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NOT FOR PUBLICATION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

In re:)	BAP No. NC-16-1125-JuFB
)	
Regan Carroll,)	Bk. No. 3:14-bk-30726-HLB
)	
Debtor.)	Adv. No. 3:14-ap-03099-HLB
)	
Regan Carroll,)	
)	
Appellant,)	
)	
v.)	MEMORANDUM*
)	
Charles I. Jadallah,)	
)	
Appellee.)	
)	

Argued and Submitted on June 22, 2017
at San Francisco, California

Filed - July 21, 2017

Appeal from the United States Bankruptcy Court
Northern District of California (San Francisco)

Honorable Hannah L. Blumenstiel, Bankruptcy Judge, Presiding

Appearances: Michael B. Cohen argued for appellant Regan
Carroll; David M. Wiseblood argued for appellee
Charles Jadallah.

Before: JURY, FARIS, and BRAND, 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 8013-1.

1 Appellant Regan Carroll ("Debtor") appeals from the
2 bankruptcy court's judgment holding that part of a loan made by
3 Appellee Charles Jadallah ("Mr. Jadallah") to fund construction
4 of real property is nondischargeable under 11 U.S.C.
5 § 523(a)(2)(A).¹ For the reasons set forth below, we AFFIRM.

6 I. FACTS

7 Debtor is a contractor with extensive experience in
8 renovating real property. Debtor is president and sole
9 shareholder of The Redland Group, Inc. (the "Redland Group") and
10 DogPatch Real Estate Company ("DogPatch"). DogPatch acts as a
11 licensed contractor on renovation projects.² The Redland Group
12 acts as the managing entity on any project by receiving payments
13 from lenders and paying subcontractors for their services
14 performed. This appeal concerns two loans made by Mr. Jadallah
15 to the Redland Group for renovation of real property.

16 A. The 2006 First Loan

17 In 2006, Debtor was actively looking for funding from a
18 non-institutional lender to finish various renovation projects.
19 For this purpose, Debtor was introduced to Mr. Jadallah by Tim
20 Desmond ("Mr. Desmond"), a certified public accountant for both
21 men. Although Mr. Jadallah was not in the business of making
22 this type of loan, after the two met, Mr. Jadallah agreed to
23 loan the funds to the Redland Group which would be secured by a

24
25 ¹ Unless otherwise indicated, all chapter and section
26 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532, and
27 "Rule" references are to the Federal Rules of Bankruptcy
28 Procedure.

² As a realtor, Debtor also operates a real estate business
under DogPatch.

1 note and first deed of trust on real property located at 721 San
2 Bruno Avenue, San Francisco, California (the "Property"). The
3 terms of the loan included full payment after eighteen months in
4 the amount of \$600,000.00 plus interest (the "First Loan"). The
5 First Loan went solely to fund Debtor's then-operating
6 renovation projects, not including the Property.

7 After the First Loan term expired, due to some difficulties
8 in selling the newly renovated projects, Debtor did not pay back
9 the loan. The parties orally agreed to extend the payment
10 period of the First Loan on the same terms.

11 **B. The 2012 Second Loan**

12 Years later, in early 2012, Debtor sought an additional
13 loan from Mr. Jadallah. This loan was to fund the complete
14 remodel of the Property upon which Mr. Jadallah held the first
15 priority lien as a result of the unpaid balance on the First
16 Loan (the "Project").

17 On August 6, 2012, in order to convince Mr. Jadallah to
18 make the loan, Debtor provided him with detailed plans and a
19 proposed budget for the Project.³ Based on the proposed plans
20 and budget, Mr. Jadallah agreed to lend the Redland Group
21 \$704,860.00.⁴ According to the plans, the Project was to be
22 completed within six months. In making the loan, the parties
23 agreed that (a) Mr. Jadallah would merely finance the Project

25 ³ The Project plans were submitted to Mr. Jadallah through
26 Mr. Desmond. For many aspects of the Project, Mr. Desmond acted
27 as a conduit between Debtor and Mr. Jadallah.

28 ⁴ This amount included \$60,000.00 for unexpected
contingencies.

1 and would play no part in its construction, (b) the funds would
2 be paid by Mr. Jadallah to Redland Group in draws on an
3 "as-needed" basis, and (c) Mr. Desmond would review the
4 Project's books and expenditures prior to the funds being
5 released by Mr. Jadallah.

6 In total, Mr. Jadallah advanced \$700,000.00 from January
7 2013 through August 2013 to fund the Project (the "Second
8 Loan"). The Second Loan was comprised of the following seven
9 funding draws from Mr. Jadallah to the Redland Group at the
10 request of Debtor:

11 Second Loan Date	Second Loan Amount
12 January 22, 2013	\$50,000.00
13 January 29, 2013	\$150,000.00
14 March 7, 2013	\$100,000.00
15 May 14, 2013	\$200,000.00
16 May 28, 2013	\$100,000.00
17 August 9, 2013	\$50,000.00
18 August 9, 2013	\$50,000.00

19 In February 2013, shortly after construction began, Debtor
20 unilaterally changed the original plans without the consent or
21 knowledge of Mr. Jadallah or Mr. Desmond. Most significantly,
22 Debtor altered the plans from a two-car garage to a three-car
23 garage based on the belief that it would increase the Property
24 value substantially. Due to the changes, Debtor started
25 immediately going over budget and falling behind in payments to
26 the subcontractors. Debtor did not tell Mr. Jadallah or
27 Mr. Desmond about these changed circumstances at that time.

28 On June 19, 2013, Mr. Desmond first learned from Debtor
that the Project was over budget and could not be completed
without additional funding. On that same day, by e-mail,

1 Mr. Desmond informed Mr. Jadallah that the Project was over
2 budget by \$200,000.00, and needed additional funding of
3 \$100,000.00. As a result of these issues, in late June 2013,
4 Debtor and Mr. Jadallah agreed to meet at the Project, along
5 with their respective attorneys and Mr. Desmond, to perform a
6 walkthrough (the "June 2013 Meeting"). At the June 2013
7 Meeting, after looking at the state of the Project, Mr. Jadallah
8 agreed to fund the additional \$100,000.00 based on Debtor's
9 representations that all subcontractors had been paid and the
10 funds would be sufficient to complete the rest of the work.
11 Shortly thereafter, Debtor ran out of funds and walked off the
12 Project, never completing the promised work.

13 Although he represented otherwise, beginning in March 2013,
14 Debtor failed to pay various subcontractors for the work
15 performed on the Project. According to the record, Debtor
16 failed to pay (a) Seosamh O'Briain ("Mr. O'Briain") for
17 excavation work on various invoices submitted from February 2013
18 through June of 2013,⁵ (b) Stephen O'Kane ("Mr. O'Kane") for
19 framing work on an invoice submitted in April 2013, and
20 (c) Golden State Lumber for unpaid lumber. As a result of the
21 failure to pay the subcontractors, each recorded mechanics'
22 liens against the Property. At some point in 2015, Mr. Jadallah
23 started foreclosure proceedings on the Property, but such were
24 enjoined by the state court due to the recorded liens.

25
26 ⁵ Mr. O'Briain submitted invoices on January 30, 2013,
27 February 13, 2013, February 27, 2013, March 5, 2013, April 3,
28 2013, and June 5, 2013. Debtor did pay the January 30, 2013 and
the February 27, 2013 invoice.

1 Mr. Jadallah worked out a deal with the subcontractors to
2 release their liens and eventually foreclosed in July 2015.

3 **C. Bankruptcy proceedings**

4 On May 11, 2014, Debtor filed a chapter 7 petition. On
5 August 15, 2014, Mr. Jadallah filed a timely adversary complaint
6 seeking to except from discharge, under §§ 523(a)(2), (4) and
7 (6), the First Loan and the Second Loan in the total amount of
8 \$1,300,000.00. The basic theory of the complaint was that
9 Debtor personally made fraudulent representations that induced
10 Mr. Jadallah to make both loans to the Redland Group.⁶

11 On January 13, 2016, the bankruptcy court held a one day
12 trial on the §§ 523(a)(2) and (6) claims only. At the start of
13 trial, Mr. Jadallah withdrew his claims for nondischargeability
14 of the First Loan, thereby only prosecuting whether the Second
15 Loan, in the amount of \$700,000.00, was exempt from discharge.
16 Debtor, Mr. Jadallah, Mr. Desmond, and Nelson Cheung, the
17 contractor that took over the Project after foreclosure, all
18 testified. On April 13, 2016, the bankruptcy court issued a
19 memorandum decision finding that \$500,000.00 of the Second Loan
20 was nondischargeable under § 523(a)(2)(A). In accordance with
21 its memorandum opinion, the court entered a judgment in favor of
22 Mr. Jadallah on April 18, 2016.

23 In its decision, the court determined that \$500,000.00 of
24 the total \$700,000.00 was exempt from discharge based on two
25 separate claims.

26
27 ⁶ Debtor has not challenged on appeal that as the principal
28 of Redland Group he could be personally liable for fraudulent
representations made during the lending transaction.

1 The first claim was based on the nondisclosure of material
2 facts (the "Nondisclosure Claim"). The court held that Debtor
3 had a duty to disclose certain material facts that were known
4 exclusively to him but suppressed. Based on the testimony, the
5 court found that: (1) Mr. Jadallah and Mr. Desmond did not learn
6 of the changes to the Project until June 19, 2013, finding
7 Debtor's testimony to the contrary not credible; and (2) Debtor
8 alone knew that (a) certain subcontractors and suppliers were
9 not paid, (b) the Project could not be completed on budget, and
10 (c) major changes were made to the Project, including changing
11 the plans from a two-car garage to a three-car garage. After
12 finding that he had a duty to disclose, the court concluded that
13 Debtor asked for the March 7th, May 7th, and May 28th advances
14 even though he knew that the Project could not have been
15 completed for \$700,000.00 and he still owed subcontractors
16 payments from the plan changes, which were material facts that
17 he did not disclose. The court then inferred Debtor's intent to
18 deceive because he knew that if he disclosed these facts
19 earlier, Mr. Jadallah would not have made any further advances
20 toward completion of the Project.

21 Under this claim, the court held that the March 7th,
22 May 7th, and May 28th advances were nondischargeable. The court
23 did not include the January 23rd and January 29th advances
24 because there was no evidence that Debtor knew of the major
25 changes and default in January 2013. Likewise, the court did
26 not include the two August 9th advances because on June 19,
27 2013, Mr. Jadallah had become aware of the plan changes and that
28 additional funding was needed.

1 The second claim was based on an affirmative
2 misrepresentation (the "Misrepresentation Claim"). Although
3 Debtor testified to the contrary (which the court found not
4 credible), the court determined that at the June 2013 meeting
5 Debtor represented that (1) parts for the Project had been
6 ordered, (2) contractors had been paid, and (3) the remaining
7 \$100,000.00 would be sufficient to complete work on the Project.
8 The court found that Debtor knew these representations were
9 false when made because there were unpaid subcontractors and the
10 remaining two advances would not be sufficient to complete the
11 Project. From these facts the court inferred an intent to
12 defraud, as there was no other explanation why Debtor would make
13 such representations except to induce Mr. Jadallah to advance
14 the last \$100,000.00.

15 On April 27, 2016, Debtor filed a timely notice of appeal
16 of the bankruptcy court's judgment. On April 30, 2016, Debtor
17 filed a reconsideration motion and a request for judicial notice
18 in support thereof, seeking reconsideration of the memorandum
19 decision (the "Reconsideration Motion"). In large part, the
20 Reconsideration Motion requested that the court consider new
21 evidence of a post-trial sale of the Property by Mr. Jadallah,
22 after he had foreclosed and completed the renovation, and a new
23 damage theory, the "special benefits" doctrine, which would
24 mitigate damages.

25 On June 2, 2016, the bankruptcy court held a hearing on the
26 Reconsideration Motion. The court required supplemental
27 briefing on various issues that were not raised at trial,
28 including the post-trial sale and the "special benefits"

1 doctrine. After further briefing, on August 8, 2016, the court
2 entered an order denying the Reconsideration Motion. In doing
3 so, the court denied admission of any new evidence regarding the
4 post-trial sale of the Property and denied consideration of the
5 "special benefits" doctrine as an unraised affirmative defense.
6 The court stated that Debtor waived this argument by not raising
7 it at trial. Debtor did not introduce any evidence to support
8 such a theory at trial, and if the court did consider the
9 theory, it would not have resulted in a dollar for dollar
10 mitigation as Debtor argued in his motion.

11 Debtor did not file a notice of appeal or amended notice
12 including the Reconsideration Motion.

13 II. JURISDICTION

14 The bankruptcy court had jurisdiction pursuant to 28 U.S.C.
15 §§ 1334 and 157(b)(2)(A). We have jurisdiction under 28 U.S.C.
16 § 158.

17 III. ISSUE⁷

18 _____
19 ⁷ This memorandum does not address issues raised in the
20 complaint pertaining to the alter ego theory and the causes of
21 action under §§ 523(a)(4) and 523(a)(6), or Debtor's
22 Reconsideration Motion for which no notice of appeal was filed.
23 First, as to the § 523(a)(4) claim, prior to trial, on
24 October 22, 2014, the bankruptcy court granted, in part, Debtor's
25 motion for judgment on the pleadings which dismissed the cause of
26 action alleged under § 523(a)(4). Second, as to the alter ego
27 theory and the §523(a)(6) claim, Debtor does not include these
28 issues in his statement of issues on appeal or provide any
argument in his opening brief; therefore, these issues have been
waived. See Arpin v. Santa Clara Valley Transp. Agency, 261 F.3d
912, 919 (9th Cir. 2001) (asserting that issues not specifically
and distinctly argued in opening brief are waived). Last, as to
the Reconsideration Motion, although Debtor timely appealed the
bankruptcy court's judgment, he did not file a new notice of
(continued...)

1 views of the evidence are possible, the trial judge's choice
2 between them cannot be clearly erroneous. Hansen v. Moore
3 (In re Hansen), 368 B.R. 868, 874-75 (9th Cir. BAP 2007). We
4 give findings of fact based on credibility particular deference.
5 Id.

6 V. DISCUSSION

7 A. Motion to Strike

8 During the pendency of this appeal, Mr. Jadallah filed a
9 motion to dismiss or, in the alternative, to strike document
10 numbers 6 and 11 in the record on appeal on the grounds that the
11 documents were not part of the record before the bankruptcy
12 court at trial. On November 7, 2016, a motions panel entered an
13 order that denied the motion to dismiss, granted the motion to
14 strike only as to document number 6,⁸ and deferred to this panel
15 the determination of whether to strike document number 11.

16 As an initial matter, the number of the document which
17 Mr. Jadallah sought to strike is incorrect. Mr. Jadallah wished
18 to strike the "Declaration of [Debtor] in Support of Revised
19 Motion for Judgment on the Pleadings Combined with Motion
20

21 ⁸ Document number 6 in Debtor's Excerpts of Record is a
22 Request for Judicial Notice of facts pertaining to the post trial
23 sale of the Property by Mr. Jadallah. Debtor had submitted a
24 similar request to the bankruptcy court in his Reconsideration
25 Motion and the court sustained an objection to the request on the
26 grounds that the source of the facts was not a "generally known"
27 source whose accuracy cannot be questioned. Our motions panel
28 granted the motion to strike the request because the pertinent
facts occurred after the trial concluded and therefore the
information could not have been part of the record which formed
the basis of the bankruptcy court's ruling. We find no error in
the motion panel's reasoning and therefore leave its ruling
undisturbed.

1 Summary Judgment.” Per Debtor’s Excerpts of Record, the
2 challenged declaration is document 12, not 11. We find that the
3 declaration should be stricken. The declaration was not
4 admitted into the trial record and it would be improper for this
5 Panel to consider any material outside that record. See Heath
6 v. Helmick, 173 F.2d 156 (9th Cir. 1949).

7 **B. Elements of § 523(a) (2) (A)**

8 Section 523(a) (2) (A), in relevant part, excepts from
9 discharge any debt for money, property, or services to the
10 extent obtained by false pretenses, a false representation, or
11 actual fraud. § 523(a) (2) (A). In order to establish that a
12 debt is nondischargeable under § 523(a) (2) (A), a creditor must
13 establish five elements by a preponderance of the evidence:

14 (1) misrepresentation, fraudulent omission or deceptive
15 conduct by the debtor; (2) knowledge of the falsity or
16 deceptiveness of his statement or conduct; (3) an intent to
17 deceive; (4) justifiable reliance by the creditor on the
debtor's statement or conduct; and (5) damage to the
creditor proximately caused by its reliance on the debtor's
statement or conduct.

18 Turtle Rock Meadows Homeowners Ass'n v. Slyman (In re Slyman),
19 234 F.3d 1081, 1085 (9th Cir. 2000); Ghomeshi v. Sabban
20 (In re Sabban), 384 B.R. 1, 5 (9th Cir. BAP 2008).

21 Since direct evidence of an intent to deceive is rarely
22 available, a debtor’s knowledge and intent to deceive may be
23 inferred from the totality of the circumstances. Gertsch v.
24 Johnson & Johnson, Fin. Corp. (In re Gertsch), 237 B.R. 160,
25 167-68 (9th Cir. BAP 1999); Alexander & Alexander of Wash., Inc.
26 v. Hultquist (In re Hultquist), 101 B.R. 180, 183 (9th Cir. BAP
27 1989).

28 Whether reliance is justified depends upon the “qualities

1 and characteristics of a particular plaintiff, and the
2 circumstances of the particular case, rather than the
3 application of a community standard of conduct to all cases.”

4 Field v. Mans, 516 U.S. 59, 71 (1995).

5 **C. Nondisclosure under § 523(a)(2)(A)**

6 For purposes of § 523(a)(2)(A), an omission may give rise
7 to fraud liability only when there is a duty to disclose. Apte
8 v. Japra M.D., F.A.C.C., Inc. (In re Apte), 96 F.3d 1319, 1324
9 (9th Cir. 1996); Citibank, N.A. v. Eashai (In re Eashai),
10 87 F.3d 1082, 1089 (9th Cir. 1996).

11 We look to the common law concept of fraud found in the
12 Restatement for guidance in determining what constitutes a
13 fraudulent nondisclosure for purposes of § 523(a)(2)(A). See
14 Field v. Mans, 516 U.S. at 68-70; In re Apte, 96 F.3d at 1324;
15 Tallant v. Kaufman (In re Tallant), 218 B.R. 58, 64-65 (9th Cir.
16 BAP 1998).

17 Section 551 of the Restatement (Second) of Torts provides
18 in relevant part:

19 (1) One who fails to disclose to another a fact that he
20 knows may justifiably induce the other to act or refrain
21 from acting in a business transaction is subject to the same
22 liability to the other as though he had represented the
23 nonexistence of the matter that he has failed to disclose,
24 if, but only if, he is under a duty to the other to exercise
25 reasonable care to disclose the matter in question.

26 (2) One party to a business transaction is under a duty to
27 exercise reasonable care to disclose to the other before the
28 transaction is consummated,

• • •

(b) matters known to him that he knows to be necessary to
prevent his partial or ambiguous statement of the facts from
being misleading,

1 . . .

2 (e) facts basic to the transaction, if he knows that the
3 other is about to enter into it under a mistake as to them,
4 and that the other, because of the relationship between
5 them, the customs of the trade or other objective
6 circumstances, would reasonably expect a disclosure of those
7 facts.

8 Restatement (Second) of Torts § 551 (1976). Moreover, in the
9 context of a contractual relationship, the Restatement (Second)
10 of Contracts may also be instructive. See Barnes v. Belice
11 (In re Belice), 461 B.R. 564, 580 (9th Cir. BAP 2011). The
12 Restatement (Second) of Contracts provides in relevant part:

13 A person's non-disclosure of a fact known to him is
14 equivalent to an assertion that the fact does not exist in
15 the following cases only:

16 . . .

17 (b) where he knows that disclosure of the fact would correct
18 a mistake of the other party as to a basic assumption on
19 which that party is making the contract and if
20 non-disclosure of the fact amounts to a failure to act in
21 good faith and in accordance with reasonable standards of
22 fair dealing.

23 Restatement (Second) of Contracts § 161 (1981). Therefore,
24 stated simply, a duty arises when the defendant actively
25 conceals a material fact from the plaintiff or makes partial
26 representations to suppress some material facts.

27 A concealed fact is material if "a reasonable man would
28 attach importance to the alleged omissions in determining his
course of action." Loomas v. Evans (In re Evans), 181 B.R. 508,
515 (Bankr. S.D. Cal. 1995).

D. Application of § 523(a)(2)(A)

We have reviewed the bankruptcy court's findings of fact in
its memorandum opinion and conclude that, under both of the

1 court's findings, it committed no clear error in finding fraud
2 under § 523(a)(2)(A). We address each claim in turn.

3 **1. The Nondisclosure Claim**

4 After trial, the bankruptcy court made factual findings
5 that Debtor committed actionable fraud under § 523(a)(2)(A) by
6 failing to disclose material facts known exclusively to him
7 after the June 2013 Meeting. We can only disturb these findings
8 if they were clearly erroneous. See Joseph F. Sanson Inv. Co.
9 v. 268 Ltd.(In re 268 Ltd.), 789 F.2d 674 (9th Cir. 1986).

10 (a) Nondisclosure

11 The bankruptcy court determined that an omission is
12 actionable under § 523(a)(2)(A) when there is a duty to
13 disclose. The court found that Debtor was under a duty to
14 disclose because he alone knew about material facts which were
15 unknown to Mr. Jadallah or Mr. Desmond until the June 2013
16 Meeting: various subcontractors and suppliers had not been paid;
17 major plan changes were unilaterally made to the Project by
18 Debtor; and the Project would not be completed on budget.
19 Debtor was under an obligation to disclose such to Mr. Jadallah
20 or Mr. Desmond prior to requesting the March 7th, May 7th, and
21 May 28th advances.

22 The bankruptcy court did not commit clear error in finding
23 that Debtor alone knew of the above facts prior to the June 2013
24 Meeting. Mr. Jadallah and Mr. Desmond both testified that they
25 were not made aware of the facts before the June 2013 Meeting.
26 Mr. Jadallah testified that if he had been made aware, he would
27 not have made the May advances. The court did not find Debtor's
28 contrary testimony credible. In the end, the court simply gave

1 more weight to the trial testimony of Mr. Jadallah and
2 Mr. Desmond. Because Debtor did not submit any evidence other
3 than his testimony to support his version of the facts, the
4 court did not commit clear error in concluding that he alone
5 possessed knowledge of the omitted facts.

6 (b) Knowledge of omitted facts

7 The court found that when requesting the March and May
8 advances, Debtor had knowledge of the facts he failed to
9 disclose. Based on Debtor's trial testimony, by March 3, 2013,
10 Debtor knew that he could not complete the Project within budget
11 and had only paid subcontractor Mr. O'Briain according to the
12 original plans, owing a balance for work done pursuant to the
13 modified plans. Based on this testimony, the court concluded
14 that Debtor knew of the omitted facts when requesting the
15 March 7th, May 7th, and May 28th advances. We see no clear
16 error.

17 (c) Intent to deceive

18 The court recognized that it was not enough that Debtor
19 failed to disclose the omitted facts, but he must have done so
20 with an intent to deceive. The court inferred that intent from
21 the surrounding circumstances, particularly because Debtor did
22 not come forward with the omitted facts based on a fear that
23 Mr. Jadallah would not make any more advances. The court's
24 inference is sound. Mr. Jadallah testified that he would not
25 have made the March and May advances had he known of the true
26 facts. Therefore, we see no error in the court's inference.

27 (d) Justifiable reliance

28 The bankruptcy court found Mr. Jadallah's reliance

1 justifiable. The court stated that Mr. Jadallah and Mr. Desmond
2 did not know of the true facts when making the March and May
3 advances, and the representations made by Debtor were not
4 contrary to common sense. Therefore, the court concluded that
5 Mr. Jadallah's reliance was justifiable when making the
6 advances. We will not disturb this finding.

7 (e) Damages

8 The court found that \$300,000.00 was nondischargeable for
9 the nondisclosure. Included in this amount were the March 7th,
10 May 7th, and May 28th advances, but not included were the
11 January and August advances. It excluded the January 23rd and
12 January 29th payments because there was no evidence that Debtor
13 knew of the major changes and default in January 2013. It
14 excluded the two August 9th advances because on June 19, 2013,
15 Mr. Jadallah had become aware of the plan changes and that
16 additional funding was needed. The court's finding of the
17 resulting damages due to nondisclosure is not error.

18 **a. Debtor's Arguments Against Nondisclosure Claim**

19 Most of Debtor's argument centers around whether
20 Mr. Jadallah recouped his losses because of a post-trial sale of
21 the Property. Debtor raised this same argument in the
22 Reconsideration Motion. In essence, Debtor asserts that under
23 the "special benefit" doctrine,⁹ the bankruptcy court was
24

25 ⁹ The "special benefit" doctrine is a long-standing
26 principle of tort damages recognized under California law. See
27 Turpin v. Sortini, 31 Cal. 3d 220 (1982). In essence, the
28 "doctrine reflects the basic compensatory theory underlying tort
damages by restricting recovery to the harm actually incurred."

(continued...)

1 obligated to mitigate damages, concluding that Mr. Jadallah did
2 not suffer any damages after accounting for the post-trial sale.

3 The first time Debtor raised the "special benefit" doctrine
4 or the post-trial sale of the Property was in his
5 Reconsideration Motion. Like most mitigation theories, the
6 "special benefit" doctrine must be both pled and proved prior to
7 trial. See Am. Jur. 2d, Damages § 30:24. Debtor did neither.
8 No argument, evidence, or exhibits in support of these new facts
9 were part of the bankruptcy court's record. The law in the
10 Ninth Circuit prevents an appellate court from considering
11 evidence outside the trial record on direct appeal. Smyrnos v.
12 Padilla (In re Padilla), 213 B.R. 349, 354 n.3 (9th Cir. BAP
13 1997); see also Kirshner v. Uniden Corp. of Am., 842 F.2d 1074,
14 1077 (9th Cir. 1988). Therefore, because there is no trial
15 record pertaining to these new facts, this Panel will not
16 consider these arguments in the disposition of this appeal.

17 Debtor does not submit any argument challenging the
18 nondisclosure law or factual findings of the bankruptcy
19 court's holding under the Nondisclosure Claim. Rather, Debtor
20 argues that because the Second Loan was based on a valid
21 contract, it is removed from § 523(a)(2)(A) unless it is shown
22 that Debtor made misrepresentations at the time of contracting.

23 We disagree. The bankruptcy court found that because
24 Debtor was required to, but did not, disclose various material
25 facts, Mr. Jadallah satisfied his burden of establishing the
26

27 ⁹(...continued)
28 Heckert v. MacDonald, 208 Cal. App. 3d 832, 839 (1989).

1 nondischargeable liability under § 523(a)(2)(A). Mr. Jadallah
2 did not plead or attempt to prove a fraud in the inducement
3 theory of nondischargeability. Thus, Debtor's contract argument
4 is wayward.

5 **2. The Misrepresentation Claim**

6 The bankruptcy court also found that Debtor committed
7 actionable fraud under § 523(a)(2)(A) by making several
8 affirmative misrepresentations at the June 2013 Meeting.

9 (a) Misrepresentation

10 The bankruptcy court found that Debtor made the following
11 affirmative misrepresentations at the June 2013 Meeting: all the
12 parts for construction had been ordered; all contractors had
13 been paid; and the remaining \$100,000.00 would be sufficient to
14 complete work on the Project. The court found Debtor's contrary
15 testimony not credible. Rather, the court gave weight to the
16 testimony of Mr. Jadallah and Mr. Desmond that the
17 representations were made at the June 2013 Meeting. The
18 bankruptcy court properly weighed the credibility of the
19 witnesses, which we cannot disturb. See Rule 8013.

20 (b) Knowledge of falsity

21 The court found that Debtor knew that the representations
22 made at the June 2013 Meeting were false because at the time of
23 the meeting there were unpaid subcontractors and the remaining
24 advances would not be sufficient for completion. The court's
25 findings are supported by the trial record. The testimony of
26 the subcontractors alone establish that they were unpaid at the
27 time of the June 2013 Meeting. This testimony, coupled with the
28 fact that Debtor was in charge of paying the subcontractors,

1 establishes that the bankruptcy court's factual finding is well
2 supported by the trial record.

3 (c) Intent to deceive

4 The court found that there was an intent to deceive
5 Mr. Jadallah because there would be no other explanation for
6 making the representations other than to induce Mr. Jadallah to
7 advance the funds. We find no clear error in this finding.

8 (d) Justifiable reliance

9 The court used the same finding to establish justifiable
10 reliance in both findings of fraud. We have already shown that
11 there was no clear error in the court's prior finding, so we
12 need not address the issue again.

13 (e) Damages

14 The court found that \$100,000.00 was nondischargeable for
15 the two August advances. The court found that at the June 2013
16 Meeting, Mr. Jadallah was led to believe that the Project would
17 be completed with \$100,000.00 and all subcontractors were paid;
18 he therefore made the last two August advances based on these
19 representations. The evidence supports this finding.

20 **a. Debtor's Arguments Against the Misrepresentation Claim**

21 Debtor argues that the testimony does not support the
22 bankruptcy court's finding that the last two August draws are
23 nondischargeable based on the affirmative misrepresentations.¹⁰

25 ¹⁰ Debtor erroneously asserts that our review of the factual
26 findings is de novo, citing cases which acknowledge a mixed
27 question of review in nondischargeability cases. However, Debtor
28 only challenges the factual findings on misrepresentation that
are given clearly erroneous deference under the mixed question of
(continued...)

1 Debtor first heavily relies on an e-mail sent on June 20,
2 2013,¹¹ that made Mr. Jadallah aware that \$100,000.00 would not
3 be enough to finish the Project. The bankruptcy court found
4 this e-mail came before the June 2013 Meeting. The court found
5 that at the June 2013 Meeting Debtor made different
6 representations: that all the contractors had been paid and that
7 the remaining \$100,000.00 would be sufficient to complete work
8 on the Project. The court believed the testimony of
9 Mr. Jadallah and Mr. Desmond that those representations were
10 made at the June 2013 Meeting and found Debtor's counter
11 assertions not credible. We defer to the trial court on that
12 finding.

13 Second Debtor asserts that by looking at the Property
14 Mr. Jadallah had to know that \$100,000.00 would not be enough to
15 finish the Project. The trial testimony and the bankruptcy
16 court's findings establish that Mr. Jadallah was not an
17 experienced contractor, nor was he in charge of construction of
18 the Property. Mr. Jadallah was merely a passive investor and,
19 as such, nothing about the state of the Project would have been
20 inherently obvious to Mr. Jadallah. Supported by the record and
21 the court's assessment of credibility, the bankruptcy court's
22 findings are not clearly erroneous on this point.

23 Debtor last argues that his statement asserting that

24 _____
25 ¹⁰(...continued)
law review.

26 ¹¹ The e-mail was sent from Mr. Desmond to Mr. Jadallah. In
27 the e-mail, Mr. Desmond quoted Debtor stating that the Project
28 would need additional funding above the \$100,000.00 to be
completed.

1 \$100,000.00 would be sufficient to complete the work on the
2 Project is excluded from review under § 523(a)(2)(A) as a
3 "representation of Debtor's financial condition."

4 This argument is nonsensical. While it is true that,
5 pursuant to § 523(a)(2)(A), an oral "statement respecting the
6 debtor's financial condition" is expressly excluded from this
7 exception to discharge, Debtor's misrepresentation does not
8 pertain to the "financial condition" contemplated under
9 § 523(a)(2)(A). Statements regarding a debtor's financial
10 condition "are those that purport to present a picture of the
11 debtor's overall financial health." Cadwell v. Joelson
12 (In re Joelson), 427 F.3d 700, 714 (10th Cir. 2005); see Barnes
13 v. Belice (In re Belice), 461 B.R. 564, 578 (9th Cir. BAP 2011).
14 Such a statement would be "analogous to balance sheets, income
15 statements, statements of changes in overall financial position,
16 or income and debt statements that present the debtor or
17 insider's net worth, overall financial health, or equation of
18 assets and liabilities." Id. Here, the statement made was
19 pertaining to Project, not Debtor. Debtor made a representation
20 about how much he believed it would cost to finish the Project,
21 which Mr. Jadallah relied on in making his last two funding
22 draws. This representation is not a statement respecting the
23 debtor's financial condition as contemplated by the statute and
24 relevant case law. Therefore, this argument fails.

25 VI. CONCLUSION

26 The bankruptcy court made proper factual findings on all of
27 the elements of fraud, both nondisclosure and affirmative
28 misrepresentations. Therefore, we AFFIRM.