Cunning v. Rucker
22 (In re Rucker), 570 F.3d 1155, 1159 (9th Cir. 2009).

23 Consequently, the bankruptcy court did not err in determining
24 that Mitelhaus had not established the necessary linkage between
25 the alleged tort and the KS Lawsuit Fees and when it declined to
26 hold those fees excepted from discharge under § 523(a)(4) and
27 (a)(6).

28 Curiously, the cross-appeal also targets the bankruptcy
court's refusal to adjudge an exception to discharge for the Nasr
Commissions. Of course, neither the Award nor the State Court
Judgment awarded damages to Mitelhaus for the Nasr Commissions.

1 In fact, the Award notes that Mitelhaus had "waived" any right to
2 payment for those commissions, finding that Mitelhaus "was ready,
3 willing and able to walk away from the Nasr lease commissions and
4 [Mitelhaus] never really wanted Nutec to pursue collection of
5 this commission." Award at 86. Simply put, because Mitelhaus
6 did not establish that Nutec and Jenkins were liable to him for
7 the Nasr Commissions, the bankruptcy court could not err in
8 declining to recognize a claim that Mitelhaus had abandoned
9 before the bankruptcy was filed. Before a debt can be excepted
10 from discharge, there must be a debt. In re Perkins, 216 B.R.
11 220, 224 (Bankr. S.D. Ohio 1997).

12 In sum, we conclude that the bankruptcy court did not err in
13 excluding from the exception to discharge the KS Lawsuit Fees and
14 the Nasr Commissions.

15 C. The bankruptcy court did not err in deciding that
16 Jenkins' bad intent cannot be imputed to Ramey.

17 In the arbitration proceedings, Mitelhaus argued that Ramey
18 was also liable for his damages because she was the "alter ego"
19 of Nutec. However, no argument was made that Ramey should be
20 liable for the wrongful acts of Jenkins. The arbitrator found
21 that Mitelhaus had not shown that Ramey was the alter ego of
22 Nutec and declined to award any damages against her.

23 In the adversary proceeding, Mitelhaus shifted his attack on
24 Ramey by contending that Jenkins' wrongful acts can be imputed to
25 Ramey on the basis of their agent-principal relationship, relying
26 on the Panel's decision in Tsurukawa v. Nikon Precision, Inc.
27 (In re Tsurukawa), 287 B.R. 515 (9th Cir. BAP 2002). In its
28 First Memorandum, the bankruptcy court correctly observed that

1 Tsurukawa examined the standard for imputation of fraud to a
2 debtor for acts committed by a spouse for purposes of
3 establishing fraud under § 523(a)(2)(A). The bankruptcy court
4 therefore rejected Mitelhaus' Tsurukawa argument because, in this
5 case, Mitelhaus had sought an exception to discharge solely under
6 § 523(a)(4) and (a)(6), not (a)(2)(A).

7 On appeal, Mitelhaus contends that the Panel's recent
8 decision in Sachan v. Huh (In re Huh), 506 B.R. 257, 271-72 (9th
9 Cir. BAP 2014) (en banc) has "clarified" the application of the
10 Tsurukawa standard. Although Mitelhaus may be correct that
11 In re Huh refines and explains the standard applicable for
12 imputation of a spouse's fraudulent acts to the debtor, that
13 decision is clearly limited to claims for an exception to
14 discharge under § 523(a)(2)(A):

15 More than a principal/agent relationship is required to
16 establish a fraud exception to discharge. While the
17 principal/debtor need not have participated actively in
18 the fraud for the creditor to obtain an exception to
19 discharge, the creditor must show that the debtor knew,
20 or should have known, of the agent's fraud. Because
this standard focuses on the culpability of the debtor,
and not solely on the actions of the agent, we think it
most properly comports with the recent holdings of the
Supreme Court and the Ninth Circuit regarding discharge
exceptions.

21 Id. at 271-72. There is no indication in In re Huh that the
22 Panel intended its holding to impact the requirements for proving
23 larceny or willful and malicious conduct under § 523(a)(4) or
24 (a)(6), nor are we aware that any other court has applied
25 In re Huh in such a manner.

26 As compared to § 523(a)(2)(A)'s focus on a debt "for fraud,"
27 the malicious conduct standard in § 523(a)(6) examines only the
28 debtor's conduct and state of mind. As we have previously held

1 in an unpublished decision cited by the bankruptcy court,

2 The Tsurukawa analysis is thus specific to fraud and to
3 apply it to willful and malicious conduct is a quantum
4 leap we are not prepared to make. The plain language
5 of § 523(a)(6) excepts from discharge a willful and
6 malicious injury by the debtor to another entity. . . .
7 We harken back to [Kawaauhau v. Geiger, 523 U.S. 57,
8 61-62 (1998)] where the Supreme Court, in the simplest
9 terms, said a debtor must intend to injure the creditor
10 before a claim is excepted from discharge based on
11 malice. The Ninth Circuit in [Carillo v. Su
(In re Su), 290 F.3d 1140, 1144 (9th Cir. 2002)] has
refined the willful prong to require the debtor to
subjectively intend to inflict injury or to believe
that injury is substantially certain to occur as a
result of his conduct. . . . Behaviors and outcomes
might be imputed, maybe even misrepresentations, but
subjective thoughts cannot be. Under no accepted legal
principles can subjective willfulness be rested upon
Debtor.

12 Luc v. Chien (In re Chien), 2008 WL 8240422, at *7 (9th Cir. BAP
13 February 7, 2008). In re Huh did not vary this approach.

14 Here, while Mitelhaus argues that Ramey appeared to
15 participate in some of Jenkins' decisions,¹¹ he never established
16 that Ramey committed the acts with the requisite intent to
17 inflict injury, or with the belief that injury was substantially
18 certain to occur. Although under limited circumstances a
19 spouse's fraud may be imputed to a debtor for § 523(a)(2)(A)
20 purposes, a spouse's subjective malicious intent cannot be
21 imputed to the debtor for § 523(a)(6) purposes.

22 The bankruptcy court did not err in deciding that Jenkins'
23 bad acts could not be imputed to Ramey under § 523(a)(6).

24
25 ¹¹ To be precise, there is no evidence in the record that
26 Ramey significantly participated in Jenkins' decision to withhold
27 the Four Commissions from Mitelhaus. Rather, as found by the
28 arbitrator, Jenkins, as the broker, had the sole legal authority
to supervise the business activities with regard to the payment
of commissions. Award at 81.

1 **CONCLUSION**

2 We REVERSE the bankruptcy court's determination that
3 Jenkins' debt to Mitelhaus for withholding the Four Commissions
4 and the Flat Fee was excepted from discharge under § 523(a)(4)
5 for larceny. However, we AFFIRM the court's decision that these
6 debts should be excepted from discharge under § 523(a)(6). In
7 the cross-appeal, we AFFIRM the bankruptcy court's decisions that
8 Jenkins' debts for the KS Lawsuit Fees and the Nasr Commissions
9 were not excepted from discharge, and that Jenkins' bad acts
10 should not be imputed to Ramey under § 523(a)(6).
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