No. 21-908

In the Supreme Court of the United States

KATE MARIE BARTENWERFER,
Petitioner,

v.

KIERAN BUCKLEY,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JOINT APPENDIX

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PETITION FOR A WRIT OF CERTIORARI FILED: DEC. 17, 2021
CERTIORARI GRANTED: MAY 2, 2022

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Signed and Filed: April 1, 2016
/s/
HANNAH L. BLUMENSTIEL
U.S. Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

In re: DAVID WILLIAM BARTENWERFER and KATE MARIE BARTENWERFER, Debtors.	Case No. 13-30827 HLB Chapter 7
KIERAN BUCKLEY, Plaintiff, v. DAVID WILLIAM BARTENWERFER and KATE MARIE BARTENWERFER, Defendants.	Adv. Proc. No. 13-03185 HLB

MEMORANDUM DECISION

I. INTRODUCTION

This matter came on for trial on January 19 and 22, 2016 on Plaintiff Kieran Buckley's complaint to determine the dischargeability of debt pursuant to 11 U.S.C.

§ 523(a)(2)(A).[1] The sole issue at trial was whether Defendants David and Kate Bartenwerfer fraudulently omitted disclosing material defects plaguing real property sold by the Bartenwerfers to Mr. Buckley.

Janet Brayer and Stephen Finestone appeared for Mr. Buckley. Iain MacDonald and Matthew Olson appeared for the Bartenwerfers. After the parties rested, the Court took the matter under advisement.

This memorandum decision constitutes the Court's findings of fact and conclusions of law as required by Rule 52(a) of the Federal Rules of Civil Procedure, as made applicable to this adversary proceeding by Rule 7052 of the Federal Rules of Bankruptcy Procedure. This court has jurisdiction over this action under 28 U.S.C. § 1334(b). The parties have consented to entry of final judgment by this Court in this action, which is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(I). Venue of this lawsuit is proper pursuant to 28 U.S.C. § 1409.

For the reasons that follow, the Court finds that the Bartenwerfers fraudulently omitted disclosing material defects on the subject property and that their related debt to Mr. Buckley is non-dischargeable pursuant to section 523(a)(2)(A).

II. BACKGROUND

Mr. Bartenwerfer received an MBA from Stanford in 1995. He has no education or training in construction and does not hold a contractor's license. Mrs. Bartenwerfer has worked at McKesson for 10 years and is currently employed as a Manager. She also holds a California real

[1] Unless otherwise indicated, all chapter, section and rule references are to the Bankruptcy Code, §§ 101–1532, or to the Federal Rules of Bankruptcy Procedure, Rules 1001–9036.

estate agent's license. Schedule I.[2] The Bartenwerfers operate two businesses: RJUOP I, LLC, a property development business, and Parthenon Design. Statement of Financial Affairs no. 18.

The Bartenwerfers bought and extensively remodeled a home located at 549 28th Street, San Francisco, California (the "Property"), which they subsequently sold to Mr. Buckley. The Bartenwerfers signed disclosure statements regarding the condition of the Property on November 11, 2007. They signed the sales contract on January 24, 2008. Escrow closed on March 14, 2008. Post-sale, Mr. Buckley discovered undisclosed defects and ultimately sued the Bartenwerfers in San Francisco County Superior Court to recoup damages under a number of theories. After a 19-day trial, a jury entered a special verdict. As relevant to this proceeding, the jury found in favor of Mr. Buckley on his claim for Non-Disclosure of Material Facts as follows:

(1) The Bartenwerfers failed to disclose information that they knew or should have known about water leaks, window conditions, permits, and the fire escape.

(2) Mr. Buckley did not know and could not have reasonably discovered this information.

(3) The Bartenwerfers knew or reasonably should have known that Mr. Buckley did not know and could not have reasonably discovered the information.

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[2] The Court takes judicial notice of the documents filed in the underlying bankruptcy case (case no. 13-30827). Fed. R. Evid. 201 made applicable to bankruptcy proceedings pursuant to Fed. R. Bankr. Proc. 9017.

(4) This information significantly affected the value or desirability of the property.

(5) Mr. Buckley was harmed.

(6) The Bartenwerfers' failure to disclose the information was a substantial factor in causing Mr. Buckley's harm.

The state court entered a judgment against the Bartenwerfers in the amount of $444,671. After post-trial briefing, Mr. Buckley accepted a $210,000 reduction in the amount of the judgment, which was amended to award $234,671.

Mr. Buckley requests a finding of non-dischargeability under section 523(a)(2)(A) as to the damages awarded by the state court for non-disclosure of issues relating to water leaks ($48,981), window conditions ($20,000), status of permits ($14,888), and the fire escape ($5,076); the value/cost differential ($90,000); and costs of suit ($40,019.89) for a total non-dischargeable debt in the amount of $218,964.89.

The Bartenwerfers do not dispute the amount of damages, but assert that they did not possess the fraudulent intent necessary to except the judgment from discharge under section 523(a)(2)(A).[3]

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[3] The Defendants also argued in their trial brief that Mr. Bartenwerfer's alleged fraudulent conduct could not be imputed to Mrs. Bartenwerfer based on their marital relationship. At trial, after Mr. Buckley rested his case-in-chief, the Bartenwerfers moved for a directed verdict pursuant to Federal Rule of Civil Procedure 52(c), applicable in this proceeding via Rule 7052, as to Mrs. Bartenwerfer, on the grounds that Mr. Buckley failed to prove by a preponderance of the evidence that she had the requisite knowledge of the misrepresentations and omissions or intent to defraud, and that a marital relationship is insufficient to impute the fraud of one spouse to the other. The

III. LEGAL STANDARDS

A. Exception to Discharge under section 523(a)(2)

Section 523(a)(2)(A) provides: (a) A discharge under . . . 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. 11 U.S.C. § 23(a)(2)(A).

To prevail in a section 523(a)(2)(A) action, a creditor must prove five elements by preponderance of the evidence: (1) a misrepresentation, fraudulent omission or deceptive conduct by the debtor; (2) knowledge of the falsity or deceptiveness of his statement or conduct; (3) the debtor made the representation with the intention and purpose of deceiving the creditor; (4) the creditor justifiably relied on the representation; and (5) the creditor sustained damage as the proximate result of the representation. Turtle Rock Meadows Homeowners Ass'n. v. Slyman (In re Slyman), 234 F.3d 1081 1085 (9th Cir. 2000).

B. Collateral Estoppel

Principles of collateral estoppel apply to proceedings seeking exceptions from discharge pursuant to 11 U.S.C. § 523(a). Grogan v. Garner, 498 U.S. 279, 284 n. 11 (1991).

Court denied the motion for a directed verdict, finding that an agency relationship existed between Mr. and Mrs. Bartenwerfer based on their partnership with respect to the remodel project: she was on title to the Property, signed the disclosure statements relating to the Property, and would financially benefit from the successful completion of the project and sale of the Property.

Under the Full Faith and Credit Act, 28 U.S.C. § 1738, the preclusive effect of a state court judgment in a subsequent bankruptcy proceeding is determined by the preclusion law of the state in which the judgment was issued. Harmon v. Kobrin (In re Harmon), 250 F.3d 1240, 1245 (9th Cir. 2001) (citations omitted). Thus, California law governs the preclusive effect of Mr. Buckley's judgment.

Under California law, collateral estoppel may only be applied if five threshold requirements are met and if its application furthers the public policies underlying the doctrine. Id. The policies the Court must consider are preservation of the integrity of the judicial system, promotion of judicial economy, and protection of litigants from harassment by vexatious litigation. Lucido v. Superior Court, 51 Cal. 3d 335, 343, 795 P.2d 1223, 1227 (1990).

The five threshold requirements are: (1) the issue to be precluded from relitigation must be identical to that decided in a former proceeding; (2) the issue must have been actually litigated in the former proceeding; (3) the issue must have been necessarily decided in the former proceeding; (4) the decision in the former proceeding must have been final and on the merits; and (5) the party against whom preclusion is sought must be the same as, or in privity with, the party to the former proceeding. Id. The party asserting collateral estoppel bears the burden of establishing these requirements. Id.

IV. DISCUSSION

A. Collateral Estoppel Applies to the Jury Verdict

The state court jury verdict on Mr. Buckley's cause of action for Seller Non-Disclosure of Material Facts found that the Bartenwerfers failed to disclose material information that they knew or should have known

(misrepresentation); that Mr. Buckley did not know nor could have known about the omitted information (justifiable reliance); and that the omission of material information was a substantial factor contributing to Mr. Buckley's harm (proximate cause and damages). Thus, these issues, which are identical to most of the elements Mr. Buckley would need to prove in order to prevail on his section 523(a)(2)(A) claim, were actually and necessarily litigated in the state court action, which involved the same parties. No one disputes that the amended judgment is final.

But beyond this, the Court finds that the principles underlying the doctrine of collateral estoppel are furthered by its application here as to these findings which satisfy elements (1), (4), and (5) of a 523(a) action, as enumerated above. The issues have already been decided so it would not be judicially economical to retry them. Furthermore, retrying the issues in this Court could result in a different outcome, which would negatively impact the integrity of the judicial system.

As the Court previously found in the context of Plaintiff's motion for summary judgment, the remaining elements; i.e., knowledge of the falsity of the statement and intent to deceive the creditor, were not actually litigated or decided and were subject to a trial on the merits.

B. Knowledge and Intent

The scienter requirement for a fraudulent misrepresentation is established by showing either actual knowledge of the falsity of a statement, or reckless disregard for its truth. Gertsch v. Johnson & Johnson, Fin. Corp. (In re Gertsch), 237 B.R. 160, 167 (B.A.P. 9th Cir. 1999). Intent to deceive or reckless disregard for truth can be inferred from the totality of the circumstances. Id.

at 167-68. "A representation may be fraudulent, without knowledge of its falsity, if the person making it 'is conscious that he has merely a belief in its existence and recognizes that there is a chance, more or less great, that the fact may not be as it is represented.'" Id. at 168 (quoting Restatement (Second) of Torts § 526, cmt. E (1977)).

An omission gives rise to liability for fraud only when there is a duty to disclose. Citibank, N.A. v. Eashai (In re Eashai), 87 F.3d 1082, 1089 (9th Cir. 1996). "[A] party to a business transaction has a duty to disclose when the other party is ignorant of material facts which he does not have an opportunity to discover." Apte v. Japra M.D., F.A.C.C., Inc. (In re Apte), 96 F.3d 1319, 1324 (9th Cir. 1996).

In addition, California law requires a seller of real property to make certain disclosures of which the seller has knowledge at the time of the disclosure. Cal. Civ. Code §§ 1102 et seq. These disclosures must be made in good faith, which requires honesty in fact in conducting the transaction. Cal. Civ. Code § 1102.7.

At trial, Mr. Bartenwerfer admitted that he understood that the disclosures he made pursuant to California Civil Code section 1102 constituted his representations as to the condition of the Property. These representations belong to Mrs. Bartenwerfer, too, given that she signed them. The substance of these representations and the extent to which they did not accurately or completely disclose the Property's condition, merit further discussion.

On November 11, 2007, the Bartenwerfers signed a Real Estate Transfer Disclosure Statement (the "Disclosure Statement") certifying that the information therein was true and correct to the best of their knowledge as of

that date. Plaintiff's Ex. 2 at 3.[4] The Bartenwerfers also signed a Seller's Supplemental to the Real Estate Transfer Disclosure Statement (the "Supplemental Disclosure" and, together with the Disclosure Statement, the "Disclosures") on November 11, 2007, stating that they answered the questions therein in "in an effort to fully disclose all material facts relating to the Property and hereby certify that the information provided is true and correct to the best of my knowledge." Id. at 7.

On January 24, 2008, the Bartenwerfers signed a Contract for the Sale and Purchase of Real Property (the "Contract"), representing that "Seller has no knowledge or notice that the Property has any material defects other than as disclosed by the Seller in the [Disclosure Statement] or other writing before Acceptance or a soon thereafter as practicable." Plaintiff's Ex. 1 at 6, ¶ 19. The Bartenwerfers made no additional written disclosures beyond what was contained in the Disclosures and Contract. Mr. Bartenwerfer admitted that he understood that he had an ongoing duty to disclose to Mr. Buckley any material defects; i.e., anything a buyer would want to know before purchasing the Property.

1. Mr. Bartenwerfer's Credibility

At trial, in an apparent effort to try to protect Mrs. Bartenwerfer from having any findings of fraudulent intent imputed to her, Mr. Bartenwerfer testified that he did not prepare the Disclosure Statement on behalf of Mrs. Bartenwerfer. This testimony contradicted his testimony during the state court trial that he had prepared the Disclosure Statement on behalf of his wife. Reporter's

[4] Mrs. Bartenwerfer is identified as "Kate Pfenninger," which the Court believes to be her maiden name.

Transcript of Trial Proceedings David Bartenwerfer's Testimony, September 5, 2012 at 94.

In addition, when asked whether Mrs. Bartenwerfer authorized him to complete the Supplemental Disclosure on her behalf, Mr. Bartenwerfer avoided answering the question directly, stating that she sat at the kitchen table while he filled it out but did not herself have the necessary information. This testimony was inconsistent with his testimony during the state court trial which explicitly acknowledged that Mrs. Bartenwerfer authorized him to complete the Supplemental Disclosure on her behalf. Id. at 111-12.

The Court finds that these inconsistent statements, as well as others made during trial, as noted below, significantly and negatively affect the credibility of Mr. Bartenwerfer's testimony

2. Water Leaks

The Bartenwerfers answered "No" to the question on the Supplemental Disclosure that asked: "Are there any past or present leaks or water intrusion from or through the roof, skylights, windows, siding, basement, foundation, or any other source? (please itemize even if leaks have been stopped)." Id. at 6.

At trial, Mr. Bartenwerfer admitted that he paid Freutel Roofing Inc. to repair leaks, specifically a leak above the master bedroom closet near the deck. Freutel Roofing submitted a quote for $1,600 to do work including patching the membrane at the deck area, adding material to the upper roof to get better drainage, and replace and seal base at same area of roof. The quote is dated October 17, 2007, less than a month before the Bartenwerfers signed the Supplemental Disclosure, in which they represented that there were no past or present leaks. In 2008-

2009, Mr. Buckley discovered a leak in the master bedroom ceiling, below the deck, as well as other leaks, including one in the media room.

Mr. Bartenwerfer admitted that he did not amend the Disclosures to disclose the leak and testified that he did not believe he had to disclose the leak because it occurred during the construction process and was corrected before the construction was complete. Mr. Bartenwerfer admitted that he did not disclose the leak to his realtor, Peter Monti, because it "didn't feel like a big deal." Mr. Bartenwerfer denies any intent to deceive and asserts that he made a simple mistake. The Court does not find Mr. Bartenwerfer's testimony credible, especially in light of the fact that the leak was repaired so close in time to the Supplemental Disclosures and at the very end of the construction on the Property. Considering the totality of the circumstances, including those relating to the other non-disclosures, the Court finds and concludes that the Bartenwerfers had the requisite knowledge and intent to deceive Mr. Buckley with respect to non-disclosure of the leak.

3. Permits

On the Supplemental Disclosure, the Bartenwerfers indicated that every time a permit for work on the Property was applied for, it was issued, but that an inspector did not approve the work by signing off on each permit after the relevant construction work was completed. Plaintiff's Ex. 2 at 6. The Bartenwerfers provided an explanation, stating that they let the "permit to update original kitchen [to] expire because of floorplan change, new kitchen completed with permits." Id. The Bartenwerfers did not disclose any additional open permits.

At trial, Mr. Bartenwerfer admitted that at the time he signed the Disclosures he was aware that electrical and

plumbing work had not been approved by an inspector, that the permits had not received final sign off, and that a lack of final sign off on electrical and plumbing permits is something a buyer would want to know. Mr. Bartenwerfer admitted that as of November 11, 2007 – the date the Bartenwerfers signed the Disclosures – there were ten permits which had not been signed off as complete. Mr. Bartenwerfer asserted that he did not disclose the open permits because he thought they were "basically done" and would be signed off at any time. But, Mr. Bartenwerfer also admitted that he was aware that the plumbing and electrical permits had not been signed off as final as of January 22, 2008, the date of Mr. Buckley's offer to buy the Property. Though more than two months had passed since they signed the Disclosures, the Bartenwerfers still did not disclose the open permits to Mr. Buckley.

Mr. Bartenwerfer admitted at trial that he received a Notice of Violation, dated January 31, 2008, which stated in relevant part that all permits had expired and no special inspection reports had been submitted (18 reports were required). He also admitted that he did not disclose the Notice of Violation or the expired permits to Mr. Buckley or Mr. Monti, and that he did not provide all permits to Mr. Buckley until after close of escrow. Mr. Monti testified that he had never seen the Notice of Violation and that such a notice would require the Disclosures to be amended. In his defense at trial, Mr. Bartenwerfer stated that the Notice of Violation was "an administrative issue" and that he did not think he had to disclose it. The Court finds that by the end of January 2008, Mr. Bartenwerfer was aware that the undisclosed open permits had expired and still did not disclose them to Mr. Buckley.

On March 13, 2008, the day before escrow closed, Mr. Buckley's realtor, Josh Nasvik, sent an email to Mr. Monti

itemizing the remaining repairs to be completed. At trial, Mr. Bartenwerfer testified that he understood that the items on the list were all that needed to be resolved and that the list did not mention permits. When asked if he was aware at that time that the electrical permit had not been closed out, Mr. Bartenwerfer testified he was not sure what he thought at that time because "there was confusion" around the electrical sign off; i.e., one of the job cards showed the final electrical inspection was completed on January 30, 2008.

The Court does not find Mr. Bartenwerfer's testimony credible because, on February 19, 2008, Mr. Buckley sent an email to Henry Karnilowicz of Occidental Express, a company helping Mr. Bartenwerfer through the permitting process, stating "we failed yet another electrical inspection." Plaintiff's Ex. 16. Accordingly, the Court finds that and finds that on March 13, 2008, Mr. Bartenwerfer was aware that the electrical permit had not been closed out. Mr. Bartenwerfer testified that he did not think he informed Mr. Nasvik or Mr. Monti of the failed inspection prior to the close of escrow. Mr. Bartenwerfer also admitted that he did not request a modification of the Disclosures to reflect the failed inspection, though he considered it to be material.

Considering the totality of the circumstances, including those surrounding the other material non-disclosures, the Court finds that the Bartenwerfers omitted information about the status of permits up through the time of the close of escrow with the intent to deceive Plaintiff. The Disclosures would lead a reasonable person to believe that the only outstanding permit issues related to the kitchen, when in fact there were 10 outstanding permits that had continuing issues through to the time of close of escrow in March 2008 and beyond, including their

expiration in January 2008. Though they received the Notice of Violation and failed inspections, the Bartenwerfers failed to notify Mr. Buckley of these issues despite their duty to do so until sometime after close of escrow. Accordingly, the Court finds and concludes that the Bartenwerfers had the requisite knowledge and intent to deceive Mr. Buckley with respect to non-disclosure of the status of permits.

4. Windows

The Bartenwerfers answered "No" to the question on the Disclosure Statement as to whether they were aware of "any significant defects/malfunctions" in windows. Plaintiff's Ex. 2 at 3. They also did not disclose any problems with windows in the Supplemental Disclosure.

At the state court trial, Mike Barbic, a service technician for Pella Windows, testified that on February 7, 2008, he made a site visit to the Property and noted that several windows had been installed "out of square;" i.e., they were set crooked in the frames and did not function properly. Joint Designation of Trial Transcript Testimony – Mike Barbic at 14, 16-18. Mr. Barbic testified that he advised the Bartenwerfers of the problem and that it was an installation error. Id. at 22-23. He recalled telling the Bartenwerfers the following details:

> In specific there was a window in front of the house that I believe there was some kind of a railing or something in the way. The window wouldn't open all the way, but it would not close all the way. And there is no adjustments we could to help even – you know, the frame was out of square. Typically what we would do is we can adjust the hinges to allow the window to close, but in this case the railings were in the way. And I

> said there was no way we could fix the window or adjust the window in the condition that it was because I was not able to open it up to adjust it.

Id. at 24-25. Mr. Barbic also told the Bartenwerfers that a window in the master bedroom had been installed out of square. Id. at 29. In addition, Mr. Barbic found that the windows were sticking between the weather stripping and the paint on the sash. Id. at 31. Mr. Barbic advised the Bartenwerfers to use paraffin wax to stop the sticking. Id. Mr. Barbic testified that the application of wax would not address the out of square issues. Id. at 32.

At trial in this proceeding, Mr. Bartenwerfer stated that he did not recall whether someone from Pella Windows had told him that the windows were out of square and needed to be reinstalled. He recalled being told that an installed door was out of square, and that his brother, Dale Bartenwerfer – who is not a contractor, has no expertise in California building codes, and has no education or training in building codes – told him all that of the window were working properly. Mr. Bartenwerfer testified during his state court trial proceeding that he did not disclose the problem with the door to Mr. Buckley because his contractor, Sergio Sepeda, told him that it was impossible for the doors to have been installed improperly and that therefore, Mr. Bartenwerfer believed the problem to be a manufacturing defect. Reporter's Transcript of Trial Proceedings David Bartenwerfer's Testimony, September 6, 2012 at 13. At trial in this proceeding, Mr. Bartenwerfer testified that he surmised that the problem with the windows was a manufacturing defect but does not know for sure. Mr. Bartenwerfer testified that he did not recall disclosing the suspected manufacturing defect to Mr. Buckley or to Mr. Monti.

The Court does not find Mr. Bartenwerfer's testimony that he was unaware that the windows had been installed out of square credible, because: (a) he had a conversation with his brother about whether the windows were working properly; (b) he testified at trial that he believed the window problem to be a manufacturing defect; and (c) Mr. Barbic's testimony as to what he told the Bartenwerfers about the windows being out of square is so detailed and specific and therefore, reliable and credible.

Regardless, even if they believed the window and door problems to be manufacturing defects rather than installation problems, the Bartenwerfers should have disclosed these defects to Mr. Buckley. Pella Windows was asked to come out to the Property as early as January 2, 2008, long before Mr. Buckley delivered his list of repairs to be made. This strongly suggests that the Bartenwerfers were aware of door and window problems before Mr. Buckley discovered them. Accordingly, based on the foregoing and the facts and circumstances surrounding the other non-disclosures, the Court finds and concludes that the Bartenwerfers had the requisite knowledge and intent to deceive Mr. Buckley with respect to nondisclosure of the window problems.

5. Fire Escape

The Disclosures contained no information about a fire escape. On October 26, 2008, Mr. Bartenwerfer received an email from Mr. Karnilowicz. Mr. Karnilowicz stated in the email,

> I am somewhat concerned about you giving [the buyer] all the plans, which you will have to do, and I hope that he doesn't notice the missing fire escape. I think you ought to wait till the CFC is issued before you hand over the plans or permits.

Plaintiff's Ex. 17. On the same day, Mr. Bartenwerfer received an email from Mr. Buckley which stated,

> For some reason the plans and permits you gave my real estate agent originally do not match or even come close to what you had with the inspector present Friday, ie you had given us 2 stamped pages of drawings while you had in your possession it seemed like 70-80 pages, you had given us one permit and you had 15 permits taken out. I will need a copy of all those plans and the 15 permits as soon as possible.

Plaintiff's Ex. 22.

At trial, Mr. Bartenwerfer testified that Mr. Karnilowicz advised him that he should not provide the plans to Mr. Buckley because, if he did so, he would not be able to get a final sign off on all the building permits. Mr. Bartenwerfer testified that a previous iteration of the plans included a fire escape but the final version did not. He testified that he relied on the approved plans, that the plans did not include a fire escape, that no fire escape was required because it was a two-story house, and that he had not intended to install one.

Contrary to Mr. Bartenwerfer's testimony at trial suggesting that he had no duty to disclose the missing fire escape because it wasn't included in the final plans, the jury in the state court found the omission of the lack of a fire escape was material and caused harm to Mr. Buckley.

Accordingly, based on the email exchange between Mr. Bartenwerfer and Mr. Karnilowicz, the fact that Mr. Bartenwerfer did not initially provide Mr. Buckley with a complete set of drawings and permits, and the facts and circumstances surrounding the other non-disclosures, the Court finds and concludes that the Bartenwerfers

possessed the requisite knowledge and intent to deceive Mr. Buckley with respect to non-disclosure of the missing fire escape.

V. CONCLUSION

Based upon the above findings of fact and conclusions of law, the Court finds that Mr. Buckley has satisfied his burden of establishing by a preponderance of the evidence that the Bartenwerfers's debt to Mr. Buckley with respect to the nondisclosure of water leaks, window conditions, permits, and the fire escape is nondischargeable under section 523(a)(2)(A). Accordingly, the Court will enter judgment in favor of Mr. Buckley consistent with this memorandum decision.

****END OF ORDER****

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Signed and Filed:
October 27, 2016
/s/
HANNAH L. BLUMENSTIEL
U.S. Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF CALIFORNIA – SAN FRANCISCO DIVISION

IN RE: DAVID WILLIAM BARTENWERFER, KATE MARIE BARTENWERFER DEBTORS	**CHAPTER 7** **CASE NO. 13-30827** **ADV. PROC. NO. 13-03185**

KIERAN BUCKLEY, PLAINTIFFS, V DAVID WILLIAM BARTENWERFER KATE MARIE BARTENWERFER, DEFENDANTS.	**SECOND AMENDED JUDGMENT**

SECOND AMENDED JUDGMENT

Pursuant to the Court's Memorandum Decision entered on April 1, 2016, the Court's Order Granting Defendants' Motion to Reconsider and Amending Judgment entered June 23, 2016, the Court's Final Order on Plaintiff's Motion for Attorneys' Fees entered September 2, 2016, and the Court's Order Granting Plaintiff's Motion to Reconsider the Court's Final Order on Plaintiff's Motion for Attorneys' Fees Re: Interest on State Court Attorneys' Fees and Costs entered on October 20, 2016, the Court hereby amends the Judgment entered September 13, 2016 in favor of Plaintiff as follows:

1. The damages awarded by the state court for nondisclosure of issues relating to water leaks ($48,981), window conditions ($20,000), status of permits ($14,888), and the fire escape ($5,076); the value/cost differential ($65,000), for a total debt in the amount of $153,945.00, plus interest thereon accruing at 10% per annum from October 4, 2012 forward, are hereby declared nondischargeable pursuant to 11 U.S.C. § 523(a)(2)(A).

2. Plaintiff is awarded attorneys' fees of $348,483.53 and costs of $30,007.47 incurred during the state court action, plus interest thereon accruing at 10% per annum from October 4, 2012 forward, and said fees, costs, and interest are hereby declared non-dischargeable pursuant to 11 U.S.C. § 523(a)(2)(A).

3. Plaintiff is awarded costs of $6,721.70 incurred in this action and said costs are hereby declared non-dischargeable pursuant to 11 U.S.C. § 523(a)(2)(A).

END OF JUDGMENT

UNITED STATES BANKRUPTCY APPELLATE PANEL OF THE NINTH CIRCUIT

In re: DAVID WILLIAM BARTENWERFER and KATE MARIE BARTENWERFER, Debtors.	BAP Nos. NC-16-1277-BJuF NC-16-1299-BJuF (Cross-Appeals) Bk. No. 13-30827 Adv. No. 13-03185
DAVID WILLIAM BARTENWERFER; KATE MARIE BARTENWERFER, Appellants/ Cross-Appellees, v. KIERAN BUCKLEY, Appellee/ Cross-Appellant.	**M E M O R A N D U M**[1]

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

Filed – December 22, 2017

[1] This disposition is not appropriate for publication. Although it may be cited for whatever persuasive value it may have, it has no precedential value. See 9th Cir. BAP Rule 8024-1.

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

Honorable Hannah L. Blumenstiel, Bankruptcy Judge, Presiding

Appearances: Matthew J. Olson of Macdonald Fernandez LLP argued for appellants/cross-appellees David and Kate Bartenwerfer; Janet Marie Brayer and Stephen Davis Finestone argued for appellee/cross-appellant Kieran Buckley.

Before: BRAND, JURY and FARIS, Bankruptcy Judges.

Appellants/cross-appellees David and Kate Bartenwerfer appeal a judgment determining that the debt from a state court judgment owed to appellee/cross-appellant Kieran Buckley was excepted from the Bartenwerfers' discharge under § 523(a)(2)(A).[2] The bankruptcy court found after a two-day trial that the Bartenwerfers knowingly concealed material defects in a home they sold to Buckley. Buckley cross-appeals the court's ruling that he was not entitled to attorney's fees incurred for prosecuting the dischargeability action against the Bartenwerfers, because he failed to plead a claim for such fees as required by former Rule 7008(b), in effect at the time the adversary complaint was filed.

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[2] Unless specified otherwise, all chapter, code and rule references are to the Bankruptcy Code, 11 U.S.C. §§ 101–1532, and the Federal Rules of Bankruptcy Procedure, Rules 1001–9037. The Federal Rules of Civil Procedure are referred to as "Civil Rules."

We AFFIRM, in part, and VACATE and REMAND, in part.

I. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

A. Prepetition events

1. Sale to Buckley

The Bartenwerfers purchased the property at issue in 2005 (the "Property") with a plan to remodel and sell it. Mr. Bartenwerfer is not a licensed contractor nor does he have any education or training in construction. Mrs. Bartenwerfer was a licensed real estate agent when they sold the Property to Buckley.

After the purchase, the Bartenwerfers substantially remodeled the Property, increasing its size from 2,600 square feet to 3,900 square feet. Various contractors and subcontractors completed work on the project; Mr. Bartenwerfer's brother, Dale, who is not a licensed contractor, also did some work on it.

Prior to the Buckley sale, the Bartenwerfers signed disclosure statements regarding the Property's condition known as "Transfer Disclosure Statements" ("TDS"), which are governed by Cal. Civ. Code § 1102 et seq. The Bartenwerfers made representations as to their knowledge regarding any past or present water leaks, the condition of the roof and windows, and whether any additions or other alterations or repairs were made to the Property without necessary permits or in violation of any building codes. In the TDS, the Bartenwerfers certified that the information therein was true and correct to the best of their knowledge as of that date.

The Bartenwerfers sold the Property to Buckley, a general contractor, in January 2008. The Bartenwerfers

represented in the sales contract that "Seller has no knowledge or notice that the Property has any material defects other than as disclosed by the Seller in the [TDS] or other writing before Acceptance or as soon thereafter as practicable." The Bartenwerfers made no additional written disclosures beyond what was contained in the TDS and sales contract. The parties executed several addenda to the sales contract, including a provision for certain repairs requested by Buckley and a holdback of funds to address outstanding permit and heating issues.

After the sale, Buckley discovered problems with the Property, including water leaks, defective window conditions due to improper installation, open permit issues and fire escape non-compliance (the "Subject Defects").[3] Unable to resolve their post-sale disputes over issues plaguing the Property, Buckley sued the Bartenwerfers in state court.

2. Buckley's state court action

Buckley's complaint against the Bartenwerfers alleged causes of action for breach of contract, negligence, negligent and intentional misrepresentation, and failure to disclose information in the sale of real estate. Buckley alleged, in part, that the Bartenwerfers had intentionally or negligently failed to disclose defects related to the addition's construction and had failed to obtain the necessary permits for that construction. Buckley sought general and special damages, interest, punitive damages, rescission of the sales contract, attorney's fees and costs.

After a 19-day trial, a jury entered a special verdict, finding in favor of Buckley on his causes of action for

[3] Other defects existed, but the Subject Defects were the defects relevant to Buckley's § 523(a)(2)(A) claim.

breach of contract, negligence and failure to disclose, and finding in favor of the Bartenwerfers on the causes of action for negligent and intentional misrepresentation. For Buckley's claim for "nondisclosure of material facts" (as titled in the verdict), the jury found: (1) the Bartenwerfers did not disclose information that they "knew or reasonably should have known" about the Subject Defects; (2) Buckley did not know and could not have reasonably discovered this information; (3) the Bartenwerfers knew or reasonably should have known that Buckley did not know and could not have reasonably discovered the information; (4) this information significantly affected the value or desirability of the Property; (5) Buckley was harmed; and (6) the Bartenwerfers' failure to disclose the information was a substantial factor in causing Buckley's harm.

The jury awarded Buckley damages of $444,671. The damages relevant here are:

> Nondisclosure of Subject Defects: water leaks ($48,981); window conditions ($20,000); status of permits ($14,888); cost for installing a needed fire escape ($5,076);
>
> Price/Value Differential ("PVD"): $300,000 (difference between price Buckley paid for the Property and its fair market value at time of purchase); and
>
> Costs of Suit (exclusive of attorney's fees): $40,019.89.

The jury awarded Buckley "$0" for "intentional fraud" and declined to award punitive damages.

The $300,000 PVD award was later reduced to $90,000, as reflected in the state court's remittitur and subsequent amended judgment ("State Court

Judgment"). The State Court Judgment provided that Buckley recover from the Bartenwerfers, jointly and severally, $234,671 plus 10% interest from October 4, 2012 until paid and attorney's fees and costs pursuant to a noticed motion.

Buckley thereafter filed his post-trial motion for attorney's fees, seeking $378,491.72. The issue was fully briefed and a hearing scheduled. The Bartenwerfers filed their bankruptcy case before the state court could hear the fee matter.

B. Postpetition events

1. Buckley's dischargeability complaint

After the Bartenwerfers filed their chapter 7 bankruptcy case, Buckley filed his dischargeability complaint, alleging that the State Court Judgment was excepted from discharge under § 523(a)(2)(A). Buckley alleged that the Bartenwerfers had concealed from him material information concerning the Property, including that the work performed was not done in compliance with building codes and was done by unlicenced contractors or the Bartenwerfers themselves, and that there were multiple leaks due to improperly installed windows, doors and roofing. Buckley further alleged that the Bartenwerfers did not disclose that all permits were still "open" and that there had been no final sign off on electrical or plumbing work despite the fact that all walls were closed at the time of sale.

Buckley alleged that the Bartenwerfers knowingly failed to disclose information that they knew was material to Buckley, with the intent to induce him to rely on the nondisclosures and to proceed with his purchase of the Property. Buckley alleged that he justifiably relied on the

Bartenwerfers' nondisclosures, completed his purchase of the Property and suffered damages as found by the jury.

In his prayer for damages, Buckley requested: (1) a determination that the Bartenwerfers' debt to him, including interest accrued at the legal rate, was nondischargeable; (2) punitive damages; and (3) costs of suit incurred in the adversary proceeding. Paragraph 4 of the complaint's preamble stated that, in addition to the amount of the State Court Judgment, Buckley was "entitled to recovery [sic] attorneys' fees totaling $378,491." Paragraph 13 of the complaint stated: "As a result of Defendant's actions, Plaintiff has suffered damages as found by the jury in the pre-petition state court trial, to wit, $234,671 plus attorneys' fees and costs totaling $378,491."

2. Pretrial motions

The Bartenwerfers moved for judgment on the pleadings or, alternatively, for summary judgment on Buckley's § 523(a)(2)(A) claim. The Bartenwerfers maintained that they were entitled to judgment on the basis of issue preclusion, because the jury expressly found that they did not engage in fraud and did not intentionally or negligently misrepresent any facts to Buckley; the jury found only that the Bartenwerfers breached their contract with Buckley, were negligent, and did not disclose facts that they "knew or should have known." The jury also did not award any damages for fraud and declined to award punitive damages, which the Bartenwerfers argued indicated no fraud.

Buckley also moved for summary judgment on the basis of issue preclusion. Part of the jury's damages award was the PVD award under Cal. Civ. Code § 3343, which is a "fraud" damage. Buckley argued that because the state court upheld the PVD award in its remittitur, only

reducing it, the court must have concluded that the Bartenwerfers committed fraud. Thus, argued Buckley, because the issue of the Bartenwerfers' fraud was actually litigated and necessarily decided against them (and all of the other elements for issue preclusion were met), he was entitled to summary judgment on his § 523(a)(2)(A) claim. In closing, Buckley stated his intention to move for attorney's fees and costs incurred in the adversary proceeding by separate motion after entry of judgment. He also raised this issue in his trial brief.

The bankruptcy court ultimately denied the parties' dispositive motions.

3. Trial on Buckley's complaint

The bankruptcy court held a two-day trial to determine the sole issue of whether the Bartenwerfers fraudulently failed to disclose the Subject Defects to Buckley.[4] Several witnesses testified, including the Bartenwerfers, Buckley, their respective real estate agents, and contractors who worked on the Property.

Once Buckley rested his case-in-chief, the Bartenwerfers moved for judgment on partial findings under Civil Rule 52(c) as to Mrs. Bartenwerfer. They argued that Buckley had failed to produce evidence that Mrs. Bartenwerfer knew of the Subject Defects and intentionally failed to disclose them to Buckley or that she knew

[4] It is undisputed that the jury had determined all of the other elements of Buckley's fraud claim: (1) the Bartenwerfers had a duty to disclose and failed to disclose the Subject Defects to Buckley; (2) the Bartenwerfers should have disclosed such items to Buckley; (3) Buckley reasonably relied on the omission of such disclosures in moving forward with his purchase of the Property; and (4) Buckley suffered damages in reliance on the Bartenwerfers' omissions and misrepresentations.

anything she had represented in the TDS was false. The Bartenwerfers argued that the jury's finding of "knew or should have known" was insufficient to show actual knowledge of any fraud by her. The court denied the Bartenwerfers' motion.

4. Ruling on Buckley's dischargeability complaint

The bankruptcy court entered a Memorandum Decision finding in favor of Buckley and against the Bartenwerfers on Buckley's § 523(a)(2)(A) claim. Overall, the court found Mr. Bartenwerfer not credible. His testimony was inconsistent at trial and inconsistent in several respects with his state court testimony. The court found that the Bartenwerfers had the requisite knowledge and intent to deceive Buckley by failing to disclose the Subject Defects. Accordingly, the court found that Buckley's damages with respect to the Subject Defects were nondischargeable under § 523(a)(2)(A).

The court entered judgment in favor of Buckley and against the Bartenwerfers for $218,964.89, which consisted of $48,981 for water leaks, $20,000 for window conditions, $14,888 for permit issues, $5,076 for the missing fire escape, $90,000 for the PVD damages and $40,019.89 for the state court costs of suit ("523 Judgment"). The court subsequently granted the Bartenwerfers' motion to alter or amend the 523 Judgment, reducing the PVD damages to $65,000.

5. Post-trial fee motions

a. Buckley's motion for attorney's fees

Buckley filed his post-trial motion for attorney's fees and interest, requesting $502,942.00 in fees (which included his state court attorney's fees of $378,491) and

$349,715 for interest on his attorney's fees and post-judgment interest ("Fee Motion").

The Bartenwerfers opposed the Fee Motion on the basis that Buckley failed to plead a claim for attorney's fees for either the state court action or the adversary proceeding as required under former Rule 7008(b), in effect when he filed his dischargeability complaint. In addition, the Bartenwerfers argued that Buckley's state court attorney's fees were not recoverable because they were "special damages" and were not pleaded with the specificity required under Civil Rule 9(g). If the court was inclined to award any attorney's fees, the Bartenwerfers argued that Buckley was required to apportion his fees and costs incurred in litigating the single claim of the five causes of action that related to the adversary proceeding.

In the order on the Fee Motion (the "June 23 Order"), the bankruptcy court applied former Rule 7008(b) and found that Buckley's complaint sufficiently pled a claim for his state court attorney's fees and costs. However, the court denied Buckley's request for his adversary fees, because he had failed to make any demand for them. Finally, the court declined to require Buckley to apportion his state court attorney's fees; the fees sounded in contract, not tort, and therefore they were nondischargeable along with the nondischargeable portion of the State Court Judgment.

The bankruptcy court subsequently reopened the evidentiary record to determine whether Buckley's state court attorney's fees of $378,491 were reasonable and whether the 523 Judgment should have included post-judgment interest on the nondischargeable portion of the State Court Judgment from October 4, 2012, and, if so, what rate of interest should apply – the California rate or the federal rate.

b. Further proceedings on the Fee Motion

In his supplemental brief, Buckley contended that his request for fees of $378,491 was reasonable given the modest hourly rates charged, a 19-day jury trial and that the parties had litigated the state court action for nearly five years. Buckley further argued that he was entitled to post-judgment interest at the California rate of 10% on the portion of the State Court Judgment determined nondischargeable (now $153,945) and on his state court attorney's fees of $378,491, assuming the bankruptcy court awarded that amount, which resulted in interest of $206,114.31.

The Bartenwerfers argued that Buckley was not entitled to any prejudgment interest on the nondischargeable portion of the State Court Judgment. However, if the court was inclined to award it, they contended the interest should accrue at the federal rate in effect at the time the final nondischargeability judgment is entered; that rate was currently .53%. The Bartenwerfers argued that Buckley was not entitled to post-judgment interest as compensatory damages because he failed to allege it in the complaint as required by Civil Rule 8. Furthermore, the court had reopened the record only for the limited purpose of liquidating the reasonable amount of the state court attorney's fees, not to consider interest as compensatory damages.

The Bartenwerfers also contended that Buckley was not entitled to interest on his state court attorney's fees because the state court did not award any such interest. In addition, the June 23 Order stated that the bankruptcy court would only consider whether the 523 Judgment should be amended to include interest on the portion of the State Court Judgment found nondischargeable, not

that it would add additional interest on fees, which the state court never awarded.

Finally, the Bartenwerfers disputed the reasonableness of Buckley's state court attorney's fees, contending that at least 531 hours ($182,566.00) of time was excessive because that claimed time arose from unrelated subcontractor litigation involving third parties. They also accused Buckley's counsel of improper "clumping" and including noncompensable time spent on travel and clerical tasks.

c. Final order on the Fee Motion

The bankruptcy court entered its final order on Buckley's Fee Motion, awarding him pre- and postpetition interest at the California rate of 10% on the nondischargeable portion of the State Court Judgment (the "Final Fee Order"). The court denied interest on Buckley's state court attorney's fees, because the State Court Judgment failed to provide for such interest.

With respect to the reasonableness of the state court attorney's fees, the court found that some time entries included noncompensable travel time and clerical tasks "clumped" with substantive legal work. Therefore, it reduced Buckley's fees to $348,483.53. However, the court found that the Bartenwerfers failed to establish that Buckley's fees should be reduced for the alleged time spent on unrelated matters involving third parties; the Bartenwerfers had failed to introduce the state court complaint into evidence and explain why these third-party time entries were unrelated to the claims he had asserted against them that gave rise to the nondischargeable debt.

Thus, the Final Fee Order: (1) awarded Buckley $348,483.53 for his state court attorney's fees; (2) awarded his costs incurred both in the state court action and in the

adversary proceeding; (3) ordered that his nondischargeable damages of $153,945 accrue interest at 10% per annum from October 4, 2012 until April 8, 2013, and accrue interest at 10% per annum on and after April 8, 2013; and (4) ordered that Buckley's state court attorney's fees not bear any interest.

d. Buckley's motion to reconsider the Final Fee Order and ruling

Just before the bankruptcy court entered its amended 523 Judgment to reflect the Final Fee Order, Buckley timely filed a motion to alter or amend the Final Fee Order. Buckley contended that the court erred by not awarding interest on his state court attorney's fees, even without an express provision in the State Court Judgment awarding it, because California law provides that, once the "attorney fee award is determined by the trial court, it is added to the judgment, and the total judgment bears statutory interest until paid," citing Lucky United Properties Investments, Inc. v. Lee, 185 Cal. App. 4th 125, 137-38 (2010) ("Lucky"). Therefore, Buckley contended he was entitled to interest on the attorney's fee amount of $348,483.79 and the costs of $30,007.47, accruing from October 4, 2012, at the rate of 10% per annum. The Bartenwerfers opposed Buckley's motion.

Ultimately, the bankruptcy court decided to reverse itself and grant the reconsideration motion in its entirety, thereby amending the Final Fee Order and the amended 523 Judgment.

6. The Second Amended 523 Judgment

The bankruptcy court entered a Second Amended 523 Judgment, awarding Buckley a nondischargeable judgment of $153,945.00, plus 10% interest accruing on the nondischargeable portion of the judgment as of October

4, 2012, and his state court attorney's fees of $348,483.53 and costs of $30,007.47, plus 10% interest accruing on the fees and costs from October 4, 2012.

These timely cross-appeals followed.

II. JURISDICTION

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

III. ISSUES

1. Did the bankruptcy court err by declining to apply issue preclusion to the jury's findings of fact?

2. Did the bankruptcy court err by not granting Mrs. Bartenwerfer's motion for judgment on partial findings?

3. Was there sufficient evidence of Mr. Bartenwerfer's knowledge and intent to find him liable under § 523(a)(2)(A)?

4. Did the bankruptcy court err by applying former Rule 7008(b) to deny Buckley attorney's fees for the adversary proceeding?

5. Did the bankruptcy court abuse its discretion in awarding Buckley his state court attorney's fees and, if so, did it err by awarding the amount that it did?

6. Did the bankruptcy court abuse its discretion by awarding Buckley interest on the nondischargeable portion of the State Court Judgment and on his state court attorney's fees, and did it further err by awarding interest at the California judgment rate of 10%?

IV. STANDARDS OF REVIEW

We review the bankruptcy court's findings of fact for clear error and its conclusions of law de novo. Carrillo v. Su (In re Su), 290 F.3d 1140, 1142 (9th Cir. 2002). A finding of fact is clearly erroneous if it is illogical, implausible or without support in the record. Retz v. Samson (In re Retz), 606 F.3d 1189, 1196 (9th Cir. 2010). "Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous." Anderson v. City of Bessemer City, 470 U.S. 564, 574 (1985). When factual findings are based on credibility determinations, we must give even greater deference to the bankruptcy court's findings. Id. at 575.

We review de novo the bankruptcy court's determination that issue preclusion was available. Plyam v. Precision Dev., LLC (In re Plyam), 530 B.R. 456, 461 (9th Cir. BAP 2015). If issue preclusion was available, we review the bankruptcy court's application of issue preclusion for an abuse of discretion. Id.

The bankruptcy court's factual findings under Civil Rule 52(c) are reviewed for clear error, while its conclusions of law are reviewed de novo. Kuan v. Lund (In re Lund), 202 B.R. 127, 129 (9th Cir. BAP 1996).

We will not disturb a bankruptcy court's award of attorney's fees on appeal "absent an abuse of discretion or an erroneous application of the law." In re Nucorp Energy, Inc., 764 F.2d 655, 657 (9th Cir. 1985). We review the bankruptcy court's prejudgment interest award for abuse of discretion. Simeonoff v. Hiner, 249 F.3d 883, 894 (9th Cir. 2001).

A bankruptcy court abuses its discretion if it applied the wrong legal standard or its factual findings were

clearly erroneous. TrafficSchool.com, Inc. v. Edriver Inc., 653 F.3d 820, 832 (9th Cir. 2011).

V. DISCUSSION

A. The bankruptcy court did not err by declining to apply issue preclusion to the jury's findings of fact.

The Bartenwerfers contend the bankruptcy court erred by not giving preclusive effect to the jury's findings that they did not engage in fraudulent conduct by failing to disclose the Subject Defects to Buckley, as the issue of their actual fraud was actually litigated and necessarily decided by the jury in their favor.

The doctrine of issue preclusion applies to dischargeability actions under § 523(a). Grogan v. Garner, 498 U.S. 279, 284 n.11(1991). Issue preclusion bars relitigation of factual issues that have been adjudicated in a prior action. Under the principles of "full faith and credit," 28 U.S.C. § 1738, federal courts give prior state-court judgments the same preclusive effect as the courts of the state from which the judgment derived, Cal-Micro, Inc. v. Cantrell (In re Cantrell), 329 F.3d 1119, 1123 (9th Cir. 2003). Hence, we apply California's doctrine of issue preclusion.

Under California law, the party asserting issue preclusion bears the burden of establishing five threshold requirements: (1) the issue to be precluded from relitigation must be identical to that decided in a former proceeding; (2) the issue must have been actually litigated in the former proceeding; (3) it must have been necessarily decided in the former proceeding; (4) the decision in the former proceeding must be final and on the merits; and (5) the party against whom preclusion is sought must be the same as the party to the former proceeding. Harmon v. Kobrin (In re Harmon), 250 F.3d 1240, 1245 (9th Cir. 2001);

Lucido v. Super. Ct., 51 Cal. 3d 335, 341 (1990). Additionally, imposition of issue preclusion must be fair and consistent with sound public policy. Lucido, 51 Cal. 3d at 343.

The party seeking to apply issue preclusion has the burden of proving that each element is satisfied. To sustain this burden, a party must introduce a record sufficient to reveal the controlling facts and the exact issues litigated in the prior action. Tomkow v. Barton (In re Tomkow), 563 B.R. 716, 722 (9th Cir. BAP 2017) (citing Kelly v. Okoye (In re Kelly), 182 B.R. 255, 258 (9th Cir. BAP 1995), aff'd, 100 F.3d 110 (9th Cir. 1996)). However, the entire record of the underlying proceedings need not be produced if the issues can be ascertained from the documents presented. See In re Plyam, 530 B.R. at 470 (to the extent jury findings are clearly and solely based on the relevant elements, they may be sufficient for application of issue preclusion); Johnson v. GlaxoSmithKline, Inc., 166 Cal. App. 4th 1497, 1513 n.9 (2008) (a court **may** refer to the entire record to determine issues decided in earlier case). Any reasonable doubt as to what was decided in the prior action will weigh against applying issue preclusion. In re Tomkow, 563 B.R. at 722 (citing In re Kelly, 182 B.R. at 258).

Neither party disputes that the State Court Judgment was final and on the merits and that the parties in the prior action were the same. Thus, elements (4) and (5) of issue preclusion were met. We now review the remaining three.

1. The exact issues sought to be precluded were identical to those in the former proceeding.

To establish a claim under § 523(a)(2)(A), a creditor must show: (1) misrepresentation, fraudulent omission or deceptive conduct by the debtor; (2) knowledge of the

falsity or deceptiveness of the debtor's statement or conduct; (3) an intent to 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. Turtle Rock Meadows Homeowners Ass'n v. Slyman (In re Slyman), 234 F.3d 1081, 1085 (9th Cir. 2000). Concealment of a material fact that a party has a duty to disclose can support nondischargeability of a debt on the grounds of actual fraud. Apte v. Japra, M.D., F.A.C.C., Inc. (In re Apte), 96 F.3d 1319, 1323-24 (9th Cir. 1996).

Similarly, under California law, to prevail on a claim for intentional misrepresentation, the plaintiff must prove: (1) a misrepresentation; (2) knowledge of the falsity; (3) intent to induce reliance; (4) actual and justifiable reliance; and (5) resulting damage. Lazar v. Super. Ct., 12 Cal. 4th 631, 638 (1996). The elements of a claim for negligent misrepresentation are the same except that negligent misrepresentation does not require knowledge of the falsity but instead requires a misrepresentation of fact by a person who has no reasonable grounds for believing it to be true. Cal. Civ. Code § 1710, subd. 2; West v. JPMorgan Chase Bank, N.A., 214 Cal. App. 4th 780, 792 (2013).

The elements of Buckley's § 523(a)(2)(A) claim and his state-court claims for intentional and negligent misrepresentation were identical. Even though we lack a copy of the state court complaint, it seems clear based on the jury verdict that the issue of the Bartenwerfers' fraudulent intent with respect to their affirmative misrepresentations to Buckley was squarely at issue in the state court action, as it was in the adversary proceeding.

2. The issue of the Bartenwerfers' fraudulent intent regarding the Subject Defects was actually litigated in the former proceeding.

An issue is "actually litigated" when both parties presented evidence and witnesses in support of their positions and had the opportunity to present full cases. Lucido, 51 Cal. 3d at 341. Even without copies of the state court complaint and jury instructions, the issue of the Bartenwerfers' fraudulent intent with respect to their misrepresentations or failure to disclose the Subject Defects to Buckley was actually litigated in the state court action, considering that the jury made express findings on that issue.

3. It is not clear whether the issue of the Bartenwerfers' fraudulent intent regarding the Subject Defects was necessarily decided.

To conclude that the issue was "necessarily decided," the issue must not have been "entirely unnecessary" to the judgment in the prior proceeding. Id. at 342. As sellers of real estate in California, the Bartenwerfers had a duty to disclose any known facts materially affecting the value or desirability of the Property, when such facts were not known to, nor readily discoverable by, Buckley. Cal. Civ. Code § 1102 et seq.; Calemine v. Samuelson, 171 Cal. App. 4th 153, 161 (2009) ("A real estate seller has both a common law and statutory duty of disclosure."). Nondisclosure is tantamount to a misrepresentation. See Calemine, 171 Cal. App. 4th at 161.

Although the jury found no fraudulent intent by the Bartenwerfers in connection with Buckley's claims for intentional and negligent misrepresentations, it is not clear what level of scienter the jury decided respecting his claim for their failure to disclose information in the sale of

the Property. The jury found that the Bartenwerfers "knew or reasonably should have known" of the Subject Defects and "knew or reasonably should have known" that Buckley did not know about them and could not reasonably have discovered them prior to the sale.

For this type of claim, if the Bartenwerfers "knew" of the Subject Defects and failed to disclose them, then failing to fulfill their duty of disclosure constitutes actual fraud. Snelson v. Ondulando Highlands Corp., 5 Cal. App. 3d 243, 251 (1970); Lingsch v. Savage, 213 Cal. App. 2d 729, 735-36 (1963). However, the standard of "reasonably should have known" suggests something less than actual fraud; rather, it sounds in negligence. To confuse matters more, the jury awarded Buckley PVD damages of $300,000 under Cal. Civ. Code § 3343,[5] which is a "fraud" damage. On the other hand, of the $400,000 in damages Buckley was initially awarded, the jury awarded him $0 for "intentional fraud." Thus, it is difficult to determine on this record whether a finding of actual fraud was necessary to the judgment. As a result, we are unable to determine conclusively whether the jury found the Bartenwerfers liable on Buckley's failure to disclose claim on the basis of actual fraud or something requiring a lower scienter standard.

As the party seeking to apply issue preclusion to the jury's findings of fact with respect to the Bartenwerfers' fraudulent intent, it was the Bartenwerfers' burden of proving that each element was satisfied. They have not

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[5] Cal. Civ. Code § 3343 provides, in relevant part:

> (a) One defrauded in the purchase, sale or exchange of property is entitled to recover the difference between the actual value of that with which the defrauded person parted and the actual value of that which he received, together with any additional damage arising from the particular transaction[.]

done so. Any reasonable doubt as to what was decided in the prior action weighs against applying issue preclusion. Accordingly, the bankruptcy court did not err by refusing to give preclusive effect to the jury's findings of intent.

B. The bankruptcy court erred by not making a finding as to Mrs. Bartenwerfer's intent in denying her motion for judgment on partial findings.

The Bartenwerfers contend the bankruptcy court erred in denying Mrs. Bartenwerfer's motion for judgment on partial findings, because there was no evidence in the record that she "knew or should have known" of Mr. Bartenwerfer's alleged fraud. While there may or may not have been sufficient evidence in the record of Mrs. Bartenwerfer's actual knowledge, we agree that the court needed to make a finding on her intent when ruling on the Civil Rule 52(c) motion.

When deciding a motion under Civil Rule 52(c),[6] made applicable here by Rule 7052, the bankruptcy court is "not required to draw any inferences in favor of the non-moving party; rather, the [bankruptcy] court may make findings in accordance with its own view of the evidence." Ritchie v. United States, 451 F.3d 1019, 1023 (9th Cir. 2006).

Recognizing that a marital relationship by itself is insufficient to impute the fraud of one spouse to the other,

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[6] Civil Rule 52(c), applicable here by Rule 7052, provides in relevant part:

> Judgment on Partial Findings. If a party has been fully heard on an issue during a nonjury trial and the court finds against the party on that issue, the court may enter judgment against the party on a claim or defense that, under the controlling law, can be maintained or defeated only with a favorable finding on that issue.

the bankruptcy court determined that a business or agency relationship existed between the Bartenwerfers; thus, Mr. Bartenwerfer's fraud could be imputed to Mrs. Bartenwerfer.

A California partnership is "an association of two or more persons to carry on as coowners a business for profit . . . ." Cal. Corp. Code § 16101(9) (2013). Whether or not parties have entered into a partnership/agency relationship rather than some other form of relationship is a question of fact and depends on whether they intended to share in the profits, losses and the management and control of the enterprise. Tsurukawa v. Nikon Precision, Inc. (In re Tsurukawa), 287 B.R. 515, 521 (9th Cir. BAP 2002).

We agree with the bankruptcy court's agency finding. Mrs. Bartenwerfer's partnership/agency relationship with Mr. Bartenwerfer was established by not only her coownership of the Property, which is a factor tending to establish partnership, id., but also because she signed the TDS and sales contract and she stood to benefit from the successful completion of the project and sale of the Property. That she participated little in the project and delegated authority to Mr. Bartenwerfer to manage it does not defeat the forming of a partnership. A partnership can exist as long as the parties have the right to manage the business, even though in practice one partner relinquishes the day-to-day management to the other partner. Id.

However, the court erred by imputing Mr. Bartenwerfer's fraudulent intent to Mrs. Bartenwerfer on the basis of agency alone. To deny Mrs. Bartenwerfer's Civil Rule 52(c) motion, the court had to also find that she "knew or had reason to know" of Mr. Bartenwerfer's fraudulent omissions. Sachan v. Huh (In re Huh), 506

B.R. 257, 271-72 (9th Cir. BAP 2014) (en banc). The court made no such finding. Accordingly, we REMAND this issue for further findings as to Mrs. Bartenwerfer's actual knowledge.

In addition, because the bankruptcy court appears to have imposed judgment against Mrs. Bartenwerfer solely on the basis of her agency relationship with Mr. Bartenwerfer, we VACATE the portion of the Second Amended 523 Judgment determining that Buckley's debt was nondischargeable under § 523(a)(2)(A) as to Mrs. Bartenwerfer.

C. Sufficient evidence existed for the bankruptcy court to find that Mr. Bartenwerfer knowingly and intentionally concealed the Subject Defects from Buckley.

The only issue for the bankruptcy court trial was whether the Bartenwerfers acted with the requisite knowledge and intent to support a finding of fraud by concealment for purposes of § 523(a)(2)(A). The Bartenwerfers argue that the court's findings of their intent to conceal the Subject Defects are erroneous and not supported by the record.

Although we concluded above that the findings as to Mrs. Bartenwerfer's intent are inadequate, we believe ample evidence existed in the record for the court to find that Mr. Bartenwerfer knowingly and intentionally concealed the Subject Defects from Buckley for purposes of § 523(a)(2)(A).

1. Water leaks

The bankruptcy court found that Mr. Bartenwerfer intentionally concealed the Property's water leaks of which he had actual knowledge. The TDS specifically

asked if there were "any past or present water leaks or water intrusions," to which the Bartenwerfers answered "No." At trial, Mr. Bartenwerfer admitted that he paid a roofing service to repair leaks, specifically a leak above the master bedroom closet near the deck. The roofing repair service's bid to perform the repairs was dated just one month before the Bartenwerfers completed and signed the TDS representing that there were no past or present leaks. Shortly after the sale, Buckley discovered a leak in the master bedroom ceiling below the deck and other leaks.

Mr. Bartenwerfer testified that he did not think he had to disclose the leaks to Buckley or his own real estate agent because the issue had been corrected before construction was complete and it "didn't feel like a big deal." The bankruptcy court did not find credible Mr. Bartenwerfer's testimony that he had "made a simple mistake" by not disclosing the known leaks, especially when the master bedroom leak was repaired so close in time to the TDS and at the very end of construction.

The Bartenwerfers argue that the evidence did not support a finding that Mr. Bartenwerfer intentionally failed to disclose water leaks. The bankruptcy court did not find credible Mr. Bartenwerfer's testimony that he did not intend to deceive Buckley by failing to disclose the water leaks. Because the court's finding regarding Mr. Bartenwerfer's intent about the water leaks is based on a credibility determination, we must give that finding greater deference. In re Retz, 606 F.3d at 1196. More importantly, the court did not make this finding in a vacuum. It found that, based on this and other nondisclosures, Mr. Bartenwerfer had the requisite knowledge and intent to deceive Buckley with respect to the

nondisclosure of the leaks. We perceive no clear error in that finding.

2. Status of permits

In the TDS, the Bartenwerfers disclosed an open building permit related to the kitchen, but did not disclose numerous other open permits (ten to be exact), subsequent permit violations and inspection failures. Mr. Bartenwerfer admitted that, at the time he signed the TDS in November 2007, he was aware that electrical and plumbing work had not been approved by an inspector, that the permits had not received final sign off, and that a lack of a sign off is something a buyer would want to know. He further admitted that he did not disclose to Buckley or his real estate agent the Notice of Violation, dated January 31, 2008, after the parties entered into the sales contract, which stated that all permits had expired and no special inspection reports had been submitted. The Bartenwerfers' agent testified that the Notice of Violation would have required the TDS to be amended.

Mr. Bartenwerfer also did not disclose to Buckley or to their own agent that on February 19, 2008, the Property had "failed yet another electrical inspection." Other evidence showed that Mr. Bartenwerfer knew that the electrical permit was still not closed out by March 13, 2008 — the day before the sale closed. The Bartenwerfers also did not provide all permits to Buckley until after the sale had closed.

The bankruptcy court found Mr. Bartenwerfer's testimony regarding the status of permits not credible and ultimately found that he omitted information about the status of the permits, the Notice of Violation and failed inspections up through the time of the closing, with the intent to deceive Buckley. The TDS would have led a

reasonable person to believe that the only outstanding permit issues related to the kitchen, when in fact there were ten outstanding permits that had continuing issues up to the time of the closing in March 2008 and beyond, including their expiration in January 2008. Accordingly, the court found that Mr. Bartenwerfer had the requisite intent to deceive Buckley with respect to nondisclosure of the status of permits.

The Bartenwerfers contend the bankruptcy court erred in finding that Mr. Bartenwerfer knowingly and fraudulently failed to disclose the status of the permits, given Addendum 4 to the sales contract, wherein the parties acknowledged Mr. Bartenwerfer's need to obtain sign off on all outstanding permits for the Property. In other words, the Bartenwerfers argue that something that was disclosed cannot have been omitted with fraudulent intent.

Although the parties acknowledged that a final sign off on any permits was necessary, the evidence showed that Buckley was not aware of the extent of the open permit issues at the time he entered into the sales contract or by the time of the closing. He testified that he was told only a "few minor items" were needed to finalize any permits, which included some electric work and a handrail installation. Given the court's credibility finding and the evidence in the record, we cannot say that the bankruptcy court made an erroneous finding as to Mr. Bartenwerfer's intent to deceive Buckley by concealing the status of the permits.

The Bartenwerfers argue that Buckley failed to establish they had a duty to provide him with specific updates of inspections or with the permit cards prior to closing, but the jury necessarily found that they had a duty to disclose issues involving the permits, when the jury

awarded Buckley damages associated with the Bartenwerfers' failure to disclose them.

3. Windows

In the TDS, the Bartenwerfers answered "No" to whether they were aware of "any significant defects/malfunctions" in the windows. They also did not disclose any window problems in a supplemental disclosure.

The primary evidence with respect to the window defects was the testimony of Mr. Barbic, a Pella Windows technician, who testified at the state court trial. In February 2008, Mr. Barbic made a site visit to the Property and noted that several windows had been installed "out of square" and therefore did not function properly. Mr. Barbic testified that he had advised either Mr. Bartenwerfer or his brother Dale of the problem and that it was an installation error.

Mr. Bartenwerfer denied having any conversations with Mr. Barbic, or anyone at Pella Windows, about the windows being "out of square" and needing to be reinstalled. He did recall being told that a door was out of square and that his brother Dale, who is not a contractor and has no education, training or expertise in California building codes, told him that the windows were working properly.

The bankruptcy court did not find credible Mr. Bartenwerfer's testimony that he was unaware that the windows had been installed "out of square" because: (a) he had a conversation with Dale about whether the windows were working properly; (b) he testified that he believed the window problem was a manufacturing defect; and (c) Mr. Barbic's testimony as to what he told Mr. Bartenwerfer or Dale about the windows being out of square was so detailed and specific and therefore, reliable and credible.

The Bartenwerfers argue that the bankruptcy court's reliance on Mr. Barbic's testimony was misplaced, because it is unclear if he spoke to Mr. Bartenwerfer or his brother, Dale. Mr. Barbic admitted he was unsure as to which man he told the windows were out of square. However, the bankruptcy court inferred that, even if he spoke to Dale about this issue, then Mr. Bartenwerfer likely was aware of it too based on his admitted conversations with Dale about the functionality of the windows. This was not an illogical or implausible inference. In any event, the bankruptcy court found that, even if Mr. Bartenwerfer believed the window and door problems to be manufacturing defects rather than installation problems, he should have disclosed these defects to Buckley. Pella Windows had been out to the Property as early as January 2, 2008, long before Buckley delivered his list of repairs to be made, which strongly suggested Mr. Bartenwerfer was aware of the door and window problems before Buckley discovered them.

Accordingly, we find no clear error in the bankruptcy court's finding that Mr. Bartenwerfer had the requisite knowledge and intent to deceive Buckley with respect to nondisclosure of the window defects.

4. Fire escape

The Bartenwerfers also did not disclose in the TDS or otherwise any information about a fire escape. Apparently, many versions of design plans were done for the Property, but the final version did not include a fire escape. In October 2008, Mr. Bartenwerfer received an email from a contractor assisting the Bartenwerfers with their permit issues, advising Mr. Bartenwerfer not to give Buckley all versions of the plans because Buckley might notice the missing fire escape, which could prevent a final

sign off on the Certificate of Final Completion. Mr. Bartenwerfer testified that a fire escape was not required.

The bankruptcy court found that, contrary to Mr. Bartenwerfer's testimony suggesting he had no duty to disclose the missing fire escape because it was not included in the final plans, the jury had found the omission of the lack of a fire escape material and that it caused harm to Buckley. Therefore, based on the email exchange between Mr. Bartenwerfer and his contractor, the Bartenwerfers' apparent duty to disclose, and that Mr. Bartenwerfer did not initially provide Buckley with a complete set of drawings and permits, the bankruptcy court found that Mr. Bartenwerfer had the requisite knowledge and intent to deceive Buckley with respect to nondisclosure of the missing fire escape.

The Bartenwerfers dispute the bankruptcy court's finding that they had a duty to disclose the requirement that a fire escape be installed, when there was no evidence that any such requirement existed. As with the permit issues, because the jury awarded Buckley damages for the missing fire escape, it was reasonable for the bankruptcy court to conclude that a fire escape was required and that this fact should have been disclosed. In addition, it is clear that Mr. Bartenwerfer had an ulterior motive to withhold plans containing a fire escape, because he was afraid that Buckley would scrutinize the plans and thus jeopardize the $25,000 holdback the Bartenwerfers were set to receive if the Property obtained a Certificate of Final Completion. Accordingly, we find no clear error here.

D. The bankruptcy court did not err by applying former Rule 7008(b) to deny Buckley his adversary attorney's fees.

Buckley cross-appeals the bankruptcy court's ruling that he was not entitled to attorney's fees incurred for prosecuting the dischargeability action against the Bartenwerfers because he failed to plead a claim for such fees as required by the former Rule 7008(b). He argues that the bankruptcy court erred by not applying Amended Rule 7008(b), in effect at the time of trial, which no longer requires a plaintiff to plead separately adversary attorney's fees.

There is no general right to recover attorney's fees under the Code. Renfrow v. Draper, 232 F.3d 688, 693 (9th Cir. 2000). Buckley's dischargeability complaint averred a claim for relief under § 523(a)(2)(A), which does not provide for an award of attorney's fees. Former Rule 7008(b), which applied when Buckley filed his dischargeability complaint, stated: "A request for an award of attorney's fees shall be pleaded as a claim in a complaint, cross-claim, third-party complaint, answer, or reply as may be appropriate." A claim for adversary attorney's fees is now made by post-trial motion. Rule 7054(b)(2).

We conclude that the bankruptcy court did not err by applying former Rule 7008(b) to Buckley's adversary fees, the rule in effect at the time he filed his dischargeability complaint, and Buckley has not persuaded us that a different rule should have been applied.

E. The bankruptcy court abused its discretion by not determining what portion of Buckley's state court

attorney's fees were attributable to Mr. Bartenwerfer's fraud.

The Bartenwerfers raise a variety of arguments respecting the bankruptcy court's decision to award Buckley his state court attorney's fees. We address each in turn.

They first argue that Buckley's allegation for his state court attorney's fees in the dischargeability complaint failed to meet the heightened pleading standard required by Civil Rule 9(g), applicable to adversary proceedings by Rule 7009. The Bartenwerfers contend that Buckley's damages for his state court attorney's fees were an item of "special damages," and failure to plead them with specificity bars them. The Bartenwerfers acknowledge that the Ninth Circuit has not yet ruled on whether attorney's fees are special damages that must be pleaded with the specificity required by Civil Rule 9(g), but they cite several cases, including other circuit cases, which have held that they are. The Bartenwerfers rely particularly on Garcia v. Odom (In re Odom), 113 B.R. 623 (Bankr. C.D. Cal. 1990).

Even if Civil Rule 9(g) applied to Buckley's state court attorney's fees, which we are not deciding, we conclude that Buckley pleaded the amount he was seeking with sufficient specificity to satisfy Civil Rule 9(g); he specifically requested $378,491. See Charlie Y., Inc. v. Carey (In re Carey), 446 B.R. 384, 394 (9th Cir. BAP 2011) (noting that what Odom and similar authorities say about claims for attorney's fees as special damages is that the claimant can receive no more than it pleads for specifically).

We also reject the Bartenwerfers' argument that Buckley's claim for state court attorney's fees failed to

meet the ordinary pleading standard of Civil Rule 8, applicable here by Rule 7008(b). Buckley pleaded his claim for state court attorney's fees in Paragraphs 4 and 13 of the complaint. He also realleged the first 4 paragraphs of the complaint in Paragraph 5. This demand was specific enough to satisfy Rule 7008(b). Id. at 392, 394 (claim for attorney's fees adequately pleaded for purposes of Rule 7008(b), because it was stated in the body of the complaint, not merely in the prayer, and included supporting factual allegations for basis for the claim). Accordingly, the bankruptcy court did not err in determining that Buckley's claim for his state court attorney's fees complied with Rule 7008(b).

The Bartenwerfers next argue that the bankruptcy court erred by not requiring Buckley to apportion his state court attorney's fees between the single state-court cause of action ruled nondischargeable – the failure to disclose information in the sale of real estate – and the four additional causes of action (two of which the Bartenwerfers prevailed upon) that were not the subject of litigation before the bankruptcy court. It is undisputed that attorney's fees for either tort or contract actions were available to the prevailing party under the sales contract. For the reasons stated below, we VACATE the June 23 Order, the Final Fee Order and the Second Amended 523 Judgment to the extent they determined that Buckley's state court attorney's fees were nondischargeable and REMAND this issue for further determination by the bankruptcy court.

In the June 23 Order, the bankruptcy court ruled that Buckley was not required to apportion his fees because they were provided for in the parties' agreement, which Buckley entered into as a result of the Bartenwerfers' fraudulent conduct. Thus, because the nondischargeable

claim for fraud in this case arose entirely out of the contract without distinction, the court determined that Buckley's state court attorney's fees did not have to be apportioned and were nondischargeable as well. That might be true had the state court liquidated the amount of the fees and specifically awarded them as part of any damages for fraud. See Younie v. Gonya (In re Younie), 211 B.R. 367, 377 (9th Cir. BAP 1997). But that is not what happened here.

Because of the Bartenwerfers' bankruptcy filing, the state court never liquidated the amount of Buckley's attorney's fees or determined their reasonableness. Thus, it was up to the bankruptcy court to liquidate them and to determine what portion, if any, flowed from Mr. Bartenwerfer's fraudulent conduct.[7] If the jury had rendered a fraud judgment, then Buckley's state court attorney's fees would also be nondischargeable. Cohen v. de la Cruz, 523 U.S. 213, 218-19 (1998). However, as we noted above, we are unable to determine if the State Court Judgment was based on fraud, breach of contract, negligence or some combination thereof. Without a copy of the state court complaint and jury instructions, the bankruptcy court was also unable to make this determination.

Just because the bankruptcy court found fraud by Mr. Bartenwerfer does not necessarily mean that the entire amount of Buckley's state court attorney's fees was

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[7] Ninth Circuit authority has held that the bankruptcy court has the power to award state court attorney's fees when a fee application there was interrupted by the bankruptcy stay. Renfrow, 232 F.3d at 694-95, citing with favor, Florida v. Ticor Title Ins. Co. of Cal. (In re Florida), 164 B.R. 636, 640 (9th Cir. BAP 1994) ("[A] bankruptcy court has jurisdiction to liquidate a claim for attorney's fees [in a state court action] intercepted by [an] automatic stay and can determine the debt nondischargeable on a motion for summary judgment.").

nondischargeable; only those fees attributable to the fraud are nondischargeable under § 523(a)(2)(A). Id. at 223 (compensation for fraud losses include "attorney's fees and costs of suit associated with **establishing fraud**") (emphasis added). See also Hensley v. Eckerhart, 461 U.S. 424, 440 (1983) (the extent of a plaintiff's success is a crucial factor in determining the proper amount of an award of attorney's fees, and where the plaintiff has failed to prevail on a claim that is distinct in all respects from his successful claims, the hours spent on the unsuccessful claim should be excluded in considering the amount of a reasonable fee); Jennen v. Hunter (In re Hunter), 771 F.2d 1126, 1131 (8th Cir. 1985) (ancillary attorney's fee award is subject to apportionment between the dischargeable and nondischargeable parts of the underlying debt); Clear Sky Props., LLC v. Roussel (In re Roussel), 536 B.R. 254, 263 (Bankr. E.D. Ark. 2015) (collecting cases holding that the bankruptcy court must apportion an attorney's fee award into dischargeable and nondischargeable components as dictated by the underlying debt).

Upon remand, we instruct the bankruptcy court to reopen the record to determine what amount of Buckley's state court attorney's fees are attributable to Mr. Bartenwerfer's fraud, if any. Because we are remanding the issue of Buckley's state court attorney's fees, we do not address the Bartenwerfers' arguments respecting the court's determinations about the reasonableness of the fees or whether Buckley met his burden of proof. The Bartenwerfers will get another chance to address those issues on remand.

F. The bankruptcy court did not abuse its discretion by awarding Buckley interest on the nondischargeable portion of the State Court Judgment and on his state court attorney's fees, and it did not

err by awarding interest at the California judgment rate of 10%.

The Bartenwerfers raise a number of arguments with respect to the interest awarded to Buckley.

First, they contend Buckley waived his claim for interest by failing to raise it at trial. Buckley requested "interest accrued at the legal rate" on the nondischargeable portion of the State Court Judgment in his dischargeability complaint. Although he did not raise the issue at trial, Buckley raised it in his Fee Motion. In their opposition to the Fee Motion, the Bartenwerfers contended that Buckley waived his right to his state court attorney's fees for failing to raise them at trial; they did not argue that he had waived his right to interest on the nondischargeable portion of the State Court Judgment for failing to do the same. The matter of interest on the nondischargeable portion of the State Court Judgment was discussed at the June 16 hearing on Buckley's Fee Motion. Counsel for the Bartenwerfers made no mention of Buckley waiving his right to interest.

The bankruptcy court then reopened the record and ordered further briefing on whether Buckley was entitled to interest on the nondischargeable portion of the State Court Judgment. In their supplemental brief, the Bartenwerfers argued that Buckley should not be awarded interest because he failed to plead it in his dischargeability complaint. When the court noted at the subsequent hearing that their contention was wrong, that Buckley had prayed for interest in his complaint, counsel for the Bartenwerfers conceded that they "missed that" and dropped the issue.

We fail to see where the Bartenwerfers argued before the bankruptcy court that Buckley waived his right to

interest by neglecting to raise it at trial; thus, this argument has been waived. See United States v. Lara, 815 F.3d 605, 613 (9th Cir. 2016) (not making argument before trial court fails to preserve argument for appeal and argument is deemed waived). To the extent they argue that Buckley waived his right to interest for failing to plead it in his complaint, they dropped that argument.

Next, the Bartenwerfers contend the bankruptcy court erred by awarding interest on the nondischargeable portion of the State Court Judgment at California's legal rate. They argue that the only final judgment entered was upon a single federal cause of action, namely § 523(a)(2)(A), which was tried in the bankruptcy court; therefore, the federal rate applies.

Where a debt that is found to be nondischargeable arose under state law, "the award of prejudgment interest on that debt is also governed by state law." Otto v. Niles (In re Niles), 106 F.3d 1456, 1463 (9th Cir. 1997); Oney v. Weinberg (In re Weinberg), 410 B.R. 19, 37 (9th Cir. BAP 2009). Under California law, the award of prejudgment interest "is a matter of right where there is a vested right to recover 'damages certain' as of a particular day." In re Niles, 106 F.3d at 1463 (citing Cal. Civ. Code § 3287(a)). The statute "looks to the certainty of the damages suffered by the plaintiff, rather than to a defendant's ultimate liability, in determining whether prejudgment interest is mandated." Wisper Corp. N.V. v. Cal. Commerce Bank, 49 Cal. App. 4th 948, 958 (1996). Similarly, interest at the state's judgment interest rate continues to accrue postpetition on nondischargeable debts. Shoen v. Shoen (In re Shoen), 176 F.3d 1150, 1166 (9th Cir. 1999) (citing Bruning v. United States, 376 U.S. 358, 360 (1964)).

While Buckley prevailed in the adversary proceeding on his § 523(a)(2)(A) claim, the underlying debt arose from

failure to disclose information in the sale of real estate subject to a contract created under state law. Therefore, the nondischargeable debt arose under state law. In addition, the State Court Judgment liquidated Buckley's damages, including interest, even though the state court had not yet liquidated the amount of attorney's fees. In short, Buckley's damages were certain. Accordingly, the bankruptcy court did not abuse its discretion by awarding prejudgment interest on the nondischargeable portion of the State Court Judgment at the California rate of 10%.

The bankruptcy court also did not abuse its discretion in awarding Buckley interest on his state court attorney's fees as a nondischargeable debt, even if it turns out that no such fees should have been or will be awarded. The court ultimately agreed with Buckley that, under California law, once costs are liquidated they are added to the principal amount of the judgment and the entire amount then bears interest at the California statutory rate. Although not cited, we presume the court relied on Lucky, cited in Buckley's reconsideration motion, for its decision.

The Lucky court explained that a prevailing party in California can recover certain costs incurred in litigation, which may include attorney fees if authorized by contract or statute. 185 Cal. App. 4th at 137. Where costs are established by the judgment, but the amount of the award is ascertained at a later time, the clerk enters the costs on the judgment after the amount is determined; thus, the amount of the cost award is incorporated into the judgment. Id. Interest at 10% per annum accrues on the unpaid principal amount of the judgment, including the cost award, as of the date of judgment entry. Id. at 137-38. Therefore, interest ordinarily begins to accrue on the prejudgment cost portion of the judgment at the same time it

begins to accrue on all other monetary portions of the judgment — upon entry of judgment. Id. at 138.

Thus, Buckley's attorney's fee award, once ascertained, would be added to the State Court Judgment and interest at the California rate of 10% would accrue thereon as though it were included in the judgment from the day of entry. Accordingly, the bankruptcy court did not err by determining that Buckley would be entitled to interest on his state court attorney's fees.

VI. CONCLUSION

For the foregoing reasons, we AFFIRM, in part, and VACATE and REMAND, in part.