

I. FACTS

1
2 The facts are not in dispute.¹ Plaintiff is a general
3 contractor in the business of buying vacant lots, building homes on
4 them, and then selling them for a profit. In 2003, Plaintiff's
5 cousin-in-law, Satnam Singh Gill, approached Plaintiff about
6 getting into the business. Satnam² discussed the idea with his
7 close friend, Dinesh Sharma, and Satnam and Dinesh decided to
8 become partners in the business.

9 Satnam and Dinesh purchased two vacant lots in Manteca,
10 California in 2003 (with financial help from Plaintiff). Satnam and
11 Dinesh agreed to pay Plaintiff for building custom homes on the
12 lots at \$75 per square foot plus a third of the profits from
13 selling the homes. Construction on the first home was completed in
14 May 2004. However, Plaintiff walked off the job on the second home
15 in June 2004 after Satnam and Dinesh refused to pay Plaintiff for
16 his work. At the time Plaintiff walked off the job, the second home
17 was substantially complete with only minor finishes (such as carpet
18 and light fixtures) remaining.

19 On June 8, 2004, Plaintiff recorded a mechanic's lien against
20 the properties. After unsuccessfully trying to informally resolve
21 his differences with Satnam and Dinesh, Plaintiff hired a lawyer
22

23 ¹Counsel for the parties have stipulated to the authenticity
24 and admissibility of the documents and testimony they intend to use
25 in support of the cross-motions to obviate the need to authenticate
26 the documents and testimony, and to avoid objections to the
admissibility of the documents and testimony.

27 ²Because several of the individuals involved in this lawsuit
28 have the same surname, this Tentative Decision refers to persons,
other than the parties to this adversary proceeding, by their given
names.

1 and filed a lawsuit in San Joaquin County Superior Court (Case No.
2 CV024661) on September 3, 2004. The lawsuit sought to foreclose the
3 mechanic's lien and recover damages for breach of contract.

4 Ten months after the San Joaquin County lawsuit was filed,
5 Satnam and Dinesh filed a lawsuit against Plaintiff in Santa Clara
6 County (Case No. 1-04-CV-030658). Satnam and Dinesh served the
7 summons and complaint in that action by publication. After
8 Plaintiff, who had no notice of the publication, failed to appear,
9 Satnam and Dinesh took Plaintiff's default and obtained an order
10 releasing the mechanic's liens.

11 The order releasing the mechanic's liens was entered on July
12 12, 2005. Less than a week later, Satnam and Dinesh sold the first
13 home to Dinesh's brother, Rakesh Sharma (Defendant) for \$500,000,
14 and the second one to Kulwant Kang, another one of Satnam's close
15 friends, for \$511,000. Escrows closed on the sales in less than two
16 weeks, without any inspections, appraisals, or any other usual
17 escrow conditions.

18 Less than nine months later, unbeknownst to Plaintiff,
19 Defendant sold the first home for \$700,000, and Kulwant sold the
20 second home for \$510,000. Both homes were sold to bona fide
21 purchasers. Plaintiff did not learn of the sales until after they
22 had closed.

23 Plaintiff thereafter obtained relief from the default against
24 him in the Santa Clara action and had the order releasing the
25 mechanic's liens vacated. Plaintiff had the case transferred to San
26 Joaquin County to be consolidated with his lawsuit. Plaintiff also
27 amended his complaint to include claims for fraudulent conveyance
28

1 under California Civil Code § 3439.04 against Defendant and Kulwant
2 Kang. The case went to trial on October 25, 2010.

3 The jury instructions with respect to Defendant pertain to the
4 conspiracy count of the state court complaint. Those instructions
5 reference Judicial Council of California Civil Jury Instruction
6 ("CACI") 3600 and provide:

7 SHAHGIR GILL claims that he was harmed by SATNAM
8 SINGH GILL and DINESH SHARMA's sale of the homes and that
9 RAKESH SHARMA and KULWANT KANG are responsible for the
10 harm because they were part of a conspiracy to commit a
11 fraudulent conveyance. A conspiracy is an agreement by
12 two or more persons to commit a wrongful act. Such an
13 agreement may be made orally or in writing or may be
14 implied by the conduct of the parties.

11 If you find that SATNAM SINGH GILL and DINESH SHARMA
12 committed a fraudulent conveyance that harmed SHAHGIR
13 GILL, then you must determine whether RAKESH SHARMA and
14 KULWANT KANG are also responsible for the harm. RAKESH
15 SHARMA and KULWANT KANG are responsible if SHAHGIR GILL
16 proves both of the following:

15 1. That RAKESH SHARMA and KULWANT KANG were aware
16 that SATNAM SINGH GILL and DINESH SHARMA planned to
17 commit a fraudulent conveyance; and

17 2. That RAKESH SHARMA and KULWANT KANG agreed with
18 SATNAM SINGH GILL and DINESH SHARMA and intended that the
19 fraudulent conveyance be committed.

19 Mere knowledge of a wrongful act without cooperation
20 or an agreement to cooperate is insufficient to make
21 RAKESH SHARMA and KULWANT KANG responsible for the harm.

21 A conspiracy may be inferred from circumstances,
22 including the nature of the acts done, the relationships
23 between the parties, and the interests of the alleged
24 coconspirators. SHAHGIR GILL is not required to prove
25 that RAKESH SHARMA and KULWANT KANG personally committed
26 a wrongful act or that they knew all the details of the
27 agreement or the identities of all the other
28 participants.

25 Exhibit 5 to Plaintiff's Motion for Summary Judgment, docket no.
26 42.

27 The jury found Defendant liable for damages for fraudulent
28 conveyance under Cal. Civ. Code § 3439.04. The jury also found that

1 Plaintiff had established by clear and convincing evidence that
2 Defendant had acted with malice, oppression, or fraud in connection
3 with the fraudulent conveyance. The jury awarded Plaintiff damages
4 of \$325,323 (for which all state court defendants are jointly and
5 severally liable); and punitive damages against Defendant of
6 \$25,000. Punitive damages in varying amounts were also awarded
7 against the other defendants in the state court lawsuit.

8 Defendant filed the underlying chapter 7 case on May 16, 2011.
9 The case was discharged on August 16, 2011 and closed. Plaintiff
10 timely filed this adversary proceeding on August 15, 2011. At that
11 time, the state court judgment was on appeal with the California
12 Court of Appeals, Third Appellate District. On July 29, 2014, the
13 appellate court affirmed the judgment, and then denied the state
14 court defendants' petition for review on October 29, 2014.

15 The adversary complaint seeks a determination of
16 nondischargeability of the state court judgment under
17 § 523(a)(2)(A) and (a)(6).

18 19 **II. SUMMARY JUDGMENT STANDARD**

20 Summary judgment shall be rendered by the Court if the
21 pleadings, depositions, answers to interrogatories, and admissions
22 on file, together with the affidavits, if any, show that there is
23 no genuine issue as to any material fact and that the moving party
24 is entitled to a judgment as a matter of law. Fed. R. Civ. P. 56,
25 incorporated in bankruptcy via Fed. R. Bank. P. Rule 7056;
26 Matsushita Electric Industrial Co., Ltd. v. Zenith Radio
27 Corporation, 475 U.S. 574, 584-85 (1985). All inferences must be
28 drawn against the moving party. Adickes v. S.H. Kress & Co., 398

1 U.S. 144, 158-59 (1970); United States v. Diebold, Inc., 369 U.S.
2 654, 655 (1962). Where a rational trier of fact could not find for
3 the non-moving party based on the record as a whole, there is no
4 "genuine issue for trial." Matsushita Elec. Indus. Co., 475 U.S.
5 at 587.

7 III. ANALYSIS

8 A. Issue Preclusion

9 Plaintiff contends that the state court judgment satisfies the
10 requirements for issue preclusion under California law and supports
11 a finding of nondischargeability under both § 523(a)(2)(A) and
12 (a)(6). Defendant does not dispute that Defendant was found liable
13 for fraudulent conveyance or that the jury found that Defendant had
14 acted with malice, oppression, or fraud. Defendant argues that
15 issue preclusion should not be applied here because the evidence
16 presented at trial did not support these findings. However, this
17 Court has no authority to review, overturn, or disregard a judgment
18 of the state court. Rather, this Court must give full faith and
19 credit to the state court judgment and apply that state's law of
20 issue preclusion. 28 USC § 1738; See Marrese v. American Academy of
21 Orthopaedic Surgeons, 470 U.S. 373, 380 (1985); In re Nourbakhsh,
22 67 F.3d 798, 800 (9th Cir. 1995).

23 Under California law, issue preclusion applies only if all of
24 the following elements have been satisfied: (1) the issue sought to
25 be precluded must be identical to that decided in the former
26 proceeding; (2) the issue must have been actually litigated in the
27 former proceeding; (3) the issue must have been necessarily decided
28 in the former proceeding; (4) the decision in the former proceeding

1 must be final and on the merits; (5) the party against whom issue
2 preclusion is sought must be the same as, or in privity with, the
3 party to the former proceeding. In re Khaligh, 338 B.R. 817, 824
4 (9th Cir. BAP 2006), aff'd, 506 F.3d 956 (9th Cir. 2007). The Court
5 must also consider a sixth element: whether "imposition of issue
6 preclusion in the particular setting would be fair and consistent
7 with sound public policy." Id. at 824-25.

8 Here, there is no dispute that the decision in the former
9 proceeding is final and on the merits, and that the party against
10 whom preclusion is sought - Defendant - is the same as the party
11 to the former proceeding. Defendant argues that the issues are not
12 identical and thus were not actually litigated or necessarily
13 decided.

14 As noted, the jury found that Defendant was liable for
15 fraudulent transfer under Cal. Civ. Code § 3439.04 under a
16 conspiracy theory. Plaintiff points out that the jury was given an
17 instruction as to an actual fraudulent conveyance and not as to
18 constructive fraudulent conveyance. That instruction was given only
19 as it pertained to Satnam and Dinesh and provided that in order to
20 find Satnam and Dinesh liable for fraudulent conveyance, the jury
21 must find that Plaintiff proved (1) that Plaintiff had a right to
22 payment from Satnam and Dinesh for the cost to construct the homes;
23 (2) that Satnam and Dinesh transferred property to Rakesh and
24 Kulwant; (3) that Satnam and Dinesh transferred the property with
25 the intent to hinder, delay, or defraud one or more of their
26 creditors; (4) that Plaintiff was harmed; and (5) that Satnam and
27 Dinesh's conduct was a substantial factor in causing Plaintiff's
28 harm. The instructions also provided that, to prove intent to

1 hinder, delay, or defraud creditors, it is not necessary to show
2 that Satnam and Dinesh had a desire to harm their creditors, but
3 only that Satnam and Dinesh intended to remove or conceal assets to
4 make it more difficult for their creditors to collect payment.

5 The instructions pertaining to conspiracy, as to Defendant and
6 Kulwant, provide that the jury does not need to find that Plaintiff
7 proved that Defendant and Kulwant "personally committed a wrongful
8 act or that they knew all the details of the agreement or the
9 identities of all the other participants." However, as noted, the
10 jury did find that Defendant and others acted with malice,
11 oppression, or fraud in connection with the fraudulent conveyance.

12
13 **B. Application of Issue Preclusion to the Jury's Findings**

14 **1. Section 523(a)(6)**

15 Section 523(a)(6) provides for an exception to discharge for
16 any debt "for willful and malicious injury by the debtor to another
17 entity or to the property of another entity[.]" In determining
18 whether a particular debt is for "willful and malicious injury by
19 the debtor to another" under § 523(a)(6), the Court must apply a
20 two-pronged test: the Court must find that the debtor's conduct in
21 causing the injuries was both willful and malicious. Suarez, 400
22 B.R. 732, 736 (9th Cir. BAP 2009) (citing In re Su, 290 F.3d 1140,
23 1146-47 (9th Cir. 2002) and In re Barboza, 545 F.3d 702, 711 (9th
24 Cir. 2008)).

25 Willfulness requires proof that the debtor
26 deliberately or intentionally injured the creditor, and
27 that in doing so, the debtor intended the consequences of
28 his act, not just the act itself. The debtor must act
with a subjective motive to inflict injury, or with a
belief that injury is substantially certain to result
from the conduct.

1 For conduct to be malicious, the creditor must prove
2 that the debtor: (1) committed a wrongful act; (2) done
intentionally; (3) which necessarily causes injury; and
3 (4) was done without just cause or excuse.

4 Suarez, 400 B.R. at 736-37 (citations omitted).

5 Regarding the first prong, willfulness, based on the jury
6 instructions, the jury needed to find that Defendant actually
7 committed an intentional wrongful act. The jury was instructed that
8 a conspiracy is an agreement by two or more persons to commit a
9 wrongful act. Under California law,

10 [t]he elements of an action for civil conspiracy are
11 the formation and operation of the conspiracy and damage
12 resulting to plaintiff from an act or acts done in
13 furtherance of the common design. . . . In such an action
14 the major significance of the conspiracy lies in the fact
that it renders each participant in the wrongful act
responsible as a joint tortfeasor for all damages ensuing
from the wrong, irrespective of whether or not he was a
direct actor and regardless of the degree of his
activity.

15 Applied Equipment Corp. v. Litton Saudi Arabia Ltd., 7 Cal. 4th 503,
16 511 (1994) (citations omitted). Conspiracy is not an independent
17 cause of action, "but a legal doctrine that imposes liability on
18 persons who, although not actually committing a tort themselves,
19 share with the tortfeasors a common plan or design in its
20 perpetration." Id. at 510-11.

21 As noted above, the jury instructions provided that in order
22 to find Defendant liable for conspiracy to commit a fraudulent
23 conveyance, the jury must find that Defendant was aware that Satnam
24 and Dinesh planned to commit a fraudulent conveyance, that
25 Defendant agreed with Satnam and Dinesh and intended that the
26 fraudulent conveyance be committed. The jury instructions also
27 provided that "[m]ere knowledge of a wrongful act without
28

1 cooperation or an agreement to cooperate is insufficient to make
2 [Defendant] responsible for the harm."

3 Vicarious liability will not usually be a basis for a
4 nondischargeable judgment unless the debtor directly participated
5 in the wrongful conduct. See In re Tobin, 258 B.R. 199, 204-06 (9th
6 Cir. BAP 2001). This Court has not found, and the parties have not
7 cited, any case law addressing whether a finding of conspiracy to
8 commit a fraudulent conveyance is sufficient to support a finding
9 of nondischargeability under § 523(a)(6). Here, the jury
10 specifically found that Defendant intended that the fraudulent
11 conveyance be committed, and cooperated or agreed to cooperate in
12 the fraudulent conveyance. To reach this finding, the jury
13 necessarily had to find that the cooperation was Defendant's
14 purchase of the real property from Satnam and Dinesh with knowledge
15 that Satnam and Dinesh were attempting to remove the real property
16 from Plaintiff's reach. The jury necessarily had to find that
17 Defendant directly participated in the scheme to hinder, delay, or
18 defraud Plaintiff by purchasing the real property, which was the
19 intentional wrongful act that gave rise to Defendant's liability.
20 This conclusion is bolstered by the fact that the jury awarded
21 punitive damages against Defendant.

22 The jury findings also support the second prong of the test
23 under § 523(a)(6), maliciousness. The jury's finding that Defendant
24 participated in the scheme supports the conclusion that Defendant
25 committed a wrongful act, done intentionally, which necessarily
26 caused injury, and was done without just cause or excuse. Further,
27 the jury found that Defendant acted with malice, oppression, or
28 fraud. Either malice or oppression satisfies the malicious prong of

1 § 523(a)(6). See In re Jercich, 238 F.3d 1202, 1209 (9th Cir. 2001).
2 Although the jury verdict did not specify whether it based its
3 award of punitive damages on malice, oppression, or fraud, there is
4 no requirement for an explicit finding that conduct is malicious,
5 so long as the individual elements of the "malicious" test are met,
6 which is the case here.

7 Defendant argues that the issue of conspiracy was not
8 "actually litigated" in the state court. However, excerpts of the
9 record provided with Plaintiff's motion for summary judgment reveal
10 that Rakesh Sharma testified at length about the circumstances
11 surrounding his purchase and subsequent sale of the real property.
12 The other state court defendants also testified about that issue.
13 Thus, the Court finds that the issue of conspiracy was actually
14 litigated.

15 In sum, the record as a whole demonstrates that Defendant's
16 conduct satisfied both the "willful" and "malicious" prongs under
17 § 523(a)(6). Accordingly, Plaintiff is entitled to summary
18 judgment on this claim.

19
20 **2. Section 523(a)(2)(A)**

21 Section 523(a)(2)(A) excepts from discharge a debt "for money,
22 property, services, or an extension, renewal, or refinancing of
23 credit, to the extent obtained by . . . false pretenses, a false
24 representation, or actual fraud, other than a statement respecting
25 the debtor's or an insider's financial condition[.]"

26 To prevail on a claim under this section, a plaintiff must
27 establish the following elements by a preponderance of the
28 evidence:

- 1 (1) The debtor made representations;
- 2 (2) The debtor knew the representations had been
false at the time he or she made them;
- 3 (3) The debtor made these representations with the
4 intent and purpose of deceiving the creditor;
- 5 (4) The creditor relied on such representations; and
- 6 (5) The creditor sustained the alleged loss and
damage as a proximate result of these representations.

7 In re Lee, 335 B.R. 130, 136 (9th Cir. BAP 2005)

8 These elements mirror the elements of common law fraud and
9 actual fraud under California law. Id. (citing In re Younie, 211
10 B.R. 367, 373-74 (9th Cir. BAP 1997), aff'd, 163 F.3d 609 (9th Cir.
11 1998)).

12 Here, there is no finding that Defendant made any
13 representation, false or otherwise, to Plaintiff. Accordingly,
14 there is no basis for this Court to conclude that the issue of
15 fraud was actually litigated or necessarily decided with respect to
16 Defendant. Although the jury found that Defendant acted with
17 malice, oppression, or fraud, the finding is in the alternative;
18 thus there is no basis for this Court to conclude that the punitive
19 damages award was necessarily based on fraud. Accordingly,
20 Plaintiff's motion for summary judgment is denied as to this claim.
21

22 **V. CONCLUSION**

23 For the foregoing reasons, Plaintiff's motion for summary
24 judgment is granted, and Defendant's motion is denied with respect
25 to § 523(a)(6). Plaintiff's motion is denied and Defendant's motion
26 is granted with respect to § 523(a)(2)(A). Counsel for the
27 respective parties shall submit proposed forms of orders.

28 ***** END OF MEMORANDUM DECISION *****

Court Service List

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