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NOT FOR PUBLICATION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. NC-15-1315-SKuB
6	STANLEY HERBERT BRODY,)	Bk. No. 13-11721
7	Debtor.)	Adv. No. 14-01039
8	_____)	
9	LYNN H. CHOU,)	
10	Appellant,)	MEMORANDUM¹
11	v.)	
12	STANLEY HERBERT BRODY,)	
13	Appellee.)	
	_____)	

Argued and Submitted on January 19, 2017
at San Francisco, California

Filed - March 15, 2017

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

Honorable Alan Jaroslovsky, Bankruptcy Judge, Presiding

Appearances: Mark T. Young of Donahoe & Young LLP argued for
appellant Lynn H. Chou; Michele M. Poteracke
argued for appellee Stanley Herbert Brody.

Before: SPRAKER,² KURTZ and BRAND, Bankruptcy Judges

¹ This disposition is not appropriate for publication.
Although it may be cited for whatever persuasive value it may
have (see Fed. R. App. P. 32.1), it has no precedential value.
See 9th Cir. BAP Rule 8024-1.

² Hon. Gary A. Spraker, Chief Bankruptcy Judge for the
District of Alaska, sitting by designation.

1 **INTRODUCTION**³

2 Appellant Lynn Chou appeals the bankruptcy court's decision
3 after trial that she failed to prove her claims under 11 U.S.C.
4 § 523(a)(2) and (a)(6) to except from discharge a prepetition
5 judgment against appellee/debtor Stanley Brody for unpaid real
6 estate commissions. She contends that the court improperly
7 credited illogical and implausible reasons offered by the debtor
8 for the nonpayment of her commissions to find that the debtor
9 lacked an intent to defraud for purposes of § 523(a)(2).
10 Additionally, she contends the debtor's failure to pay the
11 commissions constitutes tortious conduct under California law
12 sufficient to establish a willful and malicious injury under
13 § 523(a)(6). Ms. Chou further argues that the state court
14 judgment precludes consideration of the debtor's testimony and
15 arguments presented at trial. Because the bankruptcy court's
16 findings are neither illogical, nor implausible, and are
17 supported by facts in the record, we AFFIRM that court's
18 decision.

19 **I. FACTUAL BACKGROUND**

20 **A. Ms. Chou's Employment with Multisource.**

21 Multisource was a mortgage brokerage firm operated by Saul
22 Brody as the broker.⁴ Stanley Brody was Multisource's branch
23 office manager, responsible for its day to day operations.

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

27 ⁴ The record does not reveal whether Multisource was a
28 business entity or sole proprietorship, nor does it explain what
has become of the business.

1 In the summer of 1992, Multisource placed a small written
2 advertisement in a local Chinese newspaper soliciting a
3 salesperson with the promise of paying 100% of commissions
4 earned on loans closed. Chou saw the ad and telephoned
5 Multisource for more information. At the time, Chou was working
6 for another mortgage broker, All Star Investments.⁵ Chou met
7 Mr. Brody to discuss the ad, and employment with Multisource,
8 around June 10, 1992. She testified that Brody confirmed she
9 could retain 100% of her commissions, subject to a monthly
10 payment of \$650.00 as a desk fee. No written contract was
11 presented at that time.

12 At trial, Brody did not directly contradict Chou's
13 recollection of their first meeting, or that Multisource agreed
14 to pay her 100% commissions. Rather, he explained that agent
15 compensation at Multisource was based upon 100% of the
16 commissions net of expenses and costs rather than the gross
17 commissions generated. He also testified that a monthly fee of
18 \$650.00 would be deducted from Chou's net commissions as the
19 minimum desk fee. Further, if she closed more than three loans
20 in any month she would be charged an additional \$250.00 fee for
21 every loan closed after the third loan.

22 Chou began to work for Multisource sometime in June 1992.
23 Her exact starting date is unclear, but Brody presented Chou
24 with a pre-printed form entitled "Broker Salesperson Contract"
25

26 ⁵ Chou testified that, overall, she had four to five years
27 of experience in the mortgage business, but it is not clear how
28 many years of experience she had at the time she approached
Multisource.

1 (BASE) FUNDED, PLUS \$250 PER TRANSACTION
2 FUNDED ABOVE THE BASE. Salesperson shall
3 receive 100% of the net commissions after
rental deductions.

4 An Addendum B was also attached to the Salesperson
5 Contract. This addendum clarified that Chou's date of
6 termination from All Star Investments was June 28, 1992. It
7 also required her to specifically identify all loans released to
8 Multisource by All Star Investments, and to certify that she had
9 not originated, processed, or caused any other lender to approve
10 and fund any loan application.

11 Chou viewed the additional \$250.00 fee per loan above the
12 base as departing from the newspaper ad and the terms initially
13 discussed with Brody. She testified that she did not sign the
14 Salesperson Contract because she was not comfortable with it.
15 Instead, she asked Brody to explain the legal terms used in the
16 contract, but stated that he never got back to her. After
17 receiving the Salesperson Contract, she became concerned that
18 she was bringing loans into Multisource without any written
19 agreement. So, Chou hand wrote a one page summary of her
20 understanding of the terms of her employment and compensation,
21 and presented it to Brody. Both she and Brody signed this
22 document. It reads:

23 This is the confirmation to verify our
24 conversation for commission split between
25 Multisource and Lynn H. Chou (real estate
26 agent). Multisource will charge Lynn H.
Chou \$650.00 for month of July if Lynn H.
Chou can submit at least 3 loan packages to
Multisource.

27 The document is undated.

28 Brody testified that the handwritten document memorialized

1 their understanding, but he did not consider it to be a
2 contract, in part, because it was not dated. Instead,
3 Multisource still required her to sign the Salesperson Contract.
4 He was also adamant that the commission payable to Chou remained
5 net of expenses or deductions.

6 Multisource nonetheless permitted Chou to close loans under
7 its broker license. The parties always anticipated that Chou
8 would bring three or four loans with her from All Star
9 Investments that would close quickly after she changed brokers.
10 Although these loans closed, Multisource did not pay Chou any
11 commissions from them. Chou testified that she closed a number
12 of additional loans in July 1992, also without receiving
13 compensation.

14 Brody testified that he repeatedly asked Chou to sign the
15 Salesperson Contract and to provide him with her real estate
16 license. Despite these requests, he never received either of
17 them. The record is unclear as to why Chou never provided her
18 license to Multisource,⁶ but she explained that she never
19 received answers to her questions regarding the Salesperson
20 Contract.

21 Despite its concerns, Multisource paid Chou \$4,102.00 on
22 August 17, 1992. This represented her net commission for one
23 loan, less the \$650 desk fee for August 1992. When asked why
24 Multisource paid Chou without having received either a signed
25 Salesperson Contract or her real estate license, Brody answered

26

27

28 ⁶ Chou was never asked whether she provided her license to
Brody during her examination.

1 that he discovered Chou had improperly personally reimbursed a
2 client for closing costs on that loan. This was significant
3 because only brokers were authorized to reimburse clients for
4 closing costs. He discussed the matter with Chou and was
5 convinced that she understood why it was improper to directly
6 reimburse clients' closing costs. She also agreed not to do so
7 in the future. Based on their discussion, Brody was willing to
8 "stick his neck out" to pay her this commission, which he viewed
9 as remedying the problem.

10 Around this time, Brody had also become concerned with
11 other aspects of Chou's performance. He generally objected to
12 Chou's working outside of Multisource's offices, and her
13 personal retention of loan files. He explained that this
14 conduct impaired Multisource's ability to supervise her work or
15 verify disbursements at loan closings. In particular, the
16 disbursement information was needed to calculate her net
17 commissions. Chou testified, however, that she regularly worked
18 in Multisource's office.

19 On October 10, 1992, Brody terminated Chou's employment
20 with Multisource. Chou testified that she was terminated
21 without reason. Brody stated that she was terminated after he
22 discovered her "rummaging through his office." After her
23 termination, Brody discovered a number of irregularities in her
24 loan files that frustrated Multisource's ability to calculate
25 the amount of the commissions owed to Chou.

26 **B. The State Court Litigation.**

27 On April 12, 1994, Chou filed a complaint in the California
28 Superior Court, San Mateo County, against Multisource and Brody

1 to recover her commissions. Originally, she pled causes of
2 action for breach of contract and fraud, specifically, for the
3 tort of making a promise without an intention to perform. She
4 amended her complaint shortly before trial to include a separate
5 claim to recover \$7,800.00 in monies advanced "to cover the fees
6 incurred by defendants' clients pursuant to 'no-points' loans."
7 In both the original and amended complaint, Chou sought
8 exemplary damages for the defendants' fraud.

9 The case proceeded to a five day bench trial. At the
10 conclusion of trial, the superior court ruled that Chou was
11 entitled to recover commissions, but also awarded credits or
12 deductions against those commissions.⁷ It also found that Chou
13 was no longer an employee of defendant as of October 10th, by
14 which date 13 cases had been substantially completed while the
15 remainder of cases "had substantial noncompletion of
16 information." The court further found that the parties had
17 "continued to function under the basis of the original written
18 agreement as that agreement had never been replaced by another
19 agreement."⁸ The court awarded Chou commissions in the amount
20 of \$44,892.43 for the 13 completed cases less \$6,733.86 in

21
22 ⁷ Although both Multisource and Brody were named as
23 defendants in the state court action, the court generically
24 referred to only a single, unnamed defendant in both its oral
25 ruling and its subsequent Judgment dated October 1, 1997
26 ("Judgment"). Brody does not deny his individual liability under
27 the Judgment.

28 ⁸ The state court does not identify the "original contract,"
although Chou's handwritten document is the only one that was
ever signed. Nor does that court explain or discuss the
deductions credited against the commissions, other than listing
them as "processing fees" for rechecking or completing the files.

1 processing fees for rechecking files; commissions of \$29,317.94
2 for the noncompleted cases less \$10,261.28 in processing fees
3 for completing files; and awarded defendant credits in the
4 amount of \$13,800.00 for rebates paid by the defendant, as well
5 as \$1,950.00 for desk fees at \$650 per month for August-October
6 1992. In total, the court calculated the net commissions
7 payable to Chou to be \$41,465.23. The court also awarded costs
8 to plaintiff, but did not award interest on her claim.

9 On October 1, 1997, the superior court entered its
10 Judgment, but revised the gross amount of the commissions
11 awarded to Chou to \$55,266.23. The court also reduced
12 defendant's credits or deductions to \$18,945.14, which equals
13 the processing and desk fees previously awarded, but excludes
14 the award of rebates. Consistent with its oral findings, the
15 court awarded Chou costs, but no interest. The court also
16 memorialized its findings that: (1) Chou was no longer an
17 employee of defendant as of October 10, 1992, (2) 13 cases had
18 been substantially completed, and the balance "had substantial
19 noncompletion of information," and (3) the parties continued to
20 function under the original written agreement.

21 Although Chou originally asserted a fraud/tort claim
22 against Brody for a promise without intent to perform, there is
23 no evidence that this claim was presented at trial. The minutes
24 of the court's oral ruling are devoid of any reference to the
25 tort claim or the request for exemplary damages. Similarly, the
26 Judgment fails to mention either the tort claim or the request
27 for exemplary damages. Further, neither the minutes of the oral
28 ruling, nor the Judgment, address Chou's amended claim for

1 monies advanced to pay client costs. Rather, the Judgment
2 merely states that she was "entitled to recover commissions
3 totaling \$55,266.23," and provides for credits against those
4 commissions.

5 Chou renewed her Judgment on September 14, 2007, in the
6 total amount of \$127,588.46. She has not been paid any amount
7 owed under the Judgment.

8 **C. Bankruptcy and Trial on the Nondischargeability**
9 **Claims.**

10 Brody filed a chapter 13 petition on September 6, 2013. He
11 converted his bankruptcy to chapter 7 on November 11, 2013.
12 Chou timely filed her complaint objecting to the
13 dischargeability of the Judgment. She seeks relief on two
14 grounds. She asserts Brody falsely represented his intention
15 to pay her commissions, rendering the debt nondischargeable
16 under § 523(a)(2)(A), and that the nonpayment of commissions
17 willfully and maliciously injured her under § 523(a)(6).

18 The bankruptcy court conducted a trial on Chou's
19 nondischargeability claims on August 20, 2015. Chou and Brody
20 were the only witnesses. After argument, the court took the
21 matter under submission.

22 That afternoon, the bankruptcy court entered written
23 findings of facts and conclusions of law under Fed. R. Civ.
24 P. 52(a), made applicable to adversary proceedings by Fed. R.
25 Bankr. P. 7052.⁹ It ruled in Brody's favor on both claims. As

26
27 ⁹ At the conclusion of Chou's case, Brody's counsel
28 nominally made a motion for directed verdict. A motion for
(continued...)

1 to the fraud claim under § 523(a)(2), the court concluded that
2 Chou's "argument that Brody caused Multisource's ad to be placed
3 in order to lure salespeople to work for Multisource with no
4 intent to compensation [sic] them was so lacking in evidence as
5 to be preposterous." It specifically focused upon fraudulent
6 intent, and found that "Chou was hired in good faith, and her
7 failure to receive her commissions was the result of [Brody's]
8 good faith belief that she could not be compensated without a
9 signed contract and delivery of her license." The court further
10 concluded that Brody's reasonable, good faith beliefs negated
11 any subjective intent to harm Chou, which precluded any finding
12 of willful and malicious injury under § 523(a)(6).

13 The bankruptcy court entered its Judgment dismissing Chou's
14 claims, with prejudice, on August 31, 2015. Chou timely
15 appealed this decision.

16 II. JURISDICTION

17 The bankruptcy court had jurisdiction under 28 U.S.C.
18

19 ⁹(...continued)

20 directed verdict is treated as a motion for judgment as a matter
21 of law under Fed. R. Civ. P. 50, and applies only in jury trials.
22 Fed. R. Bankr. P. 9015(c); Fed. R. Civ. P. 50(a). In bench
23 trials, such a motion is treated as one for judgment on partial
24 findings under Fed. R. Civ. P. 52(c), made applicable to
25 adversary proceedings by Fed. R. Bankr. P. 7052. Here, the
26 bankruptcy court entered its decision under Rule 52(a), rather
27 than (c). The difference between the two subsections is
28 immaterial for purposes of this appeal, however. Even under
Rule 52(c), the bankruptcy court was entitled to weigh the
evidence presented and the credibility of witnesses. Kuan v.
Lund (In re Lund), 202 B.R. 127, 130 (9th Cir. BAP 1996);
27A Fed.Proc., L.Ed. § 62:701 (March 2017). Moreover, the court
was still obligated to make "findings of fact and conclusions of
law as required by Rule 52(a)." Fed. R. Civ. P. 52(c).

1 §§ 1334 and 157(b)(2)(I). This court has jurisdiction under
2 28 U.S.C. § 158.

3 **III. ISSUES**

4 Whether the bankruptcy court erred when it determined that
5 Chou did not establish her § 523(a)(2)(A) and (a)(6) claims.

6 **IV. STANDARDS OF REVIEW**

7 Whether a claim is excepted from discharge under § 523(a)
8 presents mixed issues of law and fact which we review de novo.
9 Carillo v. Su (In re Su), 290 F.3d 1140, 1142 (9th Cir. 2002);
10 Diamond v. Kolcum (In re Diamond), 285 F.3d 822, 826 (9th Cir.
11 2002). "De novo means review is independent, with no deference
12 given to the trial court's conclusion." Mwangi v. Wells Fargo
13 Bank, N.A. (In re Mwangi), 432 B.R. 812, 818 (9th Cir. BAP
14 2010).

15 We review the bankruptcy court's findings of fact for clear
16 error. Honkanen v. Hopper (In re Honkanen), 446 B.R. 373, 378
17 (9th Cir. BAP 2011). "The clear error standard is significantly
18 deferential and is not met unless the reviewing court is left
19 with a 'definite and firm conviction that a mistake has been
20 committed.'" Fisher v. Tucson Unified School Dist., 652 F.3d
21 1131, 1135 (9th Cir. 2011) (citation omitted). There is no clear
22 error unless the findings of fact are "(1) illogical,
23 (2) 'implausible,' or (3) without 'support in inferences that
24 may be drawn from the facts in the record.'" United States v.
25 Hinkson, 585 F.3d 1247, 1262 (9th Cir. 2009) (en banc) (quoting
26 Anderson v. City of Bessemer City, N.C., 470 U.S. 564, 577
27 (1985)). "Where there are two permissible views of the
28 evidence, the factfinder's choice between them cannot be clearly

1 erroneous." Anderson, 470 U.S. at 574; see also Lewis v. Ayers,
2 681 F.3d 992, 999 (9th Cir. 2012).

3 The bankruptcy court's credibility determinations are
4 entitled to special deference. Leon v. IDX Systems Corp.,
5 464 F.3d 951, 958 (9th Cir. 2006) (citation omitted). Findings
6 based upon determinations of credibility are given greater
7 deference "for only the trial judge can be aware of the
8 variations in demeanor and tone of voice that bear so heavily on
9 the listener's understanding of and belief in what is said."
10 Anderson, 470 U.S. at 574.

11 V. DISCUSSION

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

19 A. The Court Did Not Err by Dismissing Appellant's 20 § 523(a)(2) Claim.

21 Debts for money or property are excepted from discharge to
22 the extent obtained by "false pretenses, a false representation,
23 or actual fraud, other than a statement respecting the debtor's
24 or an insider's financial condition." 11 U.S.C. § 523(a)(2)(A).
25 To sustain a claim of non-dischargeability under § 523(a)(2)(A),
26 a creditor must prove five elements:

- 27 (1) the debtor made . . . representations;
28 (2) that at the time he knew they were

1 false;

2 (3) that he made them with the intention and
3 purpose of deceiving the creditor;

4 (4) that the creditor relied on such
5 representations; [and]

6 (5) that the creditor sustained the alleged
7 loss and damage as the proximate result of
8 the misrepresentations having been made.

9 Ghomeshi v. Sabban (In re Sabban), 600 F.3d 1219, 1222 (9th Cir.
10 2010) (quoting Am. Express Travel Related Servs. Co. v. Hashemi
11 (In re Hashemi), 104 F.3d 1122, 1125 (9th Cir.1996)).

12 Chou's Judgment establishes a debt based in contract. Mere
13 breaches of contract, without more, do not support
14 nondischargeability under § 523(a)(2). Businger v. Storer
15 (In re Storer), 380 B.R. 223, 235 (Bankr. D. Mont. 2007); see
16 also Ubriaco v. Martino (In re Martino), 429 B.R. 66, 72 (Bankr.
17 E.D.N.Y. 2010) (collecting cases). To support her claim under
18 § 523(a)(2)(A), Chou was required to show that Multisource,
19 acting through Brody, had no intent to perform. Cripe v. Mathis
20 (In re Mathis), 360 B.R. 662, 666 (Bankr. C.D. Ill. 2006); Brann
21 v. Oxford (In re Oxford), 440 B.R. 772, 777 (Bankr. W.D. Ky.
22 2010); Duncan v. Bucciarelli (In re Bucciarelli), 429 B.R. 372,
23 375 (Bankr. N.D. Ga. 2010); Mozeika v. Townsley
24 (In re Townsley), 195 B.R. 54, 61 (Bankr. E.D. Tex. 1996).
25 Moreover, the debtor's lack of intent to perform must exist at
26 the time he entered the contract. Paik v. Lee (In re Lee),
27 536 B.R. 848, 855 (Bankr. N.D. Cal. 2015) (citing New Falls Corp.
28 v. Boyajian (In re Boyajian), 367 B.R. 138, 147 (9th Cir. BAP
2007)).

Although the bankruptcy court stated that Chou failed to

1 establish any of the elements of her claim under § 523(a)(2),
2 its analysis was primarily directed to whether Brody acted with
3 fraudulent intent. Chou's appeal is similarly focused. She
4 acknowledges that Brody testified at length regarding his
5 understanding that a broker could not pay a salesperson absent
6 both a signed contract and possession of that person's original
7 real estate license. But, she argues that his explanation was
8 not credible; so much so that when properly viewed it actually
9 proves his fraudulent intent. As an initial matter, Chou argues
10 that the state court Judgment precludes Brody from challenging
11 the nondischargeability of the debt. Alternatively, she
12 contends that Brody's reasons for nonpayment of her commissions
13 are illogical and implausible because they are legally
14 incorrect.

15 **1. The Judgment Did Not Preclude Brody from**
16 **Presenting Evidence of his Intent.**

17 It is well settled that "[p]rinciples of collateral
18 estoppel apply to proceedings seeking exceptions from discharge
19 brought under 11 U.S.C. § 523(a)."¹⁰ Baldwin v. Kilpatrick
20 (In re Baldwin), 249 F.3d 912, 917 (9th Cir. 2001) (citing
21 Grogan, 498 U.S. at 284 n.11)). If a state court judgment
22 determines the elements necessary to establish an exception to
23 the debtor's discharge, the debtor is precluded from contesting
24 the basis for denial of the dischargeability of that debt.

26 ¹⁰ Collateral estoppel is now referred to as "issue
27 preclusion." Yaikian v. Yakian (In re Yaikian), 508 B.R. 175,
28 182 (Bankr. S.D. Cal. 2014); Lucido v. Superior Court, 51 Cal.3d
335, 341 n.3 (1990).

1 In re Diamond, 285 F.3d at 826.

2 The preclusive effect of a state court judgment is
3 determined by application of that state's laws. Id.;
4 In re Baldwin, 249 F.3d at 917. California law, therefore,
5 governs the preclusive effect of the Judgment. For collateral
6 estoppel to apply, California requires that the issue sought to
7 be precluded be identical to that previously decided, that the
8 issue was actually litigated and necessarily decided on the
9 merits, and that the party to be precluded was the same as, or
10 in privity with, the party in the prior litigation. Lucido v.
11 Superior Court, 51 Cal.3d 335, 341 (1990). As a final
12 requirement, California courts must determine "whether
13 imposition of issue preclusion in the particular setting would
14 be fair and consistent with sound public policy." Khaligh v.
15 Hadaegh (In re Khaligh), 338 B.R. 817, 824-25 (B.A.P. 9th Cir.
16 2006), aff'd, 506 F.3d 956 (9th Cir. 2007) (citing Lucido,
17 51 Cal.3d at 341-43).

18 As the party seeking preclusion, Chou "must introduce a
19 record sufficient to reveal the controlling facts and pinpoint
20 the exact issues litigated in the prior action." Kelly v. Okoye
21 (In re Kelly), 182 B.R. 255, 258 (9th Cir. BAP 1995), aff'd,
22 100 F.3d 110 (9th Cir. 1996). Any reasonable doubt as to what
23 was decided for purposes of issue preclusion is resolved against
24 the moving party. Id.

25 Chou contends that the bankruptcy court erred by
26 considering Brody's explanation for Multisource's nonpayment of
27 the commissions based on his understanding of California law
28 governing a real estate broker's employment of salespersons.

1 She maintains the state court rejected Brody's defenses because
2 it entered the Judgment notwithstanding her failure to sign the
3 Salesperson Contract or provide her original realtor's license.

4 There is nothing in the record to establish that the state
5 court considered, much less decided, why Multisource failed to
6 pay Chou's commissions. Originally, Chou asserted a separate
7 tort claim that Brody hired her without any intent to pay her
8 the commissions she generated. Neither the Judgment, nor
9 anything in the record, suggests that she actually litigated
10 this claim at trial in the state court. Indeed, Chou now
11 acknowledges that the state court made no findings of fraud in
12 the 1997 trial.

13 Chou has failed to establish that the parties actually
14 litigated, or the state court necessarily decided, the issue of
15 Brody's intent as to the nonpayment of Chou's commissions.
16 Therefore, collateral estoppel does not preclude Brody from
17 litigating his subjective beliefs and intent before the
18 bankruptcy court on Chou's nondischargeability claims.

19 **2. The Bankruptcy Court Did Not Err in Finding that**
20 **Brody Lacked the Fraudulent Intent Required to**
21 **Except a Debt from Discharge under**
§ 523(a)(2)(A).

22 Because intent to deceive is rarely subject to direct
23 evidence, creditors must generally rely upon circumstantial
24 evidence to establish fraudulent intent. Citibank (South
25 Dakota), N.A. v. Eashai (In re Eashai), 87 F.3d 1082, 1090 (9th
26 Cir. 1996). For this reason, courts may draw inferences from
27 the debtor's actions and the surrounding circumstances. Devers
28 v. Bank of Sheridan, Montana (In re Devers), 759 F.2d 751, 754

1 (9th Cir. 1985); In re Lee, 536 B.R. at 855.

2 Chou points to the fact that she was not paid her
3 commissions as proof of Brody's fraudulent intent. She cites
4 Sharma v. Salcido, (In re Sharma), 2013 WL 1987351 (9th Cir. BAP
5 May 14, 2013), in support of the proposition that "intent to
6 deceive may be inferred if a debtor takes no steps to perform
7 under a contract." Id. at *10. In In re Sharma, the debtor
8 promised an investor a 20% return on monies invested with him
9 for the purpose of refurbishing and selling houses. Although
10 some interest was paid, the debtor never worked on the houses to
11 be sold, and let them go to waste. From this, the BAP held that
12 the bankruptcy court did not err in its determination that the
13 debt was nondischargeable under § 523(a)(2)(A), concluding that
14 "[a]lthough there may be other permissible views of the
15 evidence, [the debtor] has put forth none that render this view
16 clearly erroneous." Id. at *13 (citing Anderson, 470 U.S. at
17 574).

18 In re Sharma demonstrates Chou's burden to establish clear
19 error. While nonpayment of her commission could support an
20 inference of fraudulent intent, it does not compel such a
21 conclusion. This determination was for the trial court to make
22 based upon Brody's testimony and its measure of his credibility.
23 It found his explanation to be credible. To prevail on appeal,
24 Chou must point to evidence that contradicts Brody's testimony,
25 or suggests that "the story itself [is] so internally
26 inconsistent or implausible on its face that a reasonable
27 factfinder would not credit it." Anderson, 470 U.S. at 575.

28 Chou contends that Brody's explanations are a sham,

1 Although Brody signed Chou's handwritten document, it is
2 undated and fails to cover the material aspects of her
3 employment by Multisource. California's regulatory requirements
4 support Brody's understanding regarding the need for a signed
5 Salesperson Agreement as well as Addendum A. They also explain
6 his testimony as to why he believed the lack of a date on Chou's
7 handwritten document was significant.

8 As for Brody's understanding that a salesperson must
9 provide her broker with an original license, he specifically
10 referenced "§ 10160" as the basis for this requirement during
11 his testimony at trial. This section provides:

12 The real estate salesman's license shall
13 remain in the possession of the licensed
14 real estate broker employer until canceled
15 or until the salesman leaves the employ of
16 the broker, and the broker shall make his
17 license and the licenses of his salesman
18 available for inspection by the commissioner
19 or his designated representative.

20 California Bus. & Prof. Code § 10160. It is also "unlawful" for
21 a licensed real estate broker to employ or compensate any
22 unlicensed brokers or salespersons. Cal. Bus. & Prof. Code
23 § 10137. Both statutes provide for the suspension or revocation
24 of the real estate license for violations. Cal. Bus. & Prof.
25 Code §§ 10160 and 10137. California's regulatory scheme
26 governing real estate agents supports Brody's understanding that
27 real estate brokers must verify and hold the license of a
28 salesperson before compensating that person, or face serious

27 ¹²(...continued)
28 have a written contract that "shall set forth the method by which
the commissions shall be computed and paid."

1 consequences.

2 Chou argues that Brody's explanation is merely a cover for
3 keeping her commissions. This is one possible inference to be
4 drawn from his testimony. Alternatively, one may infer that
5 Brody sincerely, but erroneously, believed that Multisource
6 could not pay her commissions until Chou complied with
7 applicable state laws and regulations. Which of the competing
8 inferences to make was for the bankruptcy court to decide,
9 taking into account credibility issues and observation of the
10 witnesses uniquely available at the trial. That court chose to
11 credit Brody's testimony and explanation. Chou's disagreement
12 with that determination and the resulting inference is
13 insufficient, by itself, to overcome the considerable deference
14 given to the bankruptcy court. Anderson, 470 U.S. at 574; see
15 also Rodriguez v. Holder, 683 F.3d 1164, 1171 (9th Cir. 2012).
16 Brody's explanation for why Multisource did not immediately pay
17 Chou her commissions is neither illogical, nor implausible.

18 Chou fails to point to any other evidence or inconsistency
19 within the record to support her contention that the bankruptcy
20 court clearly erred in determining that Brody lacked fraudulent
21 intent. To the contrary, the remainder of the evidence
22 presented at trial is consistent with both Brody's explanation
23 and the court's finding that he lacked fraudulent intent.

24 First, the Salesperson Contract presented to Chou specifically
25 detailed the proposed calculation of commissions, the duties of
26 the parties, was to be dated, and required signatures of both
27 parties. The agreement tracks Brody's understanding that
28 California law required the parties to sign a detailed, written

1 contract.

2 Second, Chou never testified that she rejected the
3 Salesperson Contract. Rather she stated only that she was
4 uncomfortable with it and wanted more information. This
5 suggests that both parties acknowledged the need for a more
6 detailed, written contract despite the signing of her
7 handwritten document. The fact that the state court credited
8 deductions against Chou's claimed commissions further indicates
9 that the handwritten document did not encompass all the
10 contractual terms of the parties' relationship.

11 Third, Multisource, acting through Brody, did pay Chou one
12 commission despite not having an executed Salesperson Contract.
13 Brody explained that he approved the payment only after he
14 discovered that Chou had improperly paid a client for closing
15 costs. Brody discussed the situation with Chou and obtained
16 assurances that she would not directly pay clients in the
17 future. His testimony on this point is uncontradicted, and
18 demonstrates a significant attempt to work with Chou, rather
19 than defraud her.

20 Most importantly, Brody testified that due to the problems
21 with Chou's files Multisource could not determine the expenses
22 to be deducted from the gross commissions on Chou's loans. The
23 amounts actually due to Chou were not determined until the state
24 court trial; and then her net commissions were reduced by
25 roughly \$19,000.00.

26 Tellingly, the state court declined to award interest on
27 the net commissions awarded to her. Under Cal. Civ. Code
28

1 3287(a),¹³ interest is recoverable on "damages certain, or
2 capable of being made certain by calculation," from the time the
3 right to recover is vested. The state court's denial of
4 interest on Chou's claims further supports Brody's argument that
5 the amounts of the commissions owed were not ascertainable until
6 trial.

7 Brody's explanation as to why Multisource did not pay Chou
8 is both consistent with the other evidence admitted at trial,
9 and supported by California's statutes and regulations governing
10 a real estate broker's employment of salespersons. The
11 bankruptcy court's reliance on that explanation to find that
12 Brody acted in good faith and without fraudulent intent is well
13 supported. Chou's view to the contrary does not render this
14 finding clearly erroneous.

15 **B. The Court Did Not Err by Dismissing Appellant's**
16 **§ 523(a)(6) Claim.**

17 Section 523(a)(6) excepts from discharge debts "for willful
18 and malicious injury by the debtor to another entity or to the
19

20 ¹³ The version of Cal. Civ. Code § 3287(a) in effect in
21 1992, when the Judgment was entered, provided:

22 Every person who is entitled to recover damages
23 certain, or capable of being made certain by
24 calculation, and the right to recover which is vested
25 in him upon a particular day, is entitled also to
26 recover interest thereon from that day, except during
27 such time as the debtor is prevented by law, or by the
28 act of the creditor from paying the debt. This section
is applicable to recovery of damages and interest from
any such debtor, including the state or any county,
city, city and county, municipal corporation, public
district, public agency, or any political subdivision
of the state.

1 property of another entity." 11 U.S.C. § 523(a)(6). To
2 establish a claim under § 523(a)(6), the creditor must prove
3 "not only that the debtor **acted** willfully, but also that the
4 debtor inflicted the **injury** willfully and maliciously rather
5 than recklessly or negligently." Petralia v. Jercich
6 (In re Jercich), 238 F.3d 1202, 1207 (9th Cir. 2001) (citing
7 Kawaauhau v. Geiger, 523 U.S. 57, 64 (1998) (emphasis in
8 original)). "Willful" and "malicious" are separate components;
9 both must be found to except a debt from discharge under
10 § 523(a)(6). In re Su, 290 F.3d at 1146.

11 As with actions under § 523(a)(2)(A), "a simple breach of
12 contract is not the type of injury addressed by § 523(a)(6)."
13 Snoke v. Riso (In re Riso), 978 F.2d 1151, 1154 (9th Cir. 1992).
14 The Ninth Circuit requires "[s]omething more than a knowing
15 breach of contract . . . before conduct comes within the ambit
16 of § 523(a)(6)," and has "defined that 'something more' as
17 tortious conduct." Lockerby v. Sierra, 535 F.3d 1038, 1041 (9th
18 Cir. 2008); see also In re Riso, 978 F.2d at 1154. Whether
19 conduct is tortious depends upon state law. Lockerby, 535 F.3d
20 at 1041-42. To prevail on her § 523(a)(6) claims, therefore,
21 Chou must prove a tortious breach of contract that resulted in a
22 willful and malicious injury. Id.

23 Evaluating Chou's § 523(a)(6) claim, the bankruptcy court
24 again focused on Brody's belief that Multisource could not pay
25 Chou her commissions until she signed the proposed form contract
26 and provided her license. The bankruptcy court properly
27 recognized that a willful injury is shown only if the creditor
28 proves "either a subjective intent to harm, or a subjective

1 belief that harm is substantially certain.” In re Su, 290 F.3d
2 at 1144. It reemphasized that “[r]egardless of whether
3 [Brody’s] understanding of state law was correct, there was a
4 good faith disagreement as to whether Chou was entitled to be
5 paid.” For this reason, the court found that Brody did not
6 subjectively intend to harm Chou, nor did he believe that harm
7 was substantially certain.

8 Chou does not distinguish between subjective intent to harm
9 and a subjective belief that injury was substantially certain.
10 She simply argues that the bankruptcy court erred by crediting
11 Brody’s explanations for Multisource’s decision not to pay
12 commissions to her. As explained above, however, the bankruptcy
13 court’s findings as to Brody’s subjective beliefs and intent
14 were neither implausible, nor illogical, and were supported by
15 the record. That another trier of fact might draw different
16 inferences from Brody’s testimony does not render the bankruptcy
17 court’s factual finding clearly erroneous. Lewis v. Ayers,
18 681 F.3d at 999-1000. Such findings support the bankruptcy
19 court’s determination that Brody lacked a subjective intent to
20 harm Chou.

21 Chou also argues that damages from a breach of contract
22 were substantially certain and, therefore, Brody must have known
23 that withholding the commissions would injure her. This
24 argument, however, strays beyond the subjective inquiry required
25 under In re Su, 290 F.3d at 1145-46. The intent to injure is
26 not measured objectively, by what a reasonable person should
27 have known, or understood, to be substantially certain. Id. at
28 1145. For this reason, “recklessly inflicted injuries do not

1 satisfy the § 523(a)(6) willfulness requirement.” Plyam v.
2 Precision Dev., LLC (In re Plyam), 530 B.R. 456, 464 (9th Cir.
3 BAP 2015). It is the debtor’s actual, subjective state of mind
4 that is dispositive. In re Su, 290 F.3d at 1145-46. Even when
5 evaluating whether a debtor had actual knowledge that harm was
6 substantially certain, the focus remains “on what was actually
7 going through the mind of the debtor at the time he acted.” Id.
8 at 1146 n.6.

9 Brody subjectively believed that state law prohibited
10 payment of Chou’s commissions until Multisource received the
11 signed form contract and license from her. As recognized by the
12 bankruptcy court, his legal analysis may have been faulty, but
13 that does not equate to a subjective belief of certain harm.
14 Multisource’s failure to pay Chou her commissions was attributed
15 to Brody’s efforts to comply with state law rather than a
16 willful refusal to pay outstanding commissions. As credited by
17 the bankruptcy court, Brody necessarily lacked the subjective
18 belief that harm to Chou was substantially certain; in his view
19 she was not entitled to payment of those commissions until she
20 complied with California law. Chou failed to prove that Brody
21 had a subjective belief that nonpayment was substantially
22 certain to injure her for purposes of establishing a willful
23 injury to support her claim under § 523(a)(6).

24 Because a willful injury has not been established, analysis
25 of the other two elements of her § 523(a)(6) claim - whether
26 Brody tortiously breached any contractual obligations under
27 California law, or whether such conduct resulted in malicious
28

1 injury - is unnecessary.¹⁴

2 **CONCLUSION**

3 The bankruptcy court found that the failure to pay Chou was
4 borne of a good faith misunderstanding of controlling law rather
5 than any wrongful refusal to pay her. Its finding negated any
6 intent to defraud or to willfully injure Chou. Despite her
7 continued disagreement with these findings, the bankruptcy
8 court's findings, and the resulting decision, are neither
9 illogical, nor implausible. Moreover, the remainder of the
10 record supports denial of Chou's claims under §§ 523(a)(2) and
11 (a)(6). We perceive no clear error in the bankruptcy court's
12 decision. It is, therefore, AFFIRMED.

13
14
15 ¹⁴ Chou argues that the Ninth Circuit's decision in Petralia
16 v. Jercich (In re Jercich), 238 F.3d 1202 (9th Cir. 2001),
17 requires reversal of the bankruptcy court's decision. In
18 Jercich, an unpaid employee sought to hold his prepetition
19 judgment for unpaid wages nondischargeable under § 523(a)(6).
20 The debtor in Jercich was found to have willfully refused to pay
21 outstanding wages while having the clear ability to do so.
22 Instead, the debtor diverted the monies for his personal benefit,
23 leading the state court to find that he had committed oppression
24 under California Civil Code § 3294, warranting an award of
25 punitive damages. Based on those particular circumstances, the
26 debtor's nonpayment of wages was found to constitute tortious
27 conduct resulting in willful and malicious injury. Here,
28 however, the state court made no findings of oppression, and no
punitive damages were awarded. There were also substantial
issues regarding the calculation of Chou's commissions, resulting
in sizeable credits against the amounts she claimed were due her.
Thus, unlike Jercich, Chou's state court Judgment did not
dispositively resolve the elements of her claim under
§ 523(a)(6). The bankruptcy court did not address whether there
was tortious conduct or a malicious injury because Chou failed to
prove a willful injury, and we agree that this failure of proof
moots the need to make a finding on these other elements of
§ 523(a)(6).