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U.S. BKCY. APP. PANEL
OF THE NINTH CIRCUIT

NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT

In re:)	BAP No.	CC-17-1002-STaL
)		
BARAK MENASHE SNAPIR,)	Bk. No.	2:12-bk-50058-BR
)		
Debtor.)	Adv. No.	2:13-ap-01334-BR
)		
BARAK MENASHE SNAPIR,)		
)		
Appellant,)		
)		
v.)	MEMORANDUM*	
)		
JANET BRELIANT, Trustee of)		
the Breliant Trust Dated)		
August 2, 1988,)		
)		
Appellee.)		

Argued and Submitted on September 29, 2017
at Pasadena, California

Filed - November 3, 2017

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

Honorable Barry Russell, Bankruptcy Judge, Presiding

Appearances: Patrick C. McGarrigle of McGarrigle, Kenney &
Zampiello, APC argued for appellee.

Before: SPRAKER, TAYLOR, and LAFFERTY, Bankruptcy Judges.

*This disposition is not appropriate for publication.
Although it may be cited for whatever persuasive value it may
have (see Fed. R. App. P. 32.1), it has no precedential value.
See 9th Cir. BAP Rule 8024-1.

1 **INTRODUCTION**

2 The bankruptcy court entered judgment against chapter 7¹
3 debtor Barak Menashe Snapir excepting from discharge his debt
4 arising from his fraudulent procurement of funds from appellee
5 Janet Breliant, trustee of the Breliant Trust Dated August 2,
6 1988. Snapir appeals from that judgment.

7 In virtually all of his arguments on appeal, Snapir in
8 essence challenges the bankruptcy court's findings. Because
9 there was sufficient evidence to support the bankruptcy court's
10 key findings, we AFFIRM the bankruptcy court's nondischargeable
11 fraud ruling under § 523(a)(2)(A).

12 Snapir also challenges the bankruptcy court's award of
13 prejudgment interest at the rate specified by California law.
14 The bankruptcy court gave no reason for departing from the
15 federal interest rate, which generally applies to
16 nondischargeability claims. Therefore, we VACATE this aspect of
17 the bankruptcy court's ruling, and we REMAND so that the
18 bankruptcy court can recalculate prejudgment interest at the
19 federal rate, or, alternately, make the requisite findings and
20 provide the reasoned justification necessary to support
21 application of the California interest rate.

22 **FACTS**

23 In September 2008, Breliant entered into a home improvement
24 contract with Snapir's wholly-owned corporation, Castle Homes,
25

26 ¹Unless specified otherwise, all chapter and section
27 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532, and
28 all "Rule" references are to the Federal Rules of Bankruptcy
Procedure, Rules 1001-9037.

1 Inc.² According to Breliant, her project designer, Roy Sklarin,
2 encouraged her to hire Snapir as her general contractor for the
3 project. Sklarin represented to Breliant that Snapir was part of
4 his team, and that Sklarin and Snapir had been working together
5 on home improvement projects for 25 years. Breliant insisted
6 that Snapir was present when Sklarin made the above-referenced
7 representations, and Snapir acknowledged and ratified each of
8 them by, among other things, nodding his head in assent as
9 Sklarin made them. Before Breliant signed the contract, she
10 asked Sklarin to show her an example of their work. Sklarin and
11 Snapir took Breliant on a tour of a whole-house remodel of a
12 large estate, which was similar in size to Breliant's residence.
13 Impressed with this example of Sklarin's and Snapir's work,
14 Breliant signed their home improvement contract.

15 Snapir concedes that Sklarin's representations to Breilant
16 were untrue. Snapir admitted that his contracting projects,
17 prior to Breliant's, typically consisted of room additions or
18 bath and kitchen remodels in smaller, middle-class homes; he
19 never had attempted as big a remodeling project on as large (or
20 high end) a residence as Breliant's. He further conceded that he
21 never worked with Sklarin prior to the Breliant project and did
22 not work on the remodel of the house shown to Breliant to
23 convince her to hire them. But, Snapir maintained that he did
24 not hear Sklarin make any of the above representations to
25

26 ²At all relevant times, Breliant was acting in her role as
27 trustee of the Breliant Trust Dated August 2, 1988. For ease of
28 reference, we refer to Breliant herein, in her capacity as
trustee, by her last name.

1 Breliant. He insists that he never acknowledged or ratified any
2 of Sklarin's misrepresentations.³

3 The contract provided for extensive remodeling and
4 renovation of Breliant's residence located in Beverly Hills,
5 California. The original contract price was \$802,000, but
6 Breliant later requested a series of changes and additions to the
7 project that resulted in the issuance of "change orders," which
8 almost doubled the contract price to roughly \$1.45 million.

9 Over the course of two years, between September 2008 and
10 September 2010, Breliant paid Snapir, in aggregate, roughly \$1.3
11 million.⁴ The remodel, however, remained far from complete.
12 Snapir would prepare invoices and change orders and deliver them
13 directly to Breliant or to Sklarin, who would present them to
14 Breliant for payment. Breliant then would make her checks
15 payable to Castle Homes or to Snapir's successor corporation,
16 U.S. Builders, and would give the checks to Sklarin, who would
17 deliver them to Snapir.

18 Unbeknownst to Breliant, Sklarin would not release
19 Breliant's checks to Snapir unless and until Snapir gave him a

20
21 ³At trial, the parties presented their direct testimony by
22 declaration, but neither party's excerpts of record included
23 Snapir's trial declaration. Nonetheless, we have reviewed this
24 trial declaration and other adversary proceeding documents not
25 provided by the parties by accessing the bankruptcy court's
26 electronic docket. We can take judicial notice of its contents
27 and of the imaged documents attached thereto. Elliot v. Weil
(In re Elliott), 544 B.R. 421, 423 n.3 (9th Cir. BAP 2016),
aff'd, 2017 WL 2570014 (Mem. Dec.) (9th Cir. June 14, 2017)
28 (citing O'Rourke v. Seaboard Sur. Co. (In re E.R. Fegert, Inc.),
887 F.2d 955, 957-58 (9th Cir. 1988)).

⁴Breliant also paid separate amounts to Sklarin for his
design work, which amounts are beyond the scope of this appeal.

1 check for 5% of the amount Breliant paid. Sklarin later
2 increased this percentage to 10%. Whereas Snapir referred to
3 these amounts as commissions or payments, Breliant, when she
4 later learned of this practice, referred to the payments as
5 kickbacks. Breliant stated that had she known about the
6 kickbacks, or that Snapir had no prior experience working with
7 Sklarin, or that he had not previously worked on high-end whole
8 house remodels, she would not have done business with Snapir.

9 But the most critical misrepresentations, in terms of
10 Breliant's damages, were those implicit in the invoices and
11 change orders Snapir caused to be presented to Breliant for
12 payment. As Breliant put it, Snapir presented these invoices
13 "for work he claimed was done and/or near completion." Breliant
14 Tr. Decl.⁵ By way of his invoices and change orders, Snapir
15 fraudulently induced Breliant to make payments for labor and
16 materials she thought had been provided, but much of it actually
17 never was provided.

18
19 ⁵The parties at trial did little or nothing to differentiate
20 between invoices and change orders. In fact, Breliant generally
21 referred to them all as invoices. See Breliant Tr. Decl.
22 (Sept. 28, 2016) at ¶ 7 & Ex. 2; see also Snapir Tr. Decl. at
23 ¶¶ 20-21 & Ex. L. As a practical matter, Sklarin and/or Snapir
24 were presenting the change orders to Breliant as if they were
25 invoices. Snapir, for his part, claimed that he never
26 represented in any change order that the labor and materials
27 described in the change order already had been supplied.
28 However, he admitted that he was aware that Sklarin was
presenting the change orders to Breliant for payment and that he
received the lion's share of the payment proceeds. He attempted
to deflect any responsibility or liability for this practice by
asserting that Sklarin was calling the shots and that he could
not prevent Sklarin from presenting the change orders for
premature payment. But he indisputably acquiesced to Sklarin's
conduct and knowingly accepted the benefits therefrom.

1 A little less than two years into the project, after paying
2 \$1.3 million to Snapir and with completion of the project
3 lagging, Breliant was confronted with demands for additional
4 payments from Snapir and Sklarin. These demands caused Breliant
5 concern, as Snapir and Sklarin did not offer Breliant any
6 specific or credible assurances as to when the project would be
7 completed or how much more they would require her to pay.
8 Breliant then hired a construction consultant, Mike Sawyer, who
9 determined that Breliant had paid Snapir hundreds of thousands of
10 dollars for work that had not been performed. Based upon his
11 review of the project, Sawyer calculated the amount of funds paid
12 for work not completed to be at least \$582,000. Sawyer testified
13 that Snapir himself had admitted to him that he had received more
14 than \$340,000 in payments that Breliant made for work not
15 completed. After Breliant, with Sawyer's support, refused to pay
16 more, Snapir refused to complete the remodeling project.
17 Breliant ultimately hired a different contractor who completed
18 the work Snapir was supposed to have finished for \$615,074.59.

19 Both Sklarin and Snapir eventually commenced separate
20 bankruptcy cases.⁶ Breliant obtained a \$1.3 million
21 nondischargeability judgment against Sklarin in his bankruptcy
22 case, and then she tried her § 523(a)(2)(A) and (a)(6)
23 nondischargeability claims against Snapir. The bankruptcy court
24 granted judgment against Snapir on both claims. The bankruptcy
25

26 ⁶The record indicates that, before Snapir's bankruptcy
27 filing, Breliant sued Snapir in state court for fraud, unjust
28 enrichment, etc. There is nothing in the record indicating how
(or whether) the state court litigation was disposed of.

1 court found Breliant's and Sawyer's testimony to be credible.
2 The bankruptcy court did not find Snapir credible. It also noted
3 that the parties' testimony differed completely and commented
4 that much of Snapir's version of events did not make any sense.

5 The bankruptcy court specifically found that Breliant had
6 proven each of the elements of her claim under § 523(a)(2). The
7 court noted that Snapir had knowingly made false representations
8 to induce Breilant to execute the contract and then fraudulently
9 misrepresented his right to payments. It also found that
10 Breilant justifiably relied on Snapir's and Sklarin's
11 representations to enter the contact and on the invoices and
12 change orders in paying for labor and materials supposedly but
13 not actually provided. The bankruptcy court held that, as a
14 direct, proximate and foreseeable result of Snapir's fraud,
15 Breliant incurred damages in the amount of the replacement
16 performance totaling \$615,074.59. The bankruptcy court also
17 awarded Breliant prejudgment interest of \$215,276.10 calculated
18 under California law.

19 As for Breliant's § 523(a)(6) claim, the bankruptcy court
20 found that Snapir's injury to Breliant was both willful and
21 malicious as those terms are defined for purposes of § 523(a)(6).

22 The bankruptcy court entered its nondischargeability
23 judgment on December 22, 2016, and Snapir timely appealed.

24 **JURISDICTION**

25 The bankruptcy court had jurisdiction pursuant to 28 U.S.C.
26 §§ 1334 and 157(b)(2)(I), and we have jurisdiction under
27 28 U.S.C. § 158.

28

1 interest under California law rather than under the applicable
2 federal rate. We address these issues in turn.

3 **A. Breliant's § 523(a)(2)(A) Claim**

4 In relevant part, § 523(a)(2)(A) excepts from discharge
5 debts for money, property or services "obtained by false
6 pretenses, a false representation, or actual fraud"

7 Under this Code provision, the debtor's liability for money,
8 goods or services fraudulently procured is nondischargeable if
9 the plaintiff establishes the following elements by a
10 preponderance of the evidence:

- 11 (1) misrepresentation, fraudulent omission or deceptive
12 conduct by the debtor; (2) knowledge of the falsity or
13 deceptiveness of his statement or conduct; (3) an
14 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.

15 Sabban v. Ghomeshi (In re Sabban), 384 B.R. 1, 5 (9th Cir. BAP
16 2008) (quoting Turtle Rock Meadows Homeowners Ass'n v. Slyman
17 (In re Slyman), 234 F.3d 1081, 1085 (9th Cir. 2000)). The
18 bankruptcy court correctly recited these five elements. Snapir
19 argues on appeal that the bankruptcy court erred because he never
20 misrepresented his qualifications or work experience to Breliant
21 and always intended to perform. There was evidence in the record
22 sufficient to support the bankruptcy court's findings on these
23 matters.

24 **1. Snapir's False Representations**

25 Snapir argues that he never made misrepresentations to
26 fraudulently induce Breliant to do anything. First, Snapir
27 argues that neither he nor Sklarin misrepresented his "ability"
28 to perform as he was always able to construct the house as

1 contracted. This argument misses the point that Snapir induced
2 Breliant to enter into the contract by misrepresenting: (1) that
3 the two of them had been working together for 25 years; and
4 (2) that Snapir had worked on high-end remodeling projects,
5 including the one Breliant toured before entering into the home
6 remodeling contract with Snapir. Both representations were
7 false, and the evidence supports the bankruptcy court's finding
8 that they were made for the purpose of inducing Breliant to enter
9 into the remodeling contract with Snapir.

10 Snapir next argues that it was Sklarin alone who
11 misrepresented his experience and involvement with Sklarin.
12 However, the bankruptcy court rejected this argument. The
13 bankruptcy court found credible Breliant's testimony that Snapir
14 acknowledged and confirmed Sklarin's misrepresentations by
15 nodding his head in assent during the first meeting between
16 Snapir, Sklarin and Breliant. Snapir furthered the
17 misrepresentation by accompanying Sklarin on the tour of the
18 model house represented as an example of their work immediately
19 before she entered into the contract. The court further found
20 that Snapir knowingly, intentionally and actively participated in
21 the fraud. The record supports these inferences. Snapir
22 presents no argument as to why this is clear error apart from his
23 disagreement with the court's finding.

24 Snapir's arguments also ignore the bankruptcy court's
25 conclusion that Snapir fraudulently misrepresented the work that
26 he had performed and completed to obtain payments to which he was
27 not entitled. Snapir admitted that he prepared the invoices, and
28 he either gave them directly to Breliant or to Sklarin, knowing

1 that Sklarin was presenting them to Breilant for payment, even
2 though much of the work described therein was nowhere near
3 completion. Snapir directly benefitted from this conduct by his
4 receipt of hundreds of thousands of dollars for work not
5 performed.

6 In short, the bankruptcy court chose to believe Breilant's
7 version of the evidence rather than Snapir's. Its findings that
8 Snapir misrepresented his work experience overall, and the status
9 of his work, were logical, plausible and supported by the record.
10 See In re Retz, 606 F.3d at 1196.

11 **2. Snapir's Intent to Perform**

12 Snapir argues on appeal that there was no fraud, that he
13 always intended to perform under the remodeling contract and that
14 he only was prevented from fully performing by forces beyond his
15 control. Specifically, he refers to Breilant's numerous
16 alterations and additions to the project which he believes caused
17 inordinate delay and unmanageable costs. Put another way, Snapir
18 argues that his partial, but incomplete, performance establishes
19 his general intent to perform and defeats Breilant's claim of
20 fraud by false promise.

21 Partial performance, under the right circumstances, can be
22 persuasive to counter a false promise allegation. See, e.g.,
23 Wagner v. Malich (In re Malich), 2011 WL 3300818, *7 (Mem Dec.)
24 (9th Cir. BAP Mar. 15, 2011); see also In re Khalil, 2017 WL
25 1485464, *3 (C.D. Cal. Apr. 20, 2017) (stating that failed
26 attempts to perform could support a finding of intent to perform
27 and thereby defeat a promissory fraud claim). Nonetheless, this
28 contention is wholly unpersuasive here because the bankruptcy

1 court's fraud determination was not based on a false promise.
2 Indeed, the bankruptcy court even commented that Snapir probably
3 subjectively wanted to finish the project, but was far out of his
4 depth and without the ability to do so. Instead, the bankruptcy
5 court was clear that the misrepresentations regarding Snapir's
6 work experience constituted fraud from the inception of the
7 project, which fraud continued when he misrepresented the work
8 completed in the invoices and change orders to procure payments
9 to which he was not entitled. The bankruptcy court found that
10 these representations - not a false promise - induced Breliant to
11 pay hundreds of thousands of dollars for work not performed and
12 that she suffered damages in the amount of \$615,074.59 as a
13 result. Any intent to perform did not negate Snapir's fraudulent
14 inducement of the contract or the unearned payments Breliant paid
15 under it.⁷

16 **B. The Applicable Prejudgment Interest Rate**

17 Snapir's only other argument on appeal asserts that the
18 bankruptcy court applied the wrong legal standard for calculating
19 prejudgment interest. The bankruptcy court applied a prejudgment
20 interest rate under California law of 7% per annum based on Cal.
21 Civ. Code § 3287(a) and under Cal. Const., Art. 15, § 1.
22 According to Snapir, the bankruptcy court should have applied the
23 federal interest rate provided for in 28 U.S.C. § 1961(a). See
24 generally Blankenship v. Liberty Life Assur. Co. of Boston,
25 486 F.3d 620, 628 (9th Cir. 2007) (postjudgment interest rate

26
27 ⁷Because we are affirming the bankruptcy court's
28 nondischargeability judgment under § 523(a)(2)(A) we decline to
address Breliant's alternate claim for relief under § 523(a)(6).

1 prescribed under 28 U.S.C. § 1961 should be applied to ERISA
2 judgment to award prejudgment interest “unless the trial judge
3 finds, on substantial evidence, that the equities of that
4 particular case require a different rate”).

5 Breliant contends that California law determines the
6 prejudgment interest rate because her nondischargeability lawsuit
7 was based on her home improvement contract with Snapir, and the
8 contract provided for the application of California law.⁸
9 However, Breliant did not sue to enforce her contract. Instead,
10 she claimed nondischargeable damages resulting from Snapir’s
11 fraud as well as willful and malicious injury. The court
12 excepted the debt from discharge under § 523(a)(2) and (6) based
13 upon its finding of such fraud. Neither the arguments presented
14 at trial nor the bankruptcy court’s decision suggest that the
15 judgment for nondischargeability was based on a mere breach of
16 contract.⁹

17 For claims brought under federal law, including the

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19 ⁸Breliant alternately argues that the bankruptcy court
20 should have applied against Snapir an 18% interest rate because
21 the home improvement contract provided for past due payments to
22 accrue interest “at the rate of 1.5% per month (18% per annum).”
Because Breliant did not file a cross-appeal from the bankruptcy
23 court’s nondischargeability judgment, we will not address this
24 argument.

25 ⁹Nondischargeability of a contract claim under § 523 is
26 subject to additional scrutiny which is not reflected in the
27 record below. See Lockerby v. Sierra, 535 F.3d 1038, 1041 (9th
28 Cir. 2008) (citing Petralia v. Jercich (In re Jercich), 238 F.3d
1202, 1206 (9th Cir. 2001)); see also Dourbetas v. Gionis
(In re Gionis), 2009 WL 7751433, at *8 (Mem. Dec.) (9th Cir. BAP
Apr. 30, 2009) (stating that neither breach of contract nor mere
negligent misrepresentations will, by themselves, support a
§ 523(a)(2)(A) claim).

1 Bankruptcy Code, the interest rate prescribed by federal law
2 applies unless the equities require a different interest rate.
3 Banks v. Gill Distrib. Ctrs., 263 F.3d 862, 871 (9th Cir.
4 2001) (analyzing award of prejudgment interest on § 523(a)
5 claims). Any departure from this standard based on the equities
6 requires "reasoned justification" supported by "substantial
7 evidence." Id.; Blanton v. Anzalone, 813 F.2d 1574, 1576 (9th
8 Cir. 1987); see also Palm Fin. Corp. v. Eberts (In re Eberts),
9 607 F. App'x 683, 686 (9th Cir. 2015) (holding that bankruptcy
10 court properly applied federal interest rate because the
11 plaintiff based its claim on § 523(a)(2)(A) and the plaintiff did
12 not argue that the equities warranted application of the state
13 interest rate instead).

14 Here, the bankruptcy court gave no reason for departing from
15 the federal interest rate. Accordingly, the bankruptcy court's
16 award of prejudgment interest must be vacated and this matter
17 must be remanded. On remand, the bankruptcy court must either
18 apply the federal interest rate recalculated in accordance with
19 28 U.S.C. § 1961 or provide a reasoned justification supported by
20 substantial evidence for departing from the federal interest
21 rate. See Blanton, 813 F.2d at 1576; see also Melikyan v.
22 Khnkoyan (In re Melikyan), 263 F. App'x 631, 635 (Mem. Dec.) (9th
23 Cir. Jan 16, 2008) (remanding either for recalculation of
24 prejudgment interest or for a "reasoned justification" for
25 departing from the federal interest rate).¹⁰

26
27 ¹⁰Breliant's response brief on appeal discussed the
28 bankruptcy court's finding that Snapir was the alter ego of his
(continued...)

1 **CONCLUSION**

2 For the reasons set forth above, we AFFIRM the bankruptcy
3 court's judgment excepting Snapir's debt from discharge under
4 § 523(a)(2)(A). However, we VACATE the court's award of
5 prejudgment interest. We REMAND for further proceedings
6 consistent with this decision.

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¹⁰ (...continued)
24 wholly-owned corporations, Castle Homes and U.S. Builders.
25 Snapir did not address or even mention the alter ego issue in
26 either his opening appeal brief or in his reply. We therefore
27 decline to address the issue. See Christian Legal Soc'y v. Wu,
28 626 F.3d 483, 487-88 (9th Cir. 2010) (declining to address
matters not specifically and distinctly discussed in the
appellant's opening brief); Brownfield v. City of Yakima,
612 F.3d 1140, 1149 n.4 (9th Cir. 2010) (same).