No. 19-7073

In the
Supreme Court of the United States
October Term 2019

Anthony Thomas,

Petitioner,

vs.

Kenmark Ventures, LLC,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF RESPONDENT WENDI THOMAS IN SUPPORT OF CERTIORARI

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January 27, 2020

QUESTIONS PRESENTED

This Court's June 4, 2018 decision in *Lamar, Archer & Cofrin, LLP v. Appling*, 548 U.S. ___ , 138 S. Ct. 1752 (2018) ("*Lamar*"), holds that dischargeability under 11 U.S.C. § 523(a)(2)(A)) extends to debts obtained by oral statements respecting a single asset and is not limited to debts obtained by statements respecting a debtor's overall financial condition. On March 23, 2018, a three-judge panel of the U.S. Court of Appeals for the Ninth Circuit ("the Panel") held that Petitioner's $4.5 million debt could not be discharged solely because the alleged oral misrepresentation was with respect to a single asset. On October 17, 2018, the same Panel refused to recall its mandate in light of *Lamar*, even though its mandate was not received by the Bankruptcy Appellate Panel ("the BAP") until after *Lamar* was decided, and even though the time for Petitioner to seek certiorari had not yet expired. In rejecting the motion to recall its mandate, the Panel (1) incorrectly held that only "exceptional" circumstances can ever justify recall of the mandate, ignoring circuit precedent that an intervening decision by this Court alone justifies a recall, (2) misapplied its incorrect holding to the instant case, which was still *sub judice*, in contravention of the decision of its *en banc* court in *Miller v. Gammie*, 335 F.3d 889 (9th Cir. 2003) (*en banc*) ("*Miller*") that three-judge panels must apply intervening decisions of this Court in cases before them, and (3) ordered Petitioner to make no further filings in what it incorrectly called a "closed" case, in contravention of circuit precedent that only permits such an order after notice and opportunity to be heard, based on findings supported by the record, and then only

insofar as it is limited to whatever perceived abuse may have been found. Here, there was no notice or opportunity to be heard, there was no suggestion of any abuse (and, hence, no such findings), and the scope of the order was limitless. The effect of the Panel's order was to prevent Petitioner from seeking a rehearing *en banc,* as authorized by Rule 35(b) of the Federal Rules of Appellate Procedure, by Ninth Circuit Rule 35-1, and by 28 U.S.C. § 46(c), in direct contravention of this Court's admonition in *Western Pac. R. Corp. v. Western Pac. R. Co.*, 345 U.S. 247 (1953) ("*Western Pac. R. Corp.*") that litigants must be allowed to suggest rehearing *en banc.*

The questions presented are:

(1) Whether the Panel committed clear legal error by refusing to apply this Court's intervening decision in *Lamar* to this then still pending case?

(2) Whether the Panel clearly abused its discretion, and so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of supervisory jurisdiction by this Court, where it prevented Petitioner from requesting a rehearing *en banc,?*

PARTIES TO THE PROCEEDINGS

Respondent Thomas is the spouse of the Petitioner. Although not joined on the face of the petition, she was a party in the proceedings below, as reflected in the caption of the October 17, 2018 order from which certiorari is sought. On January 16, 2020, she gave notice of her intent to file a brief supporting certiorari. In addition to her standing as a respondent aligned with the petitioner under Rule 12.6 of this Court's Rules, she has a substantial and concrete stake in the outcome of this proceeding. While the Ninth Circuit concluded she was not a subject of the $4.5 million dollar nondischargeable judgment because she was not implicated in the alleged fraud and no findings were made as to her, see Appendix "B" to the Petition at page 4, she and Petitioner live in a community property state and her interest in the community may forever be burdened by the judgment.

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In the Court of Appeals for the Ninth Circuit, the October 17, 2018 order in *In re Thomas (Thomas v. Kenmark Ventures, LLC)*, No. 17-60042, denying recall of the mandate, is unpublished. It is annexed to the Petition as Appendix "A." The judgment in the case was entered on March 23, 2018. It is unpublished, but unofficially reported at 716 Fed. Appx. 647 (9th Cir. 2018). It is annexed to the Petition as Appendix "B." In the Ninth Circuit BAP, the judgment in *Thomas v. Kenmark Ventures, LLC (In re Thomas),* BAP No. NV-16-1058-KuLJu, was entered on March 28, 2017. The judgment is unpublished, but unofficially reported at 2017 WL 1160868 (BAP 2017). It is annexed to the Petition as Appendix "C." The judgment in related *Thomas v. Beach (In re Thomas),* BAP No. NV-17-1072-TiFL ("Beach"), was entered on January 16, 2018. The judgment is unpublished. It is annexed hereto as Respondent's Appendix "C." In the bankruptcy court proceedings, *In re Thomas,* Nos. 3:14-bk-50333 and 3:14-bk-50031 (jointly administered) (D.NV), there were two related adversary proceedings. In *Kenmark Ventures, LLC v. Thomas,* Adv. No. 3:14-ap-05022-btb, the findings and conclusions were orally delivered on February 8, 2016 and judgment was entered on February 19, 2016. The findings and conclusions are annexed to the Petition as Appendix "D." In *Beach v. Thomas,* No. 3:14-ap-5067-btb, summary judgment was entered on February 21, 2017.

STATUTORY PROVISIONS INVOLVED

The text of 11 U.S.C. § 523 (a)(2)(A) and (B), providing for exceptions to discharge, is set forth below:

> (a) A discharge under section 727, 1141, 1192[1], 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt—
>
> * * *
>
> (2) for money, property, services, or an extension, renewal, or refinancing of credit, to the extent obtained by—
>
> (A) false pretenses, a false representation, or actual fraud, other than a statement respecting the debtor's or an insider's financial condition;
>
> (B) use of a statement in writing—
> (i) that is materially false;
> (ii) respecting the debtor's or an insider's financial condition;
> (iii) on which the creditor to whom the debtor is liable for such money, property, services, or credit reasonably relied; and
> (iv) that the debtor caused to be made or published with intent to deceive.

STATEMENT OF THE CASE

The underlying facts are set forth in the March 28, 2017 opinion of the Ninth Circuit BAP that was affirmed by the Panel on March 23, 2018. See Petitioner's Appendix "C." As described therein, Petitioner and Respondent are debtors in a Chapter 11 case that was converted to Chapter 7. Petitioner owned a 21,000 carat uncut emerald and allegedly represented to Kenmark that it had been valued at an amount substantially greater than Kenmark's $6.1 million loan to a company in which Petitioner was an investor, while failing to disclose that it had previously been valued at an amount far lower than the loan amount.

On May 31, 2014, Kenmark filed a Complaint for Damages and to Determine Dischargeability of Debt under 11 U.S.C. §523(a)(2) ("Complaint"), the pertinent portion of which is annexed hereto as Respondent's Appendix "A." The Complaint was premised upon an alleged oral misrepresentation regarding the value of the emerald:

> On or about May 1, 2007, in San Jose, California, ANTHONY THOMAS *orally* represented to Plaintiff, through its agent and members, Kenneth Tersini and Mark Tersini, that the Emerald described in ¶14 was extremely valuable and worth in excess of Five Hundred Million Dollars ($500,000,000.00). This representation was made to induce Plaintiff to make loans to him and to EPL in the ultimate amount of Six Million One Hundred Ten Thousand Dollars ($6,110,000.00) to support the development and marketing of Smartcard Technology. Plaintiff, through its agents Kenneth Tersini and Mark Tersini, heard and believed these representations and relied on these representations in making the decision to lend and actually lending money to Defendants, as is evidenced by the Note.

Id. at ¶ 33 (Emphasis supplied).

On February 19, 2016, the Bankruptcy Court entered a nondischargeability judgment under § 523(a)(2)(A). The Bankruptcy Court did not make any findings as to the actual value of the emerald. Rather, the decision was premised upon Petitioner's failure to disclose the lower of two appraisals and the amount that Petitioner had paid for the emerald. See Petitioner's Appendix "D." On appeal, the BAP affirmed, holding that these nondisclosures provided a proper basis for a judgment under 11 U.S.C. § 523(a)(2)(A):

> In sum, the bankruptcy court did not err in determining the $4.1 million [*sic*] judgment debt nondischargeable *under § 523(a)(2)(A)* based on the emerald-related nondisclosures. Analysis of the bankruptcy court's findings regarding the other nondisclosures and misrepresentations would not add significant additional weight to our decision. In our view, those other alleged nondisclosures and misrepresentations were cumulative of and incidental to

> the bankruptcy court's principal fraud finding, which relied on the emerald-related *nondisclosures.*

See Petitioner's Appendix "C" at page 7 (Emphasis supplied).

The Ninth Circuit affirmed the BAP on March 23, 2018. See Petitioner's Appendix "B." The Ninth Circuit's decision was based *solely* on Section 523(a)(2)(A) and stated that the basis for the nondischargeability judgment was the alleged emerald-related nondisclosures by Petitioner. *Id.* at 3 ("Kenmark's claim of fraud was based on Thomas's failure to disclose that the Thomas Emerald, the collateral pledged for Kenmark's loan to Electronic Plastics ('EP'), had been previously valued at amounts far lower than the amount of the loan.").

11 U.S.C. §523(a)(2)(A) makes debts nondischargeable if based upon false representations (including material omissions), with the limitation that the representations be "other than a statement respecting the debtor's or an insider's financial condition:" 11 U.S.C. § 523(a)(2)(A). Accordingly, a false representation or omission is not actionable under Section 523(a)(2)(A) if the statement or omission is "respecting the debtor's or an insider's financial condition." Rather, a false representation "respecting the debtor's or an insider's financial condition" is only actionable under Section 523(a)(2)(B) which requires that it must be a "statement in writing". 11 U.S.C. § 523(a)(2)(B). Thus, the nondischargeability judgment was premised on the conclusion that the omissions regarding the value of the Emerald were not "respecting the debtor's . . . financial condition."

Prior to *Lamar*, there was a split among the Circuits regarding the interpretation of the phrase "respecting the debtor's or an insider's financial

condition" in Section 523(a)(2)(A). The Seventh and Tenth Circuits adopted the so-called "narrow view" that a statement about a single asset is not a statement respecting the debtor's financial condition,[1] whereas the Eleventh and Fourth Circuits adopted the broad view that any statement relating to a debtor's financial condition qualified. Footnote 1 of this Court's *Lamar* decision explicitly references this split. Courts in the Ninth Circuit followed the so-called "narrow view." See *In re Kirsh*, 973 F.2d 1454, 1457 (9th Cir. 1992); *In re Belice*, 461 B.R. 564, 574, 577-78 (BAP 9th Cir. 2011).[2] Indeed, the Ninth Circuit BAP had expressly followed the Tenth Circuit's decision in *In re Joelson*, 427 F.3d 700, 714 (10th Cir. 2005) in adopting the "narrow" view. *Belice*, 461 B.R. at 574.

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[1] Under the "narrow" view, the phrase "relating to the debtor's . . . financial condition" required broad statements regarding the debtor's overall financial health, such as a balance sheet or income statement. A statement or omission concerning the value of a single asset, such as the emerald, was not deemed to be "respecting the debtor's . . . financial condition." Thus, Petitioner's alleged misrepresentation of the value of the emerald was not deemed to be excluded from nondischargeability. It was on this basis that the Bankruptcy Court entered its nondischargeability judgment pursuant to 11 U.S.C. § 523(a)(2)(A).

[2] As explained in *Belice*, 461 B.R. at 574, while *Kirsh* did not expressly state whether the phrase "statement respecting financial condition" should be interpreted broadly or narrowly in all contexts, "it would be difficult if not impossible to reconcile *Kirsh*'s specific holding with a broad interpretation of that phrase." After *Belice,* all subsequent BAP decisions in the Ninth Circuit followed the "narrow" view, citing *Belice*. *In re Roberts,* No. CC-14-1176-DKiG, 2016 WL 363946, at *6 (BAP 9th Cir. Jan. 27, 2016); *In re Carroll*, No. NC-16-1125-JuFB, 2017 WL 3122613, at *9 (BAP 9th Cir. July 21, 2017); *In re Bacino*, No. SC-14-1150-KiKuJu, 2015 WL 9591904, at *17 (BAP 9th Cir. Dec. 31, 2015); *In re Urban*, No. SC-13-1047-PaJuKu, 2014 WL 1492717, at *7 (BAP 9th Cir. Apr. 16, 2014); *In re Cai*, No. CC-11-1465-KiMkH, 2012 WL 1588834, at *3 (BAP 9th Cir. May 7, 2012), *aff'd sub nom.* 571 Fed. Appx. 580 (9th Cir. 2014) (unpublished); *In re Gilliam*, No. CC-11-1248-MkHKi, 2012 WL 1191854, at *8 (BAP 9th Cir. Apr. 6, 2012); *In re Carlson*, No. WW-11-1486-KiJuH, 2012 WL 1859450, at *8 (BAP 9th Cir. May 22, 2012).

On June 4, 2018, this Court expressly rejected the "narrow" view. In *Lamar*, the debtor had made an alleged oral misrepresentation regarding the value of a single asset (an expected tax refund of approximately $100,000). The plaintiff filed a complaint for nondischargeability under Section 523(a)(2)(A). The debtor moved to dismiss. The Bankruptcy Court held that a statement regarding a single asset was not a "statement respecting the debtor's . . . financial condition" and denied the debtor's motion to dismiss. The Court of Appeals for the Eleventh Circuit reversed, holding that "'statement[s] respecting the debtor's . . . financial condition' may include a statement about a single asset." *In re Appling*, 848 F.3d 953, 960 (11th Cir. 2017). Because the debtor's statements about his expected tax refund were not in writing, the Court of Appeals held that § 523(a)(2) did not apply and did not prevent the discharge. This Court affirmed, resolving the split "among the Courts of Appeals as to whether a statement about a single asset can be a 'statement respecting the debtor's financial condition[,]'" *Lamar, supra*, 138 S. Ct. at 1758, and rejected the "narrow" view, stating: "given the ordinary meaning of 'respecting,' [plaintiff's] preferred statutory construction - that a 'statement respecting the debtor's financial condition' means only a statement that captures the debtor's overall financial status - must be rejected, for it reads 'respecting' out of the statute." *Id.*, 138 S. Ct. at 1761.

Under *Lamar*, statements or omissions respecting a single asset such as the emerald *are* deemed to be statements or omissions "respecting the debtor's . . . financial condition" and thus are not actionable under Section 523(a)(2)(A):

> We also agree that a statement is "respecting" a debtor's financial condition if it has a direct relation to or impact on the debtor's overall financial status. A single asset has a direct relation to and impact on aggregate financial condition, so a statement about a single asset bears on a debtor's overall financial condition and can help indicate whether a debtor is solvent or insolvent, able to repay a given debt or not. Naturally, then, a statement about a single asset can be a "statement respecting the debtor's financial condition."

Id.

As a result of *Lamar*, there was an intervening change in controlling law in the Ninth Circuit. Applying *Lamar*'s holding to this case, it was clear that any oral statement or omission regarding the value of the emerald was a statement "respecting the debtor's . . . financial condition" and thus excluded from nondischargeability under 11 U.S.C. §523(a)(2)(A).

The Panel's March 23, 2018 decision was filed shortly before *Lamar*, but its mandate was not received by the BAP until June 6, 2018, two days after *Lamar* was decided. See Petitioner's Appendix "E." A petition for certiorari was not then due until June 21, 2018. On June 11, 2018, Petitioner sought a 60-day extension of time to file a petition. In his application, Petitioner explained that, while he contemplated asking this Court for a GVR order vacating and remanding the March 23, 2018 judgment to the Ninth Circuit, pursuant to 28 U.S.C. § 2106,[3] essentially the same relief could be sought from the Court of Appeals via a less expensive motion to recall its mandate.[4] On June 18, 2018, then-Justice Kennedy granted an extension until August 20, 2018.

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[3] See *Lawrence v. Chater,* 516 U.S. 163, 167 (1996) ("*Chater*").

[4] See *Calderon v. Thompson*, 523 U.S. 538, 549 (1998) (Kennedy, J.) ("[T]he courts of appeals are recognized to have an inherent power to recall their mandates, subject to review for an abuse of discretion . . ."). See also *U Calderon v. Thompson*, 523

Ultimately, Petitioner opted to seek recall of the mandate. His motion was filed on August 17, 2018, predicated on the change in law wrought by *Lamar*. On October 17, 2018, the Panel denied the motion and ordered that "[n]o further filings will be entertained in this closed case." See Petitioner's Appendix "A" at page 3.

REASONS FOR GRANTING THE PETITION

Respondent's support for certiorari is directed to the first question presented in the Petition - namely, whether the Panel erred by failing to recall its mandate based upon this Court's intervening decision in *Lamar*. The failure to apply *Lamar* was clear legal error, defied binding circuit law that requires three-judge panels to apply intervening decisions of this Court in pending cases, see *Miller, supra,* 335 F.3d at 892-93, failed to distinguish between cases that are, and are not, *sub judice*, and gave short shrift to the decisions of this Court in either case. In Respondent's view, the other questions presented by Petitioner are not properly before the Court, either because they could only have been raised had a petition for certiorari been filed from the March 23, 2018 judgment of the Court of Appeals, or, in one case, because the question relates to an issue in a pending appeal in the BAP.

But Respondent further submits that this is a case where the invocation of supervisory mandamus would be appropriate because the Panel acted beyond its jurisdiction in ordering Petitioner to make no further filings in the case. The Panel's order deprived Petitioner of the right under Rule 35(b), Fed.R.App.P. to seek a panel rehearing, without the justification required by *In re Thomas,* 508 F.3d

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U.S. 538, 549 (1998); *Zipfel v. Halliburton*, 861 F.2d 565, 567-68 (9th Cir. 1988); *Verrilli v. Concord*, 557 F.2d 664 (9th Cir. 1977).

1225, 1227 (9th Cir. 2007) (precluding an appellant from proceeding with a petition or appeal must be based on adequate justification supported in the record and narrowly tailored to address any perceived abuse), but, more importantly, it prevented Petitioner from petitioning for a rehearing *en banc* pursuant to Rule 35(b) of the Federal Rules of Appellate Procedure and Circuit Rule 35-1.

The Petition thus concerns "[r]ules formulate[d] and put in force" by this Court pursuant to 28 U.S.C. § 2072(a), such that a writ of certiorari (in the nature of mandamus) should issue to require inferior courts "to conform to them," because the order of the Panel below was "so palpably improper as to place it beyond the scope of the rule invoked" and "practically nullif[y]" it. *Los Angeles Brush Mfg. Corp. v James*, 272 U. S. 701, 706-07 (1927). The Panel's order would have been invalid had it been adopted by the Ninth Circuit as a circuit rule because, as set forth in this Court's decision in *Western Pac. R. Corp., supra,* 345 U.S.at 268, rules adopted by a court of appeals for *en banc* review must not prevent a litigant from suggesting to a majority of the judges in regular active service that rehearing *en banc* is appropriate. *A fortiorari*, the Panel's *ad hoc* order was invalid.

But because the Panel's order flouts the Ninth Circuit's own rules and binding precedents, a GVR order still may be the most appropriate resolution. See *Los Angeles Brush Corp., supra,* 272 U.S. at 706 (supervisory jurisdiction "might more properly [be exercised] in an intermediate appellate court . . ," if relief were available there). Thus, while Respondent believes that the standard for the exercise

of supervisory mandamus is met in this case,[5] a decision to GVR the case under the more liberal standard applied in deciding whether to take such action may be more appropriate where, as here, "it appears that redetermination [in the court of appeals] may determine the ultimate outcome of the litigation," *Chater, supra,* 516 U.S. at 167.

Here, the Panel's abuses of discretion and legal errors were as much about its disregard for the law of its own circuit as they were about its disregard for the rules promulgated by this Court. See *Atlantis Dev. Corp. v. United States*, 379 F.2d 818, 828 (5th Cir. 1967) ("[A] decision announced by one panel of the Court is [to be] followed by all others until such time as it is reversed, either outright or by intervening decisions of the Supreme Court, or by this Court itself en banc."); *Miller, supra*, 335 F.3d at 899 ("[A] three-judge panel may not overrule a prior decision of the court . . . [unless] . . .a prior decision . . . has been effectively overruled by [the Supreme Court] . . . and hence is no longer binding on . . . three-judge panels of this court.").

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[5] To qualify for such relief, a party must show he has no other adequate means to obtain relief, a "clear and indisputable" right to the writ, and extraordinary circumstances, such as a judicial usurpation of power or clear abuse of discretion in the lower court. All of these factors are present here. The Panel's order precluded any additional filing by Petitioner, so adequate relief could only be sought (without risking sanctions) by the filing of this Petition. Petitioner had a clear and indisputable right to seek rehearing *en banc*. The order of the Panel deprived him of that right by usurping a power the Panel did not possess, and the usurpation was extraordinary in that it interfered in the normal operation of Rule 35(b), Fed.R.App.P., and Circuit Rule 35-1, governing requests for *en banc* consideration, as contemplated by Congress in enacting 28 U.S.C. § 43(c).

Had the Panel followed the law of its circuit as established in *Miller*, *Lamar* would have been applied to this then still-pending case. Had the Panel followed the law of its circuit as announced in *Zipfel, supra, Lamar* would have been applied, and the mandate recalled, even if the Panel mistakenly thought the case was "closed." Had the Panel followed the law of its circuit as set forth in *In re Thomas* and *De Long v. Hennessey*, 912 F.2d 1144, 1149 (9th Cir.), *cert. denied*, 498 U.S. 1001 (1990) ("*De Long*"), it would never have entered its order preventing Petitioner from further filings, including a petition for rehearing *en banc*, and its error in failing to apply *Lamar* might have been corrected by its *en banc* court. On remand, the Court of Appeals would have ample authority to correct the Panel's errors. See *Highmark Inc. v. Allcare Health Mgmt. Sys.*, 572 U.S. 559, 564 n.2 (2014) (Even where abuse-of-discretion standard of review applies, appellate court may correct a lower court's legal error because a court "'necessarily abuse[s] its discretion if it base[s] its ruling on an erroneous view of the law . . . .'" (Citation omitted)).

I. THE PANEL'S ORDER FLOUTED A RULE PROMULGATED BY THIS COURT AND DEPARTED FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS BY PREVENTING A REQUEST FOR REHEARING *EN BANC*

This Court exercises supervisory jurisdiction over the inferior federal courts. Where called for, it is empowered to issues writs, in the nature of mandamus, to enforce the rules it has promulgated and to confine inferior courts to their proper jurisdiction. See, *e.g.*, *Los Angeles Brush Corp., supra* (Equity Rules 46 and 59); *LaBuy v. Howes Leather Co.*, 352 U.S. 249 (1957) (Rule 53(b), Fed.R.Civ.P.);

Schlagenhauf v. Holder, 379 U.S. 104 (1964) ("*Schlagenhauf*") (Rule 35(a), Fed.R.Civ.P.). This case calls for the exercise of this power.

First, absent extraordinary circumstances not presented here, a federal court does not have authority to order a litigant not to file pleadings allowed by the applicable federal rules (of civil or appellate procedure). See *Anders v. California*, 386 U.S. 738, 744 (1967) (due process denied where appellate court refused to allow an appeal without making any determination of frivolity). Precluding an appellant from proceeding with a petition or appeal pursuant to a pre-filing order restricts access to the courts and must be based on adequate justification supported in the record. *De Long, supra* 912 F.2d at 1149. In order to preclude an appellant from proceeding with a petition or appeal "it [must be] clear from the face of the appellant's pleadings that: (i) the appeal is patently insubstantial or clearly controlled by well settled precedent; or (ii) the facts presented are fanciful or in conflict with facts of which the court may take judicial notice." *In re Thomas, supra,* 508 F.3d at 1227. Such a pre-filing order requires notice and an opportunity to oppose the order before it is entered, an adequate record for review, and substantive findings of frivolousness. *De Long, supra*, 912 F.2d at 1147-48. The order not to file in this case was made in advance of any filing. It was entered without any notice or opportunity to be heard. There was no finding of frivolity and no basis for such finding exists. Petitioner was represented by counsel in his bankruptcy case, his appeal to the BAP, and his appeal in the Ninth Circuit, all of which proceeded normally. Entry of the Panel's extraordinary order was thus an abuse of discretion.

Second, and more importantly, the order effectively prevented not just a petition for rehearing, but a petition for rehearing *en banc*. The latter conflicts with the very purpose of the federal statute, 28 U.S.C. §46(c), pursuant to which courts of appeals are empowered to establish *en banc* procedures, as well as with the seminal decision of this Court interpreting and implementing the statute. Under this Court's decision in *Western Pac. R. Corp.,* while §46(c) is deemed a grant of power to the courts of appeals, as opposed to a grant of rights to litigants, courts of appeals are prohibited from adopting procedures that prevent a party from suggesting to other circuit judges in regular active service that rehearing *en banc* may be appropriate. By a parity of reasoning, a three-judge panel has absolutely no authority to do so *ad hoc*, as it did in this case. Preventing Petitioner from seeking a rehearing from the three-judge panel was itself an abuse of discretion, though such a petition was unlikely to change minds. But preventing Petitioner from seeking rehearing *en banc* was a serious deprivation of an important right that is accorded litigants by the Federal Rules of Appellate Procedure.

Western Pac. R. Corp. addressed an almost identical situation, arising from the same Circuit, as that presented here. There, the appellant sought rehearing *en banc* and a Ninth Circuit panel struck the request. This Court held that § 43(c) is a grant of power to the courts of appeals (to establish procedures for *en banc* consideration), rather than a grant of rights to litigants, but, in the exercise of its "general power to supervise the administration of justice in the federal courts," set

out basic guidelines to be followed by the courts of appeals in setting forth the rules governing the *en banc* procedure. In pertinent part, this Court stated:

> It is . . . essential that litigants be left free to suggest . . . that a particular case is appropriate for consideration by all the judges. A court may take steps to use the *en banc* power sparingly, but it may not take steps to curtail its use indiscriminately. Counsel are often well equipped to point up special circumstances and important implications calling for *en banc* consideration of the cases which they ask the court to decide. (Footnote omitted).

Western Pac. R. Corp., supra, 345 U.S. at 261. Thus, this Court emphasized that a court of appeals must give each litigant "an opportunity to call attention to circumstances in a particular case which might warrant a rehearing *en banc.*" (Footnote omitted). It further observed that:

> [T]he question of whether a cause should be heard *en banc* is an issue which should be considered separate and apart from the question of whether there should be a rehearing by the division. The three judges who decide an appeal may be satisfied as to the correctness of their decision. Yet, upon reflection, after fully hearing an appeal, they may come to believe that the case is of such significance to the full court that it deserves the attention of the full court.

Id. at 262.

But here, contrary to the specific holding in *Western Pac. R. Corp.*, the Panel denied Petitioner the right to seek either a panel rehearing or *en banc* review and did so in advance, without making any finding that might conceivably have justified such an extraordinary step, in violation of its own circuit precedent. Doing so usurped a power the Panel did not have, and thus clearly abused its discretion. *Schlagenhauf, supra,* 379 U.S. at 111.

II. REFUSAL TO APPLY *LAMAR* TO THIS THEN-PENDING CASE DEFIED PRINCIPLES OF STARE DECISIS AND BINDING CIRCUIT LAW

The Panel's order also conflicts on its face with the principle that "when the Supreme Court of the federal system . . . decides a case, not merely the outcome of that decision, but the [standard of decision] that it applies will thereafter be followed by the lower courts within that system . . ." Scalia, *The Rule of Law as a Law of Rules*, 56 U.Chi.L.Rev. 1175, 1177 (1989).

In the Ninth Circuit, that principle is embodied in the *en banc* decision in *Miller* that three-judge panels should apply a change in circuit law resulting from an intervening decision of this Court in cases pending before them. *Miller*, *supra,* 335 F.3d at 893 ("[W]here the reasoning or theory of our prior circuit authority is clearly irreconcilable with the reasoning or theory of intervening higher authority, a three-judge panel should consider itself bound by the later and controlling authority, and should reject the prior circuit opinion as having been effectively overruled.").[6] *Miller* has been followed in the Ninth Circuit ever since. See *United States v. Lindsey*, 634 F.3d 541, 548-50 (9th Cir. 2011) ("[W]e are an intermediate court within the federal system, and as such, we must take our cue from the Supreme Court. We refer once again to our decision in *Miller v. Gammie*, . . . noting that lower courts are 'bound not only by the holdings of higher courts' decisions but also by their 'mode of analysis'" (quoting Antonin Scalia, *The Rule of Law as a Law of*

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[6] Absent an intervening decision of this Court, as addressed in *Miller*, a three-judge panel is bound by the dictates of stare decisis to follow the decisions of its *en banc* Court and those of prior three-judge panels. *Greenhow v. Secretary of Health & Human Servs.*, 863 F.2d 633, 636 (9th Cir. 1988) (no panel can overrule prior panel precedent).

Rules, 56 U. CHI. L. REV. 1175, 1177 (1989)); see also *Dorman v. Charles Schwab Corp.*, 934 F.3d 1107, 1111-1112 (9th Cir. 2019) (Citing *Miller*, the Ninth Circuit held that "[t]he holding [in the Supreme Court's decision in *American Express Co.*] that . . . arbitrators can competently interpret and apply federal statutes . . . constitutes intervening Supreme Court authority that is irreconcilable with [the Ninth Circuit's decision in *Amaro,* which], therefore, is no longer binding precedent.").

Under these binding *en banc* and panel decisions, where, as here, an intervening decision of this Court undermines existing circuit precedent, three-judge panels must ignore prior circuit authority.[7] Indeed, the issue before the panel and the issue decided by this Court need not even be identical, *Miller,* 335 F.3d at 900, though here it is. The appropriate test is whether this Court's intervening decision has "undercut the theory or reasoning underlying the prior circuit precedent in such a way that the cases are clearly irreconcilable." *Id.* Plainly, *Lamar* did at least that and should have been applied.

The conclusion of the federal appellate process occurs when this Court denies a petition for a writ of certiorari or the time for seeking certiorari expires. See *Clay v. U.S.*, 537 U.S. 522, 527 (2003); see also *Griffith v. Kentucky*, 479 U.S. 314, 312 n.6

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[7] Virtually every other circuit has similarly held that intervening decisions of this Court must be followed by a panel over contrary circuit panel precedent. See, e.g., *Oil, Chem. & Atomic Workers Int'l Union, AFL-CIO v. Dep't of Energy,* 288 F.3d 452, 457 (D.C. Cir. 2002) (intervening Supreme Court decision handed down during appeal rejected theory of prior circuit precedent); *Union of Needlestrades, Indus.& Textile Employees v. INS*, 336 F.3d 200, 201 (2d Cir. 2003) (same); *Troy v. Samson Mfg. Corp.*, 758 F.3d 1322, 1325-27 (Fed.Cir. 2014) (where circuit's precedent has implicitly been overruled by an intervening Supreme Court decision, the prior circuit precedent is "no longer good law.").

(1987) ("By 'final,' we mean a case in which . . . the time for a petition for certiorari elapsed or a petition for certiorari finally denied."). Prior to that time, considerations of repose have little, if any, weight. The case is still *sub judice,* and "the dominant principle is that . . . [i]ntervening and conflicting decisions will . . . cause the reversal of judgments which were correct when entered." *Vandenbark v. Owens-Illinois Glass Co.,* 311 U.S. 538, 543 (1941); *Bradley v. Richmond School Board,* 416 U.S. 696, 711 (1974); see also *Bryant v. Ford Motor Co.*, 886 F.2d 1526, 1528 (9th Cir. 1989) ("*Bryant*"). The Panel's refusal to accept this principle is clear from its own language. It declined to give "retroactive" effect to *Lamar,* but there was nothing "retroactive" about Petitioner's request. *Lamar* was handed down *before* the Panel's mandate was received by the BAP and *before* the time for seeking a writ of certiorari had expired. In every respect, the case was still *sub judice* and *Lamar* is the law that the Panel was bound to apply.

III. THE PANEL ABUSED ITS DISCRETION BY ADOPTING AN INCORRECT LEGAL STANDARD FOR RECALL OF THE MANDATE THAT ACCORDS NO DEFERENCE TO THIS COURT'S DECISIONS

The Panel first ignored the above-cited *en banc* and panel precedents. It then announced a new rule for deciding motions to recall a mandate, erroneously making deference to intervening decisions of this Court discretionary and only available in extraordinary circumstances. It held that recall of the mandate is appropriate "only when the [panel] is "animated by 'an overpowering sense of fairness and a firm belief that this is the exceptional case requiring recall of the mandate in order to prevent an injustice[,]'"citing *Nevius v. Sumner*, 105 F.3d 453, 460 (9th Cir. 1996).

It ignored that the very authority it cited makes clear in the next sentence that recall of a mandate *is* justified when a subsequent "decision of the Supreme Court 'departs in some pivotal aspects' from a decision of this court." *Id.* at 560-61.[8] *Lamar* was just such a decision and that should have been the end of the discussion.

In failing to give deference to *Lamar,* the Panel not only ignored the actual standard set forth in *Nevius,* it ignored at least two other panel decisions, notably *Zipfel, supra*, 861 F.2d at 567-68, which is cited in *Nevious* for the quoted passage. In *Zipfel*, the three-judge panel recalled its mandate because of an intervening decision of this Court. The Panel also ignored *Bryant, supra*, 886 F.2d at 1530-31, where the three-judge panel, on reference from the Ninth Circuit sitting *en banc*, stayed its mandate because of an intervening decision of this Court even after certiorari was denied.

Thus, even with respect to decisions of this Court that are handed down *after* a case is no longer *sub judice*, the Panel's standard for exercising discretion to recall the mandate is incorrect because it fails to treat decisions of this Court that change

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[8] The Panel literally cropped the last sentence of the paragraph it quoted from *Nevius* in order to support its position. The uncropped quote, including the cropped last sentence (italicized below) reads as follows:

> . . . . The decision whether to exercise the power [to recall the mandate] "falls within the discretion of the court, but such discretion should be employed to recall a mandate only when good cause or unusual circumstances exist sufficient to justify modification or recall of a prior judgment." In general, we will recall a mandate only when we are animated by an "overpowering sense of fairness and a firm belief that this is an exceptional case requiring recall of the mandate in order to prevent an injustice." (Citations omitted). *Thus we have recalled a mandate when a subsequent "decision of the Supreme Court 'departs in some pivotal aspects' from a decision of this court."* (Citations omitted) (Emphasis supplied).

applicable law as, in its jargon, sufficiently "exceptional;" *i,e,,* in and of themselves, a sufficient basis to justify recall of the mandate, subject to considerations of repose. When a case has become final by virtue of a denial of a petition for certiorari or the expiration of time to file such a petition, considerations of repose carry more weight, but still are not determinative. Thus, the Panel's holding is wrong as a test for deciding when to exercise discretion to recall the mandate in a case that is final, but it is *ipso facto* wrong as applied to a case, like this one, that was not final.

IV. THE PANEL ABUSED ITS DISCRETION BY RELYING ON A CLAIM THAT IS NOT ALLEGED IN THE COMPLAINT AND A THEORY THAT LACKS RECORD SUPPORT

The Panel devoted most of its 2-1/4 page order to asserting that there is an alternate basis, in law or in fact, for affirming the BAP.

In the first place, the Panel's reliance on 11 U.S.C. § 523(a)(2)(B) is unavailing because no such claim was pled in the complaint or considered by either the Bankruptcy Court or the BAP, or even by the Panel itself in its March 23, 2018 decision. As stated in *Singleton v. Wulff,* 428 U.S. 106, 120 (1976), "[i]t is the general rule, of course, that a federal appellate court does not consider an issue not passed upon below." In *Singleton,* this Court cited its decision in *Hormel v. Helvering,* 312 U.S. 552, 556 (1941), where it explained that this rule is "essential in order that parties may have the opportunity to offer all the evidence they believe relevant to the issues . . . [and] in order that litigants may not be surprised on appeal by final decision there of issues upon which they have had no opportunity to introduce evidence." The rule allows parties to determine when an issue is out of

the case. *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 487 and n.6 (2008). As this Court noted in *Exxon Shipping*, "'[t]he reason for the rules is . . . that . . . litigation is a 'winnowing process,' and the procedures for preserving or waiving issues are part of the machinery by which courts narrow what remains to be decided." (Citation omitted).

Here, a §523(a)(2)(B) claim was never *in* the case. It was raised *sua sponte* by the Panel *after* the conclusion of *both* the trial and the appeal in its ruling on the motion to recall the mandate. A plaintiff normally cannot assert a new theory of liability after the close of discovery, see *Coleman v. Quaker Oats Co.*, 232 F.3d 1271, 1292 (9th Cir. 2000), never mind after judgment and the conclusion of the appeal, and an appellate court cannot do so either.[9]

This is especially so where, as here, the claim sounds in fraud. A complaint alleging fraud must "state with particularity the circumstances constituting [the] fraud." Fed. R. Civ. P. 9(b). To do so, a complaint must allege the "who, what, when, where, and how" of the fraud. *Vess v. Ciba-Geigy Corp.* USA, 317 F.3d 1097, 1106

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[9] "Where new, intervening authority creates additional causes of action or affirmative defenses that may materially alter the course of the litigation, the appropriate remedy is to remand to the district court to allow the parties to amend their pleadings in light of that intervening authority[,]" not to simply affirm on the basis of the new cause of action. *Flo & Eddie, Inc. v. Pandora Media, LLC*, No. 15-55287, 2019 U.S. App. LEXIS 30939 *5-6 (9th Cir., October 17, 2019). That is the "standard practice." *Singleton v. Wulff, supra*, 428 U.S. at 121; see also *Clark v. Chappell*, 936 F.3d 944, 971 (9th Cir. 2019); *Doe I v. Nestle USA, Inc.*, 766 F.3d 1013, 1026-27 (9th Cir. 2014); *Gonzales v. U.S. Dep't of Homeland Sec.*, 712 F.3d 1271, 1272-73 (9th Cir. 2013). Here, there was *no* intervening decision relative to §523(a)(2)(B), and *no* remand.

(9th Cir. 2003). Here, the complaint states with particularity that the alleged fraud consisted of not disclosing the lower of two appraisals of the emerald and the amount Petitioner paid for it. It does not allege that the higher appraisal was false.

In any event, neither of the Panel's alternate bases for affirmance is supported by the record. There was no appraisal or other evidence showing that the emerald was *not* worth the amount suggested by the higher of the two appraisals, and thus no basis for the "material falsity" required by §523(a)(2)(B)(i). As explained by the BAP in rejecting summary judgment in the related *Beach* proceeding, see Appendix "C" hereto at pages 12-13, "[w]ithout an appraisal, the falsity of Thomas' representation that the loan would be fully secured [by the emerald] is a disputed material fact." Indeed, the BAP explained the "divergent results" in the *Beach* and *Kenmark* proceedings as a reflection of their "differing procedural posture[s]" and the assertion by Kenmark of its oral "failure to disclose" argument, an argument not made in *Beach* and subsequently foreclosed by *Lamar. Id.,* at 16, n.11.

Similarly, the Panel's attempt to rely on non-emerald related representations or omissions, not previously considered by either the BAP or the Panel, is unavailing for two reasons: Kenmark disclaimed reliance upon them at trial,[10] thereby negating any basis for the "justifiable reliance" required by §523(a)(2)(A),[11] and the

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[10] Kenmark's principal testified he had concerns about the company that was to receive the funds and therefore "only made a loan" secured by the emerald, not a capital contribution. See Appendix "B," at transcript page 200.

[11] As explained at pages 3-4 of the BAP's decision, annexed as Appendix "C" to the Petition, fraud under 11 U.S.C. § 523(a)(2)(A) requires proof of (1) a false representation or omission, (2) knowledge of its falsity, (3) intent to deceive, (4) *justifiable reliance* by the creditor, and (5) proximate damage to the creditor.

alleged non-emerald related misrepresentations or omissions, albeit directed to a different asset, were also oral.

CONCLUSION

The Petition should be granted and the October 17, 2018 order should be reversed. In the alternative, the October 17, 2018 order should be vacated and the case remanded for further proceedings in the Ninth Circuit.

Respectfully submitted,

/s/ Gerald D.W. North

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January 27, 2020

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Attorneys for Plaintiff,
KENMARK VENTURES, LLC

UNITED STATES BANKRUPTCY COURT

DISTRICT OF NEVADA

In re: ANTHONY THOMAS and WENDI THOMAS, AT EMERALD, LLC, Debtors.	Case No. BK-N-14-50333-BTB Case No. BK-N-14-50332-BTB Chapter 11 [Jointly Administered]
KENMARK VENTURES, LLC Plaintiff, v. ANTHONY THOMAS and WENDI THOMAS, Defendants.	Adv. Pro. No. _____ **COMPLAINT FOR DAMAGES AND TO DETERMINE DISCHARGEABILITY OF DEBT** **[11 U.S.C. §523(A)(2)]**

Plaintiff KENMARK VENTURES, LLC ("Plaintiff"), through its counsel Wayne A. Silver and Amy N. Tirre, hereby complains and alleges against ANTHONY THOMAS and WENDI THOMAS ("Defendants") the following:

I. JURISDICTIONAL ALLEGATIONS

making the decision to lend and actually lending money to Defendants, as is evidenced by the Note.

32. ANTHONY THOMAS's representations in ¶31 regarding the use of funds were false. The falsity of these statements was known to ANTHONY THOMAS at the time they were made. The true facts were that ANTHONY THOMAS intended to and did use, or cause ELP to use, the sums evidenced by the Note and secured by the Security Agreement for purposes unrelated to production and marketing of Smartcard Technology. Plaintiff is informed and believes, and thereon alleges that ANTHONY THOMAS used the loan proceeds made pursuant to the Note for purposes other than the development and marketing of the Smartcard Technology, and used some or all of the proceeds for his personal expenses.

33. On or about May 1, 2007, in San Jose, California, ANTHONY THOMAS orally represented to Plaintiff, through its agent and members, Kenneth Tersini and Mark Tersini, that the Emerald described in ¶14 was extremely valuable and worth in excess of Five Hundred Million Dollars ($500,000,000.00). This representation was made to induce Plaintiff to make loans to him and to EPL in the ultimate amount of Six Million One Hundred Ten Thousand Dollars ($6,110,000.00) to support the development and marketing of Smartcard Technology. Plaintiff, through its agents Kenneth Tersini and Mark Tersini, heard and believed these representations and relied on these representations in making the decision to lend and actually lending money to Defendants, as is evidenced by the Note.

34. ANTHONY THOMAS's representations in ¶33 were false, and ANTHONY THOMAS knew said representation to be false at the time it was made. The true facts were the Emerald was worth far less than Five Hundred Million Dollars ($500,000,000.00), its value was not sufficient to secure Plaintiff's loan, and ANTHONY THOMAS knew his appraisal was false.

35. Plaintiff did not know of the fraud perpetrated by ANTHONY THOMAS when Plaintiff made the demand for payment under the Note on October 31, 2008.

36. When ANTHONY THOMAS made the aforesaid representations in ¶¶29, 31 and 33 and 34, he knew them to be false and made them with the intention to induce Plaintiff to act in reliance on these representations and to make the loans, as alleged above.

37. Plaintiff, at the time the representations in ¶¶29, 31 and 33 were made by ANTHONY

§523(a)(2);

3. Costs and attorneys' fees as allowed by law; and,

4. Such further relief as the Court feels is fair and equitable under the circumstances alleged herein.

Dated: May 31, 2014

/s/ Wayne A. Silver
Wayne A. Silver, attorney for Plaintiff
KENMARK VENTURES, LLC

Appendix "B"

UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEVADA (RENO)

IN RE:	.	Case No. 14-50333-btb
ANTHONY THOMAS and WENDI THOMAS,	.	Chapter 7
Debtors.	.	
KENMARK VENTURES, LLC,	.	Adv. No. 14-05022-btb
Plaintiff,	.	
v.	.	
ANTHONY THOMAS and WENDI THOMAS,	.	300 Booth Street Reno, NV 89509
Defendants.	.	Tuesday, November 10, 2015 9:36 a.m.

TRANSCRIPT OF TRIAL DAY 2 - ADVERSARY CASE 14-05022
COMPLAINT FOR DAMAGES AND TO DETERMINE
DISCHARGEABILITY OF DEBT FILED BY
KENMARK VENTURES, LLV V. ANTHONY THOMAS, WENDI THOMAS [1]
BEFORE THE HONORABLE BRUCE T. BEESLEY
UNITED STATES BANKRUPTCY COURT JUDGE

APPEARANCES:

For the Debtors:	JEFFREY A. COGAN, ESQ. 6900 Westcliff Drive, Suite 602 Las Vegas, NV 89145 (702) 474-4220
For Kenmark Ventures:	WAYNE A. SILVER, ESQ. 333 West El Camino Real, Suite 310 Sunnyvale, CA 94087 (408) 720-7007
Audio Operator:	Stacie C. Burney, ECR
Transcription Company:	Access Transcripts, LLC 10110 Youngwood Lane Fishers, IN 46038 (855) 873-2223 www.accesstranscripts.com

Proceedings recorded by electronic sound recording,
transcript produced by transcription service.

for those of us who are old enough to remember Emily Litella.
BY MR. SILVER:
Q Mr. Thomas, if I could --
A I'm Mr. Tersini.
Q Yes, you are.
A Thank you.
Q I've been saying Mr. Thomas all day. I apologize. I will not do that again. Mr. Tersini, turning to Page P-236 of the same exhibit.
A Yes.
Q P-236 is a document entitled certificado. We're going to refer to it as an appraisal. It was done by Dimitri, and it is an appraisal, I believe, of the Thomas Emerald. Was that your understanding?
A That was my understanding, yes.
Q And it appraised for $800 million. Is that correct?
A Yes, it did.
Q And in making your decision to invest in Electronic Plastics and having that investment secured by the Thomas Emerald, did you rely on this appraisal?
A Yes, I did.
Q Was it important to you?
A Yes, it was.
Q All right. Thank you. As you began -- or as Kenmark began putting money into Electronic Plastics or loaning it to

Mr. Thomas, at some point during that process, which went on for about a year, did you, at some point, become concerned that things were not going the way they were supposed to be?

A Yes.

Q Okay. Tell me about that. Talk me through that.

A There were a number of promises made, a number of deadlines that were to be met, as far as fulfilling these orders and selling territories and things of that nature, and always for one excuse or another, the deadlines were not met.

Q All right. Did you bring those concerns up to Mr. Thomas?

A Yes, I did.

Q And what did Mr. Thomas tell you?

A His response was always very consistent, "You have nothing to worry about. Your money's guaranteed by my emerald."

Q All right. Did you have occasion to get involved in any of the marketing efforts of Electronic Plastics?

A I attended a meeting in Minneapolis with Honeywell, and I attended a meeting with some individuals from the Wynn Corporation in Las Vegas.

Q Okay. And were these meetings prior to the decision to invest money in the Electronic Plastics deal or were they soon after or when did they occur?

A I don't recall the exact timeframe, but I believe they were right at the inception of our -- of the venture.

Q All right. And let's -- I believe you said Honeywell.

minutes. Thank you.

THE CLERK: All rise.

(Recess taken at 2:57 p.m.)

(Proceedings resumed at 3:13 p.m.)

THE CLERK: All rise.

THE COURT: Good afternoon. Please be seated.

Sir, you're still under oath.

Go ahead, Counsel.

MR. SILVER: Thank you, Your Honor.

BY MR. SILVER:

Q Mr. Tersini, would you turn to Plaintiff's Exhibit 20.

A Exhibit 20?

Q Yeah.

A Okay.

Q That is the declaration of Anthony Thomas in the Conetto litigation. Do you have that in front of you?

A Yes.

Q All right. Turn to Page P-213 of Exhibit 20, kind of toward the back.

A Yes.

MR. SILVER: For the record, P -- well, I'll do it. For the record, P-213 is what we've been referring to as an appraisal by Dimitri, and it's the one dated September 20th, 2001. It's in the amount of $400,000.

BY MR. SILVER:

Q Mr. Tersini, have you ever seen this document before?
A No.
Q Never seen it before today?
A If I saw it, it would have been during the preparation for the Santa Clara trial.
Q All right. I'll represent to you, sir -- I just want to establish -- this is an appraisal of the Thomas Emerald, and I will ask you this question. Given all the information you had gotten from Mr. Thomas with all the other appraisals you may have seen and whatever else he may have told you, if he had shown you a copy of this appraisal for $400,000, would it have made any difference to you?
A I would not have loaned $6 million against 400,000 in collateral.
Q Well, hold on, hold on. You now have conflicting appraisals. You have an appraisal for $400,000 and then you have the $800 million, which I'll represent to you was done a few weeks later --
A Yes.
Q -- and whatever else he would have showed you.
A Yes.

MR. COGAN: Your Honor, I'm going to object. I may have done it too late, but at least I'm going to try to stop further questioning. I think under the doctrine of judicial estoppel, this line of questioning is inappropriate as to

valuation. Kenmark filed a complaint in a Sarasota court -- Sarasota, Florida court, where they -- it said based on information and belief, the emerald -- the Thomas Emerald was worth $800 million, and I think does -- it is one of our exhibits. I think Kenmark should be judicially estopped from denying the value of the emerald.

THE COURT: I don't think he's trying to establish the value of the emerald. I think he's trying to establish that if he had seen this appraisal, he would not have entered into the transaction where he transferred money to the debtor for -- to Electronic Plastics. That's how I understood it. I did not understand he was trying to value it.

MR. SILVER: And the Court is correct, Your Honor. I'm not trying to stop its value.

MR. COGAN: I withdraw my objection.

MR. SILVER: All right.

BY MR. SILVER:

Q So, Mr. Tersini, I'm trying to set up a bit of a paradigm here, so let me try it again. If you had seen the appraisal for $400,000, okay, fine, but you also had appraisals for a whole lot more money that you were presented -- so now you have a range of value -- tell me why that $400,000 appraisal would be the one that would kill the deal.

A It's unbelievable to me that a -- the same asset could go from originally from a $400,000 valuation to $800 million.

That's just beyond my scope of belief.

Q All right. Let me stay on the same subject and ask you did you ever learn that despite the history of the Thomas Emerald that we looked at, in fact, Mr. Thomas had paid $20,000 for the Thomas Emerald.

A Unfortunately, I did.

Q Unfortunately? Why is it unfortunately?

A Because the stone is worthless and --

Q Well, let me follow that up.

A Okay.

Q If you had learned --

MR. COGAN: I'm going to move to strike that as he's not an expert to --

THE COURT: Granted.

THE WITNESS: Yes, lousy answer.

MR. SILVER: It's okay. It was a lousy question, which usually elicits a lousy answer.

BY MR. SILVER:

Q If you had learned that Mr. Thomas had only paid -- or paid $20,000 for the Thomas Emerald prior to investing in Electronic Plastics and using that emerald as collateral, would that have made a difference to you?

A I would definitely not have loaned any money against a $20,000 asset.

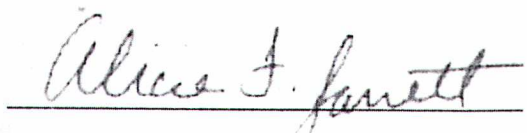
Q Well, but this -- isn't it possible he got a really good

deal?
A No, it's unbelievable to me that you could buy something for $20,000 and have it be worth 800 million or 600 million or 400 million or 100 million or 50 million.
Q All right.
A But you bought the stone from somebody who's in the stone business. They're not going to give you a $50 million stone for $20,000. That's just beyond my scope of belief.
Q Fair enough. Okay. I'd like you to turn to Exhibit 12, same binder.
THE COURT: Exhibit 12, you said?
MR. SILVER: Yes, Your Honor, one two.
THE WITNESS: Okay.
BY MR. SILVER:
Q All right. Mr. Tersini, Exhibit 12 is a secured demand note in the amount of $600,000. It's dated July 18th, 2007, and the second page, there is a signature of Tony Thomas of that date. First question, you were present in court for both days of this trial, correct?
A Yes, I was.
Q And you've heard Mr. Thomas testify that his signature on Exhibit 12, secured demand note, is a forgery?
A Yes, I have.
Q All right. Tell me, first of all, have you seen Exhibit 12 before?

that payroll is part of keeping the company going, yes.
Q Okay. Let's use the phrase "keeping the company going." That's what you just said, correct?
A That is.
Q Did that give you concerns that the company was so cash strapped prior to June 28th, 2007 that it needed money to keep going?
A Yes, and that's why I only made a loan and did not make a capital contribution.
Q If the company was so cash strapped, why would you even make the loan?
A Mr. Thomas presented in excess of 800 -- represented to be in excess of $850 million worth of assets that he personally controlled, so that's why I made a loan and didn't make a capital contribution, and that's why I had Mr. Thomas sign the promissory note.
Q Okay. But that was a month later or so, correct?
A Yes, it was. Yes.
Q Yeah.
A A month later.
Q Well, I'm just wondering, you know, you give $600,000.
A No, I didn't, it was 300,000, and by the time we put in the second 300,000 --
Q Okay.
A -- the promissory note was executed. And as I stated

CERTIFICATION

I, Alicia Jarrett, court-approved transcriber, hereby certify that the foregoing is a correct transcript from the official electronic sound recording of the proceedings in the above-entitled matter.



ALICIA JARRETT, AAERT NO. 428 DATE: April 15, 2016

ACCESS TRANSCRIPTS, LLC

CERTIFICATION

I, Ilene Watson, court-approved transcriber, hereby certify that the foregoing is a correct transcript from the official electronic sound recording of the proceedings in the above-entitled matter, and to the best of my ability.

ILENE WATSON, AAERT NO. 447 DATE: April 15, 2016

ACCESS TRANSCRIPTS, LLC

Appendix "C"

NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT

In re:	BAP No. NV-17-1072-TiFL
ANTHONY THOMAS and WENDI THOMAS; AT EMERALD, LLC,	Bk. No. 3:14-bk-50333-BTB
Debtors.	Adv. No. 3:14-ap-5067-BTB
ANTHONY THOMAS,	
Appellant,	
v.	**M E M O R A N D U M***
JOHN BEACH, AS TRUSTEE OF THE BEACH LIVING TRUST DATED JANUARY 22, 1999,	
Appellee.	

Argued and Submitted on December 1, 2017
at Reno, Nevada

Filed - January 16, 2018

Appeal from the United States Bankruptcy Court
for the District of Nevada

Honorable Bruce T. Beesley, Bankruptcy Judge, Presiding

Appearances: Laury Miles Macauley of Macauley Law Group, P.C. argued for appellant Anthony Thomas; Joseph Went of Holland & Hart LLP argued for appellee John Beach, as Trustee of the Beach Living Trust Dated January 22, 1999.

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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.

Before: TIGHE,** LAFFERTY, and FARIS, Bankruptcy Judges.

INTRODUCTION

This appeal arises from a grant of summary judgment in favor of plaintiff John Beach as Trustee of the Beach Living Trust Dated January 22, 1999 ("Beach"). Beach made a motion for summary judgment (the "Motion") in this adversary proceeding on claims under § 523(a)(2)(A)[1], Nevada state law fraud, and § 727(a)(4)(A). The bankruptcy court granted the Motion by order entered on February 21, 2017.

Admittedly, debtor and defendant Anthony Thomas ("Thomas") failed to file a written response to the Motion; nevertheless, the evidence introduced in support of the Motion was inadequate. Specifically, Beach provided insufficient proof of the required false statements, and the court's finding of knowledge and fraudulent intent must have been based, impermissibly, upon material inferences drawn against the nonmoving party. We therefore REVERSE and REMAND.

FACTS[2]

**Hon. Maureen A. Tighe, U.S. Bankruptcy Judge for the Central District of California, sitting by designation.

[1]Unless otherwise indicated, all chapter, section, and rule references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532, and to the Federal Rules of Bankruptcy Procedure, Rules 1001-9037. All "Civil Rule" references are to the Federal Rules of Civil Procedure.

[2]We have exercised our discretion to review the bankruptcy court docket and various documents filed through the electronic docketing system. See O'Rourke v. Seaboard Sur. Co. (In re E.R. Fegert, Inc.), 887 F.2d 955, 957-58 (9th Cir. 1988); Atwood v. Chase Manhattan Mortg. Co. (In re Atwood), 293 B.R. 227, 233 n.9 (continued...)

This case involves a $500,000 loan secured by a 23 kilogram black schist stone containing a 22,500 carat emerald, known as the "Thomas Emerald." The Thomas Emerald was purchased by Thomas on September 17, 2001 for $20,000 in Sao Paulo, Brazil. Thomas obtained a "Certificado" dated November 5, 2001, providing an appraisal of the Thomas Emerald and estimating it to be worth $800,000,000. A portion of the Certificado reads:

> In my 35 years as a professional, I have never encountered anything similar, and due to its uniqueness, there is nothing I can refer to in order to establish a monetary value for this rock. Consequently, it is entirely up to the owner of the crystal and the party interested in purchasing it to establish the crystal's market value.
>
> If I were to quote the commercial value of this stone, it would be superior to the value of the solid block found in the British Museum, Great Russell Street, England WCI which measures 203 x 172 x 160 mm, weighs 3,296 gr. And is worth US$ 792 million (seven-hundred, ninety-two million dollars). The specimen in this report, which weighs 1,204 grams (6,020 cts) more than the rock in the British Museum, I estimate is worth US$800 million (eight-hundred million dollars).

The Certificado is signed by a "Dimitri Paraskevopulos, Expert Appraiser and Gemologist." Thomas claims to have obtained subsequent "appraisals" of the Thomas Emerald for "over $200,000,000," and a signed asset purchase agreement dated February 5, 2009 for $340 million. However, no evidence of any subsequent appraisals or the referenced sale, other than statements by Thomas, exists in the record.[3] By all accounts,

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[2](...continued)
(9th Cir. BAP 2003).

[3]Beach submitted an appraisal to the bankruptcy court in support of the Motion, but the court declined to admit the appraisal into evidence.

however, the Thomas Emerald is unique and therefore very difficult to value.

At some point between 2001 and 2013, Thomas transferred the Thomas Emerald to AT Emerald, LLC, a Nevada limited liability company ("AT Emerald"), with himself as the sole member. By 2013, Thomas became liable for $4.5 million in connection with a settlement agreement with Kenmark Ventures. In order to satisfy that debt in part, Thomas sought to borrow money using the Thomas Emerald as collateral.

Thomas met Beach through Beach's wife and her cousins. Around January 17, 2013, AT Emerald executed a promissory note (the "Note") evidencing the trust's loan to AT Emerald of $500,000 at 7% interest per annum with a 1-year maturity date. The Note was secured by the Thomas Emerald, as described by the attached copy of the Certificado. On January 18, 2013, Beach wired the $500,000 loan funds to "Wells Fargo, Beneficiary ABA . . . Mr. Tony Thomas/AT Emerald Transfer." AT Emerald never made any payments to Beach under the Note.[4] Beach later recorded a UCC-1 financing statement.

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[4]At the hearing on the Motion, Thomas argued repreatedly that this was not his debt, but the debt of AT Emerald. Beyond a short statement in the brief, Thomas makes no argument and cites no law in this appeal that Beach sued the wrong party. Even if Thomas had adequately raised the issue in this appeal, it is easily rejected. Thomas's Schedule F (and amended Schedule F) admits that he owes a $540,000 debt to Beach. He did not mark the debt as disputed, contingent, or unliquidated. Furthermore, Beach filed a proof of claim against Thomas and his wife personally; no objection to that proof of claim was ever filed. A claim for which a proof of claim is filed is deemed allowed unless a party in interest objects. § 502(a). Here, no party in interest objected to the proof of claim filed by Beach.

On March 4, 2014, Thomas and his wife, Wendi Thomas,[5] filed a joint chapter 11 bankruptcy in the District of Nevada. Simultaneously, AT Emerald filed a separate chapter 11 case in the District of Nevada. On May 12, 2014, the bankruptcy court ordered the two cases to be jointly administered. They were later converted to chapter 7. Thomas listed as an asset in his Schedule B a 100% interest in AT Emerald valued at $200,000,000 "based on appraisal." AT Emerald listed in its Schedule B: "[o]ne Emerald Based on Appraisal Value Exceeds $200,000,000.00."

1) Valuation and Alleged Sale

At all times relevant, the Thomas Emerald was held at Sarasota Vault in Sarasota, Florida ("Sarasota Vault"). On June 20, 2014, Beach filed an Ex Parte Motion for an Order Requiring the Person Most Knowledgeable of the Sarasota Vault to Appear for 2004 Examination (the "Rule 2004 Examination" motion).

Three days later, on June 23, 2014, Thomas and AT Emerald filed in their respective bankruptcy cases identical motions to sell the Thomas Emerald free and clear of liens (the "Motion to Sell"). Attached to the Motion to Sell was a Purchase and Sale Agreement dated June 19, 2014, between AT Emerald and Koyo Shipping and Trading Corporation ("Koyo Agreement") with all references to the sales price redacted. The Koyo Agreement is signed by one "David Charles Clarke, Finance Director & International Trustee." While the sale price under the Koyo Agreement is not known, according to the Motion it was allegedly

[5]This action was dismissed as to Wendi Thomas; Debtor Anthony Thomas is the only appellant.

"hundreds of millions of dollars." Beach alleged that the Koyo Agreement was fabricated in order to delay any inspection or appraisal of the Thomas Emerald.

The Rule 2004 Examination was scheduled for July 10, 2014. Beach received a letter on July 2 from counsel for Sarasota Vault. The letter informed Beach that access to the subject box at Sarasota Vault required two keys; Sarasota Vault had one key, and Thomas had the other. Without Thomas's key, the box containing the Thomas Emerald could be opened only by having a locksmith drill and replace the locks, for a cost of roughly $200. On July 9, Beach continued the 2004 Examination.[6] The Motion to Sell, along with accompanying declarations, was withdrawn by AT Emerald on the same day.[7]

On July 17, Beach filed a motion to compel Thomas to produce the key or alternatively to authorize the drilling of the lock at Sarasota Vault. At a hearing on that motion, the court ordered AT Emerald and/or its principal, Thomas, to turn over the Sarasota Vault key by August 1. Sometime after that hearing and before August 8, Thomas contacted Beach via text message:

> John you said you weren't going to do anything to interfere with the sale of the Emerald I told you we are in contract and the buyer doesn't want you or anyone else to view the Emerald because he's already approved it for the purchase. The buyer said he would back out of the sale agreement if anybody interfered with the sale my attorneys are going to opposed you

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[6]It is not clear if the examination was ever conducted.

[7]While the Motion to Sell was withdrawn from the AT Emerald bankruptcy docket, the Motion to Sell filed by Thomas in his individual bankruptcy was not withdrawn. Curiously, the Motion to Sell in Thomas' case was granted on July 23, 2014. No sale ever occurred.

view the Emerald today 10am o'clock. [sic]

A separate text stated: "[t]he emerald is sold and I'm waiting for confirmation, when they will wire the funds. I don't see your point in going to Florida."

On August 8, Thomas sent Beach a text message containing a letter allegedly from David C. Clarke of Koyo Shipping ("Koyo Letter"), the same individual who signed the original agreement. The Koyo Letter stated that Koyo had entered into an agreement with Thomas for the sale of the Thomas Emerald. The letter further stated that Mr. Clarke and an appraiser had visited the vault on July 7 to inspect the stone and had approved it for sale. The letter further warned that if Beach visited the vault, Koyo would either have to withdraw from the agreement or arrange another inspection of the Thomas Emerald.

Thomas subsequently produced the key. The Sarasota Vault produced a sign-in sheet for the box where the Thomas Emerald is stored, which showed two entries: 1) May 23, 2008 by A. Thomas, and 2) July 9, 2014 by A. Thomas. Beach cites the sign-in sheet as evidence that nobody other than Thomas visited the vault, and that the Koyo Letter was a "sign of desperation" after Thomas failed to prevent an independent inspection of the Thomas Emerald. Beach argues that the Koyo Agreement for an alleged sale of the Thomas Emerald for hundreds of millions of dollars was a "fantasy sale" which not only failed to materialize, but that nothing was ever heard again from "David Clarke" of "Koyo Shipping and Trading Corporation."

2) The Adversary Action

Beach filed this adversary proceeding on November 24, 2014.

The First Amended Complaint charges that Thomas misrepresented the value of the stone in obtaining the loan and that he knew that the value of his interest in AT Emerald, set forth as $200,000,000 in Thomas' schedules, was not accurate. Beach further argues in the Motion that Thomas's attempts to block an independent inspection of the Thomas Emerald indicate an attempt to prevent the true value of the stone from being determined.

On January 25, 2016, Beach filed the Motion, along with a Statement of Undisputed Facts as required by District of Nevada Local Bankruptcy Rule 7056. Thomas, who was representing himself, failed to file a written response to the Motion.

A hearing on the Motion was held on March 9, 2016. Thomas appeared in court and was permitted to argue. Thomas's statements at the hearing on the Motion were wide-ranging. He addressed the uniqueness of the Thomas Emerald and denied the allegations that he had fabricated the Koyo Letter. Thomas discussed the circumstances under which he obtained the Thomas Emerald:

> You know, these emeralds were a curse to me. I bought them in Brazil, you know, from people that were supposed to know what they were. I went and got expert appraisals, and they ended up being worth a lot more. The next thing you know, I'm losing my house and everything I got, and I did nothing wrong. I have committed no fraud to nobody. [sic]

Our review of the bankruptcy court transcript leads us to conclude that Thomas's oral opposition was not considered in the court's ruling on the Motion. At the end of Thomas's statement, the judge stated:

> There was a default in responding to this. I am entering judgment against Mr. Thomas. . . . Please upload an order consistent with the representations

made and the evidence produced.

Judgment was entered on April 13, 2017, and Thomas timely appealed. On appeal, Thomas now argues that the court did not allow him to present an oral opposition or grant him a continuance to file a written opposition.[8]

Lastly, Thomas argues that, whether or not he raised any disputed facts at the hearing on the Motion, summary judgment should not have been entered because plaintiff failed to offer sufficient evidence to support the alleged claims.

ISSUES

I. Did the bankruptcy court err in granting summary judgment in favor of Beach under § 523(a)(2)(A)?

II. Did the bankruptcy court err in granting summary judgment in favor of Beach for fraud under Nevada state law?

III. Did the bankruptcy court err in granting summary judgment in favor of Beach under § 727(a)(4)(A)?

JURISDICTION

The bankruptcy court had jurisdiction pursuant to 28 U.S.C. §§ 1334 and 157(b)(2)(I), (J), and (O). See Dietz v. Ford (In re Dietz), 469 B.R. 11, 22 (9th Cir. BAP 2012), aff'd, 760 F.3d 1038 (9th Cir. 2014) (bankruptcy court may enter a monetary judgment on a disputed state law fraud claim in the course of determining that a debt is nondischargeable). We have

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[8]Because we determine that the decision should be reversed on other grounds, we do not reach the question of whether the bankruptcy court erred in denying Thomas a continuance to file a written opposition to the Motion.

jurisdiction over this appeal under 28 U.S.C. § 158.

STANDARD OF REVIEW

We review the bankruptcy court's granting of a summary judgment motion de novo. Foster v. Double R Ranch Ass'n (In re Foster), 435 B.R. 650, 655 (9th Cir. BAP 2010).[9]

DISCUSSION

To succeed on a summary judgment motion, the movant must establish the lack of a genuine issue of material fact and entitlement to judgment as a matter of law. Aubrey v. Thomas (In re Aubrey), 111 B.R. 268, 272 (9th Cir. BAP 1990). The moving party must support its motion with credible evidence, as defined in Civil Rule 56(c), which would entitle it to a directed verdict if not controverted at trial. Id. If a party fails to address another party's assertion of fact, the court may consider the fact undisputed for purposes of the summary judgment motion. Civil Rule 56(e)(2). The court must view all the evidence in the light most favorable to the nonmoving party. Barboza v. New Form, Inc. (In re Barboza), 545 F.3d 702, 707 (9th Cir. 2008). "Even where no evidence is presented in opposition to the motion, summary judgment should not be granted if the evidence in support

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[9]The order granting summary judgment includes findings of fact. Findings of fact on summary judgment pinpoint for the appellate court which facts are undisputed and indicate the basis for summary judgment. Beach argues that because the lower court entered "findings of fact," a clearly erroneous standard should apply. This is incorrect. As stated by the 9th Circuit: "[t]hey are not findings of fact in the sense that the trial court has weighed the evidence and resolved disputed factual issues. As the findings are not entitled to deference upon review, the clearly erroneous standard is simply inapplicable." Heiniger v. City of Phoenix, 625 F.2d 842, 843 (9th Cir. 1980).

of the motion is insufficient." Hoover v. Switlik Parachute Co., 663 F.2d 964, 967 (9th Cir. 1981).

The bankruptcy court apparently granted the motion for summary judgment solely because Thomas did not file a timely opposition. This was error. Under governing Ninth Circuit precedent, even if a motion for summary judgment is unopposed, the court must evaluate the sufficiency of the movant's evidence. Id. The bankruptcy court did not do so. As explained below, the movant's evidence was not sufficient to sustain summary judgment.

I. Section 523(a)(2)(A)

Section 523(a)(2)(A) excepts from discharge any debt "to the extent obtained by false pretenses, a false representation, or actual fraud, other than a statement respecting the debtor's or an insider's financial condition." § 523(a)(2)(A). A creditor's claim of nondischargeability based on § 523(a)(2)(A) must satisfy five elements: (1) the debtor made a false statement or engaged in deceptive conduct; (2) the debtor knew the representation to be false; (3) the debtor made the representation with the intent to deceive the creditor; (4) the creditor justifiably relied on the representation; and (5) the creditor sustained damage resulting from its reliance on the debtor's representation. Turtle Rock Meadows Homeowners Ass'n v. Slyman (In re Slyman), 234 F.3d 1081, 1085 (9th Cir. 2000). In order to avoid unjustifiably impairing a debtor's fresh start, exceptions to discharge should be strictly construed against creditors and in favor of debtors. Klapp v. Landsman, 706 F.2d 998, 999 (9th Cir. 1983).

1) False Statement or Deceptive Conduct

The false statement or deceptive conduct relied on in this matter was an alleged representation by Thomas that the Thomas Emerald could provide adequate collateral to secure the full amount of the loan. Attached to the Note and security agreement was a copy of the Certificado claiming the value of the Thomas Emerald to be $800,000,000. Beyond the Certificado, Beach provided no evidence in support of the Motion that Thomas represented at the time of the loan that the loan would be fully secured. The Note itself makes no such statement, nor does it allege that the Certificado represents the true value of the Thomas Emerald. The Certificado itself states that "it is entirely up to the owner of the crystal and the party interested in purchasing to establish the crystal's market value." To establish that Thomas made a false statement, Beach relies in part on Request for Admission No. 2, which states:

> No. 2: Admit that you represented to Plaintiff that you could provide collateral to Plaintiff for loan proceeds in the form of the Thomas Emerald.
>
> A: Admit, Anthony Thomas represented this on behalf of AT Emerald, LLC.

This admission does not state, however, that the emerald would fully secure the value of the loan.[10]

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[10]At oral argument in this appeal, Beach alleged that he had previously filed a declaration in the action in which Beach declared that Thomas represented that the value of the Thomas Emerald would be sufficient to completely secure repayment of the loan proceeds and that the declaration was referenced in Beach's motion for summary judgment. The panel was not able to locate any such declaration on the docket of either the adversary or

(continued...)

Even if Thomas' statement is considered a representation that the Thomas Emerald would fully secure the loan, the true value of the emerald was not proven. Without an appraisal, the falsity of Thomas' representation that the loan would be fully secured is a disputed material fact.

Even without considering Thomas's oral statements, Beach's evidence and his argument showed that the Thomas Emerald is unique and that there is "nothing like it." Beach's own papers revealed a genuine issue of material fact regarding the falsity of Thomas' statements.

2) Thomas Knew the Representation to be False

Assuming for purposes of this element that the statement was false, to prevail under § 523(a)(2)(A), it was insufficient for Beach to show that Thomas knew at the time of the loan that the $800,000,000 figure was a gross overvaluation; Beach must have shown that Thomas knew that the value of the Thomas Emerald was less than the amount of the loan. Even if Thomas believed at the time of the loan that the Thomas Emerald was only worth $600,000, the loan would still have been fully collateralized and therefore the second element would not be satisfied.

In a request for admission submitted with the Motion, Thomas denied that he knew that the Thomas Emerald was worth less than $200,000,000, or that he misrepresented the value of the Thomas Emerald to Beach in order to induce him to make the $500,000 loan.

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[10](...continued)
main bankruptcy case, nor was the panel able to locate a reference to such a declaration in the Motion.

Beach alleges that the court can infer knowledge of the falsity of Thomas's alleged representation from the following "undisputed facts":

1) Thomas purchased the Thomas Emerald for $20,000 in 2001;

2) Thomas was "reduced to begging for money from Beach, even though he allegedly held a valuable stone, which could have been used to secure financing from a traditional lending source";

3) Thomas attempted to block an independent evaluation of the Thomas Emerald; and

4) "Thomas's production of the Koyo Letter, which threatened to pull out of a proposed purchase of the Thomas Emerald if anyone else looked at it."

Beach asked the court to infer from the circumstances surrounding the production of the Koyo Letter that there was no proposed sale and that Thomas fabricated the deal and the letter in order to forestall an appraisal because he knew it would reveal a low value. Drawing such an inference against Thomas, however, violates the requirement that, on summary judgment, the court must view all the evidence in the light most favorable to the nonmoving party. In re Barboza, 545 F.3d at 707. Beach asked the court to draw inferences against the nonmoving party. For example, Beach would like the court to infer from the Sarasota Vault sign-in sheet that nobody other than Thomas visited the vault. The sign-in sheet shows Thomas' signature for a date that appears to be "7/9/14," although the "9" is difficult to read. The Koyo Letter states that Mr. Clarke and his

appraiser visited the vault on July 7. In interrogatory No. 10, Thomas states that he met with Mr. Clarke and his appraiser on July 7 and they viewed the Thomas Emerald.

One reasonable inference from the facts in favor of the nonmoving party is that Thomas visited the vault and was accompanied by Mr. Clarke and an appraiser, who were simply not required to sign the sign-in sheet, on either July 7 or July 9. No evidence was introduced to show that the visit reflected on the sign-in sheet was not the visit described in the Koyo Letter and in the interrogatories.

In order to conclude that the Koyo Letter was a fabrication intended to forestall an inspection and appraisal, the court essentially had to make credibility findings against Thomas. While such a conclusion could be drawn at trial, it was not permissible on summary judgment. Cal. Steel & Tube v. Kaiser Steel Corp., 650 F.2d 1001, 1003 (9th Cir. 1981).

More importantly, Beach never drew a clear connection between the alleged actions surrounding the Koyo Letter and Thomas' knowledge of the Thomas Emerald's value **at the time of the loan**. Beach did not meet his burden of showing that Thomas knew at the time the loan was made that the Thomas Emerald's value was less than the amount of the loan.

3) Intent to Deceive

Intent to deceive may be inferred from the totality of circumstances. Eashai v. Eashai (In re Eashai), 87 F.3d 1082, 1087-88 (9th Cir. 1996). Where intent is at issue, summary judgment is seldom granted; however, "summary judgment is appropriate if all reasonable inferences defeat the claims of one

side, even where intent is at issue." Gertsch v. Johnson & Johnson, Fin. Corp. (In re Gertsch), 237 B.R. 160, 165 (9th Cir. BAP 1999).

Beach argues that intent to deceive can be inferred from the same facts as those which establish knowledge. When viewed in a light most favorable to the nonmoving party, the record does not establish that Thomas intended to deceive Beach. For the foregoing reasons, the bankruptcy court erred in granting summary judgment in favor of Beach under § 523(a)(2)(A).[11]

II. Nevada State Fraud Claim

Under Nevada law, plaintiff has the burden of proving each and every element of a fraudulent misrepresentation claim by clear and convincing evidence: (1) a false representation made by defendant; (2) defendant's knowledge or belief that its representation was false or that defendant has an insufficient basis of information for making the representation; (3) defendant intended to induce plaintiff to act or refrain from acting upon the misrepresentation; and (4) damage to plaintiff as a result of relying on the misrepresentation. Barmettler v. Reno Air, Inc., 956 P.2d 1382, 1386 (Nev. 1998); Bulbman, Inc. v. Nev. Bell, 825 P.2d 588, 592 (Nev. 1992).

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[11]The result of this action differs from our decision in a similar action brought against Thomas by Kenmark Ventures, LLC ("Kenmark case"). Thomas v. Kenmark Ventures, LLC (In re Thomas), BAP No. NV-16-1058-KuLJu, 2017 WL 1160868 (9th Cir. BAP Mar. 28, 2017). The Kenmark case was decided after a trial and with significant evidence that was not before the court on this summary judgment motion. Our divergent results are a reflection of the differing procedural posture as well as the limited evidence in the record in this case. Also, Kenmark asserted a failure to disclose argument not made here.

The elements of fraud under Nevada state law are essentially identical to the elements of § 523(a)(2)(A); however, the state law fraud claim uses a higher "clear and convincing" evidentiary standard, whereas § 523(a)(2)(A) merely requires a preponderance of the evidence. In re Slyman, 234 F.3d at 1085. Given the similar intent requirements of the fraud claim in addition to the higher evidentiary standard, summary judgment on the Nevada state law fraud claim should be reversed for the same reasons as the § 523(a)(2)(A) claim.

III. Section 727(a)(4)(A)

The bankruptcy court must grant a discharge to a chapter 7 debtor unless one of the twelve enumerated grounds in § 727(a) is satisfied. Claims for denial of discharge under § 727(a) are liberally construed in favor of the debtor and against the objector to discharge. Khalil v. Developers Sur. & Indem. Co. (In re Khalil), 379 B.R. 163, 172 (9th Cir. BAP 2007), aff'd, 578 F.3d 1167 (9th Cir. 2009).

A debtor's discharge may be denied if the debtor "knowingly and fraudulently, in or in connection with the case . . . made a false oath or account." § 727(a)(4)(A). To prevail on such a claim, plaintiff must show, by a preponderance of the evidence, that: "(1) the debtor made a false oath in connection with the case; (2) the oath related to a material fact; (3) the oath was made knowingly; and (4) the oath was made fraudulently." Retz v. Samson (In re Retz), 606 F.3d 1189, 1197 (9th Cir. 2010).

The "knowing and fraudulent" intent standard of § 727(a)(4) means that the debtor must have actual, not constructive, intent in concealing records or making an omission in schedules. Fogal

Legware of Switzerland, Inc. v. Wills (In re Wills), 243 B.R. 58, 64 (9th Cir. BAP 1999). Fraudulent intent may be proved by circumstantial evidence; reckless disregard combined with other circumstances may support an inference of fraudulent intent. Stamat v. Neary, 635 F.3d 974, 982 (7th Cir. 2011) (reckless disregard shown where debtors who failed to disclose business interests were highly educated and had significant business experience); In re Retz, 606 F.3d at 1199; Sholdra v. Chilmark Fin. LLP (In re Sholdra), 249 F.3d 380, 382 (5th Cir. 2001); In re Khalil, 379 B.R. at 174. Intent can be established by consideration of the totality of the circumstances. Devers v. Bank of Sheridan, Mont. (In re Devers), 759 F.2d 751, 753-54 (9th Cir. 1985).

The allegedly false oath on which Beach's claim relies is the estimate of the value of Thomas' interest listed on Schedule B as "AT EMERALD, LLC 100% BASED ON APPRAISAL VALUE EXCEEDS $200,000,000." This statement is distinct from the value of the Thomas Emerald itself, which is valued in AT Emerald's separate bankruptcy case.[12] Beach failed to submit any evidence that this valuation of the Thomas Emerald was false or that Thomas made the statement with knowledge of its falsity or with fraudulent intent.

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[12]Thomas correctly points out that Beach's statement of undisputed facts in support of the Motion attached and referenced only the value of the Thomas Emerald in the AT Emerald case and did not include the schedules of Thomas's personal bankruptcy. Thomas claims that the failure to attach the schedules to the Motion is a fatal flaw because no evidence was presented of a false oath; however, as noted previously, the panel has exercised its discretion to review the schedules filed on the docket.

Beach's argument regarding the "false oath" element of § 727(a)(4)(A) depends on the court believing Beach's assertion that Thomas's valuation of the Thomas Emerald was "not based in reality" or "fantastical." There is no evidence in the record as to the value of the Thomas Emerald other than the purchase price of $20,000 and the $800,000,000 Certificado appraisal, both of which date from roughly the same time. The only appraisal on the record far exceeds the scheduled value of the asset. Viewing the evidence in this record in favor of the nonmoving party, Thomas could have reasonably based his estimate on the Certificado.

Beach failed to establish that Thomas knowingly and fraudulently misrepresented the value of the Thomas Emerald in his bankruptcy schedules.

CONCLUSION

For the foregoing reasons, we REVERSE the bankruptcy court's determination on summary judgment as to § 523(a)(2)(A), § 727(a)(4)(A), and the Nevada state law fraud claim and REMAND the case for further proceedings.

UNITED STATES BANKRUPTCY APPELLATE PANEL

OF THE NINTH CIRCUIT

FILED

FEB 06 2018

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

In re: ANTHONY THOMAS; WENDI THOMAS; AT EMERALD, LLC

Debtors

BAP No.: **NV-17-1072-TiFL**

ANTHONY THOMAS

Appellant

Bankr. No.: 3:14-bk-50333-BTB
Adv. No.: 3:14-ap-05067-BTB
Chapter 7

v.

JOHN BEACH, Trustee of the Beach Living Trust Dated January 22, 1999

Appellee

February 6, 2018

PROOF OF SERVICE OF MANDATE

A certified copy of the attached judgment was sent to:

CLERK
U.S. BANKRUPTCY COURT

Honorable U.S. Bankruptcy Judge Bruce T. Beesley
U.S. Bankruptcy Court
C. Clifton Young Federal Building and United States Courthouse
300 Booth Street
5th Floor
Reno, NV 89502-1316

BkCt, Reno
U.S. Bankruptcy Court
C. Clifton Young Federal Bldg and United States Courthouse
300 Booth Street
Room 1109
Reno, NV 89502-1316

on February 6, 2018
By: Vincent Barbato, Deputy Clerk

UNITED STATES BANKRUPTCY APPELLATE PANEL

OF THE NINTH CIRCUIT

In re: ANTHONY THOMAS; WENDI THOMAS; AT EMERALD, LLC

Debtors

ANTHONY THOMAS

Appellant

v.

JOHN BEACH, Trustee of the Beach Living Trust Dated January 22, 1999

Appellee

BAP No.: **NV-17-1072-TiFL**

Bankr. No.: 3:14-bk-50333-BTB
Adv. No.: 3:14-ap-05067-BTB
Chapter 7

January 16, 2018

JUDGMENT

ON APPEAL from the United States Bankruptcy Court for Nevada - Reno.

THIS CAUSE came on to be heard on the record from the above court.

ON CONSIDERATION WHEREOF, it is ordered and adjudged by this Panel that the judgment of the Bankruptcy Court is REVERSED and REMANDED.

FOR THE PANEL,

Susan M Spraul
Clerk of Court
By: Vincent Barbato, Deputy Clerk

Date: January 16, 2018