

JUL 27 2016

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

NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT

In re:) BAP No. CC-16-1001-KuFKi
)
 ALBERT S. AN and LAURI I. AN,) Bk. No. 2:14-bk-25340-BB
)
 Debtors.) Adv. No. 2:14-ap-01739-BB
)
)
 ALBERT S. AN; LAURI I. AN,)
)
 Appellants,)
)
 v.) **MEMORANDUM***
)
 IL YOON KWON; COASTAL ASSET)
 MANAGEMENT, LLC,)
)
 Appellees.)
)

Argued and Submitted on June 23, 2016
at Pasadena, California

Filed - July 27, 2016

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

Honorable Sheri Bluebond, Chief Bankruptcy Judge, Presiding

Appearances: James Alexander Dumas, Jr. of Dumas & Associates
 argued for appellants Albert and Lauri An; Ryan
 Daniel O'Dea of Shulman Hodges & Bastian LLP
 argued for appellees Il Yoon Kwon and Coastal
 Asset Management, LLC.

Before: KURTZ, FARIS and KIRSCHER, Bankruptcy Judges.

*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.

1 **INTRODUCTION**

2 Pursuant to 11 U.S.C. § 523(a)(6),¹ the bankruptcy court
3 excepted from discharge - as a debt arising from a willful and
4 malicious injury - a portion of the judgment debt chapter 7
5 debtor Albert An owes to Il Yoon Kwon and Coastal Asset
6 Management, LLC. The bankruptcy court gave issue preclusive
7 effect to the state court's findings and based thereon ruled that
8 all of the elements were met for a nondischargeable debt under
9 § 523(a)(6), except for those elements pertaining to An's state
10 of mind. After trial delving into An's state of mind, the
11 bankruptcy court found that An intended to injure Kwon and
12 Coastal Asset Management and that An knew that such injury was
13 substantially certain to occur.

14 On appeal, An has not challenged the bankruptcy court's
15 application of issue preclusion. Instead, An contends that the
16 bankruptcy court incorrectly excepted the debt from discharge
17 because it arose from a simple breach of lease and not from any
18 tortious conduct. An further contends that the bankruptcy court
19 incorrectly applied the legal standard for determining
20 willfulness and also incorrectly found willfulness. None of An's
21 contentions have any merit.

22 The bankruptcy court also excepted from discharge the same
23 debt as against An's wife, Lauri. It is unclear how the
24 bankruptcy court reached this result. Neither the state court
25

26 ¹Unless 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 nor the bankruptcy court made any findings that Lauri actively
2 participated in An's nondischargeable conduct or that she had the
3 requisite state of mind for nondischargeability under
4 § 523(a)(6), and the record on appeal does not support the
5 nondischargeability judgment entered against her. In fact, at
6 oral argument, Kwon and Coastal Asset Management admitted that
7 the nondischargeability judgment against Lauri was "incorrect."

8 AFFIRMED IN PART, VACATED IN PART, AND REMANDED.

9 **FACTS**

10 The underlying dispute concerns a medical office building in
11 Los Angeles, California. At the time Kwon and An met in 2001, An
12 was renting the building from a third party under a lease. An's
13 business ventures were not generating sufficient revenue to pay
14 all of his bills, including his rent. Over time, Kwon lent An,
15 in aggregate, roughly \$1 million in order to help An pay his
16 expenses.

17 Kwon later became concerned that An could not pay his rent
18 and might be evicted from the office building, which in turn
19 would prevent An from generating further revenue and would
20 jeopardize Kwon's ability to recover the money he lent An.
21 Therefore, in June 2002, Kwon decided to purchase the office
22 building. Kwon paid \$3.15 million for the building and took
23 title in his own name as his sole and separate property.

24 At the time of Kwon's purchase, Kwon succeeded the prior
25 owner as the landlord under the prior owner's 2000 master lease
26 of the building to An. Even so, An never paid any rent to Kwon.
27 This state of affairs remained essentially unchanged until August
28 2005. By that time, Kwon had transferred title to the office

1 building to his wholly-owned limited liability company Coastal
2 Asset Management, LLC.² Also at that time, Kwon filed an
3 unlawful detainer action against the Ans. In response, the Ans
4 filed a verified answer, in which they asserted that they were
5 not Kwon's tenants, they did not owe him any rent, and they
6 became co-owners of the office building at the time Kwon acquired
7 title to the building.

8 The state court entered judgment after trial denying Kwon
9 any relief on his unlawful detainer complaint, apparently holding
10 that the issue of ownership prevented the court from granting
11 Kwon relief in a summary unlawful detainer proceeding.

12 At the time of commencement of the unlawful detainer
13 proceeding, the Ans already had filed their first chapter 7
14 bankruptcy case, but Kwon did not learn of the bankruptcy case
15 until sometime in early 2006, about the same time the 2005
16 bankruptcy case was closed.

17 An also filed in 2005, in the state court, a quiet title
18 action seeking to establish his asserted 50% interest in the
19 office building. An claimed that he had an oral agreement with
20 Kwon that, in effect, entitled An to a 50% interest in the office
21 building, even though An signed multiple documents around the
22

23 ²In the subsequent state court litigation over possession of
24 the building, both Kwon and Coastal Asset Management were parties
25 to the litigation as the former and current owner of the
26 building. Both also filed the nondischargeability complaint
27 against the Ans in their current bankruptcy case. Nonetheless,
28 for purposes of this appeal, there is no material distinction in
position between Kwon and Coastal Asset Management, so for ease
of reference, we hereafter refer to them both simply by Kwon's
name.

1 time of purchase stating that he had no interest in the building.

2 In response to An's quiet title action, Kwon filed a cross-
3 complaint against An, his medical corporation Woori Medical
4 Center Corp., and his spouse Lauri for, among other things,
5 possession and damages based on their alleged wrongful possession
6 of the office building. The state court litigation was subject
7 to years of delay, which the state court generally attributed to
8 An. Eventually, a bench trial took place, after which the state
9 court ruled in favor of Kwon. According to the state court, An's
10 testimony generally lacked credibility. More specifically, the
11 state court found that An's contention of an oral agreement
12 providing for co-ownership of the office building was false. In
13 support of this finding, the state court pointed out that An's
14 testimony regarding co-ownership "wildly conflicts" with An's
15 prior testimony and sworn statements, including those made in his
16 2005 bankruptcy case that he did not own any real property. The
17 state court also pointed out that An's co-ownership claim was
18 "directly contradicted" by several written agreements he signed
19 at the time of Kwon's purchase of the building and that An failed
20 to explain why there were no writings of any kind supporting An's
21 ownership claim. The state court further noted that the
22 testimony of An's wife Lauri, An's bankruptcy attorney, the
23 seller of the building, and the real estate broker who handled
24 the sale, all were at odds with An's testimony regarding co-
25 ownership.

26 Notably, virtually none of the state court's findings shed
27 any light on the conduct of Lauri. Only one paragraph of the
28 state court's fifteen-page statement of decision is devoted to

1 her. In it, the court recounts Lauri's testimony regarding her
2 knowledge of An's co-ownership claim at the time of the Ans' 2005
3 bankruptcy filing. According to Lauri, An never mentioned at
4 that time that he believed he owned half of the office building
5 and she did not know this is what he believed. Lauri further
6 testified that she believed their initial 2005 bankruptcy
7 schedules were correct when she signed them - that they correctly
8 reflected that the Ans owned no real property. The only other
9 information this paragraph reveals about Lauri is that she was
10 not working at the time of the 2005 bankruptcy filing.

11 In September 2010, the state court entered judgment in favor
12 of Kwon. In relevant part, the judgment included a \$1.6 million
13 damages award on Kwon's ejectment cause of action against the Ans
14 and Woori, jointly and severally.

15 In August 2014, the Ans filed their current chapter 7
16 bankruptcy case, and in November 2014, Kwon filed his
17 nondischargeability complaint against the Ans. The complaint
18 contained a single claim for relief under § 523(a)(6). Kwon
19 alleged that the state court's \$1.6 million award of damages on
20 his ejectment cause of action was nondischargeable as a willful
21 and malicious injury.

22 Relying on the state court's judgment and statement of
23 decision, Kwon filed a summary judgment motion. The bankruptcy
24 court granted that motion with one exception. According to the
25 court, a trial was necessary on the issue of An's state of mind.
26 On the other hand, the bankruptcy court held that, as to all
27 other issues essential to determining the nondischargeability of
28 the ejectment damages award under § 523(a)(6), the Ans were

1 barred from revisiting those issues based on the doctrine of
2 issue preclusion.

3 While the court concluded that trial was necessary on An's
4 state of mind, the court's summary judgment order, on its face,
5 granted summary judgment as to Lauri's state of mind, even though
6 there was virtually nothing in the record from which the
7 bankruptcy court could have determined that her state of mind
8 satisfied the requirements for a willful and malicious injury
9 under § 523(a)(6). In fact, there was virtually nothing in the
10 summary judgment record from which the bankruptcy court could
11 have inferred that Lauri actively participated in the conduct
12 from which Kwon's nondischargeability claim arose.

13 In fairness to the bankruptcy court, the Ans' summary
14 judgment opposition did nothing to point out the absence of
15 evidence regarding Lauri specifically; however, there was one
16 statement in their summary judgment papers in which the Ans
17 pointed out that there was nothing in the state court judgment or
18 statement of decision from which the bankruptcy court could
19 conclude, on summary judgment, that either of the Ans had acted
20 willfully or maliciously. At the hearing on the summary judgment
21 motion, counsel for the Ans followed up on this point by stating
22 as follows:

23 And by the way, Your Honor, I also have a problem as to
24 the spouse because there is nothing -- they have no
25 communication with the spouse. I know they've named
26 their -- on everything but there's never been any
27 communication between the plaintiff and the debtor,
28 Ms. An.

27 Hr'g Tr. (Aug. 25, 2015) at 30:21-31:1.

28 After a trial at which An and Kwon both testified, the

1 bankruptcy court ruled from the bench that most of the ejectment
2 damages award would be excepted from discharge against both An
3 and Lauri. After pointing out that there was no disagreement
4 amongst the parties and the court regarding the applicable legal
5 standard for a willful and malicious injury under § 523(a)(6),
6 the bankruptcy court specifically found, based on the testimony
7 at trial and based on the state court's findings, that An did not
8 really believe that he had an oral agreement with Kwon entitling
9 him to a 50% interest in the office building; rather, An asserted
10 his spurious ownership claim simply as a means to retain
11 possession during eight years of state court litigation knowing
12 that he had no right to possession and knowing that his wrongful
13 possession would injure Kwon. From these facts, the court
14 further found that An intended to injure Kwon and that he knew
15 that such harm would occur. The bankruptcy court, therefore,
16 concluded that An's conduct was willful, malicious and knowing
17 within the meaning of § 523(a)(6).

18 The bankruptcy court made no findings regarding Lauri's
19 conduct or her state of mind.

20 After the filing of a declaration by Kwon's counsel backing
21 out from the ejectment damages award the amount that was
22 discharged as a result of the Ans' 2005 bankruptcy case, the
23 bankruptcy court entered judgment against the Ans on December 22,
24 2015, declaring the remaining amount of the ejectment damages
25 award nondischargeable. The Ans timely appealed from the
26 nondischargeability judgment.

27 **JURISDICTION**

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

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

3 **ISSUES**

- 4 1. Did the bankruptcy court err when it excepted from An's
5 discharge the ejectment damages award?
6 2. Did the bankruptcy court err when it excepted from Lauri's
7 discharge the ejectment damages award?

8 **STANDARDS OF REVIEW**

9 The issues raised in this appeal require us to review both
10 the bankruptcy court's summary judgment ruling, as well as the
11 bankruptcy court's judgment after trial. We review the summary
12 judgment ruling ne novo. Barboza v. New Form, Inc.
13 (In re Barboza), 545 F.3d 702, 707 (9th Cir. 2008).

14 As for the judgment after trial, we review the bankruptcy
15 court's legal conclusions de novo and its findings of fact under
16 the clearly erroneous standard. Carrillo v. Su (In re Su),
17 290 F.3d 1140, 1142 (9th Cir. 2002).

18 The bankruptcy court's factual findings were clearly
19 erroneous only if they were "illogical, implausible, or without
20 support in the record." Retz v. Samson (In re Retz), 606 F.3d
21 1189, 1196 (9th Cir. 2010) (citing United States v. Hinkson,
22 585 F.3d 1247, 1261-62 & n.21 (9th Cir.2009) (en banc)).

23 **DISCUSSION**

24 Section 523(a)(6) excepts from discharge debts arising from
25 willful and malicious injuries. For purposes of this appeal, the
26 legal standards governing this nondischargeability provision are
27 well established and not in dispute. See In re Barboza, 545 F.3d
28 at 706; In re Su, 290 F.3d at 1144-46. Therefore, we will focus

1 instead on the Ans' arguments on appeal.

2 Without citing any California authority, the Ans claim that
3 Kwon's ejectment cause of action sounded in contract rather than
4 tort. Therefore, the Ans reason, because the source of Kwon's
5 injury was contractual rather than tortious, the bankruptcy court
6 should not have declared nondischargeable under § 523(a)(6) the
7 ejectment damages award.

8 It is true that a simple breach of contract cannot give
9 rise, by itself, to a nondischargeable debt. Petralia v. Jercich
10 (In re Jercich), 238 F.3d 1202, 1205 (9th Cir. 2001). On the
11 other hand, when the debtor engages in willful tortious conduct
12 that injures the creditor, the existence of a current or former
13 contractual relationship between the parties does not render
14 § 523(a)(6) inapplicable. Id. at 1205-06. As Jercich explained,
15 § 523(a)(6) can apply when a breach of contract is accompanied by
16 willful tortious conduct. Id.

17 We look at applicable non-bankruptcy law to determine
18 whether particular conduct is tortious. Id. at 1206. Under
19 California law, all individuals have a general (non-contractual)
20 duty not to interfere with another's right to possession of real
21 property. Rickley v. Goodfriend, 212 Cal. App. 4th 1136, 1152-55
22 (2013) (citing Burtscher v. Burtscher 26 Cal. App. 4th 720, 727
23 (1994)). An's wrongful interference with Kwon's right to
24 possession of the office building violated this general duty and
25 thus was tortious under California law. See id. Kwon's
26 ejectment action was aimed at remedying An's violation of this
27 general duty and thus sounds in tort. See Haggin v. Kelly,
28 136 Cal. 481, 483 (1902) (citing Payne & Dewey v. Treadwell,

1 16 Cal. 220, 244-45 (1860)) (explaining that ejectment cause of
2 action arises when a defendant possesses real property and
3 wrongfully withholds possession of it from the owner of the
4 property). Moreover, the California cases cited by Kwon identify
5 ejectment actions as tort actions rather than as contract
6 actions. See, e.g., B & B Sulphur Co. v. Kelley, 61 Cal. App. 2d
7 3, 6 (1943); Zettle v. Gillmeister, 64 Cal. App. 669, 671 (1923).
8 In contrast, the Ans have not cited any California cases
9 identifying ejectment causes of action as sounding in contract.

10 Instead, the Ans rely on the fact that the bankruptcy court
11 declared nondischargeable the portion of the state court's
12 judgment for "unpaid rent." In essence, the Ans contend that,
13 because the state court judgment referred to "rent" as the type
14 of damages awarded on account of the ejectment cause of action,
15 the state court's "rent" award must have been based on or arose
16 from the lease - a contractual relationship. The record does not
17 support the Ans' contention. While the state court does refer to
18 the ejectment damages award as "past due rent" and "holdover
19 rent," other parts of the state court's decision make clear that
20 the ejectment damages award was based on the property's
21 **reasonable rental value**, which is the appropriate measure for an
22 ejectment damages award for wrongfully withholding possession of
23 real property. As stated in one leading treatise on California
24 real property law: "The measure of damages in an action for
25 ejectment . . . is the value of the use of the property, which is
26 measured by the greater of either the reasonable rental value of
27 the property . . . or the benefits obtained by the person
28 wrongfully occupying the property." Harry D. Miller & Marvin B.

1 Starr, 10 Cal. Real Estate § 34:226 (4th ed. 2015).

2 Furthermore, Kwon terminated the lease no later than August
3 2005. Thus, the ejectment damages accruing after that date were
4 not calculated based on the accrual of rent under the lease, and
5 the references to "rent" in the state court judgment and decision
6 and in the bankruptcy court's judgment did not render the state
7 court's ejectment damages award a dischargeable contract claim.

8 An further challenges the bankruptcy court's determination
9 that An's conduct was willful within the meaning of § 523(a)(6).
10 An's argument is twofold. An first contends that the bankruptcy
11 court did not apply the correct legal standard for determining
12 willfulness, and An also contends that the bankruptcy court's
13 finding of willfulness was clearly erroneous. We are perplexed
14 by An's argument regarding the willfulness legal standard. The
15 parties and the bankruptcy court all were in agreement that the
16 willfulness element is satisfied if the debtor subjectively
17 intended to injure the creditor or subjectively knew that injury
18 to the creditor was substantially certain to occur. In re Su,
19 290 F.3d at 1142-43. The bankruptcy court correctly referred to
20 this standard and concluded that it needed to hold trial on An's
21 state of mind to ensure that the standard was met.

22 As for the bankruptcy court's finding of willfulness, the
23 bankruptcy court was presented with sufficient evidence from
24 which it could infer that An intended to injure Kwon and that An
25 knew Kwon would suffer injury as a result of An's wrongful
26 possession of the office building.

27 Nor is there anything illogical or implausible concerning
28 the bankruptcy court's willfulness finding. An complains that

1 the bankruptcy should have found that An subjectively believed
2 that he had a right to possession of the office building based on
3 his claim of a 50% ownership interest in the office building, but
4 the bankruptcy court found otherwise. It found that An did not
5 really believe that he was entitled to 50% ownership of the
6 office building, but rather pretended to believe in this
7 ownership claim in order to wrongfully keep possession of the
8 office building for as long as possible, all to Kwon's detriment.
9 We hold that the bankruptcy court's finding regarding An's
10 subjective state of mind was a reasonable inference drawn from
11 the evidence presented to the bankruptcy court at the time of the
12 trial.

13 An also identified as an issue on appeal the bankruptcy
14 court's determination that An acted maliciously within the
15 meaning of § 523(a)(6). But his opening appeal brief does not
16 contain any argument specifically and distinctly challenging this
17 determination. Consequently, An has forfeited this argument on
18 appeal. See Clark v. Arnold, 769 F.3d 711, 731 (9th Cir. 2014)
19 (citing Greenwood v. F.A.A., 28 F.3d 971, 977 (9th Cir. 1994)).
20 Even if we were to address this issue, nothing in the record
21 establishes any error in the bankruptcy court's determination
22 that An's conduct was malicious. There was no controversy
23 between the parties or the court regarding the correct legal
24 standard. While the court did not specifically recite the
25 elements of a malicious injury within the meaning of § 523(a)(6),
26 all of the parties' trial briefs recited the correct legal
27 standard.

28 Under the correct standard, conduct is considered malicious

1 for purposes of § 523(a)(6) if it is: "(1) a wrongful act,
2 (2) done intentionally, (3) which necessarily causes injury, and
3 (4) is done without just cause or excuse." In re Jercich,
4 238 F.3d at 1209.

5 Here, the bankruptcy court did not make a specific finding
6 as to each of the four maliciousness elements, but the record
7 nonetheless supports the bankruptcy court's maliciousness
8 determination. The state court judgment and statement of
9 decision established that An intentionally deprived Kwon of
10 possession of the office building and that this deprivation was
11 wrongful because An had no right or entitlement to possession.
12 In addition, our discussion, above, regarding the tortious nature
13 of an ejectment action under California law further establishes
14 the wrongfulness of An's conduct and that such conduct
15 necessarily caused injury to Kwon as the owner of the real
16 property who was entitled to possession. Finally, there is
17 nothing in the record in any way suggesting that An had any just
18 cause or excuse for fabricating a spurious ownership claim - a
19 claim he really did not believe existed - in order to continue as
20 long as possible his wrongful possession of the office building.
21 See generally Jett v. Sicroff (In re Sicroff), 401 F.3d 1101,
22 1106-07 (9th Cir. 2005) (explaining nature of just cause or
23 excuse element).

24 There is only one other issue we need to address: the
25 bankruptcy court's exception to discharge against An's wife
26 Lauri. We cannot ascertain from either the court's ruling or the
27 record how the court reached this result. If, as the bankruptcy
28 court held, the state court's findings were insufficient by

1 themselves to conclusively determine An's state of mind for
2 nondischargeability purposes, how could they have been sufficient
3 to determine Lauri's state of mind? Moreover, there were
4 virtually no allegations, evidence or findings, either in the
5 bankruptcy court or in the state court, suggesting that Lauri
6 actively participated in An's misconduct.

7 These incongruities perhaps suggest that the bankruptcy
8 court imputed An's nondischargeable conduct to Lauri. But if
9 that is what the bankruptcy court had in mind, the record does
10 not support the bankruptcy court's decision. There were no
11 allegations, evidence or findings that An was Lauri's business
12 partner or agent. And the mere fact that Lauri was An's spouse,
13 by itself, would be insufficient to support the
14 nondischargeability judgment against her. See Tsurukawa v. Nikon
15 Precision, Inc. (In re Tsurukawa), 258 B.R. 192, 198 (9th Cir.
16 BAP 2001); accord Sachan v. Huh (In re Huh), 506 B.R. 257, 269-71
17 (9th Cir. BAP 2014) (en banc). When, as here, there are no
18 allegations, evidence or findings that the debtor participated in
19 the spouse's nondischargeable conduct or that a partnership or
20 principal-agent relationship existed between the spouses, the
21 bankruptcy court commits reversible error by imputing the
22 nondischargeable conduct to the debtor. Id. at 270 (citing
23 In re Tsurukawa, 258 B.R. at 198).

24 In re Huh further suggests an additional requirement. Based
25 on In re Huh, in order to impute An's nondischargeable conduct to
26 Lauri, Kwon would have needed to establish that Lauri knew or
27 should have known of the wrongful nature of An's conduct. See
28 id. at 265-68, 71 (citing Walker v. Citizens State Bank

1 (In re Walker), 726 F.2d 452 (8th Cir. 1984)). The bankruptcy
2 court made no findings regarding Lauri's knowledge, nor was there
3 evidence in the record from which the court reasonably could have
4 inferred what Lauri knew or should have known regarding An's
5 wrongful conduct.

6 At oral argument, Kwon's counsel asserted that the
7 nondischargeability judgment against Lauri was the result of a
8 "typographical" error on his part. This assertion implies that
9 the entry of the judgment against Lauri was inadvertent, but the
10 record demonstrates that Kwon affirmatively requested relief
11 against Lauri in his summary judgment motion and provided for
12 relief against her in his draft proposed final judgment, which
13 the bankruptcy court adopted as drafted. This conduct seems
14 intentional rather than inadvertent.

15 Regardless, because the nondischargeability judgment was not
16 supported by any allegations, evidence or findings pertaining to
17 Lauri, we must VACATE AND REMAND the bankruptcy court's ruling to
18 the extent it determined that the ejectment damages award was
19 nondischargeable against Lauri.³

20 **CONCLUSION**

21 For the reasons set forth above, we AFFIRM the exception to
22 discharge against An, VACATE the exception to discharge against
23 Lauri, and we REMAND for further proceedings consistent with this
24 decision.

25
26 ³In light of our analysis and resolution of this appeal, it
27 is unnecessary for us to address the Ans' argument that the state
28 court's findings would not have been sufficient to support a
malicious prosecution cause of action against them under
California law.