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NOT FOR PUBLICATION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 No.	CC-14-1314-TaKuD
6	JOEL WERNER and)	Bk. No.	8:08-bk-11153-RK*
7	CATHLEEN WERNER,)	Adv. No.	8:10-ap-01104-CB
8	Debtors.)		
9	JASON SCOTT WICKAM,)		
10	Appellant,)		
11	v.)	MEMORANDUM**	
12	DEBORAH IVAR; ALAN IVAR;)		
13	DAVID ROCHE,)		
14	Appellees.)		

Argued and Submitted on June 18, 2015
at Pasadena, California

Filed - August 25, 2015

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

Honorable Catherine E. Bauer, Bankruptcy Judge, Presiding

* The bankruptcy court consolidated four related adversary proceedings; the lead was designated as 08:08-ap-01241-RK, RSD Group Inc., et al. v. Werner (In re Werner). As a result, the Werner bankruptcy case is designated as the bankruptcy case on appeal, although neither Joel Werner nor Cathleen Werner are parties to the appeal.

** 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(c)(2).

1 Appearances: Robert R. Anderson argued for appellant; Michael
2 John Carras of Conforti & Carras argued for
3 appellees.

4 Before: TAYLOR, DUNN, and KURTZ, Bankruptcy Judges.

5
6 **INTRODUCTION**

7 In an adversary proceeding commenced against debtor Jason
8 Scott Wickam, plaintiffs Alan Ivar, Deborah Ivar, and David
9 Roche alleged that the Debtor made misrepresentations and
10 fraudulently concealed material information, which induced them
11 to invest in an ultimately unsuccessful real estate development
12 project. The Ivars and Roche sought a determination from the
13 bankruptcy court that their particular investments were
14 nondischargeable under § 523(a)(2)(A).¹ After trial, the
15 bankruptcy court entered a judgment in favor of the Ivars and
16 Roche, determining the amount of \$1,016,000 (plus post-judgment
17 interest) nondischargeable.

18 As to the judgment, we conclude that the bankruptcy court
19 did not make sufficient or complete findings with respect to
20 each investment and each element of § 523(a)(2)(A). Therefore,
21 we VACATE the judgment and REMAND to the bankruptcy court with
22 instructions that it make additional findings. The Debtor also
23 argues that, in contravention of § 523(a)(2)(A), the bankruptcy
24 court improperly relied on statements relating to his financial
25 condition. We disagree and AFFIRM the bankruptcy court in this

26
27 ¹ Unless otherwise indicated, all chapter and section
28 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532.

1 regard.

2 **FACTS**

3 In 2005, the Debtor and Joel Werner formed Connexian
4 Investments, Inc. for the purposes of developing, selling, and
5 marketing high-end "spec" homes in Southern California and
6 Colorado. Connexian's first project was Coral Blue, the
7 construction and development of four lots (the "Properties") in
8 Southern California (the "Coral Blue Project"). In early 2006,
9 it contracted to purchase the Properties for \$3,825,000. But,
10 it lacked the funds necessary to complete the purchase and
11 obtained extensions to close escrow.

12 The Debtor and Werner also formed Coral Blue, LLC,
13 specifically for the Coral Blue Project. And Connexian retained
14 RSD Group, Inc. to raise equity capital and financing for the
15 project. Through RSD, Connexian pursued potential financing
16 from Point Center Financial, a self-described "hard money
17 lender."

18 Eventually, Point Center loaned Connexian \$6,587,100 to
19 fund the purchase of the Properties and the construction of two
20 spec houses. To consummate the loan, the Debtor and Werner
21 executed a funding agreement on behalf of Connexian, which
22 contained a truncated loan term and a 11.5% interest rate.
23 Connexian finally completed its purchase of the Properties in
24 September of 2006. The recorded deed of trust in favor of Point
25 Center reflected that Connexian owned the Properties.

26 Consistent with its charge to raise equity, in August 2006,
27 RSD also introduced the project to the Ivars and coordinated a
28 meeting between the Ivars and the Debtor and Werner. Both the

1 Ivars and Roche, who was acquainted with the Debtor through
2 prior construction projects, soon made investments.

3 On August 28, 2006, the Ivars made an initial investment of
4 \$216,000 in the Coral Blue Project ("Ivars' First Investment").
5 They contemporaneously executed a Coral Blue, LLC operating
6 agreement dated August 18, 2006 ("Ivars' LLC Agreement"),² which
7 purported to give the Ivars 216,000 governance units in Coral
8 Blue, LLC. In pertinent part, the agreement contained the
9 following provision:

10 **2.6 BUSINESS AND PURPOSE OF THE LLC.** The purpose of
11 the LLC is to engage in any lawful act or activities
12 for which a limited liability company may be organized
13 under the Statute and specifically the purchasing,
14 developing, selling, and managing four residential
15 properties **identified as Lots 23, 26, 27 and 28,**
16 located in Covenant Hills, Ladera Ranch (such
17 business, including the provision of services with
18 respect to the products of the LLC, is herein referred
19 to as the "Business of the LLC").

20 ("Section 2.6") (second emphasis added).

21 Apparently, in exchange for their investment, the Ivars
22 received from Connexian an unsecured promissory note in the
23 amount of \$216,000. The note matured in one year, required a
24 balloon payment, and carried a 25% annual interest rate.

25 Separately, on September 12, 2006, Roche completed a
26 \$200,000 investment in the Coral Blue Project. He also executed
27 a Coral Blue, LLC operating agreement, this one dated
28

² The Ivars also executed a Coral Blue, LLC subscription agreement, which purported to give them 216,000 membership units in the company.

1 September 13, 2006 ("Roche LLC Agreement").³

2 Although dated only 26 days after the Ivars' LLC Agreement,
3 the Roche LLC Agreement contained material differences. They
4 included a completely different schedule of LLC members; the
5 membership list in Roche's agreement contained only himself, the
6 Debtor, and Werner - there was no reference to the Ivars. And,
7 unlike the Ivars' LLC Agreement, the Roche LLC Agreement did not
8 contain the Section 2.6 language; in fact, there was no
9 reference to the Properties at all.

10 A few months later, the Ivars agreed to further investment
11 in the Coral Blue Project. Apparently, they understood that
12 these funds would be used to develop lots 26 and 27. According
13 to the Ivars, the second investment consisted of two
14 installments: \$200,000 in December 2006 and \$400,000 in April
15 2007 (jointly, "Ivars' Second Investment").

16 In connection with the first installment, the Ivars
17 received a "straight note" from Connexian in the amount of
18 \$200,000. Pursuant to broker escrow instructions executed by
19 Alan Ivar and Werner, the \$200,000 was also a 30-day loan to
20 Connexian. The "loan" was secured by a deed of trust
21 encumbering lots 26 and 27; the deed of trust, however, was "to
22 be held unrecorded until maturity or satisfaction"

23 As to the second installment, Alan Ivar and Werner (on
24 behalf of Connexian) executed an "investment breakdown"
25 worksheet dated April 18, 2007. The worksheet reflected a

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27 ³ Like the Ivars, Roche also executed a Coral Blue, LLC
28 subscription agreement, which allegedly gave him 200,000
membership units in the company.

1 proposed rate of interest of 25% to the Ivars, which the Ivars
2 later attested referred to 25% of the profits from the
3 construction of lots 26 and 27.

4 In August 2007, Connexian obtained a second loan from Point
5 Center, in the amount of \$6.5 million dollars. According to
6 Connexian, this loan was intended for the construction on lots
7 26 and 27. The fall of 2007 then brought hurried efforts to
8 refinance the first Point Center loan. Connexian, however, was
9 ultimately unsuccessful in these efforts, and the first Point
10 Center loan matured without repayment.

11 Point Center then learned that Connexian had encumbered the
12 Properties with junior liens, in express contravention of the
13 terms of its loans. It notified Connexian that it was in
14 default of the terms of the second loan and that, as a result,
15 Point Center was accelerating the loan balance and required
16 immediate payment of the second loan in full. Connexian could
17 not repay either of the Point Center loans, and Point Center
18 ultimately foreclosed on the Properties. None of the Properties
19 had been fully developed, much less marketed or sold. Connexian
20 ceased doing business in March 2008.

21 Next, the Ivars and Roche joined forces and commenced an
22 adversary proceeding against the Debtor.⁴ The adversary
23 complaint alleged fraud in the inducement and sought to except
24
25

26 ⁴ The Ivars and Roche also commenced an action against the
27 Debtor in California state court, where they obtained a default
28 judgment. That judgment was later vacated, following the
Debtor's bankruptcy filing.

1 their investments from discharge under § 523(a)(2)(A).⁵
2 Following a successful petition for a transfer of venue to the
3 Central District of California, the bankruptcy court
4 consolidated four related adversary proceedings, including the
5 proceeding against the Debtor.⁶

6 During the one-day trial, counsel for the Ivars and Roche
7 introduced two prior tax returns and the Debtor's statements of
8 financial affairs, as initially filed and twice amended, for the
9 purposes of impeachment. The bankruptcy court admitted the
10 documents as impeachment evidence. It then took the matter
11 under submission.

12 The bankruptcy court subsequently entered an amended
13 statement of decision. It found that Connexian's purchase of
14 the Properties expressly contravened Section 2.6 of the Coral
15 Blue, LLC operating agreement. And it found the Debtor not
16 credible as a witness, stating that it instead believed the
17 plaintiffs' version of the events. It thereafter entered a
18 judgment in favor of the Ivars for \$816,000 (plus post-judgment
19 interest), and Roche for \$200,000 (plus post-judgment interest).
20 The Debtor timely appealed.

21 **JURISDICTION**

22 The bankruptcy court had jurisdiction pursuant to 28 U.S.C.

23
24 ⁵ The adversary complaint also alleged a claim under
25 § 523(a)(4). The bankruptcy court later determined that because
26 it found in favor of the plaintiffs on their § 523(a)(2)(A)
27 claim, there was no need for it to rule on the alternate claim
28 under § 523(a)(4).

⁶ The parties to the other proceedings later settled,
leaving only the proceeding against the Debtor for trial.

1 §§ 1334 and 157(b) (2) (I). We have jurisdiction under 28 U.S.C.
2 § 158.

3 **ISSUES⁷**

- 4 1. Whether the bankruptcy court erred in excepting the
5 investments from discharge under § 523(a) (2) (A).
6 2. Whether the bankruptcy court erred by considering the
7 Debtor's prior tax returns and statements of financial
8 affairs to find that he was not credible as a witness.

9 **STANDARD OF REVIEW**

10 In appealing from a nondischargeability determination, we
11 review the bankruptcy court's findings of fact for clear error
12 and its conclusions of law de novo. Oney v. Weinberg
13 (In re Weinberg), 410 B.R. 19, 28 (9th Cir. BAP 2009), aff'd,
14 407 Fed. App'x. 176 (9th Cir. 2010); see also Carrillo v. Su
15 (In re Su), 290 F.3d 1140, 1142 (9th Cir. 2002) ("Whether a claim
16 is nondischargeable presents mixed issues of law and fact and is
17 reviewed de novo.").

18 **DISCUSSION**

19 Section 523(a) (2) (A) excepts from discharge a debt "for
20 money, property, services, or an extension, renewal, or
21 refinancing of credit" obtained by "false pretenses, a false
22 representation, or actual fraud, other than a statement
23 respecting the debtor's . . . financial condition." To prevail
24 on such a claim, a creditor must prove: (1) misrepresentation,
25

26 ⁷ On appeal, both parties advance arguments as to the
27 Debtor's alleged omissions of the terms of the first loan with
28 Point Center. In its decision, however, the bankruptcy court
made no findings or determination on this theory of fraud.
Thus, we do not address those arguments.

1 fraudulent omission or deceptive conduct by the debtor; (2) the
2 debtor's knowledge of the falsity or deceptiveness of his
3 representation or omission; (3) an intent to deceive;
4 (4) justifiable reliance by the creditor on the debtor's
5 representation or conduct; and (5) damage to the creditor
6 proximately caused by its reliance on the debtor's statement or
7 conduct. Ghomeshi v. Sabban (In re Sabban), 600 F.3d 1219, 1222
8 (9th Cir. 2010); In re Weinberg, 410 B.R. at 35. The creditor
9 must prove each element by a preponderance of the evidence.
10 Grogan v. Garner, 498 U.S. 279, 284 (1991).

11 A principal purpose of the Bankruptcy Code is providing
12 the "honest but unfortunate debtor" with a fresh start.
13 Danielson v. Flores (In re Flores), 735 F.3d 855, 861 (9th Cir.
14 2013). As a result, the § 523 exceptions to discharge are
15 narrowly interpreted in favor of debtors. Mele v. Mele
16 (In re Mele), 501 B.R. 357, 363 (9th Cir. BAP 2013).

17 **A. As to each investment, the bankruptcy court failed to make**
18 **adequate findings on each element of § 523(a) (2) (A) .**

19 Civil Rule 52(a) (incorporated into adversary proceedings
20 by Rule 7052) instructs that "[i]n an action tried on the facts
21 without a jury, . . . the court must find the facts specially
22 and state its conclusions of law separately." These findings
23 and conclusions may be stated on the record or in a memorandum
24 decision. The findings must be sufficient to indicate the
25 factual basis for the trial court's ultimate conclusion. Unt v.
26 Aerospace Corp., 765 F.2d 1440, 1444 (9th Cir. 1985). And, the
27 findings must be sufficiently explicit such that the appellate
28 court has a clear understanding of the basis of the trial

1 court's decision and can determine the grounds on which the
2 trial court reached its decision. Mattel, Inc. v. Walking
3 Mountain Prods., 353 F.3d 792, 815 (9th Cir. 2003); Unt,
4 765 F.2d at 1444; Veal v. Am. Home Mortg. Servicing, Inc.
5 (In re Veal), 450 B.R. 897, 919 (9th Cir. BAP 2011). Even when
6 a bankruptcy court does not make formal findings, however, we
7 may proceed with review "if a complete understanding of the
8 issues may be obtained from the record as a whole or if there
9 can be no genuine dispute about omitted findings." Id. at
10 919-20.

11 Here, there were three different investment transactions
12 involving two unrelated parties; the Ivars and Roche learned of
13 one another and joined forces only after they were shorn of
14 their investments. Nonetheless, the bankruptcy court's sparse
15 findings lump the transactions together. This is problematic
16 because the basis for its one clear finding of misrepresentation
17 applied only to the Ivars' First Investment. Also problematic
18 is the complete absence of findings on three of § 523(a)(2)(A)'s
19 required elements.

20 The bankruptcy court found at least one, but possibly three
21 misrepresentations. First, it found that despite Coral Blue,
22 LLC's "clear purpose" of buying the Properties as set forth in
23 its operating agreement, Coral Blue, LLC did not, in fact, buy
24 the Properties - Connexian did. This, it found, contravened the
25 Section 2.6 language in the Ivars' LLC Agreement. Section 2.6,
26 however, did not actually state that Coral Blue, LLC would hold
27 title to the Properties. And nothing else in the agreement made
28 reference to property ownership.

1 Significantly more problematic, however, is that
2 Section 2.6 existed only in the Ivars' LLC Agreement. Although
3 both the Roche LLC Agreement and the Ivars' Coral Blue II, LLC
4 Operating Agreement contained a section discussing the business
5 and purpose of the LLC's, only the Section 2.6 in the Ivars' LLC
6 Agreement made any reference to the Properties. Therefore, the
7 emphasized Section 2.6 language relied upon by the bankruptcy
8 court pertained only to the Ivars' First Investment - not to the
9 Roche Investment and not to the Ivars' Second Investment. To
10 the extent it found that this was a misrepresentation as to all
11 three investments, it appears to be clear error.

12 Unlike the Ivars, however, Roche provided additional
13 evidence on this issue. In his declaration, Roche attested that
14 he was informed that Coral Blue, LLC would purchase the
15 Properties. But, he did not identify who made that
16 representation to him. And his testimony at trial did not touch
17 upon the issue. To the extent that Werner made the
18 representation, the bankruptcy court would need to make the
19 necessary findings as required by this Panel's decision in
20 Sachan v. Huh (In re Huh), 506 B.R. 257 (9th Cir. BAP 2014),⁸ so
21 as to impute Werner's alleged misrepresentation (if any) to the
22 Debtor.⁹

24 ⁸ In re Huh was filed on March 11, 2014; this was after
25 the adversary trial but before the bankruptcy court issued its
26 amended statement of decision.

27 ⁹ There is also ambiguity as to whether the bankruptcy
28 court admitted Werner's declaration into evidence. Insofar as
it was admitted, the bankruptcy court did not resolve contrary

(continued...)

1 Second, the bankruptcy court found that the Ivars and Roche
2 were led to believe that the Debtor was an experienced real
3 estate developer, which it determined to be untrue. On this
4 record, however, we are unclear as to whether it found that this
5 was a representation made by the Debtor; it made no findings as
6 to who made the representation to the Ivars and Roche or when.
7 Moreover, the record does not support this finding cleanly;
8 there was no dispute that RSD introduced the Ivars to the Coral
9 Blue Project (and, by extension, the Debtor). And, Roche was
10 already acquainted with the Debtor through prior construction
11 projects.

12 Third, the bankruptcy court found that, contrary to the
13 loan documents related to Point Center's senior lien, "a junior
14 lien was [created and] recorded against the Properties . . .
15 without Point Center's prior knowledge or consent and
16 constituted a serious breach of the terms of the loan secured by
17 the senior lien on the Properties." Again, we are unclear as to
18 whether the bankruptcy court determined that this was a
19 misrepresentation or omission. Insofar as it did, it is unclear

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21 (...continued)

22 evidence contained therein; namely, that Werner did not make any
23 representation that Coral Blue, LLC would own the Properties.

24 The adversary proceeding docket shows that, prior to trial,
25 the Ivars and Roche moved to strike Werner's declaration. There
26 was no ruling on this request prior to trial. But, at the
27 conclusion of trial, it appears that the bankruptcy court
28 admitted into evidence the declarations of witnesses to the
extent they contained references to exhibits. The record is
unclear as to whether this referred only to the declarations of
witnesses who testified at trial. In its decision, the
bankruptcy court made no reference one way or another to
Werner's declaration.

1 how this related to the investments made by the Ivars and Roche.

2 The bankruptcy court then broadly found that "the
3 misrepresentations made by [the Debtor] proximately caused
4 Plaintiffs' [losses]." It did not, however, particularly
5 explain its finding. Again, that is a concern here, given the
6 existence of some anomalous facts.

7 As noted by the bankruptcy court, Connexian held title to
8 the Properties, rather than Coral Blue, LLC. But, the Ivars
9 received promissory notes only from Connexian with respect to
10 their investments. And, in connection with the Second
11 Investment, the Ivars also received a deed of trust from
12 Connexian securing the promissory note. To the extent the
13 pertinent misrepresentation was that Coral Blue, LLC would hold
14 title to the Properties, the existence of these notes and deed
15 of trust bear some relevance on the issue of proximate cause and
16 reliance.

17 Finally, the bankruptcy court made no findings as to the
18 Debtor's knowledge of falsity and intent to deceive or the
19 plaintiffs' justifiable reliance.

20 Additional findings are necessary here. That the
21 bankruptcy court found the Debtor not credible and, conversely,
22 accepted the plaintiffs' version of events, did not absolve it
23 of the requirement to make specific findings, particularly in a
24 nondischargeability proceeding and given this record.

25 **B. The bankruptcy court did not err by considering admissible**
26 **impeachment evidence to find that the Debtor was not**
27 **credible as a witness.**

28 The Debtor also contests the bankruptcy court's reliance on

1 prior tax returns and his statements of financial affairs, as
2 initially filed and twice amended (collectively, the "SOFAs"),
3 in determining that he was not a credible witness. He argues
4 that because these documents constituted statements relating to
5 his financial condition, the bankruptcy court could not rely on
6 them in assessing his credibility as a witness.

7 We disagree. While it is true that § 523(a)(2)(A) excludes
8 statements respecting a debtor's financial condition, that
9 subsection does not speak to the use of admissible impeachment
10 evidence. Here, the record shows that the bankruptcy court
11 admitted the documents into evidence to impeach the Debtor's
12 credibility as a witness.

13 At trial, the bankruptcy court permitted counsel for the
14 Ivars and Roche to cross-examine the Debtor as to
15 inconsistencies between prior tax returns and his SOFAs. The
16 Debtor was given the opportunity to explain. And, counsel for
17 the Ivars and Roche expressly offered the documents as
18 impeachment evidence.

19 Contrary to the Debtor's argument, the bankruptcy court did
20 not rely on the tax returns and SOFAs as the misrepresentations
21 themselves. Instead, it found that the evidence showed that the
22 Debtor was not a successful real estate developer. The
23 bankruptcy court ultimately found that the Debtor was not
24 credible based on the cumulative evidence before it, including
25 the impeachment evidence. We discern no error in this regard.

26 **CONCLUSION**

27 We VACATE the judgment and REMAND to the bankruptcy court
28 with instructions to make adequate findings. But, to the extent

1 that the bankruptcy court relied on impeachment evidence
2 respecting the Debtor's financial condition, we AFFIRM.

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