11 U.S.C. § 523(a)(6)

Vincent v. Frasnelly, Adversary No. 03-3217-tmb
In re Frasnelly, Case No. 03-30297-tmb7
Appellate No. BAP No. OR-04-1144-MaSK

12/6/04 TMB unpub

Debtor appealed from a ruling of the bankruptcy court that a portion of the debt owed to contract seller of a restaurant business was nondischargeable under § 523(a)(6) of the bankruptcy code. The bankruptcy court found the debt nondischargeable based on its conclusion that the seller had a security interest in the assets of the restaurant and that the debtor, with knowledge of that interest, sold or otherwise disposed of the seller's collateral without accounting to her for the proceeds of the sale or disposition. The bankruptcy court further found that the debtor's actions were "willful and malicious" in that he acted with the subjective knowledge that his actions were likely to cause harm to the seller.

On appeal the debtor argued that the bankruptcy court erred in finding that the seller held a security agreement in the restaurant assets and applied an incorrect standard for determining whether the conversion of the assets allegedly subject to the security interest was "willful and malicious."

In support of this argument that the seller held no security interest in the restaurant assets the debtor pointed out that although the original buyer had granted the seller a security interest in the assets of the restaurant, he had not assumed that security agreement nor signed a new security agreement. Although he had signed a financing statement in favor of the seller, the debtor argued that this document was insufficient to create a security agreement in favor of the seller. The BAP agreed that the financing statement, taken alone, was not sufficient to create a security interest in favor of the seller. It found, however, that the debtor's knowledge of the history of the original sale, including the documents granting the seller a security interest in the restaurant assets, together with the security agreement signed by the debtor "clearly met the minimum formalities of a written security agreement" under Oregon law.

The BAP also rejected the debtor's argument that the bankruptcy court applied an incorrect standard to determine whether the conversion of the seller's collateral was "willful and malicious". In describing the test to determine a debtor's state of mind the bankruptcy court held that an act was "willful and malicious" if taken with subjective intent to cause harm or "under circumstances where there is an objective and substantial certainty of harm from the act." The BAP, citing Carrillo v. Su (In re Su), 290 F.3d 1140, 1142 (9th Cir. 2002) agreed that the standard, as articulated by the bankruptcy court was incorrect and that the "wilful injury requirement is met 'only when the debtor has a subjective motive to inflict injury or when the debtor believes that injury is substantially certain to result from his own conduct.'" It found, however, that the bankruptcy court's "actual findings", including its findings that the debtor was aware of the seller's security interest and that the retention of that interest was to protect the

seller in the event of the buyer's default, "sufficiently determined Debtor's subjective intent to harm [the seller] and, thus, the requisite 'willfulness' prong was established."

As a final matter, the BAP rejected the Debtor's contention that the court should have granted his motion for a directed verdict at the close of the seller's case in chief. The BAP found that debtor waived his right to appeal any error resulting from the failure to grant the directed verdict by offering his evidence after denial of his motion rather than refusing to offer his evidence, accepting a judgment for the seller and appealing from that judgment.

BkCt

NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL

OF THE NINTH CIRCUIT

In re:	BAP No. OR-04-1144-MaSK
JAMES KEVIN FRASNELLY; KAREN ANN FRASNELLY,	Bk. No. 03-30297
Debtors.	Adv. No. 03-03217
JAMES KEVIN FRASNELLY,	
Appellant,	
v.	
HAZEL VINCENT,	
Appellee.	

M E M O R A N D U M[1]

Argued by Video Conference and Submitted on October 20, 2004

Filed - December 6, 2004

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

Honorable Trish M. Brown, Bankruptcy Judge, Presiding.

Before: MARLAR, SMITH and KLEIN, Bankruptcy Judges.

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[1] This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except when relevant under the doctrines of law of the case, res judicata, or collateral estoppel. See 9th Cir. BAP Rule 8013-1.

INTRODUCTION

The debtor has appealed a judgment of nondischargeability of a debt as a "willful and malicious" injury resulting from his conversion of a secured creditor's collateral. See 11 U.S.C. § 523(a)(6).[2] We AFFIRM.

FACTS

James Frasnelly ("Debtor") is the sole shareholder of KFRANZ, LLC, an Oregon limited liability company. When Debtor and his wife filed a chapter 7 bankruptcy petition, in 2003, KFRANZ owned Eddie Rickenbacker's Bar and Grill (the "Restaurant"), located in the Hillsboro airport terminal. KFRANZ had acquired the Restaurant three years before from John Chu and J & J Chu, Inc. (together "Chu"), who had encumbered the business assets with a security interest in favor of the original owner, Eddie Rickenbacker's corporation (the "Corporation"). The Corporation's shareholders were John (now deceased) and appellee Hazel Vincent ("Vincent").

Restaurant Ownership and Security Interest

The Corporation sold the Restaurant to Chu, in 1994, for $132,000. Pursuant to a written agreement ("Vincent/Chu

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[2] Unless otherwise indicated, "section" and "chapter" references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1330, and rule references are to the Federal Rules of Bankruptcy Procedure, Rules 1001-9036.

Agreement"), Chu paid $40,000 cash, and the $92,000 balance was to be paid in monthly installments of $1,215.80, together with interest at the rate of 10% per annum. To secure this obligation, Chu granted the Corporation a security interest in all of the business assets, "including the furnishings, fixtures, and equipment, assumed business name, goodwill, inventory, contract rights, and leasehold rights." Vincent/Chu Agreement (April 18, 1994), at 2 ¶ 5.[3]

Of the $132,000 purchase price paid by Chu, $65,000 was allocated for equipment, fixtures and furnishings. A three-page list of equipment and furnishings was attached to the Vincent/Chu Agreement.

In 2000, Debtor, on behalf of KFRANZ, entered into an agreement with Chu ("Chu/KFRANZ Agreement") to purchase the Restaurant for $60,000 cash paid at closing and an assumption of the balance due to the Corporation under the Vincent/Chu Agreement. KFRANZ and Debtor executed a promissory note ("Note") in favor of Vincent[4] for $47,122.83, to be paid in monthly installments of $1,215.80 including interest at the rate of 10% per annum. This was the same monthly payment as provided in the Vincent/Chu Agreement.

The Chu/KFRANZ Agreement did not contain words granting a

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[3] The Vincent/Chu Agreement required the filing of a financing statement to perfect the Corporation's security interest, but it is not in the excerpts of record. At oral argument, counsel was unsure if it had been filed. Nonetheless, it was undisputed that Chu's business assets were Corporation's collateral pursuant to the parties' agreement.

[4] Hazel Vincent succeeded to the Corporation's interest after the death of her husband.

security interest to Vincent. Although the KFRANZ Agreement incorporated a list of assets, the exhibit was not attached, and there was no evidence that there was a new property listing.

In July, 2000, Debtor's attorney, David Frost ("Frost") filed a UCC-1 Financing Statement ("Financing Statement"), which was signed by Debtor for KFRANZ, and which named Vincent as the secured party. The collateral was described, in pertinent part, as "all equipment, furniture and fixtures used in Eddie Rickenbacker's Bar & Grill . . . ." Financing Statement (July 12, 2000).[5]

Frost then wrote a letter to Vincent indicating that the Financing Statement had been filed, and that she should file a UCC Continuation Statement if the debt was not paid by the time the filing expired in July of 2005.

Events Leading to Bankruptcy

In late 2001, Debtor was having financial difficulties and contemplating bankruptcy. Vincent testified that she had heard rumors to this effect and had contacted Debtor, who assured her that a bankruptcy filing would not affect the Restaurant. She further testified that she visited the Restaurant in January 2002, and that it was operating and "looked good." Tr. of Proceedings (Oct. 29, 2003), at 31:18-20.

Debtor closed the Restaurant on February 18, 2002. Within

[5] The bankruptcy court could not find that the Vincent/Chu property list described the same collateral as was described in the Chu/KFRANZ Financing Statement. Such finding was not dispositive, however.

days, Vincent learned of the closure and returned to the Restaurant, only to discover that it had been stripped of all equipment, furniture, and fixtures. She described the scene as follows:

> It was the biggest mess I've ever seen. There was garbage on the floor. All my equipment was gone. Anything worth anything was gone. . . .

Id. at 32:15-17.

Another witness described the Restaurant as having been

> [c]leaned out. . . . There was [sic] no tables, no chairs. There was things taken out of the walls; things were disheveled, if you will."

Id. at 5:8.

Debtor moved some of the furnishings, fixtures, and equipment to a storage unit. He invited Thomas Rose ("Rose"), an equipment and supply company owner, to make an offer. Rose purchased two ice machines, a Hobart mixer, and 88 captain's chairs for $4,100. He also purchased a used dance floor for $300. Debtor also admitted to selling two cash registers and a high chair at a garage sale, for about $5-$10 each, and to keeping three tables at his home. He testified that the remaining tables were destroyed by weather due to improper storage, and all of the other equipment was discarded as valueless.

Debtor testified, and the bankruptcy court found, that he used the proceeds to meet his past-due payroll for the Restaurant.

Vincent then sued Debtor on the Note, in state court, and obtained a judgment for $30,346. When Debtor filed a bankruptcy petition, Vincent filed an adversary complaint seeking a judgment of nondischargeability under § 523(a)(6) ("willful and malicious

injury") on the grounds that Debtor had converted her collateral.[6]

Trial Testimony

At trial, Vincent presented three witnesses, including Harley,[7] Rose, and Vincent.

Harley basically attested to the condition of the Restaurant premises, as quoted above. Rose testified concerning his March 2002 purchase of the equipment, furniture, and dance floor.

Vincent then testified.[8] In addition to the facts already outlined, Vincent testified that she was not represented by an attorney in that transaction, she was aware of the sale of the Restaurant from Chu to KFRANZ, and she understood that Debtor was assuming Chu's contract.

Moreover, Vincent testified that she told Debtor about her willingness to take over operation of the Restaurant in order to protect her investment. Vincent also testified that the going-concern value of the Restaurant was about $100,000, and that the

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[6] Vincent also sought the denial of Debtor's discharge pursuant to § 727(a)(2) (concealment or transfer or assets with intent to hinder, delay, or defraud creditors) and (a)(5) (failure to explain loss of assets). The bankruptcy court entered judgment in favor of Debtor on the § 727 counts; that portion of the judgment was not appealed.

[7] Harley is not identified in the few pages of transcript made available in the excerpts of record.

[8] It is unclear on which page Vincent's testimony begins due to missing pages of transcript. All that has been included in the excerpts of record are pages 29-38 and 40-45, where it ends. We may presume that the missing portions are not helpful to Debtor's appeal. McCarthy v. Prince (In re McCarthy), 230 B.R. 414, 417 (9th Cir. BAP 1999).

cost to replace the personal property and restart the Restaurant would be the same.

At the close of Vincent's case, Debtor moved for a directed verdict, herein deemed a motion for judgment on partial findings pursuant to Fed. R. Civ. P. 52(c) (made applicable by Fed. R. Bankr. P. 7052).[9] The bankruptcy court denied the motion.

Debtor then testified on his own behalf. Debtor admitted to signing the Financing Statement and further stated:

> To the best of my memory, prior to having Frost draw up the note, the agreement between me and [Chu] and -- that I would assume the balance of the note, prior to that, Mrs. Vincent came up to us and said that her lawyer[10] had instructed her to do a UCC filing, and kind of concerned, everything's done, but I'll do whatever you feel most comfortable," that's all I can really remember, having to be -- having been done.

Tr. of Proceedings (October 29, 2003), at 68:9-12; 52:21-25 to 53:1-7.

Debtor's testimony was inconsistent, however, as to whether he knew that Vincent had a security interest in the Restaurant assets. Compare the following testimony:

> Q. When you sold those items to Mr. Rose, did you have any idea that there would be an assertion that there was a security interest or a lien against the property?

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[9] A motion for "directed verdict" in a nonjury trial used to be treated as a motion for involuntary dismissal under Fed. R. Civ. P. 41(b). In 1991, that portion of former Rule 41(b) was incorporated into Rule 52(c); it allows for a dismissal at the close of the plaintiff's evidence on the ground that, upon the facts and the law, the plaintiff has not shown any right to relief. See generally 9-9A Charles Alan Wright & Arthur R. Miller, Federal Practice & Procedure §§ 2371, 2573.1 (1995 and Supp. 2004).

[10] Although Vincent testified that she did not have a lawyer for that transaction, see Tr. of Proceedings (Oct. 29, 2003), at 36:22-23, the record reveals that Frost wrote Vincent a letter advising her of the filing.

A. No, I did not.

. . . .

Q. All right. And did you understand that signing [the UCC-1 Financing Statement] that you were intending to give a security interest in the business to Mrs. Vincent?

A. No.

Id. at 54:22-25; 68:14-17.

Q. All right, and did you list the equipment as collateral for Hazel Vincent?

A. Equipment -- yes.

Q. All right. So when you signed the UCC-1, you knew that you were giving Hazel Vincent a security interest in that equipment?

A. Yes.

Id. at 70:3-9.

Concerning his intent in selling the collateral, Debtor testified as follows:

Q. Can you describe in your own words how that sale developed?

A. I don't believe that I object to anything that Mr. Rose said. It pretty much was a call to him that said, "I don't want to move this stuff anymore," and "are you interested in purchasing it," and "I'm going to lose it because I didn't have any storage space," and I needed to make a payroll -- a final payroll, and I sold him what he was interested in buying.

Q. Ok. Was -- so your intent in selling the equipment to Mr. Rose was to meet payroll?

A. Absolutely.

Id. at 53:14-25.

Judgment

The bankruptcy court issued its findings and conclusions in a a Letter Order, and a Judgment was entered on January 22, 2004.

Debtor timely appealed.[11]

On the § 523(a)(6) count, the bankruptcy court found that Debtor signed the Financing Statement and knew that KFRANZ had granted Vincent a security interest in the Restaurant assets. Examining Oregon law, the court concluded that the Financing Statement constituted a security agreement.

The court then stated the legal standard for determining nondischargeability under § 523(a)(6) as follows:

> In Kawaauhau v. Geiger, 523 U.S. 57, 61 (1998), the Supreme court held that "[t]he word 'willful' in (a)(6) modifies the word 'injury,' indicating that nondischargeability takes a deliberate or intentional *injury*, not merely a deliberate or intentional *act* that leads to injury." Under this standard, "a claim is excepted from discharge under Code § 523(a)(6) if it is based on an injury caused by the deliberate act of the debtor, undertaken either with the subjective motive to cause harm, or under circumstances where there is an objective and substantial certainty of harm from the act." Harry Ritchie's Jewelers, Inc. v. Chlebowski (In re Chlebowski), 246 B.R. 639, 645 (Bankr. D. Or. 2000) See also, Baldwin v. Kilpatrick (In re Baldwin), 245 B.R. 131 (9th Cir. BAP 2000)[12].

Letter Order (Dec. 15, 2003), at 6.

Applying the law to the facts, the bankruptcy court concluded that a nondischargeable conversion had taken place, and stated:

> Conversion of property subject to a security interest is substantially certain to cause harm to the secured party's interest in that property. Harry Ritchie's Jewelers, supra, 246 B.R. at 645. Consequently, to the extent that [Debtor] converted Vincent's collateral, the claim for damages arising from that conversion is nondischargeable under § 523(a)(6).

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[11] The January 22, 2004 judgment contained factual findings and, therefore, did not comply with the Separate Document Rule. The bankruptcy court then entered an amended judgment in April, 2004, and Debtor filed a timely amended notice of appeal.

[12] Aff'd, 249 F.3d 912, 918 (9th Cir. 2001) (affirming a battery as an intentional tort within the meaning of § 523(a)(6)).

Id. at 7.

ISSUES

1. Whether the court erred in determining that Vincent had a security interest in the Restaurant assets.

2. Whether the bankruptcy court applied an incorrect legal standard for a "willful and malicious" injury under § 523(a)(6).

3. Whether the bankruptcy court erred in denying Debtor's Rule 52(c) motion.

STANDARD OF REVIEW

The bankruptcy court's findings of fact are reviewed for clear error, and its conclusions of law are reviewed de novo. See Carrillo v. Su (In re Su), 290 F.3d 1140, 1142 (9th Cir. 2002).

A pure finding of fact is clearly erroneous "when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." Anderson v. City of Bessemer City, N.C., 470 U.S. 564, 573 (1985) (citation omitted). The panel gives "due regard . . . to the opportunity of the bankruptcy court to judge the credibility of the witnesses." Fed. R. Bankr. P. 8013.

We review the legal standard applied by the bankruptcy court

de novo. See Thiara v. Spycher Bros. (In re Thiara), 285 B.R. 420, 427 (9th Cir. BAP 2002). Whether a claim is a nondischargeable intentional tort is a mixed question of law and fact that we review de novo. See Peklar v. Ikerd (In re Peklar), 260 F.3d 1035, 1037 (9th Cir. 2001). Whether an injury is "malicious" is a separate factual determination. Petralia v. Jercich (In re Jercich), 238 F.3d 1202, 1208 (9th Cir. 2001).

The bankruptcy court's findings of fact under Fed. R. Civ. P. 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); Stone v. Millstein, 804 F.2d 1434, 1437 (9th Cir.1986) (decided under pre-1991 Fed. R. Civ. P. 41(b)).

DISCUSSION

Vincent alleged in her complaint that Debtor had converted her collateral, i.e., the Restaurant equipment, furniture, and fixtures that Debtor stripped and then sold or discarded. Conversion of secured property can be a willful and malicious injury under § 523(a)(6). Whether the underlying claim amounts to conversion is determined under state law, but whether the debt is excepted from discharge is a matter of federal bankruptcy law. See Grogan v. Garner, 498 U.S. 279, 284 (1991) (citing Brown v. Felsen, 442 U.S. 127, 129-30 (1979)). The creditor has the burden of proof, by a preponderance of the evidence. Grogan, 498 U.S. at 291; Transamerica Comm. Fin. Corp. v. Littleton (In re Littleton), 942 F.2d 551, 554 (9th Cir. 1991) (creditor has burden of proof).

In Oregon, conversion is defined as the "intentional exercise

of dominion or control over a chattel which so seriously interferes with the right of another to control it that the actor may justly be required to pay the other the full value of the chattel." Mustola v. Toddy, 253 Or. 658, 663, 456 P.2d 1004, 1007 (1969), adopting Rest. (Second) of Torts § 222A(1) (1965). The gravamen of the tort is the defendant's intent to exercise control over the chattel which is inconsistent with the plaintiff's rights. Naas v. Lucas, 86 Or. App. 406, 409, 739 P.2d 1051, 1052 (Ct. App. 1987).

Under state law, Debtor only challenges the bankruptcy court's conclusion that Vincent had a security interest in the Restaurant assets by virtue of the Chu/KFRANZ Agreement. Thus, he maintains that no conversion occurred.

A. Financing Statement as Security Agreement

Debtor contends that the bankruptcy court erred when it determined that the Financing Statement constituted a security agreement.[13]

State law governs the secured interests asserted by the parties in bankruptcy. Butner v. United States, 440 U.S. 48, 55, (1979) ("Property interests are created and defined by state law.

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[13] The parties have not raised an issue as to whether Vincent's security interest under the Vincent/Chu Agreement simply continued following the sale. See Oregon Revised Statutes ("ORS") 79.0315(1)(a) (providing that "[a] security interest . . . continues in collateral notwithstanding sale . . . thereof unless the secured party authorized the disposition free of the security interest . . . ."). This issue involves factual questions that were not resolved in bankruptcy court, and therefore we decline to address it sua sponte in this appeal.

. . . The justifications for application of state law are not limited to ownership interests; they apply with equal force to security interests. . . .").

Oregon enacted the revised Uniform Commercial Code ("UCC") on July 1, 2001, and adopted the official UCC comments, at ORS 79.0101 - 79.0628. The revised version applies to transactions or liens within its scope, even if such transaction or lien was entered into or created before the effective date. See ORS 79.0101, 2003 Note (1). On the other hand, the revisions do not affect "an action, case or proceeding commenced before the effective date." Id. at Note (3).

Some courts look to the date of bankruptcy to determine which version of the UCC should apply, while others use the version in effect at the time the interest was allegedly created and perfected. See generally Bank of Am., N.A. v. Outboard Marine Corp. (In re Outboard Marine Corp.), 300 B.R. 308, 315 (Bankr. N.D. Ill. 2003).

The documents involved in this case were executed and filed prior to the revision date, but the bankruptcy case was filed post-revision. The parties' arguments are based on the current version of the UCC. The bankruptcy court's Letter Order does not cite either version, but refers to pre-revision case law.

As applied to this case, there is one relevant difference in the requirements for filing a financing statement between the former and current versions of the Oregon UCC. Formerly, the debtor was required to sign the financing statement whereas now the debtor is not required to sign it. See ORS 79.0502(1)(a) and UCC cmt. 3. This difference would only be significant, here, if

Debtor's signed Financing Statement were the only documentary evidence of a security agreement.[14] Since we conclude that it does not stand alone, we will apply current law.

ORS 79.0102(1)(uuu) defines a "security agreement" as "an agreement that creates or provides for a security interest." Furthermore, a security interest is enforceable only if certain conditions are met, including: "The debtor has authenticated a security agreement that provides a description of the collateral . . . ." ORS 79.0203(2)(c)(A).

In construing these provisions in conjunction with the UCC official comments, the Ninth Circuit has held that "[n]o magic words or precise form are necessary to create or provide for a security interest" but "there must be language in the instrument which 'leads to the logical conclusion that it was the intention of the parties that a security interest be created.'" Nolden v. Plant Reclamation (In re Amex-Protein Dev. Corp.), 504 F.2d 1056, 1058-59 (9th Cir. 1974) (citation omitted). This liberal and reasonable approach to commercial transactions reflects the UCC's flexibility and simplified procedures. See id. at 1059.

In Amex-Protein Dev. Corp., there was not one, formal security agreement that met all of the UCC requirements found in § 9-203. Therefore, the Ninth Circuit adopted the so-called "composite document rule," which is still good law. The rule provides that a security agreement may consist of a collection of

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[14] By eliminating the signature requirement, the post-revision UCC emphasizes the notice purpose of a financing statement rather than its contractual nature. See generally Juliet M. Moringiello, "Revised Article 9, Liens From the Fringe, and Why Sometimes Signatures Don't Matter," 10 Widener J. Pub. L. 135, 153-54 (2001).

documents, none of which could, standing alone, satisfy the requirements for a security agreement found in UCC § 9-203.

The Ninth Circuit, in Amex-Protein Dev. Corp., looked at the transaction as a whole, and by aggregating the promissory note, invoices, and the financing statement, concluded that the minimum formal requirements for a security agreement had been met. Amex-Protein Dev. Corp.), 504 F.2d at 1058-59.

However, Amex-Protein Dev. Corp. does not stand for the proposition that the financing statement alone may constitute a security agreement. See In re Ace Lumber Supply, Inc., 105 B.R. 964, 966-67 (Bankr. D. Mont. 1989). Cf. In re Numeric Corp., 485 F.2d 1328, 1332 (1st Cir. 1973) (financing statement taken together with directors' resolution constituted a security agreement); In re Bollinger Corp., 614 F.2d 924, 928 (3rd Cir. 1980) (looking at entire transaction, including the parties' "course of dealing").[15]

The determination of a security agreement is a two-step process, requiring both objective evidence of a writing and subjective evidence of intent. The Ninth Circuit has explained:

> Although the U.C.C. does not specifically state that intention to create a security agreement is an element necessary to creating a valid security agreement, it is clear that intention to do so is required. Determining whether the parties intended to create a security interest is a two-step process. The court must find both language in a written agreement that objectively indicates the parties' intent to create a security interest and the presence of a subjective intent by the parties to create a security interest. The intent to create a security interest must appear on the face of a written document executed by the debtor.

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[15] See note 14 infra.

Expeditors Int'l of Wa., Inc. v. Official Creditors Comm. (In re CFLC, Inc.), 166 F.3d 1012, 1016 (9th Cir. 1999) (preprinted invoice terms were insufficient) (internal quotations and citations omitted).

Another authority has explained:

> [T]he writing requirement is a formal requisite "in the nature of a statute of frauds." A statute of frauds requirement . . . merely contemplates objective indicia of the possibility of an underlying actual agreement--here an agreement for security. The defendant may be able to show that there was no agreement even though the writing requirement is satisfied.
>
> Once the 9-203 writing requirement is satisfied, there may be an inquiry into the second question whether the parties actually intended a security interest, a question of fact. Ordinarily, the writing that satisfies the objective statute of frauds requirement above, will also be sufficient proof of an actual intention to create such an interest. When this is so, no further inquiry is required. But in problem cases, the writing may barely meet the objective test and no more, leaving for further factual inquiry the question whether the parties also actually intended to create a security interest. Parol evidence is admissible to inform this second inquiry, but not the first.

James J. White & Robert S. Summers, Uniform Commercial Code § 31-3 (4th ed. 1995 & Supp. 2004), at 101-02 (footnotes omitted).

Here, it was undisputed that Debtor did not expressly assume the Vincent/Chu security agreement in the Chu/KFRANZ Agreement; the assumption terms included only the balance of the debt owed by Chu to the Vincent. It was also undisputed that there was no "granting" language of a security interest in the Chu/KFRANZ Agreement or Note. Nor did this Debtor execute a new or separate formal security agreement.

Therefore, for objective evidence, the bankruptcy court focused on the signed Financing Statement, alone. Although this rationale was incorrect, we may affirm on any basis fairly

supported by the record. Steckman v. Hart Brewing, Inc., 143 F.3d 1293, 1295 (9th Cir. 1998). We find such grounds, as follows.

Debtor admittedly knew the history concerning the Restaurant, its assets, and the Corporation/Vincent as the secured party. Thus, the entire objective evidence of a written security agreement reasonably consisted of the following documents: (1) the Vincent/Chu Agreement, which incorporated a security interest in favor of the Corporation, (2) the Chu/KFRANZ Agreement, in which Debtor's assumption of Chu's debt, pursuant to the Vincent/Chu Agreement, evidenced Debtor's knowledge of that earlier agreement; (3) the Note, whereby KFRANZ promised to pay Vincent the Chu debt; and (4) the Financing Statement signed by Debtor for KFRANZ, listing the collateral by type, and naming Vincent as the secured party. Additionally, a financing statement's purpose, its *raison d'être*, is to evidence a security interest.

Together, these agreements and documents clearly met the minimum formalities of a written security agreement under ORS 79.0203.

Additionally, the bankruptcy court found subjective evidence of the parties' intent to create a security interest, giving great weight to Debtor's signature on the Financing Statement and his admission that he knew that KFRANZ had granted Vincent a security interest in the Restaurant assets.[16] It concluded that the

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[16] It ruled as follows:

> In this case [Debtor] executed a financing statement on behalf of KFRANZ. His attorney, David Frost, filed the financing statement with the Secretary of State's Office and forwarded a copy of the statement to Vincent. Mr.
>
> (continued...)

Financing Statement was a security agreement.

The bankruptcy court's subjective findings were not clearly erroneous. Debtor admitted that KFRANZ intended to give a security interest to Vincent by its execution of the Financing Statement. Attorney Frost's letter to Vincent that the Financing Statement had been filed, and advising her to file a Continuation Statement, was additional evidence of Debtor's intent to create a security interest.

Debtor challenges the finding of intent because his testimony was inconsistent and, at one point, he denied granting Vincent a security interest. A bankruptcy court's finding is not clearly erroneous, however, even if there is some evidence to support a contrary finding. See Anderson, 470 U.S. at 574 ("Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous.") The bankruptcy court properly weighed all of the evidence and circumstances in order to determine the parties' intent. Its finding was supported by the evidence and we do not have the "definite and firm conviction that a mistake has been committed." Id. at 573.

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[16](...continued)
Frost also advised Vincent that she would need to file a Statement of Continuation if the debt owed to her was not paid by the time the filing expired on July 12, 2005. Importantly, [Debtor] testified that he knew KFRANZ had granted Vincent a security interest in the restaurant assets.

Under these circumstances, I find that there is sufficient evidence of intent to grant a security interest to support a finding that the financing statement . . . created a security interest in the KFRANZ's "equipment, furniture, and fixtures" assets in favor of Vincent.

Letter Order (Dec. 15, 2003), at 7.

Debtor further maintains that there was an inadequate description of the collateral to support a security agreement. In Oregon, the security agreement must provide "a description of the collateral." ORS 79.0203(2)(c)(A). A description is "sufficient, whether or not it is specific, if it reasonably identifies what is described." ORS 79.0108(1). A description of collateral by category reasonably identifies the collateral. ORS 79.0108(2)(b). The UCC comments to this section state that an "all assets" or "all personal property" description is not sufficient *for purposes of a security agreement.* Id., cmt. 2 (2003). However, ORS 79.0504(2) provides that a financing statement may use this broader description.

The Financing Statement identified the collateral by category: "all equipment, furniture and fixtures used in Eddie Rickenbacker's Bar & Grill . . . ." Debtor contends that this description was equivalent to descriptions such as "all of debtor's personal property," or "all of debtor's assets." We disagree. The "all" property descriptions are distinguishable because they do not describe categories or types of goods. The Financing Statement descriptions by category were sufficient.

In summary, the bankruptcy court did not err in determining that there was a security agreement between KFRANZ and Vincent granting Vincent a security interest in the Restaurant assets.

B. Legal Standard

Next, Debtor contends that the bankruptcy court applied an incorrect legal standard for determining whether the conversion

was "willful and malicious," and therefore its judgment must be reversed. See Su, 290 F.3d at 1141 (affirming BAP for reversing the bankruptcy court because it applied the wrong legal standard).

The bankruptcy court correctly defined an intentional tort as follows:

> In Kawaauhau v. Geiger, 523 U.S. 57, 61 (1998), the Supreme court held that "[t]he word 'willful' in (a)(6) modifies the word 'injury,' indicating that nondischargeability takes a deliberate or intentional *injury*, not merely a deliberate or intentional *act* that leads to injury."

Letter Order (Dec. 15, 2003), at 6.

However, in describing the test to determine the actor's state of mind, the bankruptcy court cited old law:

> Under this standard, "a claim is excepted from discharge under Code § 523(a)(6) if it is based on an injury caused by the deliberate act of the debtor, undertaken either with the subjective motive to cause harm, or under circumstances where there is an objective and substantial certainty of harm from the act." Harry Ritchie's Jewelers, Inc. v. Chlebowski (In re Chlebowski), 246 B.R. 639, 645 (Bankr. D. Or. 2000) See also, Baldwin v. Kilpatrick (In re Baldwin), 245 B.R. 131 (9th Cir. BAP 2000).

Id. at 6-7.

The court's reference to Baldwin correctly stated the standard of "actual intent to cause injury." Baldwin, 245 B.R. at 918. The reference to an objective test, however, was an incorrect statement of the law. In the Ninth Circuit, the willful injury requirement is met "only when the debtor has a subjective motive to inflict injury or when the debtor believes that injury is substantially certain to result from his own conduct." Su, 290 F.3d at 1142. "The subjective standard focuses on the debtor's state of mind and precludes application of § 523(a)(6)'s

nondischargeability provision short of the debtor's actual knowledge that harm to the creditor was substantially certain." Id. at 1146. Therefore, the legal standard, as expressed, was partially correct and partially incorrect.

The bankruptcy court then concluded as follows:

> Conversion of property subject to a security interest *is substantially certain to cause harm to the secured party's interest in that property.* Harry Ritchie's Jewelers, supra, 246 B.R. at 645. Consequently, to the extent that [Debtor] converted Vincent's collateral, the claim for damages arising from that conversion is nondischargeable under § 523(a)(6).

Letter Order (Dec. 15, 2003), at 7 (emphasis added).

From this excerpt and the bankruptcy court's reliance on pre-Su law, it is unclear whether the court made the proper subjective finding, i.e., that Debtor knew that his conversion of property was substantially certain to cause harm to Vincent.

Debtor contends that reversal or remand is necessary under our holding in Thiara. Those facts are distinguishable, however. In Thiara, we remanded for specific findings of the debtor's intent to injure or his subjective belief as to the certainty of harm because the bankruptcy court had expressly applied an objective test of "willfulness" instead of the subjective Geiger test. Thiara, 285 B.R. at 433.

In contrast, here, the bankruptcy court articulated the proper subjective test for "willfulness," under Geiger, and made appropriate findings. Specifically, a debtor's actual knowledge of the creditor's secured interest and awareness of harm to the creditor is evidence of subjective motive to injure or belief that an injury is substantially certain to occur as a result of a conversion of the creditor's collateral. Thiara, 285 B.R. at 433-

34; see also Su, 290 F.3d at 1146. The bankruptcy court, in our case, found that: (1) Debtor knew that Vincent had a security interest in the Restaurant assets; (2) Vincent, concerned about her collateral, visited the Restaurant after she had heard rumors about Debtor's financial difficulties. In addition, Vincent testified that she had told Debtor that she would take over operation of the Restaurant if necessary to protect her investment; (3) Debtor, after reassuring Vincent, nonetheless converted the assets by stripping the Restaurant of its equipment, furniture and fixtures and selling or disposing of the collateral; and (4) conversion of the collateral was "substantially certain to cause harm" to Vincent. Letter Order (Dec. 15, 2003), at 7. While lacking some refinement, the court's findings sufficiently determined Debtor's subjective intent to harm Vincent and, thus, the requisite "willfulness" prong was established. See Steckman, 143 F.3d at 1295 (court of appeals may affirm on any basis fairly supported by the record). Further, a finding of malice was implicit in the bankruptcy court's ruling. See Thiara, 285 B.R. at 433-34 (if a willful conversion is established, a finding of malice is inferrable).

In summary, the elements for a willful and malicious conversion were proven in this case, as we may affirm the bankruptcy court on any basis fairly supported by the record. Steckman, 143 F.3d at 1295. The bankruptcy court's expression of a partially incorrect legal standard was harmless error, see Fed. R. Bankr. P. 9005 (incorporating Fed. R. Civ. P. 61), because the court nonetheless adhered to the correct legal standard in its factual findings and determination that Debtor's conversion of

Vincent's collateral was willful and malicious.

C. Motion for Judgment on Partial Findings

Finally, Debtor contends that the bankruptcy court erred when it denied his Rule 52(c) motion at the close of Vincent's case-in-chief and challenges whether Vincent presented a prima facie case.

In adversary proceedings (nonjury trials), a party may move for judgment upon partial findings pursuant to Rule 52(c), which provides:

> If during a trial without a jury a party has been fully heard on an issue and the court finds against the party on that issue, the court may enter judgment as a matter of law against that party with respect to a claim or defense that cannot under the controlling law be maintained or defeated without a favorable finding on that issue, or the court may decline to render any judgment until the close of all the evidence. Such a judgment shall be supported by findings of fact and conclusions of law as required by subdivision (a) of this rule.

Fed. R. Civ. P. 52(c)/Fed. R. Bankr. P. 7052.

A Rule 52(c) motion at the close of the plaintiff's case should be granted where "the plaintiff's proof has failed in some aspect."[17] See 9 Wright & Miller, supra, § 2371, at 388.

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[17] Such motion for involuntary dismissal, formerly under Fed. R. Civ. P. 41(b), has been incorporated in Rule 52(c), and case law developed under former Rule 41(b) is applicable. See 9A Wright & Miller, supra, § 2573.1, at 494. Former Rule 41(b) read, in relevant part:

> After the plaintiff, in an action tried by the court without a jury, has completed the presentation of his evidence, the defendant, without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. The

(continued...)

Nonetheless, Rule 52(c) also affords the trial court discretion to carry a mid-trial motion until the court has heard all the evidence, or to consider a renewed Rule 52(c) motion at the end of the trial. See Smith Petroleum Serv., Inc. v. Monsanto Chem. Co., 420 F.2d 1103, 1116 (5th Cir. 1970) (administratively, one trial and appeal is preferable); see also 9A Wright & Miller, supra, § 2573.1 at 495 (Supp. 2004) ("Most commonly, a Rule 52(c) motion is brought by the defendant at the close of the plaintiff's case (and may be renewed at the close of all evidence.")).

At the end of trial, however, and notwithstanding an extant Rule 52(c) motion, the trial court must make findings of fact, make conclusions of law, and apply the law to the facts "in the light of *all the evidence received at the trial.*" King v. Petitioning Creditors, 427 F.2d 689, 690-91 (9th Cir. 1970) (emphasis added); 9 Wright & Miller, supra, § 2371, at 391-92.

Here, the bankruptcy court denied Debtor's motion and he then proceeded to present his evidence. The bankruptcy court ultimately ruled on the basis of all the evidence. Therefore, only the final judgment is before us.

If Debtor wished to challenge the denial of his Rule 52(c) motion, he should have refused to offer his evidence, accepted a judgment for Vincent, and appealed it on the ground that Vincent's evidence was insufficient. Since Debtor went forward with his

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[17](...continued)
court as trier of the facts may then determine them and render judgment against the plaintiff or may decline to render any judgment until the close of all the evidence.

Fed. R. Civ. P. 41(b) (pre-1991 amendment).

case, he has waived his right to appeal any error in the bankruptcy court's denial of his Rule 52(c) motion. See id.; King, 427 F.2d at 690-91; Wealden Corp. v. Schwey, 482 F.2d 550, 551-52 (5th Cir. 1973).

CONCLUSION

In properly assessing the entire evidence, the bankruptcy court did not err in its determination that KFRANZ and Debtor intended to give Vincent a security interest in the Restaurant assets, as evidenced by the aggregate Vincent/Chu and Chu/KFRANZ transactions. It correctly concluded that Debtor, while aware of such interest and potential harm to Vincent, nonetheless converted Vincent's collateral, resulting in a willful and malicious injury to her secured interest. The bankruptcy court's judgment of nondischargeability under § 523(a)(6) is therefore AFFIRMED.

U.S. Bankruptcy Appellate Panel
of the Ninth Circuit
125 South Grand Avenue, Pasadena, California 91105
Appeals from Central California (626) 229-7220
Appeals from all other Districts (626) 229-7225

NOTICE OF ENTRY OF JUDGMENT

BAP No. OR-04-1144-MaSK

RE: JAMES KEVIN FRASNELLY and KAREN ANN FRASNELLY

A separate Judgment was entered in this case on 12/6/04.

BILL OF COSTS:

Bankruptcy Rule 8014 provides that costs on appeal shall be taxed by the Clerk of the Bankruptcy Court. Cost bills should be filed with the Clerk of the Bankruptcy Court from which the appeal was taken.
9th Cir. BAP Rule 8014-1

ISSUANCE OF THE MANDATE:

The mandate, a certified copy of the judgment sent to the Clerk of the Bankruptcy Court from which the appeal was taken, will be issued 7 days after the expiration of the time for filing a petition for rehearing unless such a petition is filed or the time is shortened or enlarged by order. See Federal Rule of Appellate Procedure 41.

APPEAL TO COURT OF APPEALS:

An appeal to the Ninth Circuit Court of Appeals is initiated by filing a notice of appeal with the Clerk of this Panel. The Notice of Appeal should be accompanied by payment of the $255 filing fee (effective November 1, 2003) and a copy of the order or decision on appeal. Checks may be made payable to the U.S. Court of Appeals for the Ninth Circuit. See Federal Rules of Appellate Procedure 6 and the corresponding Rules of the United States Court of Appeals for the Ninth Circuit for specific time requirements.

CERTIFICATE OF MAILING

The undersigned, deputy clerk of the U.S. Bankruptcy Appellate Panel of the Ninth Circuit, hereby certifies that a copy of the document on which this certificate appears was mailed this date to all parties of record to this appeal.

By: Elaine Lewis

Deputy Clerk: December 6, 2004

Elaine Lewis

UNITED STATES BANKRUPTCY APPELLATE PANEL

OF THE NINTH CIRCUIT

BAP NO. OR-04-1144-MaSK

BK NO. 03-30297-tmb13
ADV NO. 03-03217

In re: JAMES KEVIN FRASNELLY; In re: KAREN ANN FRASNELLY

Debtors

JAMES KEVIN FRASNELLY

Appellants

v.

HAZEL VINCENT

Appellee

JUDGMENT

ON APPEAL from the United States Bankruptcy Court for the District of Oregon.

THIS CAUSE came on to be heard on the record from the above court and was argued by counsel.

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

FOR THE PANEL,

Harold S. Marenus,
BAP Clerk

By: Elaine Lewis
Deputy Clerk

CASE NAME: JAMES KEVIN FRASNELLY and KAREN ANN FRASNELLY

BAP NO: OR-04-1144-MaSK

Bk. NO: 03-30297-tmb13 Adv. NO: 03-03217

PROOF OF SERVICE MANDATE

A certified copy of the attached judgment was sent to:

CLERK

U.S. BANKRUPTCY COURT

at 1001 SW 5th Avenue

Portland, OR 97204

on 12/30/04

By: Edwina Clay
Deputy Clerk