

APR 26 2017

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

NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL  
OF THE NINTH CIRCUIT

In re:	)	BAP No.	CC-16-1226-FLKu
	)		
BRENT ROY SEPULVEDA,	)	Bk. No.	8:13-bk-17965-SC
	)		
Debtor.	)	Adv. Pro.	8:14-ap-01003-SC
	)		
_____	)		
BRENT ROY SEPULVEDA,	)		
	)		
Appellant,	)		
	)		
v.	)	<b>MEMORANDUM*</b>	
	)		
GEORGE ADAMS, JR.,	)		
	)		
Appellee.	)		
_____	)		

Argued and Submitted on March 23, 2017  
at Pasadena, California

Filed - April 26, 2017

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

Honorable Scott C. Clarkson, Bankruptcy Judge, Presiding

Appearances: David C. Codell argued on behalf of appellant  
Brent Roy Sepulveda; Ryan Daniel O’Dea of Shulman  
Hodges & Bastian LLP argued on behalf of appellee  
George Adams, Jr.

Before: FARIS, LAFFERTY, and KURTZ, Bankruptcy Judges.

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\* 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 Chapter 7<sup>1</sup> debtor Brent Roy Sepulveda appeals from the  
3 bankruptcy court's judgment in favor of creditor George Adams,  
4 Jr. on Mr. Adams's § 523(a)(2)(A) nondischargeability claim. He  
5 argues that the court erred by (1) finding that he intended to  
6 defraud Mr. Adams and (2) miscalculating the damages award to  
7 Mr. Adams. We reject both arguments. Accordingly, we AFFIRM.

8 **FACTUAL BACKGROUND**

9 **A. The joint business venture**

10 This dispute arises from a business partnership between  
11 Mr. Sepulveda and Mr. Adams. In 2000, the parties agreed to form  
12 a joint venture whereby they would acquire real property and  
13 construct and sell custom homes. In November 2000, they executed  
14 a written agreement to construct four custom homes. Mr. Adams  
15 was responsible for financing and obtaining construction loans,  
16 and Mr. Sepulveda was responsible for the construction of the  
17 homes through his company, Sepulveda Builders. Mr. Adams said  
18 that Mr. Sepulveda represented that he maintained liability  
19 insurance that would cover the construction of the custom homes.

20 Under the 2000 agreement, the parties constructed a home for  
21 Ray and Tracy Arriola in Orange, California (the "Arriola  
22 Property") for \$1.365 million. In 2004, Mr. Adams and  
23 Mr. Sepulveda executed a second written agreement consistent with  
24 the terms of the 2000 agreement. The 2004 agreement concerned

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25  
26 <sup>1</sup> Unless specified otherwise, all chapter and section  
27 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532,  
28 all "Rule" references are to the Federal Rules of Bankruptcy  
Procedure, and all "Civil Rule" references are to the Federal  
Rules of Civil Procedure.

1 the construction of a custom home for Robert and Liz Kofdarali in  
2 Anaheim, California (the "Kofdarali Property") for \$3.1 million.  
3 (For convenience, we will refer to the 2000 and 2004 agreements  
4 collectively as the "Partnership Agreement.")

5 **B. The construction defect lawsuits**

6 **1. The Kofdarali lawsuit**

7 In September 2007, the Kofdaralis filed suit (the "Kofdarali  
8 Lawsuit") against Mr. Adams and Mr. Sepulveda in state court for  
9 construction defects related to the Kofdarali Property.

10 Mr. Adams asserted that, around this time, he discovered that  
11 Mr. Sepulveda's liability insurance did not cover home  
12 construction; rather, it only covered home improvement and  
13 remodeling. Accordingly, Mr. Sepulveda's insurance carrier  
14 refused to defend or indemnify Mr. Sepulveda and Mr. Adams in the  
15 Kofdarali Lawsuit. Mr. Adams filed cross-claims against  
16 Mr. Sepulveda for indemnity, contribution, and other causes of  
17 action relating to fraud and misrepresentation.

18 The parties to the Kofdarali Lawsuit reached a settlement in  
19 September 2010 that excluded Mr. Adams's cross-claims against  
20 Mr. Sepulveda. Neither Mr. Sepulveda nor his insurer contributed  
21 to the costs of defense or the settlement.

22 **2. The Arriola lawsuit**

23 In May 2008, the Arriolas filed a state court lawsuit (the  
24 "Arriola Lawsuit") against Mr. Adams and Mr. Sepulveda for  
25 construction defects associated with the Arriola Property.  
26 Again, Mr. Sepulveda's insurance carrier denied coverage, and  
27 Mr. Adams filed cross-claims against Mr. Sepulveda for  
28 contribution and reimbursement.

1           **3. The settlement agreement**

2           In January 2011, Mr. Adams and Mr. Sepulveda entered into a  
3 settlement agreement ("Settlement Agreement") that resolved  
4 Mr. Adams's cross-claims against Mr. Sepulveda in the Arriola  
5 Lawsuit and the Kofdarali Lawsuit. The Settlement Agreement  
6 provided that: (1) Mr. Sepulveda would transfer real properties  
7 in Yorba Linda, California to Mr. Adams in consideration of the  
8 expenses Mr. Adams incurred in defending and settling the  
9 Kofdarali Lawsuit and defending the Arriola Lawsuit; (2) the  
10 parties would share equally the future costs of defense of the  
11 Arriola Lawsuit; and (3) the parties would share equally the  
12 costs of the judgment or settlement of the Arriola Lawsuit. In  
13 return, Mr. Adams agreed to dismiss the cross-claims and waive  
14 his rights to reimbursement from Mr. Sepulveda for all  
15 previously-incurred attorneys' fees, costs, and expenses.

16           **4. The Arriola Lawsuit judgment**

17           In September 2011, the referee in the Arriola Lawsuit  
18 awarded the Arriolas \$370,116.66 (the "Arriola Judgment") jointly  
19 and severally against Mr. Adams and Mr. Sepulveda. The state  
20 court entered the Arriola Judgment on October 17, 2011.

21           **C. Mr. Adams's state court action**

22           Mr. Sepulveda partially performed under the Settlement  
23 Agreement by transferring the Yorba Linda properties to  
24 Mr. Adams. However, he failed to pay his share of the Arriola  
25 Judgment and contribute to the post-January 2011 defense costs of  
26 the Arriola Lawsuit. Therefore, Mr. Adams paid the entire  
27 Arriola Judgment himself.

28           On January 27, 2012, Mr. Adams sued Mr. Sepulveda in state

1 court for fraud and breach of contract arising from  
2 Mr. Sepulveda's breach of the Settlement Agreement. In March, he  
3 obtained an order for contribution against Mr. Sepulveda in the  
4 Arriola Lawsuit for \$185,058.28 and recorded an abstract of  
5 judgment in that amount against Mr. Sepulveda's residence. In  
6 August, he recorded another abstract of judgment against  
7 Mr. Sepulveda's residence for \$287,517.20, this time in  
8 connection with the Kofdarali Lawsuit.

9 **D. Mr. Sepulveda's chapter 7 bankruptcy**

10 On September 23, 2013, Mr. Sepulveda filed his chapter 7  
11 petition.

12 On January 3, 2014, Mr. Adams filed his complaint to  
13 determine nondischargeability of debt under §§ 523(a)(2)(A) and  
14 (6). He requested a nondischargeable judgment in the amount of  
15 at least \$472,575.48.<sup>2</sup>

16 As to his § 523(a)(2)(A) claim, he alleged that  
17 Mr. Sepulveda committed fraud by making multiple false statements  
18 of material fact: (1) he falsely represented in 2000 that he had  
19 liability insurance coverage for the construction of the custom  
20 homes, despite knowing that his liability insurance covered only  
21 home remodeling; and (2) he promised in 2011 to pay half of the  
22 defense costs of the Arriola Lawsuit and subsequent judgment, but  
23 never had any intention to do so. Mr. Adams said that he was  
24 ignorant of the true facts and, had he known the truth about the  
25 lack of insurance, he would not have gone into business with

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26  
27 <sup>2</sup> By order dated July 9, 2014, the bankruptcy court  
28 dismissed Mr. Adams's § 523(a)(6) claim. That order is not the  
subject of this appeal.

1 Mr. Sepulveda; he also would not have entered into the Settlement  
2 Agreement if he had known that Mr. Sepulveda did not intend to  
3 comply fully with the terms of the settlement.

4 In advance of trial on Mr. Adams's § 523(a)(2)(A) claim, the  
5 parties submitted their respective trial briefs and declarations  
6 and a joint pretrial stipulation. Mr. Sepulveda agreed that he  
7 lacked insurance coverage for construction of the custom homes.  
8 However, he declared that he never represented to Mr. Adams that  
9 he maintained contractor's commercial general liability insurance  
10 and that Mr. Adams never expressed to him that liability  
11 insurance was important to him or was a requirement for agreeing  
12 to the joint venture. In any event, he said that his then-wife  
13 and office manager, Chelly Moore, handled all office duties and  
14 paperwork, including managing Sepulveda Builders's insurance  
15 coverage. He said that she had "complete autonomy" in obtaining  
16 and renewing liability insurance for the company and was solely  
17 responsible for ensuring proper coverage.

18 Mr. Sepulveda further stated that he fully intended to  
19 comply with the terms of the Settlement Agreement when he  
20 executed it. His financial condition deteriorated after he and  
21 Mr. Adams executed the Settlement Agreement due to his  
22 contentious and lengthy divorce proceedings and declining  
23 business income. He planned to borrow money to fulfill his  
24 obligations. He offered Mr. Adams \$300,000 in settlement of any  
25 amounts due on the Settlement Agreement, but Mr. Adams did not  
26 accept the offer.

27 At trial, Mr. Adams's counsel cross-examined Mr. Sepulveda  
28 about \$200,000 that he received from the sale of his residence in

1 January 2011. Mr. Sepulveda admitted that, although he received  
2 the funds around the time that he entered into the Settlement  
3 Agreement, he did not set aside any of the monies to pay for  
4 defense costs or judgment in the Arriola Lawsuit. Following  
5 trial, the bankruptcy court took the matter under advisement.

6 **E. The memorandum decision**

7 The bankruptcy court entered its memorandum of decision on  
8 July 5, 2016. It analyzed whether Mr. Sepulveda made a  
9 misrepresentation or engaged in fraudulent conduct in connection  
10 with the Partnership Agreement and the Settlement Agreement. It  
11 concluded that both agreements resulted from Mr. Sepulveda's  
12 misrepresentations or fraudulent actions.

13 The court found that Mr. Sepulveda misrepresented his  
14 construction liability coverage in order to induce Mr. Adams to  
15 enter into the Partnership Agreement. Mr. Adams discussed  
16 insurance coverage with Mr. Sepulveda and made clear that he was  
17 concerned with the possibility of future construction defect  
18 litigation. Mr. Sepulveda presented Mr. Adams with a certificate  
19 of general liability insurance and told him that the policy  
20 covered liability for "ground-up" construction of the custom  
21 homes.

22 The court also found that Mr. Sepulveda knew that he lacked  
23 proper liability insurance. The court pointed to Ms. Moore's  
24 testimony that Mr. Sepulveda instructed her to keep costs down  
25 and only maintain remodeling insurance and that she only filled  
26 out insurance applications at Mr. Sepulveda's direction. The  
27 court found Ms. Moore's testimony credible, while Mr. Sepulveda's  
28 testimony was "evasive and not credible."

1           The court further said that Mr. Sepulveda intended to  
2 deceive Mr. Adams when he represented that he had proper  
3 construction liability insurance. Ms. Moore testified that  
4 Mr. Sepulveda told her that he understood that Mr. Adams wanted  
5 construction liability insurance. However, the court said that  
6 Mr. Sepulveda "deliberated and conducted a cost-benefit analysis"  
7 and determined that he would save money by not obtaining the  
8 additional coverage.

9           The court found that Mr. Adams justifiably relied on  
10 Mr. Sepulveda's representations that he held construction  
11 liability insurance; Mr. Adams had no reason to believe that  
12 Mr. Sepulveda was lying about the insurance coverage.

13           The court determined that Mr. Sepulveda's misrepresentation  
14 was a direct and substantial cause of Mr. Adams's damages  
15 incurred during the Arriola Lawsuit. Because Mr. Adams relied on  
16 Mr. Sepulveda's representations, he was not covered by insurance  
17 when construction defects arose and had to pay for defense costs  
18 and damages in the Arriola Lawsuit.

19           Regarding the Settlement Agreement, the court said that  
20 Mr. Sepulveda lacked a present intent to perform or had a  
21 positive intent not to perform. The court did not find credible  
22 Mr. Sepulveda's testimony that he intended to perform and had the  
23 financial ability to do so.

24           The court found that Mr. Sepulveda knew or should have known  
25 that he could not perform under the Settlement Agreement, because  
26 he lacked the financial wherewithal to do so. Mr. Sepulveda was  
27 living off of his savings, his business income had declined by  
28 ninety-five percent, and he was involved in a contentious



1 divorce. He knew that the Settlement Agreement required him to  
2 pay for prospective defense costs, but he did not allocate any of  
3 the \$200,000 he received from the sale of his home toward the  
4 Arriola Lawsuit.

5 The court determined that the transfer of the Yorba Linda  
6 properties did not indicate an intent to perform; rather, the  
7 partial performance was just enough to allow Mr. Sepulveda to  
8 obtain a dismissal of Mr. Adams's cross-claims against him.  
9 Moreover, the court found that Mr. Sepulveda recklessly  
10 disregarded the truth of his representation that he intended to  
11 perform fully because he knew that he did not have sufficient  
12 assets and was not earning sufficient income to satisfy the  
13 Settlement Agreement.

14 The court found that Mr. Adams justifiably relied on  
15 Mr. Sepulveda's representations, even though, by the time he  
16 signed the Settlement Agreement, Mr. Adams knew that  
17 Mr. Sepulveda had misrepresented the status of his insurance  
18 coverage.

19 The court found that Mr. Sepulveda's misrepresentation was a  
20 substantial and important cause of the damages Mr. Adams  
21 incurred. It said that there was no dispute that, if Mr. Adams  
22 had known that Mr. Sepulveda did not intend to comply with the  
23 Settlement Agreement, he would not have agreed to it and could  
24 have continued to pursue his cross-claims against Mr. Sepulveda.

25 Regarding damages, the court granted Mr. Adams's request in  
26 full (excluding attorneys' fees). It awarded Mr. Adams damages  
27 for his costs of defending the Arriola Lawsuit and satisfying the  
28 Arriola Judgment, but subtracted the amount that Mr. Adams

1 recovered from the foreclosure sale of Mr. Sepulveda's residence:

2	Arriola Judgment:	\$370,116.55
	Arriola Lawsuit Defense:	\$195,199.91
3	Arriola Lawsuit Consultant Fees:	\$18,401.81
	State Court Action Fees/Costs:	\$94,993.43
4	<u>(Recovery from Sepulveda foreclosure):</u>	<u>(\$151,000.00)</u>
	<b>Total damages:</b>	<b>\$527,711.70</b>

5  
6 The court entered its judgment in the amount of \$527,711.70  
7 in favor of Mr. Adams, and Mr. Sepulveda timely appealed.

#### 8 JURISDICTION

9 The bankruptcy court had jurisdiction pursuant to 28 U.S.C.  
10 §§ 1334 and 157(b) (2) (I). We have jurisdiction under 28 U.S.C.  
11 § 158.

#### 12 ISSUE

13 Whether the bankruptcy court erred in awarding Mr. Adams  
14 \$527,711.70 and determining that the award was nondischargeable  
15 under § 523(a) (2) (A) .

#### 16 STANDARDS OF REVIEW

17 In bankruptcy discharge appeals, we review the bankruptcy  
18 court's findings of fact for clear error and conclusions of law  
19 de novo, and apply de novo review to mixed questions of law and  
20 fact. Oney v. Weinberg (In re Weinberg), 410 B.R. 19, 28 (9th  
21 Cir. BAP 2009), aff'd, 407 F. App'x 176 (9th Cir. 2010) (citation  
22 omitted). De novo review requires that we consider a matter  
23 anew, as if no decision had been rendered previously. United  
24 States v. Silverman, 861 F.2d 571, 576 (9th Cir. 1988).

25 We review the bankruptcy court's findings of fact for clear  
26 error. See Honkanen v. Hopper (In re Honkanen), 446 B.R. 373,  
27 378 (9th Cir. BAP 2011); see also Anastas v. Am. Sav. Bank  
28 (In re Anastas), 94 F.3d 1280, 1283 (9th Cir. 1996) ("A finding

1 of whether a requisite element of section [ ] 523(a)(2)(A) claim  
2 is present is a factual determination reviewed for clear  
3 error.”). “To be clearly erroneous, a decision must strike us as  
4 more than just maybe or probably wrong; it must . . . strike us  
5 as wrong with the force of a five-week-old, unrefrigerated dead  
6 fish.” Papio Keno Club, Inc. v. City of Papillion (In re Papio  
7 Keno Club, Inc.), 262 F.3d 725, 729 (8th Cir. 2001) (quoting  
8 Parts & Elec. Motors, Inc. v. Sterling Elec., Inc., 866 F.2d 228,  
9 233 (7th Cir. 1988)); see Anderson v. City of Bessemer City,  
10 470 U.S. 564, 573 (1985) (A factual finding is clearly erroneous  
11 if, after examining the evidence, the reviewing court “is left  
12 with the definite and firm conviction that a mistake has been  
13 committed.”). The bankruptcy court’s choice among multiple  
14 plausible views of the evidence cannot be clear error. United  
15 States v. Elliott, 322 F.3d 710, 714 (9th Cir. 2003).

16 “The bankruptcy court’s witness credibility findings are  
17 entitled to special deference, and are also reviewed for clear  
18 error.” In re Weinberg, 410 B.R. at 28 (citing Rule 8013;  
19 Anderson, 470 U.S. at 573).

20 “[W]e review the legal standards used in the calculation of  
21 damages de novo.” R.B. Matthews, Inc. v. Transamerica Transp.  
22 Servs., Inc., 945 F.2d 269, 272 (9th Cir. 1991) (citing Galindo  
23 v. Stody Co., 793 F.2d 1502, 1516 (9th Cir. 1986)); see Oswalt  
24 v. Resolute Indus., Inc., 642 F.3d 856, 859-60 (9th Cir. 2011)  
25 (“We review de novo the legal conclusion that damages are  
26 available and review for clear error factual findings underlying  
27 the damages award.”); Ambassador Hotel Co. v. Wei-Chuan Inv.,  
28 189 F.3d 1017, 1024 (9th Cir. 1999) (“The district court’s

1 computation of damages following a bench trial is reviewed for  
2 clear error. However, the issue of whether the district court  
3 applied the correct legal standard in computing damages receives  
4 de novo review.”) (citations omitted).

#### 5 DISCUSSION

6 **A. The bankruptcy court correctly determined that Mr. Sepulveda**  
7 **committed fraud in connection with the Partnership Agreement**  
8 **and the Settlement Agreement.**

9 Section 523(a)(2)(A) excepts from discharge a debt resulting  
10 from “false pretenses, a false representation, or actual fraud,  
11 other than a statement respecting the debtor’s or an insider’s  
12 financial condition.” Regarding the elements necessary to prove  
13 a § 523(a)(2)(A) claim, we have said:

14 A creditor seeking to except a debt from discharge  
15 based on fraud bears the burden of proof by a  
16 preponderance of the evidence to establish each of five  
17 elements: (1) misrepresentation, fraudulent omission or  
18 deceptive conduct; (2) knowledge of the falsity or  
19 deceptiveness of such representation(s) or omission(s);  
20 (3) an intent to deceive; (4) justifiable reliance by  
21 the creditor on the subject representation(s) or  
22 conduct; and (5) damage to the creditor proximately  
23 caused by its reliance on such representation(s) or  
24 conduct.

25 Sachan v. Huh (In re Huh), 506 B.R. 257, 262 (9th Cir. BAP 2014)  
26 (citing Ghomeshi v. Sabban (In re Sabban), 600 F.3d 1219, 1222  
27 (9th Cir. 2010); In re Weinberg, 410 B.R. at 35).

28 The court found that Mr. Adams satisfied all of these  
elements for both the Partnership Agreement and the Settlement  
Agreement. On appeal, Mr. Sepulveda argues that the bankruptcy  
court erred in finding that he had a fraudulent intent or  
fraudulently induced Mr. Adams to enter into the Settlement  
Agreement. He fails to establish that the bankruptcy court  
committed clear error.

1           **1. Mr. Sepulveda does not appeal the court's finding of**  
2           **misrepresentation and fraud concerning the Partnership**  
3           **Agreement.**

3           In its memorandum decision, the bankruptcy court made clear  
4           that Mr. Sepulveda committed fraud concerning both the  
5           Partnership Agreement and the Settlement Agreement. It  
6           independently analyzed each agreement and determined that both  
7           satisfied the elements of § 523(a)(2)(A). Mr. Sepulveda's  
8           misrepresentations under either agreement form a sufficient basis  
9           to deny dischargeability of the debt.

10           But on appeal, Mr. Sepulveda does not challenge the court's  
11           findings regarding the Partnership Agreement. He focuses  
12           exclusively on the court's purported errors concerning the  
13           Settlement Agreement. On this basis alone, we can affirm the  
14           bankruptcy court's finding of fraud under § 523(a)(2)(A).

15           **2. The bankruptcy court did not err in finding that**  
16           **Mr. Sepulveda committed fraud regarding the Settlement**  
17           **Agreement.**

17           Mr. Sepulveda argues that the bankruptcy court erred in  
18           finding that he had an intent to deceive Mr. Adams and that he  
19           fraudulently induced Mr. Adams to enter into the Settlement  
20           Agreement. We discern no error.

21           All of Mr. Sepulveda's arguments challenge the bankruptcy  
22           court's factual findings and its findings of credibility. We  
23           review these determinations for clear error, giving special  
24           deference to the bankruptcy court's credibility findings. See  
25           In re Weinberg, 410 B.R. at 28.

26           **a. Fraudulent intent**

27           Mr. Sepulveda argues that the court erred by finding,  
28           despite his partial performance, that he did not intend to

1 perform fully under the Settlement Agreement. He claims that the  
2 court erroneously interpreted his financial situation and that he  
3 could have performed on the day the Settlement Agreement was  
4 executed.

5 But the court considered a number of factors when finding  
6 that Mr. Sepulveda knew that he could not satisfy the terms of  
7 the Settlement Agreement. It found that Mr. Sepulveda could not  
8 fully perform because of: (1) Mr. Sepulveda's lack of income  
9 caused by a ninety-five percent decline in his income in the two  
10 years prior to the execution of the Settlement Agreement; (2) his  
11 need to borrow \$40,000 from his parents, but his ability to only  
12 pay back \$20,000; (3) his lengthy, contentious, and expensive  
13 divorce proceedings; (4) his inability to work due to childcare  
14 responsibilities caused by the divorce; and (5) his failure to  
15 set aside for the Arriola Lawsuit any of the \$200,000 received  
16 from the sale of his home. It also said that, even if  
17 Mr. Sepulveda did not have an affirmative intention to not  
18 perform, he acted with reckless disregard for the truth. The  
19 court found that Mr. Sepulveda's testimony was not credible. The  
20 court made proper factual findings supported by the record and  
21 did not clearly err.

22 Mr. Sepulveda argues that his partial performance evidenced  
23 his good faith, because he otherwise had no reason to surrender  
24 the Yorba Linda properties. The bankruptcy court correctly  
25 observed that Mr. Sepulveda surrendered the Yorba Linda  
26 properties to Mr. Adams so that he could obtain a quick dismissal  
27 of Mr. Adams's cross-claims against him in the Arriola Lawsuit.  
28 The court also stated that Mr. Sepulveda's testimony on this

1 topic was not credible. Again, we do not discern any clear  
2 error.

3 Mr. Sepulveda argues that the court should not have relied  
4 on his ex-wife's testimony. But the court made specific findings  
5 that Ms. Moore's testimony was credible, while Mr. Sepulveda's  
6 testimony was not. Mr. Sepulveda does not convince us that these  
7 findings were clearly erroneous.

8 **b. Fraudulent inducement**

9 Mr. Sepulveda argues that the bankruptcy court erred in  
10 finding that he fraudulently induced Mr. Adams to enter into the  
11 Settlement Agreement. We reject this argument.

12 He contends that the bankruptcy court conflated its analysis  
13 of the Partnership Agreement with the Settlement Agreement, but  
14 does not explain how the bankruptcy court confused the issues.  
15 He says that the court "relied on previous inaccuracies in  
16 testimony in assuming that Appellant did not intend to perform  
17 when the Settlement Agreement was made." But there is no  
18 indication that the court assumed fraudulent intent in connection  
19 with the Settlement Agreement based on its analysis of the  
20 Partnership Agreement. Nor does Mr. Sepulveda identify the  
21 supposed "previous inaccuracies in testimony." We find no error.

22 Mr. Sepulveda also argues that he acted in good faith  
23 because the Kofdarali Lawsuit settled without further litigation  
24 and he offered to satisfy his remaining obligations under the  
25 Settlement Agreement for \$300,000. But neither of these factors  
26 has anything to do with his intent when he entered into the  
27 Settlement Agreement. The disposition of the Kofdarali Lawsuit  
28 has little or no bearing on his agreement to pay for fees, costs,

1 and judgment in the Arriola Lawsuit. Moreover, Mr. Adams was not  
2 obligated to accept the \$300,000 settlement offer.

3 Finally, Mr. Sepulveda argues that the court erred by  
4 finding that Mr. Adams had met his burden as to each element of  
5 the § 523(a)(2)(A) claim because Mr. Adams did not provide  
6 adequate evidence. Mr. Sepulveda fails to expand on this  
7 argument. As the bankruptcy court discussed extensively,  
8 Mr. Adams provided sufficient evidence to prevail on each element  
9 of his claim.

10 Therefore, we hold that the bankruptcy court did not clearly  
11 err in finding that Mr. Sepulveda intended to defraud Mr. Adams.

12 **B. The bankruptcy court did not err in calculating Mr. Adams's**  
13 **damages.**

14 Mr. Sepulveda argues that the bankruptcy court erred in  
15 calculating the damages award. His argument is not a model of  
16 clarity, but he appears to contend that the bankruptcy court  
17 (1) should have applied the profit that Mr. Adams received from  
18 the construction of the Arriola Property against the damages  
19 award and (2) should have charged him for only half of the  
20 Arriola Lawsuit costs and judgment. We disagree on both counts.

21 **1. Mr. Sepulveda failed to raise the purported error**  
22 **regarding Mr. Adams's profit from the sale of the**  
23 **Arriola Property with the bankruptcy court.**

24 Mr. Sepulveda did not specifically argue to the bankruptcy  
25 court that he must be credited for the profit that Mr. Adams  
26 received from the Arriola Property. Absent extraordinary  
27 circumstances (none of which exist in this case), we will only  
28 consider on appeal issues that were distinctly raised before the  
bankruptcy court. See Yamada v. Nobel Biocare Holding AG,



1 825 F.3d 536, 543 (9th Cir. 2016) (“[g]enerally, an appellate  
2 court will not hear an issue raised for the first time on  
3 appeal”); O’Rourke v. Seaboard Sur. Co. (In re E.R. Fegert,  
4 Inc.), 887 F.2d 955, 957 (9th Cir. 1989) (“appellate courts will  
5 not consider arguments that are not ‘properly raise[d]’ in the  
6 trial courts”); Ezra v. Seror (In re Ezra), 537 B.R. 924, 932  
7 (9th Cir. BAP 2015) (“Ordinarily, federal appellate courts will  
8 not consider issues not properly raised in the trial courts.”).  
9 An issue “must be raised sufficiently for the trial court to rule  
10 on it” in the first instance. In re E.R. Fegert, Inc., 887 F.2d  
11 at 957.

12 Further, Mr. Sepulveda offered no evidence to establish the  
13 amount, if any, of profit that Mr. Adams realized from the sale  
14 of the Arriola Property. Mr. Sepulveda only uses an estimate or  
15 example (“e.g. <\$300,000>”) of Mr. Adams’s profit.

16 Therefore, we will not consider Mr. Sepulveda’s argument  
17 that the bankruptcy court should have reduced the damages award  
18 by the amount of Mr. Adams’ alleged profit on the Arriola  
19 project.<sup>3</sup>

20 **2. The bankruptcy court did not err in compensating**  
21 **Mr. Adams for the full litigation costs.**

22 Mr. Sepulveda argues that the award overcompensates  
23 Mr. Adams. He says that the court should have awarded Mr. Adams  
24 only half of the costs of the Arriola Lawsuit. We disagree.

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25  
26 <sup>3</sup> Even if we were to consider this argument, we would affirm  
27 the bankruptcy court’s decision. The measure of damages which  
28 the bankruptcy court correctly selected, and which we discuss in  
the following section, does not require any reduction for such  
profits.

1 In this case, Mr. Adams offered a calculation of his damages  
2 without much explanation, and the bankruptcy court accepted it  
3 without much discussion. We may affirm, however, on any basis  
4 supported by the record, see Caviata Attached Homes, LLC v. U.S.  
5 Bank, N.A., 481 B.R. 34, 44 (9th Cir. BAP 2012), and the record  
6 supports that damage award.

7 Under California law, “[a] plaintiff fraudulently induced  
8 to enter into a contract has the power to elect to affirm the  
9 contract and sue for damages resulting from the fraud; the  
10 plaintiff may recover out-of-pocket damages in addition to  
11 benefit-of-the-bargain damages.” Wang v. Massey Chevrolet,  
12 97 Cal. App. 4th 856, 872 (2002); see Ifeorah v. Flegal  
13 (In re Ifeorah), BAP No. CC-14-1363-KuDTa, 2015 WL 3895502, at \*8  
14 (9th Cir. BAP June 24, 2015), aff’d in part, rev’d in part,  
15 2017 WL 1046203 (9th Cir. Mar. 20, 2017) (“The overarching goal  
16 of compensatory tort damages is to make the plaintiff whole. In  
17 order to accomplish this goal, the trial court typically may  
18 consider out-of-pocket damages, benefit-of-the-bargain damages  
19 and other measures of damages.”). “The benefit-of-the-bargain  
20 measure places a defrauded plaintiff in the position he would  
21 have enjoyed had the false representation been true, awarding him  
22 the difference in value between what he actually received and  
23 what he was fraudulently led to believe he would receive.” Henry  
24 v. Lehman Commercial Paper, Inc. (In re First All. Mortg. Co.),  
25 471 F.3d 977, 1001 (9th Cir. 2006) (citations omitted).  
26 Conversely, “[t]he out-of-pocket measure restores a plaintiff to  
27 the financial position he enjoyed prior to the fraudulent  
28 transaction, awarding the difference in actual value between what

1 the plaintiff gave and what he received." Id.

2 A plaintiff may choose to affirm or rescind a contract  
3 procured by fraud. Under California law, "[i]t is settled law  
4 that if a defrauded party is induced by false representations to  
5 execute a contract, the party has the option of rescinding the  
6 contract or affirming it and recovering damages for the fraud."  
7 Persson v. Smart Inventions, Inc., 125 Cal. App. 4th 1141, 1153  
8 (2005) (citation omitted); see Denevi v. LGCC, 121 Cal. App. 4th  
9 1211, 1220 (2004) ("To be sure, the law requires one who has been  
10 defrauded into entering into a contract to choose either to  
11 'affirm or rescind' the contract.").<sup>4</sup>

12  
13 <sup>4</sup> When seeking to rescind a contract for fraud, the  
14 defrauded party:

15 may rescind a contract "[i]f the consent of the party  
16 rescinding, or of any party jointly contracting with  
17 him, was given by mistake, or obtained through duress,  
18 menace, fraud, or undue influence, exercised by or with  
19 the connivance of the party as to whom he rescinds, or  
20 of any other party to the contract jointly interested  
21 with such party." Cal. Civ. Code § 1689. Where, as  
22 here, a party seeks to rescind a contract due to  
23 alleged fraud in the inducement, the party must allege  
24 that he or she justifiably relied on misrepresentations  
made with the intent to induce him or her to execute  
the contract. Wilke v. Coinway, Inc., 257 Cal. App. 2d  
126, 136 (1967). Additionally, the party must allege  
that but for his or her reliance on the  
misrepresentations, the contract would not have been  
executed. Merced County Mut. Fire Ins. Co. v. State of  
California, 233 Cal. App. 3d 765, 772 (1991).

25 Eisenberg v. Citibank N.A., No. 2:13-CV-01814CAS-JPRx, 2016 WL  
26 3410171, at \*3 (C.D. Cal. June 15, 2016). The bankruptcy court  
27 made appropriate findings that (1) Mr. Sepulveda obtained  
28 Mr. Adams's assent to the Partnership Agreement and Settlement  
Agreement by fraud; (2) Mr. Adams justifiably relied on

(continued...)

1           It is important to recall that there are two relevant  
2 contracts in this case, and that the bankruptcy court found that  
3 Mr. Sepulveda committed fraud in connection with both of the  
4 contracts.

5           The first contract is the Partnership Agreement, pursuant to  
6 which the parties developed and sold the Arriola Property and the  
7 Kofdarali Property. The bankruptcy court found (and we have  
8 affirmed the finding) that Mr. Sepulveda defrauded Mr. Adams in  
9 connection with Partnership Agreement by misrepresenting the  
10 status of his insurance. The bankruptcy court's award is  
11 consistent with the "benefit of the bargain" measure of damages.  
12 (Although Mr. Adams did not explicitly elect to affirm the  
13 contracts and sue for damages, the damages calculation he  
14 presented to the bankruptcy court makes sense only if he made  
15 that election.) If Mr. Sepulveda had proper liability insurance  
16 as he represented, Mr. Adams (1) would have received his share of  
17 the profits from the sale of the Arriola Property and (2) would  
18 not have had to pay any of the costs of resolving the Arriola  
19 Lawsuit. To put Mr. Adams in the position he would have occupied  
20 had Mr. Sepulveda told the truth about his insurance,  
21 Mr. Sepulveda must pay Mr. Adams all of the costs that Mr. Adams  
22 paid to resolve the Arriola Lawsuit. In other words, Mr. Adams  
23 is entitled to both the profit and all of the litigation and  
24 judgment costs arising from the Arriola Lawsuit.

25           The second contract is the Settlement Agreement. As noted

26 \_\_\_\_\_  
27           <sup>4</sup>(...continued)  
28 Mr. Sepulveda's misrepresentations; and (3) if Mr. Adams had  
known the truth, he would not have executed the contracts.

1 above, the bankruptcy court found (and we have affirmed the  
2 finding) that Mr. Sepulveda defrauded Mr. Adams in connection  
3 with the Settlement Agreement because Mr. Sepulveda never  
4 intended to perform all of his obligations under that agreement.  
5 Based on this fraud, Mr. Adams could elect to rescind the  
6 Settlement Agreement (and his damages calculation only makes  
7 sense on that basis). The rescission of the Settlement Agreement  
8 means that the 50/50 sharing of expenses under that agreement  
9 became inoperative.

10 Mr. Sepulveda argues that the damages award was punitive in  
11 nature. This argument has no support. The bankruptcy court did  
12 not award Mr. Adams punitive damages. All of the damages are  
13 compensatory in nature.

14 Therefore, the bankruptcy court did not err in calculating  
15 damages awarded to Mr. Adams.

#### 16 **CONCLUSION**

17 The bankruptcy court did not err in determining that  
18 Mr. Sepulveda's nondischargeable debt to Mr. Adams totaled  
19 \$527,711.70. Therefore, we AFFIRM.

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