

JUL 22 2016

ORDERED PUBLISHED

SUSAN M. SPRAUL, CLERK
U.S. BKCY. APP. PANEL
OF THE NINTH CIRCUIT

UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT

In re:) BAP Nos. AZ-14-1497-JaJuKu
) AZ-15-1040-JaJuKu
 DONALD GARY SHANNON and)
 MAI DOAN SHANNON,)
) (Consolidated)
)
 Debtors.) Bk. No. 2:10-bk-35640-BKM
)
) Adv. No. 2:11-ap-00260-EPB
)
 ANDRES CARDENAS; TERESA)
 CARDENAS,)
)
 Appellants,)
)
 v.) O P I N I O N
)
 DONALD GARY SHANNON; MAI DOAN)
 SHANNON,)
)
)
 Appellees.)
)

Argued and Submitted on May 20, 2016
at Phoenix, Arizona

Filed - July 22, 2016

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

Honorable Eddward P. Ballinger, Jr., Bankruptcy Judge, Presiding

Appearances: H. Troy Romero of Romero Park P.S. argued for
 appellants Andres Cardenas and Teresa Cardenas;
 Neal H. Bookspan of Jaburg & Wilk, P.C. argued for
 appellees Donald Gary Shannon and Mai Doan
 Shannon.

Before: JAIME,¹ JURY, and KURTZ, Bankruptcy Judges.

¹Hon. Christopher D. Jaime, United States Bankruptcy Judge
for the Eastern District of California, sitting by designation.

1 JAIME, Bankruptcy Judge:

2

3 Creditors Andres Cardenas and Teresa Cardenas ("Cardenases")
4 appeal from an order denying their request for an order declaring
5 that a debt owed by debtors Donald Gary Shannon and Mai Doan
6 Shannon ("Shannons") is non-dischargeable in the Shannons'
7 bankruptcy case and the judgment entered on that order
8 discharging the debt. The bankruptcy court concluded that the
9 Cardenases failed to prove several elements of their
10 non-dischargeability claim under 11 U.S.C. § 523(a)(2)(A),² which
11 exempts from discharge debts for, among other things, money and
12 property to the extent obtained by false pretenses, a false
13 representation, or actual fraud.

14 The Cardenases also appeal the bankruptcy court's order and
15 judgment awarding costs and attorney's fees with interest to the
16 Shannons, arguing that the action before the bankruptcy court was
17 based in fraud and misrepresentation and not contract.

18 For the reasons explained below, we AFFIRM the bankruptcy
19 court's ruling that the Cardenases failed to prove
20 non-dischargeability under § 523(a)(2)(A), we AFFIRM the
21 bankruptcy court's award of costs to the Shannons in the amount
22 of \$5,002.10, and we VACATE and REMAND the bankruptcy court's
23 award of \$72,691.00 in attorney's fees to the Shannons.

24 ///

25

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

1 **I. INTRODUCTION**

2 The dispute below and this appeal arise out of a
3 longstanding business and personal relationship between the
4 Cardenases and the Shannons. It began in 2005 when Mr. Cardenas
5 purchased vacant land and a dilapidated building located at 30333
6 Pacific Highway South, Federal Way, Washington ("Washington
7 Property") for \$1,000,000.00, with Ms. Shannon's assistance. It
8 continued with a fraud and negligent misrepresentation lawsuit
9 the Cardenases filed against the Shannons in Washington state
10 court in which the Cardenases obtained a default judgment in
11 excess of \$1,000,000.00 against the Shannons after the Washington
12 Property was lost to foreclosure. The adversary proceeding
13 ensued when the Shannons moved to Arizona and filed a voluntary
14 petition for relief under chapter 7 of the Bankruptcy Code.

15 The Cardenases commenced an adversary proceeding in the
16 Shannons' chapter 7 case in which they sought to have the debt
17 created by the Washington state court default judgment declared
18 non-dischargeable under § 523(a)(2)(A). After a three-day trial
19 during which the bankruptcy judge heard testimony from numerous
20 witnesses and judged their credibility, the bankruptcy court
21 entered an order denying the Cardenases' request for an order
22 providing that any debt owed to them based on the Washington
23 state court default judgment be deemed non-dischargeable in the
24 Shannons' bankruptcy case. Entry of a judgment, as amended,
25 discharging that debt followed. The bankruptcy court concluded
26 that the Cardenases failed to carry their burden of proof on two
27 elements of the § 523(a)(2)(A) claim. It also concluded that the
28 Cardenases failed to prove their damages were proximately caused

1 by their reasonable reliance on any representations made by the
2 Shannons.

3 In post-trial proceedings, the bankruptcy court awarded the
4 Shannons their costs and attorney's fees as the prevailing
5 parties on the Cardenases' § 523(a)(2)(A) claim.

6 The Cardenases first appealed from the adverse order and
7 judgment discharging the debt created by the Washington state
8 court default judgment. A subsequent appeal from the order and
9 judgment awarding costs and attorney's fees followed. This court
10 consolidated both appeals.

11 **II. FACTS**³

12 **A. The Parties**

13 Before moving to Arizona, the Shannons resided in Washington
14 where they established a successful bookkeeping and accounting
15 practice. Ms. Shannon began her career with the Internal Revenue
16 Service as an enrolled agent. She is also a licensed real estate
17 agent with numerous years of real estate experience.

18 Mr. Cardenas is a Mexican immigrant. Although he lacks an
19 extensive formal education and his command and understanding of
20 the English language are limited, he is a fairly sophisticated
21 and experienced businessman. He has established an impressive
22 empire of Mexican-themed restaurants throughout Washington. He
23 owned as many as twenty restaurants, and he currently owns at
24 least fifteen. Throughout his career, Mr. Cardenas has

25
26 ³Because the parties provided limited excerpts from the
27 trial transcripts, we exercise our discretion to review the
28 bankruptcy court's docket for the complete trial transcript
record. See Woods & Erickson, LLP v. Leonard (In re AVI, Inc.),
389 B.R. 721, 725 n.2 (9th Cir. BAP 2008).

1 personally managed and overseen his restaurant holdings and other
2 business operations in Washington and Oregon. He also has
3 experience renovating and selling real properties. Mr. Cardenas
4 always communicated with Ms. Shannon in English.

5 The Cardenases and the Shannons met sometime around 1998 and
6 formed a personal and business relationship. Through her tax and
7 accounting business, for a number of years Ms. Shannon provided
8 accounting, payroll, and tax services for all of the Cardenases'
9 restaurants. As a result of their work for the Cardenases, the
10 Shannons received an annual six-figure income.

11 In addition to accounting, payroll, and tax services,
12 Ms. Shannon also represented Mr. Cardenas in real estate matters.
13 They had partnered successfully and profitably on the
14 rehabilitation of a former bank property where Ms. Shannon
15 oversaw and managed the purchase, renovations, and sale of the
16 building. Although Mr. Cardenas worked with Ms. Shannon on real
17 estate transactions, on the first day of trial he testified that
18 he did not rely on her for advice in real estate matters.

19 **B. The Washington Property**

20 Without performing any due diligence or obtaining an
21 appraisal, Mr. Cardenas purchased the Washington Property in 2005
22 for \$1,000,000.00 cash as the property was about to be sold to
23 another buyer. Ms. Shannon represented Mr. Cardenas in that
24 transaction. Mr. Cardenas used his personal funds to purchase
25 the Washington Property. However, the property was subsequently
26 titled in the name of Mazatlan Properties, LLC ("MPL"), a limited
27 liability company of which the Cardenases were the sole members
28 when the Washington Property was purchased.

1 The Washington Property sat vacant for approximately a year.
2 It was vandalized, gutted of its fixtures and copper wiring, and
3 a target for graffiti.

4 By the summer of 2006, Mr. Cardenas decided he no longer
5 wanted the Washington Property. He retained Ms. Shannon as the
6 listing agent in 2006 and she unsuccessfully attempted to sell
7 the property through 2008. She then approached Mr. Cardenas with
8 a proposal to renovate and sell the Washington Property.

9 **C. The Agreement**

10 The Washington state court action and the adversary
11 proceeding arise out of the failed business venture between
12 Mr. Cardenas and Ms. Shannon for the purchase, renovation, and
13 sale of the Washington Property. It is in that context that the
14 Cardenases accused Ms. Shannon of making false representations
15 and engaging in other deceitful conduct in an effort to obtain
16 the Washington Property from Mr. Cardenas without payment.
17 Ms. Shannon denied those accusations.

18 An initial oral understanding between Mr. Cardenas and
19 Ms. Shannon provided for the renovation and sale of the
20 Washington Property, required Ms. Shannon to furnish funds for
21 renovations to the property, and required Ms. Shannon to pay
22 \$1,000,000.00 to Mr. Cardenas upon renovation and sale of the
23 property. That much is undisputed.

24 The parties' understanding was subsequently memorialized in
25 two writings, both of which are entitled "Amendment of Operating
26 Agreement of Mazatlan Properties, LLC" (the "First Amendment" and
27 "Second Amendment"). Following discussions, the First Amendment
28 would have made Ms. Shannon and one of her associates equal

1 members in MPL with the Cardenases, stated that Ms. Shannon and
2 her associate would provide funds necessary for renovations to
3 the Washington Property, and would have made Ms. Shannon a co-
4 manager in MPL with Mr. Cardenas. The First Amendment, admitted
5 at trial as Exhibit 17, is neither dated nor signed. The Second
6 Amendment, admitted at trial as Exhibit 18, is signed and dated
7 August 23, 2008. It transferred the Cardenases' interest in MPL
8 and the Washington Property to Ms. Shannon, made Ms. Shannon the
9 sole member and manager of MPL, and gave her the power and
10 authority to sell or lease the Washington Property.

11 The Cardenases asserted that they never agreed to the terms
12 in the Second Amendment. They accused Ms. Shannon of using a
13 signature page from the First Amendment for the Second Amendment
14 without their knowledge or authorization. They also accused
15 Ms. Shannon of not renovating and selling the Washington Property
16 within a promised three- to five-month time period, using funds
17 other than her own funds (which they claimed she fraudulently
18 obtained through loans) to fund renovations, and not providing
19 Mr. Cardenas with a lien on the Washington Property to secure his
20 interest as she purportedly promised to do. They further accused
21 Ms. Shannon of selling a portion of the Washington Property and
22 not paying Mr. Cardenas the sale proceeds.

23 Ms. Shannon denied the Cardenases' accusations. She denied
24 forging or appending an unauthorized signature page to the Second
25 Amendment. This is consistent with Mr. Cardenas' trial testimony
26 that he signed the Second Amendment, signed his wife's signature,
27 and discussed the terms of the Second Amendment with Pat Horan
28 ("Mr. Horan"), vice-president of Timberland Bank ("Timberland"),

1 the bank from which Ms. Shannon obtained a loan which she used
2 for renovations. Ms. Shannon attested that she had a prospective
3 buyer when she entered into the business venture with
4 Mr. Cardenas. She also attested that she agreed to furnish funds
5 to renovate the Washington Property and pay the Cardenases
6 \$1,000,000.00 upon the sale of that property. However,
7 Ms. Shannon denied that she represented any time limitation on
8 completion of the renovations or sale of the property, that she
9 committed to use only her own funds, or that she promised to give
10 Mr. Cardenas a lien on the property. Additionally, the purported
11 \$72,000.00 "sale" was actually a payment to MPL in 2010 by the
12 City of Federal Way for its taking of a portion of the Washington
13 Property through condemnation in an eminent domain proceeding.

14 **D. Trial**

15 In March of 2014, the bankruptcy court conducted a three-day
16 trial on the issue of non-dischargeability under § 523(a)(2)(A).⁴
17 On September 30, 2014, the bankruptcy court entered findings of
18 fact and conclusions of law in support of its order denying the
19 Cardenases' request for an order declaring the debt created by
20 the Washington state court default judgment non-dischargeable in
21 the Shannons' bankruptcy case. On February 25, 2015, the
22 bankruptcy court entered a judgment discharging all pre-petition
23 indebtedness the Shannons owed to the Cardenases.

24 In support of its judgment for the Shannons and against the
25

26 ⁴The Cardenases' complaint pled two claims for relief:
27 (1) enforcement of the Washington state court fraud and negligent
28 misrepresentation default judgment; and (2) "fraud under the
Bankruptcy Code" based on the Shannons' alleged negligent and
intentional misrepresentations.

1 Cardenases, the bankruptcy court made the following specific
2 findings:

3 (1) That the Shannons did not make any representation
4 to the Cardenases that they knew to be false and they
5 did not make any representations with the intent and
6 purpose of deceiving the Cardenases; and

7 (2) That any damages suffered by the Cardenases are not
8 a result from reasonably relying on representations by
9 the Shannons.

10 Minute Entry/Order entered October 1, 2014; Judgment entered
11 February 25, 2015.

12 The bankruptcy court's ruling was based primarily upon its
13 evaluation of live witness testimony of Mr. Cardenas,
14 Ms. Shannon, and Mr. Horan who dealt with both the Cardenases and
15 Ms. Shannon. The bankruptcy court found Ms. Shannon's testimony
16 credible and consistent with the objective documentary evidence.
17 It found that Ms. Shannon had a letter of intent for
18 \$1,700,000.00 from a prospective buyer at the inception of the
19 parties' agreement, she did not represent there was a temporal
20 limit associated with renovations and a sale, she did not commit
21 to use only her funds for renovations, and she did not promise to
22 give Mr. Cardenas a lien on the Washington Property.

23 On the other hand, the bankruptcy court found Mr. Cardenas'
24 testimony inconsistent with his position in the litigation and
25 other admitted evidence. Some of the more important
26 contradictions noted were: the Cardenases' claim that Ms. Shannon
27 was a trusted advisor upon whom Mr. Cardenas relied for real
28 estate advice was contradicted by Mr. Cardenas' testimony on the
first day of trial that he did not rely on her; the Cardenases'
claim that Ms. Shannon represented she had a committed buyer who

1 would purchase the Washington Property in three to five months
2 was contradicted by Mr. Cardenas' testimony that Ms. Shannon
3 committed to help him **find** a buyer within three to five months;
4 Mr. Cardenas' claim that funds for renovation would come solely
5 from Ms. Shannon and that he was unaware of and did not authorize
6 loans was contradicted by Mr. Cardenas' admission that he was
7 aware of the loan that Ms. Shannon obtained from Timberland and
8 that the Washington Property was security for that loan; despite
9 his claim that signature pages from the First Amendment were
10 appended to the Second Amendment, Mr. Cardenas admitted he signed
11 the Second Amendment and signed it for his wife after having it
12 in his possession; and Mr. Cardenas' admission at trial that
13 Ms. Shannon did in fact own the Washington Property despite his
14 claim she fraudulently held herself out as an owner to obtain
15 loans.

16 In post-trial proceedings, the bankruptcy court entered an
17 order, followed by a judgment, awarding the Shannons costs in the
18 amount of \$5,002.10 and attorney's fees in the amount of
19 \$72,691.00 with interest accruing at the rate set forth in 28
20 U.S.C. § 1961. It based that award on the parties' joint pre-
21 trial statement which referenced Washington law.

22 **III. JURISDICTION**

23 The bankruptcy court had jurisdiction under 28 U.S.C.
24 §§ 1334 and 157(b) (2) (I). We have jurisdiction under 28 U.S.C.
25 § 158.

26 **IV. ISSUES**

27 1. Was the bankruptcy court clearly erroneous in its
28 findings that Ms. Shannon did not make representations that were

1 false and did not intend to deceive the Cardenases?

2 2. Did the bankruptcy court err in awarding the Shannons
3 costs and attorney's fees as the prevailing party?

4 **V. STANDARD OF REVIEW**

5 Whether a claim is excepted from discharge presents mixed
6 issues of law and fact, which we review de novo. Diamond v.
7 Kolcum (In re Diamond), 285 F.3d 822, 826 (9th Cir. 2002). When
8 reviewing a bankruptcy court's determination of an exception to
9 discharge claim, we review its findings of fact for clear error
10 and its conclusions of law de novo. Oney v. Weinberg (In re
11 Weinberg), 410 B.R. 19, 28 (9th Cir. BAP 2009). As relevant in
12 this appeal, whether there has been proof of an essential element
13 of § 523(a)(2)(A) is a factual determination reviewed for clear
14 error. Am. Express Travel Related Servs. Co. v. Vinhnee (In re
15 Vinhnee), 336 B.R. 437, 443 (9th Cir. BAP 2005).

16 "Clearly erroneous review is significantly deferential,
17 requiring that the appellate court accept the [trial] court's
18 findings absent a definite and firm conviction that a mistake has
19 been committed." United States v. Syrax, 235 F.3d 422, 427 (9th
20 Cir. 2000) (citation and internal quotation marks omitted). The
21 bankruptcy court's choice among multiple plausible views of the
22 evidence cannot be clearly erroneous. Anderson v. City of
23 Bessemer City, 470 U.S. 564, 573-75 (1985); United States v.
24 Elliott, 322 F.3d 710, 715 (9th Cir. 2003); Ng v. Farmer (In re
25 Ng), 477 B.R. 118, 132 (9th Cir. BAP 2012). The deference owed
26 to the bankruptcy court is heightened where its choice is based
27 on the credibility of live witnesses. Anderson, 470 U.S. at 575.
28 In fact, we give great deference to the bankruptcy court's

1 findings when they are based on its determinations as to
2 credibility of witnesses. Retz v. Samson (In re Retz), 606 F.3d
3 1189, 1196 (9th Cir. 2010) (citing Anderson, 470 U.S. at 575).

4 We may affirm the bankruptcy court on any basis supported by
5 the record. See ASARCO, LLC v. Union Pac. R.R. Co., 765 F.3d
6 999, 1004 (9th Cir. 2014).

7 **VI. DISCUSSION**

8 **A. The Bankruptcy Court Did Not Err in Finding That the**
9 **Cardenases Failed to Satisfy Their Burden of Proof on**
10 **an Element of Their § 523(a) (2) (A) Claim.**

11 In a non-dischargeability action under § 523(a), the
12 creditor has the burden of proving all the elements of its claim
13 by a preponderance of the evidence. Grogan v. Garner, 498 U.S.
14 279, 291 (1991). Exceptions to discharge are strictly construed
15 against an objecting creditor and in favor of the debtor to
16 effectuate the fresh start policies under the Bankruptcy Code.
17 Snoke v. Riso (In re Riso), 978 F.2d 1151, 1154 (9th Cir. 1992).

18 Section 523(a) (2) (A) states as follows:

19 (a) A discharge under section 727 . . . of this title
20 does not discharge an individual debtor from any debt -

21 . . .

22 (2) for money, property, services, or an extension,
23 renewal, or refinancing of credit, to the extent
24 obtained by - (A) false pretenses, a false
25 representation, or actual fraud, other than a statement
26 respecting the debtor's or an insider's financial
27 condition[.]

28 11 U.S.C. § 523(a) (2) (A) .

A creditor seeking to except a debt from discharge under
§ 523(a) (2) (A) based on false representations bears the burden of
proving by a preponderance of the evidence five elements:

(1) misrepresentation(s), fraudulent omission(s), or deceptive

1 conduct; (2) knowledge of the falsity or deceptiveness of such
2 representation(s), omission(s), or conduct; (3) an intent to
3 deceive; (4) justifiable reliance by the creditor; and (5) damage
4 to the creditor proximately caused by its reliance. Ghomeshi v.
5 Sabban (In re Sabban), 600 F.3d 1219, 1222 (9th Cir. 2010);
6 In re Weinberg, 410 B.R. at 35. The bankruptcy court found that
7 the Cardenases failed to carry their burden of proving false
8 representations and deceitful conduct by Ms. Shannon. Its
9 decision is not clearly erroneous.

10 The bankruptcy court identified the representations that the
11 Cardenases accused Ms. Shannon of making to obtain ownership of
12 MPL and the Washington Property without payment as follows:⁵

- 13 (1) that Ms. Shannon had a valid purchase commitment
14 that would permit payment to the Cardenases of
15 \$1,000,000.00 within a period of three to five
16 months (the "Buyer and Temporal Representation");
- 17 (2) that Ms. Shannon would use only her own funds to
18 renovate the Washington Property (the "Use of
19 Funds Representation");
- 20 (3) that the agreement between the parties created an
21 immediate debt (but not a property sale) owed to
22 the Cardenases that was to be secured by a deed of
23 trust (the "Lien Representation"); and
- 24 (4) a representation by the Shannons through which
25 they improperly obtained loans that were secured
26 by the Washington Property and use of the loan
27 proceeds for other than MPL purposes (the "Other
28 Deceitful Conduct").

23 As to each of these matters, the bankruptcy court found
24 either that the representations were not made, or if made were
25

27 ⁵These are consistent with the representations identified in
28 the Cardenases' amended opening brief.

1 not false, and Ms. Shannon's conduct was not deceitful.⁶
2 Supported by the record and based on its assessment of the
3 credibility of the witnesses providing testimony, the bankruptcy
4 court's findings are not clearly erroneous. That holds true even
5 if, as the Cardenases complain on appeal, the bankruptcy judge
6 selected the Shannons' version of events over the Cardenases'
7 version of events.

8 1. The Buyer and Temporal Representation

9 The Cardenases accused Ms. Shannon of stating that she had a
10 committed buyer who would purchase the property within three to
11 five months of the initial oral agreement. However, Mr. Cardenas
12 contradicted that accusation at trial when he testified as
13 follows:

14 Q And can you please describe for the Court what she
15 proposed. In other words, what was she willing to --
16 what was her offer to you?

17 A She told me she wanted to help me out as always and
18 that she told me that with three or four months, no
19 more than five months down the road she would **find** me a
20 buyer who would be willing to pay me \$1 million for
21 that property.

22 Trial Tr. (March 25, 2014) at 45:23-46:4 (emphasis added).

23 In other words, according to Mr. Cardenas, the

24 ⁶Although not raised by the parties, we note that the
25 bankruptcy court also recited a "reasonable" reliance standard.
26 Section 523(a)(2)(A) only requires justifiable reliance. Field
27 v. Mans, 516 U.S. 59, 74-75 (1995); In re Sabban, 600 F.3d at
28 1222; In re Weinberg, 410 B.R. at 35. Nevertheless, because the
bankruptcy court's factual findings that Ms. Shannon made no
false representations and her conduct was not deceitful are not
clearly erroneous, we need not reach the reliance standard used
by the bankruptcy court. In the absence of false pretenses,
misrepresentations, or deceitful conduct, the Cardenases'
§ 523(a)(2)(A) claim fails regardless of which reliance standard
the bankruptcy court used.

1 representation was actually that Ms. Shannon would help **find** him
2 a buyer for - not that she would actually sell - the Washington
3 Property. And she did just that, it being undisputed that she
4 had a letter of intent from an interested investor for
5 \$1,700,000.00 at the inception of the agreement.

6 As to the three- to five-month time frame, Mr. Cardenas
7 wavered in his testimony. In fact, Mr. Cardenas himself was
8 unsure of the time frame within which Ms. Shannon supposedly told
9 him the Washington Property would be sold. He testified on
10 direct examination that Ms. Shannon "proposed selling [the
11 property] as soon as possible and within two or three months,
12 three or four months." Trial Tr. (March 25, 2014) at 49:22-23.
13 On cross-examination he testified that Ms. Shannon "said from
14 three to five" months. Trial Tr. (March 25, 2014) at 65:11. In
15 short, Mr. Cardenas was unclear and uncertain, and could not
16 definitively articulate what Ms. Shannon supposedly said as to
17 any time frame for a sale.

18 Mr. Cardenas' claim that Ms. Shannon represented she would
19 renovate and sell the Washington Property within three to five
20 months is further undercut, again, by his own testimony regarding
21 another much easier and better resourced renovation project that
22 took over a year to complete. Trial Tr. (March 25, 2014) at 62-
23 63. That suggests an understanding by Mr. Cardenas that
24 renovation of the Washington Property within three to five months
25 was not likely, and two months was even less likely.

26 Mr. Cardenas' understanding is consistent with Ms. Shannon's
27 testimony that she "never" told him the Washington Property would
28 be renovated and sold within three to five months, (Trial Tr.

1 (March 25, 2014) at 136:8-10; Trial Tr. (March 26, 2014) at
2 168:17-23), because a three- to five-month time frame was not
3 possible due to permitting issues for renovations. Trial Tr.
4 (March 26, 2014) at 169:6-8. Ms. Shannon's testimony is also
5 consistent with Mr. Horan's testimony that there was no reference
6 in Timberland's loan file of any mention by Ms. Shannon of a
7 three- to five-month renovation and sale time frame. Trial Tr.
8 (March 26, 2014) at 50:9-11, 55:6-8.

9 In short, when faced with Mr. Cardenas' contradictory and
10 wavering testimony, both as to renovation and sale of the
11 Washington Property and the timeline for both, we find no error
12 in the version of events that the bankruptcy court accepted. Its
13 findings, supported by the evidence, will not be disturbed. The
14 bankruptcy court's findings related to the Buyer and Temporal
15 Representation are not clearly erroneous.

16 2. The Use of Funds Representation

17 To support this representation, the Cardenases pointed to
18 language in the First and Second Amendment that states
19 Ms. Shannon was to "furnish funds" for the renovations. The
20 bankruptcy court also established this as the representation the
21 Cardenases accused Ms. Shannon of making based on the parties'
22 joint pre-trial statement.

23 Ms. Shannon testified that she did not tell Mr. Cardenas she
24 would use only her funds but did tell him that all necessary
25 funds would be used for renovations to the Washington Property.
26 Trial Tr. (March 25, 2014) at 136:24-137:7. And while
27 Ms. Shannon used a significant amount of her own money for
28 renovations, she also used funds from loans obtained from

1 Timberland and private lenders.

2 After the Second Amendment made Ms. Shannon the sole member
3 and 100% owner of MPL, she obtained a \$250,000.00 loan from
4 Timberland and a \$300,000.00 loan from private lenders.⁷

5 Mr. Horan testified that he and Mr. Cardenas were aware that
6 Mr. Cardenas no longer owned 100% of MPL and that 100% of the
7 interest in MPL had been transferred to Ms. Shannon because the
8 two discussed the matter. Trial Tr. (March 26, 2014) at 70-71.
9 Mr. Cardenas also testified that he was aware of the Timberland
10 loan and that the Washington Property was security for that loan
11 because he and Mr. Horan also discussed both matters:

12 BY MR. DRAKE:

13 Q Mr. Cardenas, were you aware that Pat Horan and
14 Timberland Bank were loaning money to Mai Shannon to
renovate the building?

15 A Yes.

16 Q And were you aware that Timberland Bank was going to
17 get a lien in the property for that loan?

18 A The property was security for that.

19 Q Was security to Timberland Bank?

20 A Let me tell you honestly, Pat asked me if she was
21 applying for a loan and I told him it's your money, do
you have any security. And he said, yes, the security
is your land, your property.

22 Trial Tr. (March 25, 2014) at 96:6-18. In fact, Mr. Horan
23 testified that Timberland would not have proceeded with the loan
24 to Ms. Shannon if Mr. Cardenas was unaware that the Washington
25

26 ⁷Although loan funds were deposited into accounts other than
27 those maintained by MPL, the bankruptcy court concluded loan
28 funds were not misused. It found no credible evidence that loan
funds were used for anything other than renovations.

1 Property was security for the loan. Trial Tr. (March 26, 2014)
2 at 85:4-11.

3 Based on the testimony described above, the bankruptcy court
4 could easily conclude that Ms. Shannon did not make the Use of
5 Funds Representation. In other words, Mr. Cardenas' knowledge
6 and understanding that Ms. Shannon was using loan funds to
7 renovate the Washington Property is inconsistent with his claim
8 that Ms. Shannon represented that only her funds would be used
9 for renovations. Therefore, the bankruptcy court's finding that
10 the Use of Funds Representation did not support the Cardenases'
11 § 523(a) (2) (A) claim is not clearly erroneous.

12 3. The Lien Representation

13 While it is true that Ms. Shannon did not place a lien on
14 the Washington Property in favor of Mr. Cardenas, it is equally
15 true that she never represented to Mr. Cardenas that she would.
16 Trial Tr. (March 25, 2014) at 138:3-6; Trial Tr. (March 26, 2014)
17 at 211:2-6.

18 Mr. Cardenas, on the other hand, could not definitively
19 state if Ms. Shannon ever told him that she would ensure he had a
20 deed of trust on the Washington Property. At first he testified
21 she did. Trial Tr. (March 25, 2014) at 47:1-8. Then he reversed
22 course and testified that she did not:

23 BY MR. ROMERO:

24 Q Mr. Cardenas, when you entered into your agreement
25 with Ms. Shannon, did she ever tell you that you would
26 be protected or secured if her buyer didn't come
through in buying the property?

27 A Well, I was told she had a buyer, and that
28 everything was safe, that everything that was going
along fine, and --

1 Q Did she ever tell you that she would give you a deed
2 of trust or lien or something to protect your interest
in the property?

3 A No, my protection was the promise she told me.

4 Trial Tr. (March 25, 2014) at 54:7-17.⁸

5 Again, we will not disturb the choice by the bankruptcy
6 court of the version of events it accepted, particularly, when
7 the version accepted is supported by evidence in the record and
8 heavily dependent on the credibility of witnesses. On this
9 record, there is ample support for the bankruptcy court's finding
10 that Ms. Shannon did not promise to provide Mr. Cardenas with a
11 lien on the Washington Property. Therefore, the bankruptcy
12 court's finding in regard to the Lien Representation is not
13 clearly erroneous.

14 4. The Additional Deceitful Conduct

15 After this case was briefed and before it was argued, the
16 United States Supreme Court decided Husky Int'l Electronics, Inc.
17 v. Ritz, 136 S. Ct. 1581 (2016). In Husky, the Supreme Court
18 held that the term "actual fraud" in § 523(a)(2)(A) includes
19 fraudulent schemes even when those schemes do not involve a false
20 representation.

21 The parties did not raise Husky during oral argument.
22 However, the Cardenases' amended opening brief includes
23 references to conduct raised at trial which the Cardenases claim
24 was fraudulent. This includes changing the terms of the parties'

26 ⁸There also is no reference to any such requirement in the
27 First or Second Amendment, and there is no reference to any such
28 lien in Timberland's credit write-ups until early 2010. Earlier
write-ups did not include any such reference.

1 agreement, using the signature page from the First Amendment for
2 the Second Amendment without telling Mr. Cardenas, obtaining
3 loans secured by the Washington Property, and not paying
4 Mr. Cardenas the \$72,000.00 MPL received when the City of Federal
5 Way condemned and took a portion of the Washington Property
6 through eminent domain. Since the conduct occurred after the
7 parties agreed to renovate and sell the Washington Property,
8 arguably, it could not have induced Mr. Cardenas to enter into
9 the business venture with Ms. Shannon in the first instance. The
10 Cardenases complain that the bankruptcy court ignored evidence of
11 this conduct. Perhaps a better characterization, and a more
12 accurate one, is that the bankruptcy judge assessed credibility,
13 found that the Cardenases lacked it, and concluded either these
14 events did not occur or, if they did, they were not fraudulent
15 because Mr. Cardenas knew of and consented to them. In any
16 event, the above-described conduct does not implicate Husky.

17 The terms of the agreement were not changed without
18 Mr. Cardenas' knowledge or consent. The First Amendment was
19 prepared by Ms. Shannon's lawyer after discussions with
20 Mr. Cardenas. Trial Tr. (March 25, 2014) at 132, 138. That
21 document was given to Mr. Cardenas by one of Ms. Shannon's
22 employees. Trial Tr. (March 25, 2014) at 51-51, 77. It was also
23 reviewed by one of Mr. Cardenas' daughters who assists with
24 business matters. Trial Tr. (March 25, 2014) at 77.

25 With regard to the Second Amendment, Mr. Cardenas claimed
26 the document was forged or fabricated, and he did not know about
27 it. Mr. Cardenas accused Ms. Shannon of tricking him into
28 signing the First Amendment and then taking the signature page

1 from the First Amendment and attaching it to the Second Amendment
2 without his knowledge. Not only does that make no sense because
3 the First Amendment admitted at trial was not signed, (Trial Tr.
4 (March 25, 2014) at 131:19-132:1, 138:7-9, and Appellants'
5 Excerpts of Record BAP dkt 21 Tab 13 p. 191-192), but
6 Mr. Cardenas admitted during trial that he signed the Second
7 Amendment - admitted as Exhibit 18 - and he signed it for his
8 wife:

9 BY MR. DRAKE:

10 Q Let me start with this. Mr. Cardenas, please look
11 at the screen right now. I'll try and mark -- is that
your signature there beside the marking?

12 A That is my signature.

13 Q And what about the signature for your wife; do you
14 recognize that signature?

15 A No, that's not my wife's signature.

16 Q And how do you know that?

17 A Real well. I've lived with her 38 years.

18 Q And you did not sign your wife's signature there?

19 A I signed.

20 Q Oh, so you're saying it's not your wife's signature
because you signed it, not her?

21 A Because Mai told me it would be valid, that
22 ultimately everything would be taken care of soon
enough.

23 Q But is it you that signed for your wife on this
24 document then?

25 A Yes, I'm telling yes.

26 Q Okay. And then your signature, you signed that one
as well?

27 A I signed it. How could I? I cannot deny that.
28

1 Trial Tr. (March 25, 2014) at 87:8-88:4.⁹

2 As discussed above in the context of the Use of Funds
3 Representation, Mr. Cardenas also testified that he was aware of
4 the Timberland loan. More precisely, he testified that he was
5 aware that Ms. Shannon obtained a loan from Timberland to fund
6 renovations because he discussed both the loan and the use of the
7 Washington Property as security for the loan with Mr. Horan.
8 Moreover, at the time Ms. Shannon obtained the Timberland loan
9 she owned 100% of MPL which owned the Washington Property. In
10 that regard, Ms. Shannon's conduct was not deceitful.

11 That is also true with respect to the \$72,000.00 that MPL
12 received from the City of Federal Way during the time the city
13 condemned and took a portion of the Washington Property through
14 eminent domain. That occurred in 2010 and, thus, when
15 Ms. Shannon owned 100% of the interest in MPL. Moreover, those
16 proceeds were received upon condemnation through eminent domain -
17 not a sale - which means the transaction would not have triggered
18 any obligation that Ms. Shannon may have had to pay those funds
19 to Mr. Cardenas upon a sale of the Washington Property.

20 5. Conclusion

21 We find no error with the bankruptcy court's conclusion that
22 the above-described representations and conduct are not false or
23 deceitful and, thus, are insufficient to support the first
24 element of the Cardenases' § 523(a)(2)(A) claim. Because its
25 factual determinations are supported by the record, we cannot say

26
27 ⁹The Cardenases never explained how the signature page of
28 Exhibit 17, without signatures, could be swapped for a signature
page on Exhibit 18 with signatures.

1 that the bankruptcy court's decision is clearly erroneous.
2 Therefore, as to the order and judgment that the debt created by
3 the Washington state court default judgment is dischargeable, we
4 AFFIRM.

5 **B. The Bankruptcy Court Erred When it Awarded Attorney's**
6 **Fees to the Shannons.**

7 Unless prohibited by a federal statute or the Bankruptcy
8 Rules, a prevailing party in an adversary proceeding is typically
9 awarded its costs other than attorney's fees. See Fed. R. Bankr.
10 P. 7054(b)(1). Here, the bankruptcy court awarded the Shannons
11 \$5,002.10 in costs apart from its award of \$72,691.00 in
12 attorney's fees. The Cardenases' amended opening brief does not
13 articulate a separate argument that the bankruptcy court erred in
14 its award of costs to the Shannons. An issue not raised by a
15 party in its opening brief is generally deemed waived. Rivera v.
16 Orange County Probation Dept. (In re Rivera), 511 B.R. 643, 649
17 (9th Cir. BAP 2014). Therefore, as to the award of costs other
18 than attorney's fees to the Shannons in the amount of \$5,002.10,
19 we AFFIRM.

20 We turn now to attorney's fees. Mr. Cardenas asked the
21 bankruptcy court to determine that his Washington state court
22 default judgment against the Shannons be deemed excepted from
23 discharge for fraud and false representations. Essentially,
24 Mr. Cardenas alleged that Ms. Shannon induced him to sign and
25 execute the First Amendment to the Limited Liability Company
26 Operating Agreement of Mazatlan Property, LLC (January 1, 2016)
27 ("Operating Agreement") by making false representations about the
28 substance of that agreement and then by committing actual fraud

1 when she allegedly removed the parties' signature page from the
2 First Amendment and attached it to the Second Amendment, which
3 effectively transferred his interest in the Washington Property
4 to her. In her answer and at trial, Ms. Shannon both denied
5 Mr. Cardenas' allegations and showed that her conduct was
6 consistent with the Operating Agreement as amended. In other
7 words, her defense was not simply a denial of fraud allegations
8 but an assertion of her right to act as she did based upon the
9 parties' written agreement. After hearing the evidence, the
10 bankruptcy court did not accept Mr. Cardenas' testimony and
11 instead found Ms. Shannon's testimony more credible.

12 The executed Second Amendment provides "except as amended by
13 this agreement, the other provisions of the operating agreement
14 shall remain in full force and effect and hereby ratified and
15 confirmed." In the Operating Agreement, there is an attorney's
16 fees provision that provides:

17 Section 12.3 Attorney's Fees. If any litigation
18 or other dispute resolution proceeding is commenced
19 between parties to this Agreement to enforce or
20 determine the rights or responsibilities of such
21 parties, the prevailing party or parties in any such
22 proceeding will be entitled to receive, in addition
23 [to] such other reliefs as may be granted, its or their
24 reasonable attorney's fees, expenses and costs incurred
25 preparing for [sic] participating in such proceedings.

26 Operating Agreement at Section 12.3. Significantly, the scope of
27 this bilateral attorney's fees provision is quite broad and
28 likely its sweep reached issues raised by Ms. Shannon's defense.

Before trial the parties filed a proposed joint pre-trial
order but it was not signed by the court. However, the parties
and the court thereafter treated it as a joint pre-trial
statement. Under the heading Agreed Issues of Law, the joint

1 pre-trial statement stated:

2 The court may award attorney fees to the prevailing
3 party on any claim arising out of contract. RCW
4 4.84.330.

5 Relying upon the joint pretrial statement, the bankruptcy court
6 awarded attorney's fees and costs to Ms. Shannon for the reason
7 that "the parties stipulated that the court may make an award of
8 attorney fees and costs to the prevailing party." This is the
9 only explanation that the court provides for its award of
10 attorney's fees. The court's decision referenced, but does not
11 explain, the applicability of the attorney's fees provision in
12 the Operating Agreement.

13 RCW 4.84.330 is a fee shifting statute that regulates
14 unilateral attorney's fees provisions, making them bilateral.
15 Because the agreement at issue here contained a bilateral fee
16 provision, RCW 4.84.330 did not apply. "By its terms,
17 RCW 4.84.330 applies only to contracts with unilateral attorney
18 fee provisions." Kaintz v. PLG, Inc., 147 Wash. App. 782, 786,
19 197 P.3d 710 (2008). Moreover, a stipulation by the parties to
20 the law does not bind a trial court or an appellate court.
21 Modeer v. United States, 183 F. A'ppx 975, 977 (Fed. Cir. 2006);
22 Avila v. INS, 731 F.2d 616, 620-21 (9th Cir. 1984); Worden v.
23 Smith, 178 Wash. App. 309, 327, 314 P.3d 1125 (2013). The
24 bankruptcy court's reliance on the joint pre-trial statement as
25 opposed to the Operating Agreement's attorney's fees provision
26 for its award of attorney's fees was error.

27 "[U]nder Cohen [v. de la Cruz], 523 U.S. 213 (1998)], the
28 determinative question for awarding attorney's fees is whether
the creditor would be able to recover the fee outside of

1 bankruptcy under state or federal law.” Fry v. Dinan (In re
2 Dinan), 448 B.R. 775, 785 (9th Cir. BAP 2011) (citations
3 omitted). Notably, Cohen is not limited to attorney’s fees
4 awarded under state or federal statutes; it also applies to cases
5 in which fees are provided for by contract. Redwood Theaters,
6 Inc. v. Davison (In re Davison), 289 B.R. 716, 722 (9th Cir. BAP
7 2003). Under the rationale of Renfrow v. Draper, 232 F.3d 688,
8 694 (9th Cir. 2000), and Heritage Ford v. Baroff (In re Baroff),
9 105 F.3d 439, 441 (9th Cir. 1997), a prevailing debtor also can
10 recover attorney’s fees, provided the parties have a written
11 agreement which would award fees to the debtor if the same issues
12 were tried in a state court.

13 The rule in Washington is that, absent a contract, statute
14 or recognized ground of equity, attorney’s fees will not be
15 awarded as part of the cost of litigation.¹⁰ Pennsylvania Life
16 Ins. Co. v. Emp’t Sec. Dep’t, 97 Wash. 2d 412, 413, 645 P.2d 693
17 (1982). Under Washington law, attorney’s fees in contract cases
18 may be awarded if the contract contains a provision specifically
19 providing for attorney’s fees upon breach or other stipulated
20 circumstances. For purposes of a contractual attorney’s fees
21 provision, an action is on a contract if the action arose out of
22 the contract and if the contract is central to the dispute.
23 Hemenway v. Miller, 116 Wash. 2d 725, 742, 807 P.2d 863 (1991).

25 ¹⁰The parties stipulated to the applicability of Washington
26 state law, which is appropriate given that the business venture
27 between the Cardenases and Shannons arose in Washington, the
28 property in question is located in Washington, and the judgment
giving rise to the Shannons’ debt to the Cardenases was issued by
a Washington state court.

1 The meaning of "on the contract" is explained in Boguch v.
2 Landover Corp., 153 Wash. App. 595, 615, 224 P.3d 795 (2009), and
3 Brown v. Johnson, 109 Wash. App. 56, 58-59, 34 P.3d 1233 (2001).
4 In Boguch, the court held that "[i]f a party alleges breach of a
5 duty imposed by an external source, such as a statute or the
6 common law, the party does not bring an action on the contract,
7 even if the duty would not exist in the absence of a contractual
8 relationship." Boguch, 153 Wash. App. at 615. Boguch sued his
9 realtors for breach of contract and negligence, contending that
10 their mistakes caused his property to lose value. His case was
11 dismissed on summary judgment and his realtors were awarded
12 attorney's fees based upon a provision in the listing agreement.
13 Id. at 606-07. On appeal, the court reversed the attorney's fees
14 award and remanded, stating that Boguch's negligence claims were
15 not "on the contract" because they concerned breaches of duties
16 imposed by statute and common law. Id. at 619. The case was
17 remanded to the trial court with instructions to recalculate the
18 attorney's fees award, limiting it to fees arising from the
19 contract claim. Id. In Brown, the purchaser of the house sued
20 the vendor for misrepresenting the house's condition. The court
21 awarded attorney's fees to the purchaser for her
22 misrepresentation claim against the seller because the purchase
23 and sale agreement provided for attorney's fees to the prevailing
24 party "concerning this agreement," and the tort arose from the
25 parties' agreement. Brown, 109 Wash. App. at 58-59.

26 These Washington cases are consistent with Ninth Circuit
27 case law. In Baroff, Baroff's creditors, like Mr. Cardenas,
28 disputed the dischargeability of their debt to him, alleging that

1 they were induced to enter into a settlement agreement by fraud
2 and false representations. Like Ms. Shannon, Baroff based his
3 defense upon the parties' written settlement agreement. He
4 prevailed because the bankruptcy court ruled that the statute of
5 frauds barred the oral statements purporting to amend or
6 supplement the written agreement. Baroff, 105 F.3d at 442.
7 Although he prevailed, Baroff's request for attorney's fees was
8 denied. Id. at 441. The Ninth Circuit reversed, reasoning that
9 because the bankruptcy court was required to determine whether
10 the statute of frauds applied to the creditors' fraudulent
11 inducement claim before ruling on the question of
12 dischargeability, "the document containing the attorney fees
13 clause in this case played an integral role in the proceedings."
14 Id. at 442.

15 Baroff was clarified by the Ninth Circuit's subsequent
16 decision in Renfrow. In that case, the court stated that the
17 rule in Baroff does not permit the bankruptcy court to award a
18 party's attorney's fees for litigating federal law issues in
19 bankruptcy court whenever a state law is "integral" to
20 determining dischargeability. Renfrow, 232 F.3d at 694.
21 Instead, the court held that attorney's fees should be awarded
22 solely to the extent they were incurred in litigating state law
23 issues. Id. Likewise the rule in Washington is that if
24 attorney's fees are recoverable for only some of the parties'
25 claims, the award "must properly reflect a segregation of the
26 time spent on issues for which fees are authorized from time
27 spent on other issues." Hume v. Am. Disposal Co., 124 Wash. 2d
28 656, 673, 880 P.2d 988 (1994).

1 Here, the parties' agreement contained an attorney's fees
2 provision awarding fees to the prevailing party in any litigation
3 between them to enforce or determine their respective rights and
4 responsibilities. In part, Ms. Shannon responded to
5 Mr. Cardenas' fraud allegations by maintaining that the Second
6 Amendment to the Operating Agreement was validly executed and by
7 showing that her conduct was consistent with the amended
8 agreement. To the extent that she litigated those state law
9 issues before the bankruptcy court and prevailed, she was
10 entitled to an award of reasonable attorney's fees.

11 In conclusion, the bankruptcy court's award of attorney's
12 fees is VACATED because it is based on an erroneous application
13 of the law. Upon REMAND, the bankruptcy court should base its
14 award of attorney's fees upon the fees provision of the parties'
15 Operating Agreement, and the court should limit its award to the
16 fees incurred in litigating state law issues under that
17 provision.

18 **VII. CONCLUSION**

19 Based on the foregoing, we AFFIRM the bankruptcy court's
20 ruling that the Cardenases failed to meet their burden of proof
21 in establishing non-dischargeability under § 523(a)(2)(A) and its
22 judgment that the debt created by the Washington state court
23 default judgment is discharged in the Shannons' bankruptcy case,
24 we AFFIRM the bankruptcy court's order and judgment awarding the
25 Shannons \$5,002.10 in costs, and we VACATE and REMAND the
26 bankruptcy court's order and judgment awarding the Shannons
27 \$72,691.00 in attorney's fees.

28