

JUL 14 2017

NOT FOR PUBLICATION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

In re:	)	BAP No.	NC-16-1070-FBJu
	)		
JAMES PAUL GARRETT,	)	Bk. No.	14-41630
	)		
Debtor.	)	Adv. Pro.	14-04090
	)		
NOBANTU ANKOANDA,	)		
	)		
Appellant,	)		
	)		
v.	)	<b>MEMORANDUM*</b>	
	)		
JAMES PAUL GARRETT,	)		
	)		
Appellee.	)		
	)		

Submitted Without Argument on June 22, 2017

Filed - July 14, 2017

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

Honorable Charles D. Novak, Bankruptcy Judge, Presiding

Appearances: David L. Olson on brief for appellant Nobantu Ankoanda; appellee James Paul Garrett, pro se, on brief.

Before: FARIS, BRAND, and JURY, 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 Appellant Nobantu Ankoanda appeals from the bankruptcy  
3 court's judgment in favor of chapter 7<sup>1</sup> debtor James Paul Garrett  
4 on her nondischargeability claim. Ms. Ankoanda failed to make  
5 any reasonable effort to carry her burden of proof under  
6 § 523(a)(2), and she waived any claims under §§ 523(a)(4) and  
7 (6). Accordingly, we AFFIRM.

8 **FACTUAL BACKGROUND**

9 Mr. Garrett, an attorney licensed to practice law in  
10 California, provided legal services to Ms. Ankoanda regarding  
11 trust matters. Around 2004, Mr. Garrett told Ms. Ankoanda that  
12 he needed \$100,000 for a down payment to purchase real property  
13 located in Oakland, California (the "Oakland Property").

14 The parties did not document the transaction, and  
15 Ms. Ankoanda later gave conflicting testimony about its nature.  
16 At one point, she testified that the money was payment for  
17 Mr. Garrett's legal services, but she also said that it was a  
18 "temporary loan." Whatever the case, Ms. Ankoanda borrowed money  
19 against her real property located in East Palo Alto, California  
20 and used \$100,000 as a down payment to purchase the Oakland  
21 Property. She took title to the Oakland Property.

22 According to Ms. Ankoanda, she was supposed to transfer the  
23 Oakland Property to Mr. Garrett's "business associates," who  
24 would refinance the Oakland Property and use the proceeds to  
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.

1 repay Ms. Ankoanda's loan. The business associates took title to  
2 the Oakland Property, refinanced it, and got \$115,000 in cash.  
3 However, Ms. Ankoanda said that she only received \$10,000 from  
4 the transaction, while Mr. Garrett kept the remainder.  
5 Mr. Garrett currently resides at the Oakland Property.

6 In 2007, Ms. Ankoanda sued Mr. Garrett and others in state  
7 court (the "State Court Action") for fraud. On the day of trial,  
8 before the trial court received any testimony, Ms. Ankoanda and  
9 Mr. Garrett reached a settlement of the State Court Action.  
10 Mr. Garrett agreed to make a lump sum payment of \$200,000 to  
11 Ms. Ankoanda within a year. He agreed to sign a promissory note  
12 and a deed of trust on the Oakland Property.<sup>2</sup>

13 Mr. Garrett apparently never signed a promissory note or  
14 deed of trust and failed to pay the debt when due. Ms. Ankoanda  
15 filed a second complaint against him in state court to enforce  
16 the settlement.

17 On March 16, 2014, Mr. Garrett filed a chapter 7 petition in  
18 the bankruptcy court for the Northern District of California.  
19 Ms. Ankoanda initiated an adversary proceeding against  
20 Mr. Garrett. In her complaint, she offered a brief recitation of  
21 the facts and requested that the court deny dischargeability of  
22 his debt to her. She did not identify any particular statutory  
23 authority.

24 On January 20, 2016, the bankruptcy court held a trial on  
25 Ms. Ankoanda's complaint. Ms. Ankoanda was the only witness; as

---

26  
27 <sup>2</sup> The parties did not reduce the settlement agreement to  
28 writing. The terms of the settlement agreement were orally  
placed on the record before the state court.

1 the bankruptcy court noted, her testimony was difficult to  
2 follow. She failed to identify Mr. Garrett's so-called "business  
3 associates" and gave conflicting testimony regarding the nature  
4 of her transaction with Mr. Garrett, her contact with the  
5 business associates, and what representations might be  
6 attributable to Mr. Garrett or the business associates. She did  
7 not introduce any documents evidencing any of the relevant  
8 transactions. Mr. Garrett did not testify.

9 At the conclusion of Ms. Ankoanda's testimony, her counsel  
10 stated, in response to the bankruptcy court's questions, that she  
11 relied solely on § 523(a)(2).

12 The court asked both parties to discuss the elements of a  
13 § 523(a)(2) claim. Both parties repeatedly referred to the  
14 settlement in the State Court Action, but the court explained  
15 that the settlement was not sufficient on its own to prove fraud.  
16 When neither Ms. Ankoanda's counsel nor Mr. Garrett could  
17 satisfactorily answer the court's questions, it commented, "Does  
18 anyone understand what a 523(a)(2) claim is here? I'm beginning  
19 to suspect not." It questioned why neither party had provided  
20 evidence to substantiate their respective positions and stated,  
21 "I'm just, again, I guess expressing some frustration here at the  
22 level of evidence that's been presented."

23 On February 2, 2016, the bankruptcy court issued its  
24 Decision After Trial. It held that Ms. Ankoanda did not meet her  
25 burden of proof regarding § 523(a)(2)(A) because she failed to  
26 "demonstrate by a preponderance of the evidence exactly what  
27 representations Garrett made to her regarding repayment of the  
28 loan (in contrast to her testimony regarding the representations

1 made by the 'business associates'), or the exact nature of  
2 [Mr.] Garrett's relationship with his alleged 'business  
3 associates.'" It found her testimony "inconsistent at best" and  
4 stated that it could not determine if Mr. Garrett should be held  
5 liable for the business associates' statements.

6 The bankruptcy court also held that Ms. Ankoanda's judicial  
7 estoppel argument (contending that Mr. Garrett was estopped from  
8 denying the facts that she alleged in the State Court Action)  
9 failed because Mr. Garrett had consistently denied liability in  
10 both the state court and bankruptcy court. The bankruptcy court  
11 also ruled that issue preclusion did not apply.

12 The bankruptcy court issued its judgment in favor of  
13 Mr. Garrett on February 2, 2016, and Ms. Ankoanda timely  
14 appealed.

#### 15 **JURISDICTION**

16 The bankruptcy court had jurisdiction pursuant to 28 U.S.C.  
17 §§ 1334 and 157(b)(2)(I). We have jurisdiction under 28 U.S.C.  
18 § 158.

#### 19 **ISSUE**

20 Whether the bankruptcy court erred in determining that  
21 Mr. Garrett's obligation to Ms. Ankoanda was not excepted from  
22 discharge under § 523(a)(2).

#### 23 **STANDARDS OF REVIEW**

24 We review the bankruptcy court's findings of fact after a  
25 trial for clear error and conclusions of law de novo, and apply  
26 de novo review to mixed questions of law and fact. Oney v.  
27 Weinberg (In re Weinberg), 410 B.R. 19, 28 (9th Cir. BAP 2009),  
28 aff'd, 407 F. App'x 176 (9th Cir. 2010) (citation omitted).

1 De novo review requires that we consider a matter anew, as if no  
2 decision had been rendered previously. United States v.  
3 Silverman, 861 F.2d 571, 576 (9th Cir. 1988).

4 We review the bankruptcy court's findings of fact for clear  
5 error. See Honkanen v. Hopper (In re Honkanen), 446 B.R. 373,  
6 378 (9th Cir. BAP 2011); see also Anastas v. Am. Sav. Bank  
7 (In re Anastas), 94 F.3d 1280, 1283 (9th Cir. 1996) ("A finding  
8 of whether a requisite element of section [ ] 523(a)(2)(A) claim  
9 is present is a factual determination reviewed for clear  
10 error."). "To be clearly erroneous, a decision must strike us as  
11 more than just maybe or probably wrong; it must . . . strike us  
12 as wrong with the force of a five-week-old, unrefrigerated dead  
13 fish." Papio Keno Club, Inc. v. City of Papillion (In re Papio  
14 Keno Club, Inc.), 262 F.3d 725, 729 (8th Cir. 2001) (quoting  
15 Parts & Elec. Motors, Inc. v. Sterling Elec., Inc., 866 F.2d 228,  
16 233 (7th Cir. 1988)); see Anderson v. City of Bessemer City, 470  
17 U.S. 564, 573 (1985) (A factual finding is clearly erroneous if,  
18 after examining the evidence, the reviewing court "is left with  
19 the definite and firm conviction that a mistake has been  
20 committed."). The bankruptcy court's choice among multiple  
21 plausible views of the evidence cannot be clear error. United  
22 States v. Elliott, 322 F.3d 710, 714 (9th Cir. 2003).

## 23 DISCUSSION

### 24 A. Ms. Ankoanda failed to carry her burden of proof under 25 § 523(a)(2).

26 Section 523(a)(2)(A) excepts from discharge any debt for  
27 money, property, services, or credit obtained by false pretenses,  
28

1 false representations, or actual fraud.<sup>3</sup> Ms. Ankoanda argues  
2 that Mr. Garrett's \$200,000 debt is nondischargeable under  
3 § 523(a)(2)(A) because of his allegedly fraudulent statements.  
4 She does not articulate any reversible error.

5 Ms. Ankoanda did not come close to meeting her burden of  
6 proof at trial. At most, she proved that Mr. Garrett promised to  
7 pay her \$200,000 and to sign a promissory note and deed of trust  
8 but did none of those things. As the bankruptcy court correctly  
9 observed, she did not prove that Mr. Garrett made any  
10 representations to her or that any representations made by the  
11 "business associates" were attributable to him. We also note  
12 that she offered no evidence at all, direct or circumstantial,  
13 supporting any of the other elements of § 523(a)(2)(A).

14 In sum, there was a complete failure of proof. The  
15 bankruptcy court did not err.

16  

---

17 <sup>3</sup> To establish fraud under § 523(a)(2)(A), the creditor must  
18 prove each of the following elements by a preponderance of the  
19 evidence:

- 20 (1) the debtor made . . . representations;
- 21 (2) that at the time he knew they were false;
- 22 (3) that he made them with the intention and purpose of  
23 deceiving the creditor;
- 24 (4) that the creditor relied on such representations;  
[and]
- 25 (5) that the creditor sustained the alleged loss and  
26 damage as the proximate result of the  
27 misrepresentations having been made.

28 Ghomeshi v. Sabban (In re Sabban), 600 F.3d 1219, 1222 (9th Cir.  
2010) (citations omitted).

1 **B. Ms. Ankoanda cannot rely on judicial estoppel or issue**  
2 **preclusion.**

3 Ms. Ankoanda argues that the settlement of the State Court  
4 Action was sufficient to sustain her nondischargeability claim.  
5 She is wrong.

6 The legal basis for Ms. Ankoanda's argument was unclear at  
7 best. In her trial brief, she invoked judicial estoppel; in her  
8 oral argument at trial, she argued for issue preclusion;  
9 elsewhere, she referred to "collateral judicial estoppel," a  
10 doctrine unknown to us.

11 We agree with the bankruptcy court that Ms. Ankoanda argued  
12 for issue preclusion, rather than judicial estoppel. But she  
13 could not prevail under either doctrine.

14 The doctrine of judicial estoppel is informed by several  
15 factors: (1) whether a party's later position is clearly  
16 inconsistent with its earlier position; (2) whether the party has  
17 succeeded in persuading a court to accept that party's earlier  
18 position, so that judicial acceptance of an inconsistent position  
19 in a later proceeding would create the perception that either the  
20 first or the second court was misled; and (3) whether the party  
21 seeking to assert an inconsistent position would derive an unfair  
22 advantage or impose an unfair detriment on the opposing party if  
23 not estopped. Ah Quin v. Cty. of Kauai Dep't of Transp.,  
24 733 F.3d 267, 270 (9th Cir. 2013).<sup>4</sup> Mr. Garrett never changed  
25

---

26 <sup>4</sup> Federal courts apply federal principles of judicial  
27 estoppel, even when based on statements made in other tribunals.  
28 Rissetto v. Plumbers & Steamfitters Local 343, 94 F.3d 597, 603  
(9th Cir. 1996).



1 his position; he always denied liability to Ms. Ankoanda. His  
2 agreement to pay her in the settlement agreement did not include  
3 an admission of any facts.<sup>5</sup> Further, he was not successful in  
4 the State Court Action. He agreed to pay \$200,000 to settle  
5 claims arising out of a \$100,000 loan, which is hardly a  
6 favorable outcome for him, and the state court did not determine  
7 that any of his assertions were true.

8 Similarly, issue preclusion did not apply. That doctrine  
9 comes into play only when: (1) the issues to be precluded are  
10 identical to the ones decided in the prior proceeding; (2) the  
11 issues were actually litigated in the prior proceeding; (3) the  
12 issues were necessarily decided; (4) the decision was final and  
13 on the merits; and (5) the party to be precluded was identical to  
14 or in privity with a party to the prior proceeding. See Lopez v.  
15 Emergency Serv. Restoration, Inc. (In re Lopez), 367 B.R. 99, 104  
16 (9th Cir. BAP 2007) (applying California law). Ms. Ankoanda  
17 failed to offer evidence that the state court issued a judgment,  
18 or that any issues were litigated or decided.

19 **C. Ms. Ankoanda waived her claims of nondischargeability under**  
20 **§§ 523(a) (4) and (6) at trial.**

21 Ms. Ankoanda argues that her claims are not dischargeable  
22

---

23 <sup>5</sup> Ms. Ankoanda seems to think that, because the parties  
24 agreed to settle, all of her allegations in her State Court  
25 Action complaint are automatically admitted as true. She relies  
26 on City of Lodi v. Randtron, 118 Cal. App. 4th 337, 350 n.18  
27 (2004), and Rissetto, 94 F.3d at 605, but those cases are  
28 distinguishable because the parties had expressly stipulated to a  
fact in a prior case. The transcript of the State Court Action  
hearing to memorialize the settlement does not reveal that  
Mr. Garrett stipulated to or admitted anything.

1 under §§ 523(a)(4) and (6). We reject this argument.

2 Ms. Ankoanda waived these claims at trial. In response to  
3 the court's question, her counsel only identified § 523(a)(2) as  
4 the basis for her nondischargeability claim. Thus, she waived  
5 subsections (a)(4) and (6). See O'Rourke v. Seaboard Sur. Co.  
6 (In re E.R. Fegert, Inc.), 887 F.2d 955, 957 (9th Cir. 1989)  
7 ("appellate courts will not consider arguments that are not  
8 'properly raise[d]' in the trial courts").

9 Even if she had not waived those claims, she did not carry  
10 her burden of proof under either subsection.

11 Section § 523(a)(4) excepts from discharge any debt "for  
12 fraud or defalcation while acting in a fiduciary capacity,  
13 embezzlement, or larceny[.]" The creditor must establish:  
14 "(1) an express trust; (2) that the debt was caused by fraud or  
15 defalcation; and (3) that the debtor was a fiduciary to the  
16 creditor at the time the debt was created." Nahman v. Jacks  
17 (In re Jacks), 266 B.R. 728, 735 (9th Cir. BAP 2001) (citation  
18 omitted). Additionally, the creditor must establish a culpable  
19 state of mind. Bullock v. BankChampaign, N.A., 133 S. Ct. 1754,  
20 1757 (2013) (holding that defalcation requires a "culpable state  
21 of mind . . . involving knowledge of, or gross recklessness in  
22 respect to, the improper nature of the relevant fiduciary  
23 behavior"). Ms. Ankoanda did not offer any evidence that  
24 Mr. Garrett acted in a "fiduciary capacity" (i.e., as trustee of  
25 an express trust) or that he had the mental state required for  
26 "fraud or defalcation."

27 Section 523(a)(6) excepts from discharge debts for "willful  
28 and malicious injury" by the debtor to another. "Willful" means

1 that the debtor entertained "a subjective motive to inflict the  
2 injury or that the debtor believed that injury was substantially  
3 certain to occur as a result of his conduct." Petralia v.  
4 Jercich (In re Jercich), 238 F.3d 1202, 1208 (9th Cir. 2001).  
5 Maliciousness is defined as "(1) a wrongful act, (2) done  
6 intentionally, (3) which necessarily causes injury, and (4) done  
7 without just cause or excuse." Id. at 1209. Ms Ankoanda offered  
8 no direct or circumstantial evidence that Mr. Garrett intended to  
9 injure her or that he knew that his actions were substantially  
10 certain to injure her.

11 **CONCLUSION**

12 The bankruptcy court did not err. Accordingly, we AFFIRM.  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28