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U.S. BKCY. APP. PANEL
OF THE NINTH CIRCUIT

NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT

5	In re:)	BAP No.	CC-14-1010-KiKuDa
6	ANA BEATRIZ BETANCOURT,)	Bk. No.	1:10-bk-14588-GM
7	Debtor.)	Adv. No.	1:12-ap-1221-GM
8	_____)		
9	ANA BEATRIZ BETANCOURT,)		
10	Appellant,)		
11	v.)	MEMORANDUM¹	
12	MATTHEW BALLMER,)		
13	Appellee.)		
	_____)		

Argued and Submitted on September 18, 2014,
at Pasadena, California

Filed - June 3, 2015

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

Honorable Geraldine Mund, Bankruptcy Judge, Presiding

Appearances: Jeffrey D. Nadel argued for appellant, Ana Beatriz
Betancourt; Derek L. Tabone of Law Offices of
Tabone, APC argued for appellee, Matthew Ballmer.

Before: KIRSCHER, KURTZ and DAVIS,² 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 8024-1.

² Hon. Laurel E. Davis, Bankruptcy Judge for the District of
Nevada, sitting by designation.

1 Debtor Ana Beatriz Betancourt appeals a judgment determining
2 that she willfully and maliciously injured Paul Ballmer or his
3 property under § 523(a)(6)³ by transferring certain real property
4 to prevent Paul Ballmer, and his assignee, appellee Matthew
5 Ballmer from collecting on his prepetition judgment lien.

6 Because the bankruptcy court failed to make sufficient
7 findings to support its ruling, we VACATE and REMAND.

8 I. FACTUAL AND PROCEDURAL HISTORY

9 A. Events leading to the state court litigation.

10 Paul Ballmer is a real estate broker and developer. Debtor
11 became a licensed real estate agent in 1977. Debtor married
12 Calvin Larson in 2012; they began dating in 1984. Debtor is the
13 sole shareholder of La Fe, Inc. ("La Fe"). La Fe owned
14 undeveloped lots in Topanga, California, generally described for
15 purposes of this appeal as three parcels: 30-7; 30-10; and 027-
16 029.⁴

17 Robert Rein is a real estate attorney and former neighbor of
18 Debtor. He met Debtor when he or his company, Racada Corporation
19 ("Racada"), purchased or attempted to purchase two lots: Parcels
20 30-7 and 30-10, from La Fe in 2002. Rein represented La Fe in the
21 state court litigation initiated by Ballmer.

22 Debtor hired Ballmer to assist Debtor and La Fe in lot-line
23 adjustments for La Fe's various parcels. Ballmer worked for La Fe

24
25
26 ³ Unless specified otherwise, all chapter, code and rule
27 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532, and
the Federal Rules of Bankruptcy Procedure, Rules 1001-9037.

28 ⁴ We recognize that more than one lot may be included in each
identified parcel.

1 from 1996 to 2001.

2 When La Fe failed to pay Ballmer for his services, he sued
3 La Fe in state court in 2003 for breach of contract. The state
4 court held a final status conference on December 9, 2004, and
5 commenced a trial on December 13, 2004. No one appeared for
6 La Fe. Debtor failed to appear at the state court trial due to
7 knee pain. Rein never explained why he did not appear.

8 Ballmer obtained a default judgment after prove-up. The
9 state court entered a judgment against La Fe for \$85,626.73 on
10 January 28, 2005. La Fe did not appeal the judgment or move to
11 set it aside. Ballmer recorded the abstract of the judgment on
12 February 23, 2005. Ballmer believed the recorded abstract
13 attached to the properties owned by La Fe. In 2007, Ballmer
14 assigned the judgment to his son, Matthew,⁵ the appellee in this
15 case.

16 **B. Debtor's bankruptcy filing and the adversary proceeding.**

17 Debtor filed a chapter 7 bankruptcy case on April 20, 2010.
18 Matthew initiated a nondischargeability complaint and alleged that
19 on December 13, 2004, the day of the state court trial, La Fe
20 owned certain parcels of undeveloped lots. However, between the
21 trial date of December 13, 2004, and the entry of the judgment on
22 January 28, 2005, Matthew alleged that Debtor and her allies
23 engaged in a series of fraudulent transfers for the purpose of
24 divesting La Fe of these parcels prior to the entry of judgment
25 against La Fe. Matthew alleged that neither Ballmer nor he became
26 aware of the transfers of the parcels until July 2011, when

27 _____
28 ⁵ We refer to Ballmer's son as Matthew only because the men
share the same surname. No disrespect is intended.

1 Matthew began collection efforts on the judgment. Matthew further
2 alleged that: (1) Debtor actually intended "to hinder, delay and
3 defraud the legitimate creditors of [La Fe];" (2) Debtor "is
4 liable for the value of the fraudulently conveyed properties;"
5 (3) Debtor's acts "were made with actual malice and intent to
6 defraud thereby preventing Ballmer or his assigns from recovering
7 for the considerable services he rendered [La Fe] and . . .
8 Debtor" and justifying "punitive damages;" and (4) Debtor's
9 obligation is not "dischargeable under [§ 523(a)(4)] as a
10 fiduciary of [La Fe] with respect to its creditors" and "under
11 [§ 523(a)(6)] as a willful and malicious injury in that debtor
12 intended her actions in transferring La Fe's assets to wrongfully
13 enrich herself at the expense of [Matthew's] predecessor." See
14 Matthew's adversary complaint, p. 4. Matthew concurrently filed a
15 fraudulent conveyance action against Debtor and Larson in state
16 court, which may still be pending.

17 The bankruptcy court held a trial on the § 523(a)(6) claim on
18 December 3, 2013. The transfers at issue in this case involve
19 Parcels 30-7, 30-10, and 027-029. After hearing testimony from
20 the witnesses and brief closing arguments from counsel, the
21 bankruptcy court took the matter under submission.

22 **C. The bankruptcy court's ruling.**

23 The bankruptcy court issued its Memorandum Opinion on
24 December 20, 2013. Based on the identified exhibits, which are
25 not part of the record on appeal, testimony submitted to the
26 bankruptcy court during the trial and its Memorandum Opinion, we
27 glean the following facts.

28 Larson, in the 1990s, tried to purchase Parcels 30-7 and

1 30-10 from a third-party seller through escrow. After
2 considerable time, Larson instructed the escrow agent to transfer
3 the lots from the third-party seller to La Fe, since La Fe could
4 obtain the necessary purchase loans. Debtor did testify that
5 Larson actually paid the purchase price and taxes associated with
6 the two parcels. In 2002, La Fe transferred Parcel 30-7 to Rein.
7 Parcel 30-7 was never returned to Larson, Debtor or La Fe.

8 In October 2002, La Fe transferred Parcel 30-10 to Racada by
9 grant deed. The grant deed and a trust deed were recorded on
10 December 20, 2004. Rein signed the trust deed in favor of Larson,
11 the beneficiary, on December 13, 2004, on the same date as the
12 state court trial. In 2007, Racada assigned the beneficiary's
13 interest under the trust deed to Debtor although Larson was the
14 beneficiary and Racada was the grantor. Debtor, stating she was
15 the beneficiary, then substituted trustees. In 2008, a trustee's
16 deed was recorded transferring Parcel 30-10 to Debtor for a credit
17 bid price of \$124,130.64. Debtor, in 2009, transferred Parcel 30-
18 10 to Larson and Debtor. The bankruptcy court found that Rein and
19 Racada never paid anything for Parcel 30-10 and that Rein served
20 as a "straw man" for Debtor to transfer the parcel from La Fe.

21 For Parcel 027-029, Debtor testified that she created La Fe
22 in 1983 to own this parcel and that Larson loaned money to La Fe
23 for its purchase and payment of taxes. The bankruptcy court found
24 that no documents explained: why it initially was transferred to
25 Larson in 1998; why the grant deed was not recorded for six years;
26 and how on December 14, 2004, Debtor had any interest to be
27 transferred by her quitclaim deed to Larson. Also, no evidence
28 was presented that Larson paid anything to La Fe or to Debtor for

1 this transfer. This lack of payment was supported by the fact
2 that in May 2007 Larson transferred the property back to Debtor as
3 a gift.

4 Thus, looking at the evidence as a whole, the bankruptcy
5 court found that a group of deeds, originally created in the late
6 1990s and through 2002, were unrecorded and possibly undelivered.
7 Then, suddenly, on December 20, 2004 - one week after the state
8 court trial - they were recorded transferring all of La Fe's
9 interest in Parcel 027-029 to Larson. The only remaining parcel,
10 Parcel 30-10, was transferred to Racada and simultaneously a deed
11 of trust was recorded on behalf of Racada, giving a lien to Larson
12 on that parcel.

13 The bankruptcy court found that this "flurry" of activity in
14 December 2004 demonstrated Debtor's intent to remove any ownership
15 interest in real property from La Fe to prevent Ballmer from
16 placing a judgment lien in his favor.

17 Based on the evidence, the bankruptcy court found that the
18 two sets of parcels transferred in December 2004 had equity in
19 them. Parcels 30-7 and 30-10 were originally purchased for
20 \$70,000 or \$80,000. Parcel 30-7 was transferred to Rein for
21 \$200,000, and Parcel 30-10 showed a documentary transfer tax
22 equivalent to \$100,000 (which was never paid) at the time the
23 grant deed from La Fe to Racada was recorded, which coincided with
24 the deed of trust for that same amount. No evidence of any liens
25 or encumbrances existed on Parcel 027-029 when it was transferred
26 from La Fe to Larson by deed recorded in December 2004, and that
27 deed showed a transfer tax valuing the property at \$100,000. In
28 addition, no evidence existed establishing Larson actually paid

1 that amount or any amount for Parcel 027-029.

2 Therefore, the bankruptcy court found that Debtor's transfer
3 of valuable assets of La Fe without consideration to prevent
4 Ballmer from collecting on his judgment was a willful injury. It
5 also found that Debtor's actions constituted a malicious injury.
6 Transferring property without adequate consideration in order to
7 prevent a creditor from obtaining a judgment lien is a wrongful
8 act. It was done intentionally, and Debtor's actions necessarily
9 caused Matthew injury. Finally, Debtor had offered no just cause
10 or excuse for her wrongful actions.

11 A judgment in favor of Matthew for \$75,440.84 plus interest
12 was entered on December 20, 2013.⁶ Debtor timely appealed.

13 **II. JURISDICTION**

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

16 **III. ISSUE**

17 Did the bankruptcy court err in determining that Debtor
18 intended through her actions to inflict a willful and malicious
19 injury to Ballmer or to his property, which is nondischargeable
20 under § 523(a)(6)?

21 **IV. STANDARDS OF REVIEW**

22 In reviewing a bankruptcy court's nondischargeability
23 determination, we review its findings of fact for clear error and
24 its conclusions of law de novo. Oney v. Weinberg
25 (In re Weinberg), 410 B.R. 19, 28 (9th Cir. BAP 2009). However,
26 the ultimate question of whether a particular debt is

27
28 ⁶ The § 523(a)(4) claim was withdrawn at the time of trial.
See Judgment, Dkt. No. 35, Dec. 20, 2015.

1 dischargeable is a mixed question of fact and law we review de
2 novo. See Honkanen v. Hopper (In re Honkanen), 446 B.R. 373, 382
3 (9th Cir. BAP 2011).

4 The issue of a debtor's intent is a question of fact reviewed
5 under the clearly erroneous standard. Arnold v. Gill
6 (In re Arnold), 252 B.R. 778, 784 (9th Cir. BAP 2000), overruled
7 on other grounds by Law v. Siegal, 134 S.Ct. 1188 (2014). Factual
8 findings are clearly erroneous if illogical, implausible or
9 without support in the record. Retz v. Samson (In re Retz),
10 606 F.3d 1189, 1196 (9th Cir. 2010). If two views of the evidence
11 are possible, the trial judge's choice between them cannot be
12 clearly erroneous. Anderson v. City of Bessemer City, N.C.,
13 470 U.S. 564, 573-75 (1985).

14 V. DISCUSSION

15 A. Preliminary issue.

16 The Debtor, as appellant, has the responsibility to provide
17 an adequate record on appeal. Kritt v. Kritt (In re Kritt),
18 190 B.R. 382, 387 (9th Cir. BAP 1995). She also bears the burden
19 of demonstrating that the bankruptcy court's factual findings are
20 clearly erroneous. Id. "Appellants should know that an attempt
21 to reverse the [bankruptcy] court's findings of fact will require
22 the entire record relied upon by the [bankruptcy] court be
23 supplied for review." Id. (internal quotations and citation
24 omitted) (emphasis added).

25 Matthew contends we should summarily affirm the bankruptcy
26 court's decision because Debtor failed to include any of the trial
27 exhibits in her record on appeal, which were not electronically
28 filed.

1 However, it is also important to consider the reciprocal role
2 of the appellee when it comes to the ultimate sufficiency of the
3 record. This Panel has cautioned that the "appellee stands on
4 tenuous footing when arguing that a record is too incomplete to
5 permit appellate review because while the assembly of the record
6 is appellant's duty, appellate rules allow appellees to
7 participate in the designation of portions of transcripts and
8 other parts of the record." Kyle v. Dye (In re Kyle), 317 B.R.
9 390, 394 (9th Cir. BAP 2004), aff'd, 170 F. App'x 457 (9th Cir.
10 2006) (citing Rule 8006;⁷ Fed. R. App. P. 6(b)(2)(B)(ii) &
11 10(b)(3)(B)). Likewise, an appellee is authorized to file
12 excerpts of record in an appendix "which contains material
13 required to be included by the appellant but omitted by
14 appellant." Id. (citing Rule 8009(b)⁸).

15 Nevertheless, we have discretion to dismiss an appeal or
16 summarily affirm a bankruptcy court's ruling if the appellant does
17 not provide a sufficient record to enable us to conduct an
18 informed review. Id. at 393. However, before exercising such
19 discretion we first should consider whether we can conduct an
20 informed review with the record provided. Id. In this regard, a
21 distinction must be drawn between a record that is so incomplete
22 that it does not permit the Panel to obtain an understanding of
23 the issues, and an incomplete record that does contain enough to
24 enable review. Id. If the record is impossibly incomplete, there

26 ⁷ Rule 8006 was amended, effective December 1, 2014, and in
27 this context became Rule 8009(a)(2).

28 ⁸ Rule 8009(b) was amended, effective December 1, 2014, and
in this context became Rule 8018(b)(2).

1 is "little choice" but to affirm or dismiss. Id. at 394 (citing
2 Morrissey v. Stuteville (In re Morrissey), 349 F.3d 1187, 1191
3 (9th Cir. 2003). If the record is merely incomplete, the Panel is
4 left with the possibility that enough of the record might
5 nevertheless be present so as to enable review. Id.

6 While the inclusion of the exhibits in the record would have
7 aided our review, their omission does not render the record
8 impossibly incomplete. Significantly the resolution of the appeal
9 turns on material factual determinations that are missing from the
10 bankruptcy court's analysis. The record does contain a copy of
11 the trial transcript, which was sufficient for our review. Thus,
12 the record appears to contain enough to obtain an understanding of
13 the issues to enable review. As such, we will not exercise our
14 discretion to summarily affirm the bankruptcy court's ruling.
15 Thus, we turn now to the merits of Debtor's appeal.

16 **B. The bankruptcy court did not make findings sufficient to**
17 **support its determination that Debtor's actions inflicted a**
18 **willful and malicious injury that would be nondischargeable**
19 **under § 523(a)(6).**

20 **1. Governing law.**

21 As a general rule, the Bankruptcy Code is "designed to give
22 a debtor a fresh start by discharging as many of its debts as
23 possible." Cal. Dept. of Health Servs. v. Jensen (In re Jensen),
24 995 F.2d 925, 928 (9th Cir. 1993) (internal quotations and
25 citations omitted). This process begins when a bankruptcy
26 petition is filed and an estate is created consisting of "all
27 legal or equitable interests of the debtor in property as of the
28 commencement of the case." § 541(a)(1). The debtor's objective
is to be personally discharged from the obligations against the

1 property of this estate. § 727. Such a discharge relieves "the
2 debtor from all debts that arose before the date of the order for
3 relief[.]" § 727(b).

4 Section 523(a) enumerates exceptions to the general rule of
5 discharge by providing that a bankruptcy court must not discharge
6 an individual from certain kinds of obligations. Quarre v. Saylor
7 (In re Saylor), 108 F.3d 219, 220 (9th Cir. 1997) ("Saylor II")⁹
8 (citing Papadakis v. Zelis (In re Zelis), 66 F.3d 205, 208 (9th
9 Cir. 1995)). A creditor objecting to the dischargeability of its
10 claim bears the burden of proving, by a preponderance of the
11 evidence, that the particular debt falls within one of the
12 exceptions to discharge enumerated in § 523(a). Grogan v. Garner,
13 498 U.S. 279, 291 (1991). If the creditor carries its burden and
14 the bankruptcy court declares a debt nondischargeable under
15 § 523(a), the debtor continues to bear part of the financial
16 burden that drove the debtor to file bankruptcy in the first
17 place; thus, § 523(a) "stands in tension" with the fundamental
18 bankruptcy goal of providing debtors with a "fresh start." Willms
19 v. Sanderson (In re Sanderson), 723 F.3d 1094, 1099-1100 (9th Cir.
20 2013). For this reason, § 523(a) is narrowly construed against
21 the objecting creditor and in favor of the debtor. Snoke v. Riso
22 (In re Riso), 978 F.2d 1151, 1154 (9th Cir. 1992) ("In order to
23 effectuate the fresh start policy, exceptions to discharge should
24 be strictly construed against an objecting creditor and in favor

25
26 ⁹ In Saylor II, the Ninth Circuit affirmed this panel's
27 decision by the same name found at 178 B.R. 209 (9th Cir. BAP
28 1995). We discuss both the Circuit and BAP decisions in this
memorandum. For clarity, we refer to the BAP decision as
"Saylor I" and the Ninth Circuit decision as "Saylor II."

1 of the debtor.").

2 The issue in this appeal involves § 523(a)(6), which excepts
3 from discharge, debts "for willful and malicious injury by the
4 debtor to another entity or to the property of another entity."
5 § 523(a)(6).

6 Therefore, to hold that an exception to discharge under
7 § 523(a)(6) arose from the property transfers at issue in this
8 appeal, the bankruptcy court must find by a preponderance of the
9 evidence: that Debtor subjectively intended a willful and
10 malicious injury to the creditor or the property of the creditor
11 by transferring the property; and that such willful and malicious
12 injury gave rise to the type of debt excepted from discharge under
13 § 523(a)(6).

14 **a. Willful and malicious conduct.**

15 Both willfulness and maliciousness must be proven in order to
16 apply § 523(a)(6). Ormsby v. First Am. Title Co. of Nev.
17 (In re Ormsby), 591 F.3d 1199, 1206 (9th Cir. 2010). "A 'willful'
18 injury is a 'deliberate or intentional injury, not merely a
19 deliberate or intentional act that leads to injury.'" Barboza v.
20 New Form, Inc. (In re Barboza), 545 F.3d 702, 706 (9th Cir. 2008)
21 (quoting Kawaauhau v. Geiger, 523 U.S. 57, 61 (1998)). At a
22 minimum, willful requires "a deliberate act with knowledge that
23 the act is substantially certain to cause injury." Petralia v.
24 Jercich (In re Jercich), 238 F.3d 1202, 1208 (9th Cir. 2001). In
25 other words, a debtor's act is "willful" only if he or she
26 actually intended to cause injury or actually believed that injury
27 was substantially certain to occur. Carrillo v. Su (In re Su),
28 290 F.3d 1140, 1144-45 (9th Cir. 2002).

1 Proving a "malicious" injury requires a showing that the
2 debtor (1) committed a wrongful act, (2) done intentionally,
3 (3) which necessarily causes injury, and (4) was done without just
4 cause or excuse. Id. at 1146-47.

5 Debtor contends the facts and applicable law do not support
6 the bankruptcy court's findings that Debtor transferred property
7 with the intent to inflict injury to Ballmer. Specifically,
8 Debtor contends she transferred the properties to Larson not as a
9 means to intentionally cause injury to Ballmer, but to pay Larson
10 for La Fe's debt owed to him based on his investment and financial
11 contributions to La Fe.

12 The bankruptcy court, after considering the several transfers
13 involving Parcels 30-10 and 027-029, found that the facts
14 "demonstrate[d] the intent to remove any ownership interest in
15 real property from La Fe so as to prevent Ballmer from placing a
16 judgment lien in his favor." Mem. Op. at 7. Further, the court
17 stated: "Because valuable assets of La Fe were transferred
18 without consideration so as to prevent Ballmer from collecting on
19 his judgment, this was a willful injury. It was also a malicious
20 injury. Transferring the property without adequate consideration
21 in order to prevent a creditor from obtaining a judgment lien is a
22 wrongful act. This was done intentionally and such an act
23 necessarily caused injury. And no just cause existed that would
24 excuse this wrongful action." Mem. Op. at 9.

25 The bankruptcy court does not make findings as to the
26 Debtor's state of mind. In reviewing the bankruptcy court's
27 memorandum opinion, we are unable to determine whether it applied
28 a subjective or an objective standard in finding a willful injury.

1 As Su teaches, a subjective standard must be applied. We vacate
2 and remand so the bankruptcy court may conduct further proceedings
3 in considering whether it applied a subjective standard in
4 determining willful injury.

5 We must also vacate and remand for another reason. The
6 bankruptcy court needs to make findings of a proper debt resulting
7 from injury to Ballmer or the property of Ballmer.

8 **b. Debt resulting from injury to person or property.**

9 Before there can be a nondischargeable debt under § 523(a)(6)
10 a finding must be made that the Debtor's willful and malicious
11 conduct actually constituted "injury . . . to another entity or
12 the property of another entity."¹⁰ See § 523(a)(6).

13 **i. Injury to person.**

14 Nothing in the record indicates that the court made a finding
15 that Debtor's conduct actually caused a willful and malicious
16 injury to Ballmer sufficient to bring Matthew's claim within the
17 first predicate of § 523(a)(6) as "willful and malicious injury
18 . . . to another entity."

19 In order to say that an act caused injury to the creditor
20 himself within the meaning of § 523(a)(6), the act must be such
21 that it gives rise to a legally cognizable claim which could
22 result in a monetary judgment. See Quarre v. Saylor
23 (In re Saylor), 178 B.R. 209, 213 (9th Cir. BAP 1995)
24 ("Saylor I").¹¹ Otherwise, no debt arises as a result of the

26 ¹⁰ The term "entity," is broadly defined to include a "person,
27 trust, [or] estate." § 101(15).

28 ¹¹ We are mindful that both Saylor I and Saylor II were
(continued...)

1 injury and, if no debt arises as a result of a willful and
2 malicious injury, § 523(a)(6) does not come into play.

3 Here, the bankruptcy court found that Debtor's willful and
4 malicious conduct in transferring the property out of La Fe
5 injured Ballmer because it prevented him from collecting on his
6 eventual judgment. However, it does not automatically follow that
7 this constitutes an injury to Ballmer within the scope of
8 § 523(a)(6).

9 For instance, typically when a debtor attempts to hinder,
10 delay or defraud a creditor by transferring property, a claim for
11 fraudulent transfer is the basis in law for holding the debtor
12 liable to the creditor for such injury. However, this would not
13 give rise to a nondischargeable injury under § 523(a)(6) because,
14 under California law, a creditor's remedies for fraudulent
15 transfer are generally non-monetary in nature.¹² See Saylor I,
16 178 B.R. at 213-214. In this case, the bankruptcy court expressly
17 excluded fraudulent transfer as the legal basis for Matthew's
18 right to payment stating "the issue of whether [the lot transfers]
19 meets the legal definition of a fraudulent transfer is not before
20

21 ¹¹ (...continued)
22 decided prior to the Supreme Court deciding Geiger. Consequently
23 the emphasis now is on the injury and not the act.

24 ¹² "[U]nder California law, a creditor's remedies for
25 fraudulent transfer are avoidance of the transfer to the extent
26 necessary to satisfy the creditor's claim, attachment of the asset
27 transferred, and equitable (injunction against further transfer of
28 the asset transferred, or appointment of a receiver). Where . . .
the creditor has a judgment against the transferor, he may also
execute against the asset transferred or its proceeds. How these
remedies raise a right to payment **from the transferors**, here the
debtors, is not clear." Saylor I, 178 B.R. at 213-214 (emphasis
in original).

1 the bankruptcy court." Mem. Op. at 8, n.10. Yet, the court made
2 no further findings as to the legal theory, statutory or
3 otherwise, under which Matthew has a right to payment from Debtor.

4 Accordingly, if the bankruptcy court is to support its
5 § 523(a)(6) ruling in favor of Matthew on the basis that there has
6 been an "injury . . . to another entity[,]" the court must make a
7 finding that Debtor's transfers of property inflicted a willful
8 and malicious injury that could give rise to a legal right to
9 payment from Debtor.

10 **ii. Injury to property.**

11 In order to bring Matthew's claim within the second predicate
12 of § 523(a)(6) as "willful and malicious injury . . . to
13 . . . property," Ballmer must have held an interest in property
14 capable of being willfully and maliciously injured by Debtor's
15 transfers. See Saylor I, 178 B. R. at 214 ("Nondischargeability
16 is meaningful only in connection with obligations which are or may
17 be monetary"). In other words, unless Ballmer had a property
18 interest associated with the parcels at issue, then Debtor's
19 transfer of the parcels could not have caused willful and
20 malicious injury to the "property" of Ballmer within the meaning
21 of § 523(a)(6).

22 The Ninth Circuit has addressed whether a debtor's misconduct
23 constituted a willful and malicious injury to property for
24 purposes of § 523(a)(6) in a context with facts strikingly similar
25 to the case at bar. In the Saylor case, the creditor brought a
26 breach of contract claim against the debtors and, while the action
27 was pending, the debtors transferred three parcels of real
28 property to a third party for insufficient consideration.

1 Saylor II, 108 F.3d at 219. After the transfers were made, the
2 trial court in the breach of contract action entered a judgment in
3 creditor's favor. Id. Seeking to satisfy the breach of contract
4 judgment, the creditor filed a fraudulent conveyance action. Id.
5 However, the debtors then filed for chapter 7 bankruptcy; creditor
6 subsequently filed an adversary proceeding to determine the
7 dischargeability of the debtors' debt under § 523(a)(6). Id.

8 Despite creditor's contention that debtors' fraudulent
9 transfers gave rise to a nondischargeable debt under § 523(a)(6),
10 the Ninth Circuit affirmed the BAP's decision in favor of the
11 debtors. Specifically, the Court held that the creditor did not
12 have "property" that was injured because his "claim had not been
13 reduced to judgment at the time the three parcels of real estate
14 were transferred, and he had no security interest in the property
15 represented thereby." Id. at 221. Thus, a mere interest in
16 fraudulent transfer remedies without something more was
17 insufficient to qualify as an interest in property for purposes of
18 § 523(a)(6). Id.

19 Similarly, in Riso, the Ninth Circuit affirmed the BAP's
20 decision that a right of first refusal was not a "property"
21 interest under § 523(a)(6). 978 F.2d at 1154. Therefore, the
22 debtor's willful transfer of certain real property in violation of
23 the creditor's interest in the right of first refusal did not
24 constitute the sort of injury to creditor's property contemplated
25 by § 523(a)(6). Id.

26 In this case, nothing in the record indicates that the
27 bankruptcy court made any findings as to whether Debtor's property
28 transfers to keep La Fe's assets out of the hands of Ballmer

1 constituted a willful and malicious injury to the property of
2 Ballmer. The property transfers at issue that divested La Fe of
3 valuable assets so as to prevent Ballmer from executing on a
4 judgment in his favor were completed by December 20, 2004.¹³
5 These transfers were after Debtor failed to appear for trial in
6 the underlying breach of contract matter, but over one month
7 before the judgment was entered in Ballmer's favor and over two
8 months before an abstract of the judgment was recorded.

9 Thus, similar to the Saylor cases, the transfers were made
10 before Ballmer's claim was reduced to judgment. Ballmer had no
11 lien against the parcels at issue at the time the transfers were
12 made. The facts only reveal that at the time Debtor transferred
13 the property out of La Fe, depleting the assets available to
14 satisfy a potential adverse judgment, Ballmer was merely an
15 unsecured creditor holding only an interest in the possibility of
16 obtaining a judgment and placing a judgment lien in his favor
17 sometime in the future.

18 Based on the limited record before us, we are unable to
19 ascertain what theory the bankruptcy court may have relied on to
20 reach a result different than the Saylor cases and Riso. Indeed,
21 under Ninth Circuit precedent, if transfers in violation of a
22

23 ¹³ Although the record refers to certain property transfers
24 that occurred in 2007 (i.e. post-judgment), these transfers would
25 be immaterial to a determination of whether the Debtor's property
26 transfers willfully and maliciously injured Ballmer because the
27 2007 transfers did not deplete La Fe of assets which otherwise
28 would have been available to Ballmer to place a judgment lien in
his favor. That scheme was accomplished by December 20, 2004 when
Debtor transferred the subject property out of La Fe. (ER 144,
149-150). Rather the 2007 transfers were between Larson and
Debtor individually, long after La Fe was stripped of its
ownership interest in them.

1 potential state court judgment, a right to fraudulent transfer
2 remedies, or a right of first refusal are insufficient grounds for
3 a
4 § 523(a)(6) injury to property, then certainly a transfer in
5 violation of the future right to file a judgment lien against the
6 parcels at issue here would not be a property right protected by
7 § 523(a)(6).

8 Therefore, if the bankruptcy court is to support its
9 § 523(a)(6) ruling in favor of Matthew on the basis that there has
10 been an injury to property, the court must make a finding that
11 Ballmer had an established property interest that Debtor's
12 property transfers willfully and maliciously injured.

13 **iii. Resulting debt.**

14 In the event the bankruptcy court finds, on remand, that
15 Debtor's conduct willfully and maliciously injured either the
16 creditor or the property of the creditor, the court must also
17 determine whether a proper § 523(a)(6) debt resulted.

18 The Bankruptcy Code defines "debt" as "liability on a claim."
19 § 101(12). A "claim" is broadly defined as "a right to payment"
20 or a "right to an equitable remedy for breach of performance if
21 such breach gives rise to a right to payment." § 101(5)(A)-(B).

22 For purposes of nondischargeability under § 523(a)(6) the
23 "debt" at issue must arise from the intentional conduct that
24 willfully and maliciously injures a person or the property of that
25 person; therefore, the general rule in the Ninth Circuit is that
26 § 523(a)(6) applies to recoveries based on a tort claim rather
27 than those based on breach of contract. See In re Riso, 978 F.2d
28 at 1154 ("It is well settled that a simple breach of contract is

1 not the type of injury addressed by § 523(a)(6)"); Barbachano v.
2 Allen, 192 F.2d 836, 838 (9th Cir. 1951); Comm'n Workers of Am.
3 Local No. 11500, AFL-CIO v. Akridge (In re Akridge), 71 B.R. 151,
4 154 (Bankr. S.D. Cal. 1987) (debts that are excepted from
5 discharge under § 523(a)(6) relate solely to tortious liabilities,
6 not debts stemming from breach of contract); Stout v. Marshack
7 (In re Stout), 2014 WL 1724506 (9th Cir. BAP May 1, 2014)
8 ("Section 523(a)(6) essentially encompasses intentional torts").

9 In narrow circumstances a breach of contract claim may be
10 nondischargeable under § 523(a)(6) if the breach is both in bad
11 faith and "accompanied by some form of 'tortious conduct' that
12 gives rise to 'willful and malicious injury.'" In re Jercich,
13 238 F.3d at 1206. Whether a debtor's breach of contract is
14 tortious is determined under state law. Id.

15 In California, tortious breach of contract requires:
16 "[c]onduct amounting to a breach of contract [that] . . . also
17 violates an independent duty arising from principals of tort law."
18 Id.; see also Lockerby v. Sierra, 535 F.3d 1038, 1041 (9th Cir.
19 2008) (conduct is "tortious if it constitutes a tort under state
20 law"). California law further limits recovery for tortious breach
21 of contract to situations where: "in addition to the breach of the
22 covenant [of good faith and fair dealing] a defendant's conduct
23 violates a fundamental public policy of the state."
24 In re Jercich, 238 F.3d at 1206 (internal quotation marks omitted)
25 (alteration in original).

26 In this appeal, the bankruptcy court's findings are
27 insufficient for the Panel to determine whether the debt at issue
28 is a nondischargeable debt under § 523(a)(6). The limited record

1 before us does not reveal whether Matthew's premise in seeking the
2 nondischargeability protection of § 523(a)(6) is that Debtor's
3 property transfers created a new/independent debt or whether the
4 transfers transmuted the otherwise dischargeable breach of
5 contract debt into a nondischargeable debt arising from willful
6 and malicious injury.

7 This ambiguity leaves us unable to reconcile conflicting
8 aspects of the record and the court's memorandum opinion to
9 ascertain whether the debt ultimately reflected in the court's
10 judgment is the uncollected breach of contract damages or
11 independent damages. For instance, the only pre-petition "debt"
12 explicitly stated in the record is the \$85,626.75 judgment debt
13 from the underlying breach of contract claim. Yet, in Matthew's
14 complaint he asks that "the court **determine the debt** of debtor to
15 Claimant and find that said debt is not dischargeable under
16 section . . . 523(a)(6)," which suggests that the "debt" Matthew
17 is seeking to except from discharge is a debt distinct from the
18 already determined judgment debt. See Matthew's adversary
19 complaint 5:1-5 (emphasis added).

20 Similarly confusing in this regard is the bankruptcy court's
21 memorandum opinion. The court begins by pointing to the fact that
22 Ballmer received a judgment in the underlying breach of contract
23 action in the amount of \$85,626.75, and that Matthew "filed this
24 adversary proceeding seeking to have **the judgment** declared
25 non-dischargeable under . . . 523(a)(6)." Mem. Op. 138:18-139:1
26 (emphasis added). Thus, the court seems to frame the context of
27 this adversary proceeding as dealing with the nondischargeability
28 of the breach of contract judgment as the debt at issue. However,

1 the court then enters a judgment in favor of Matthew in the amount
2 of \$75,440.84, an amount that does not correspond to the
3 uncollected breach of contract debt, but also is not explained as
4 an independent measure of damages by any of the court's findings.¹⁴

5 The record is unclear as to whether the debt the bankruptcy
6 court has deemed nondischargeable indeed resulted from the
7 Debtor's conduct inflicting willful and malicious injury as a
8 separate debt or whether it is some sort of recalculation of the
9 outstanding judgment debt that arose from the underlying breach of
10 contract claim. In any event, the court must properly identify
11 the character of the debt at issue to support its \$75,440.84
12 judgment as a nondischargeable debt under § 523(a)(6).

13 Under these circumstances, we conclude that further findings
14 are required before a proper determination of nondischargeability
15 under § 523(a)(6) can be made. The bankruptcy court needs: to
16 determine Debtor's state of mind given the appropriate standard of
17 intent; to determine whether Debtor's conduct inflicted willful
18 and malicious injury on Ballmer or his property; and to determine
19 whether such willful and malicious injury gave rise to a
20 nondischargeable debt.

21 VI. CONCLUSION

22 For the reasons set forth above, we VACATE and REMAND for the
23 bankruptcy court to conduct further proceedings consistent with
24 this memorandum.

25

26

27 ¹⁴ At oral argument Matthew's counsel was asked how the
28 bankruptcy court arrived at the \$75,440.84 figure but he did not
know where it came from or what measure of damages it represented.