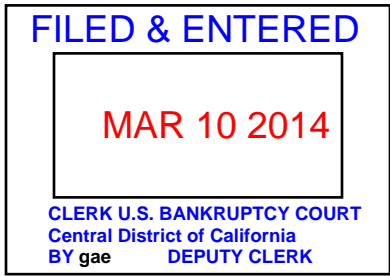


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UNITED STATES BANKRUPTCY COURT
CENTRAL DISTRICT OF CALIFORNIA
LOS ANGELES DIVISION

In re: CHARLES BELL, Debtor.	Case No. 2:11-bk-51860 RK Chapter 7 Adv. No. 2:12-ap-01053 RK
CHRISTOPHER HART, Plaintiff, vs. CHARLES BELL aka CHARLES ALBERT BELL aka TOPAZ CONSTRUCTION aka TOPAZ CONSTRUCTION AND DEVELOPMENT COMPANY, Defendant.	MEMORANDUM DECISION AFTER TRIAL

The trial in this adversary proceeding was conducted before the undersigned United States Bankruptcy Judge on September 5 and 11, 2013. Appearances were made as noted on the record.

In his adversary complaint, Plaintiff Christopher Hart ("Plaintiff") alleges three causes of action under 11 U.S.C. §§ 523(a)(2)(A), (a)(4), and (a)(6), claiming that Defendant Charles Bell, aka Charles Albert Bell, aka Topaz Construction, aka Topaz Construction and Development Company ("Defendant") owes Plaintiff a debt that is

1 nondischargeable in connection with construction work promised or performed on
2 Plaintiff's residence. In accordance with the court's order, Plaintiff filed his Post-Trial
3 Findings of Fact and Conclusions of Law ("Proposed Findings") on October 9, 2013. See
4 *Docket Entry No. 55*. Defendant filed a Response and Opposition to Plaintiff's Post-trial
5 Findings of Fact and Conclusions of Law ("Response") on November 8, 2013. See
6 *Docket Entry No. 56*. Defendant's Response contained a request for judicial notice
7 pursuant to Federal Rule of Evidence 201. *Id.* at 3:25-5:3 (citations to transcripts are to
8 page:line). The court denies Defendant's request for judicial notice because the court
9 granted permission for the parties to provide post-trial briefing only, and it is improper to
10 introduce additional evidence at this stage of the proceedings after trial has been
11 concluded. Finally, on November 20, 2013, Plaintiff filed his reply to the Defendant's
12 opposition. See *Docket Entry No. 57*. Having reviewed and considered the evidence
13 and argument presented by the parties at trial and in their post-trial submissions, the
14 court rules as follows.

15 **I. 11 U.S.C. § 523(a)(2)(A)**

16 The first cause of action in Plaintiff's complaint alleges a claim for debt
17 nondischargeability under 11 U.S.C. § 523(a)(2)(A). *First Amended Complaint* at ¶¶ 42-
18 51. Section 523(a)(2)(A) excepts from discharge debts that are the result of "false
19 pretenses, false representation, or actual fraud," other than a statement respecting the
20 debtor's financial condition. To prevail on a claim under § 523(a)(2)(A), a plaintiff must
21 prove that:

- 22 (a) the debtor made a representation,
- 23 (b) the debtor knew the representation was false at the time it was made,
- 24 (c) the debtor made the representation with the intent to deceive the plaintiff,
- 25 (d) the plaintiff relied on the representation, and
- 26 (e) the plaintiff sustained a loss as the proximate result of the
27 misrepresentation.

28 *Ghomeshi v. Sabban (In re Sabban)*, 600 F.3d 1219, 1222 (9th Cir. 2010). "A creditor

1 must prove each element of fraud by a preponderance of the evidence.” *Citibank (South*
2 *Dakota), N.A. v. Eashai (In re Eashai)*, 87 F.3d 1082, 1086-1087 (9th Cir. 1996). An
3 exception to discharge should be construed strictly in favor of debtors and against
4 creditors. *In re Sabban*, 600 F.3d at 1222. After consideration of these standards, the
5 court determines that Plaintiff has not met his burden of proof to establish conduct by a
6 preponderance of the evidence that rises to the level of fraud.

7 Plaintiff’s claim under § 523(a)(2)(A) fails because he has not proven the first
8 element – a misrepresentation by Defendant. It is undisputed that this adversary
9 proceeding concerns construction work promised or performed by a Terrance A. Green
10 who claimed to be authorized to work under the Defendant’s general contractor’s license
11 as Topaz Construction, and alleged misrepresentations and omissions made during the
12 course of the remodeling project. *See Proposed Findings at 2:7-4:27; Response at 3:9-*
13 *20*. Plaintiff signed a “Home Improvement Contract” dated June 25, 2007 with “Topaz
14 Construction”, listing an address in Los Angeles, California. *Trial Exhibit No. 1*, Home
15 Improvement Contract. As shown by Trial Exhibit 1, Plaintiff did not provide evidence of
16 a contract signed by any person on behalf of Topaz Construction, but Plaintiff testified at
17 trial that he entered into a contract with Topaz Construction through Mr. Green. In
18 response, Defendant contended that Mr. Green entered into the agreement with Plaintiff
19 and used Defendant’s contractor’s license without Defendant’s knowledge or permission.
20 *Response at 3:9-20*.

21 There does not appear to be any real dispute between the parties that multiple
22 misrepresentations were made to Plaintiff by Mr. Green that he was a licensed contractor
23 and that the contracted construction work would be done in a timely and workmanlike
24 manner. However, the court determines that Plaintiff has not proved by a preponderance
25 of the evidence that Defendant actually and directly made any of these
26 misrepresentations.

27 A. No Affirmative Misrepresentation by the Defendant

28 Plaintiff alleges that Defendant misrepresented that Mr. Green was the owner of

1 Topaz Construction when Defendant was actually the owner of the company. *First*
2 *Amended Complaint* at ¶ 40. However, the evidence at trial, including Plaintiff's
3 testimony, demonstrates that it was Mr. Green who misrepresented ownership of the
4 company in connection with the Home Improvement Contract. Plaintiff testified that Mr.
5 Green made representations to Plaintiff that he was a licensed construction contractor
6 who would provide certain remodeling services under the Home Improvement Contract.
7 *Trial Testimony of Christopher Hart (Hart Trial Testimony)*, September 5, 2013, at 9:15-
8 9:16 a.m. Plaintiff testified that he never received a business card from Topaz
9 Construction, and that he only had a business card from Terrence Green and a phone
10 number given to him by Mr. Green. *Hart Trial Testimony*, September 5, 2013, at 9:32-
11 9:33 a.m. On cross-examination, Plaintiff testified that Mr. Green was previously known
12 to him as the handyman who previously performed work for Plaintiff on his house in 1998
13 when he purchased the house. *Hart Trial Testimony*, September 5, 2013, at 10:09-10:10
14 a.m. Plaintiff testified that that Mr. Green approached him about doing remodeling work
15 for him, and that when he inquired as to Mr. Green's contractor license status because he
16 knew that Mr. Green was a handyman, Mr. Green informed Plaintiff that he now had a
17 contractor's license. *Hart Trial Testimony*, September 5, 2013, at 9:15-9:16 a.m. Plaintiff
18 also testified that he had not even met Defendant until the first day when construction
19 work started at the property in early July 2007. *Hart Trial Testimony*, September 5, 2013,
20 at 9:23-9:24 a.m. According to Plaintiff, Mr. Green introduced Defendant to Plaintiff as a
21 foreman, but Defendant did not mention that he was the actual owner of Topaz
22 Construction. *Hart Trial Testimony*, September 5, 2013, at 9:26-9:27 a.m. Therefore,
23 any representations made in connection with the contract agreement were not made by
24 Defendant to Plaintiff because the evidence indicates that only Plaintiff and Mr. Green
25 were party to those contract discussions.

26 Before and after Plaintiff met Defendant as the foreman in July 2007, Mr. Green
27 was the person who requested and received funds from Plaintiff on behalf of Topaz in
28 connection with the project. *Hart Trial Testimony*, September 5, 2013, at 9:21-9:22 a.m.

1 and 9:25-9:26 a.m. According to Plaintiff's testimony, Mr. Green was also the person
2 who made verbal representations regarding the completion date of the project. *Hart Trial*
3 *Testimony*, September 5, 2013, at 9:22-9:23 a.m. and 9:29-9:30. The evidence is lacking
4 to indicate any affirmative direct representations made by Defendant prior to the time
5 when Mr. Green abandoned the project.

6 Plaintiff also alleges that Defendant had misrepresented that construction work
7 would be timely completed and subcontractors and employees would be paid so that a
8 full and unconditional release could be given to Plaintiff. *First Amended Complaint* at ¶
9 40. The evidence shows that the first time Defendant made any representations of this
10 type was after Mr. Green abandoned the project. Plaintiff testified that there was a
11 meeting in October 2007 between Plaintiff and Mr. Green in which Defendant offered to
12 serve as mediator for the dispute regarding the lack of progress in the remodeling project.
13 *Hart Trial Testimony*, September 5, 2013, at 9:37-9:38 a.m. At this meeting, after Mr.
14 Green left, Defendant represented to Plaintiff for the first time that he was the owner of
15 Topaz Construction and promised correct anything that was wrong and complete the
16 project. *Hart Trial Testimony*, September 5, 2013, at 9:38-9:39 a.m.

17 Defendant testified that he offered to complete the project for free, other than
18 supplies and payments to suppliers and subcontractors, because he saw the situation
19 that Plaintiff and his family were in and it was "in his character to help" in such a situation.
20 *Trial Testimony of Charles Bell (Bell Trial Testimony)*, September 5, 2013, at 11:05-11:06
21 a.m. The court does not find this self-serving testimony that Defendant was being a
22 Good Samaritan as it were to be credible, but such testimony shows that he had a prior
23 business relationship with Mr. Green.

24 The only direct representation by Defendant to Plaintiff that is supported by
25 evidence is that he agreed to complete the project undertaken by Mr. Green and to do so
26 by Christmas of 2007. A promise to perform can be a false representation for purposes
27 of §523(a)(2)(A), but it requires evidence that the debtor knew the promise was false
28 when it was made, had no intent to perform the promise, or at least should have known

1 that it was outside of his ability to perform. *In re Carlson*, 426 B.R. 840, 854 (Bankr. D.
2 Idaho 2010).

3 Defendant testified that he did not actually complete the job because Plaintiff's
4 wife tried to add additional work and he had only agreed to complete the original job
5 without compensation. *Bell Trial Testimony*, September 5, 2013, at 11:07-11:08 a.m.
6 The parties' testimony and the documentary evidence provided indicates that Defendant
7 did at least attempt to complete some of the remaining work to be done, and this
8 indicates that his promise to complete the work was true at the time that it was made.
9 There is no evidence to the contrary other than the fact that the project was ultimately not
10 completed by Defendant. Plaintiff has established only that the Defendant did not in fact
11 perform in completing the project where Mr. Green left off, and this alone is insufficient to
12 demonstrate this promise by Defendant was false when it was made. Plaintiff has
13 therefore failed to carry his burden to prove that Defendant made any affirmative and
14 direct false representation to Plaintiff.

15 B. Imputed Representations by Mr. Green

16 Plaintiff also asserts that Mr. Green's fraudulent representations are attributable to
17 Defendant on a vicarious liability or agency theory. *Proposed Findings* at 9:7-14. The
18 actual fraud of another can, in some instances, be imputed to a debtor for purposes of §
19 523(a)(2)(A) under partnership and agency principles. *Tsurukawa v. Nikon Precision,*
20 *Inc. (In re Tsurukawa)*, 287 B.R. 515, 524-525 (9th Cir. BAP 2002). The debtor partner
21 need not, be aware of or, ratify the fraudulent conduct. *Id.* at 525-526. A partnership is
22 an association of two or more persons to carry on a business for profit as co-owners. *Id.*
23 at 520-521. The existence of a partnership is a question of fact, and evidence of a
24 partnership includes the intention to share profits, losses, and control of the enterprise.
25 *Id.* "A primary characteristic of an agency relationship is the principal's right to control the
26 agent's conduct regarding matters entrusted to the agent." *Id.* at 521 (citing *Alvarez v.*
27 *Felkner Mfg. Co.*, 230 Cal. App. 2d 987, 999 (1964)). However, unlike in *Tsurukawa*, the
28 current record does not reveal detailed or sufficient facts to demonstrate a partnership or

1 agency relationship between the Defendant and Mr. Green. While there is an implication
2 that the two were working together, Plaintiff failed to provide direct evidence from which
3 the court could conclude either that (1) the Defendant and Mr. Green intended to share
4 profits, or (2) that Defendant had a right to control Mr. Green with respect to the Plaintiff's
5 remodeling project. *Id.*

6 It is undisputed that Mr. Green used the Defendant's contractor's license number
7 in connection with the work performed on Plaintiff's residence. It appears that he did so
8 with the Defendant's knowledge or consent. Defendant testified that the Wells Fargo
9 Bank account in the name of Topaz Construction where Plaintiff's checks were deposited
10 was owned by Mr. Green, and that he never received any money from the account.
11 Defendant further stated that he maintains an account for his own business at Bank of
12 America. *Bell Trial Testimony*, September 5, 2013, at 11:03-11:05 a.m. This testimony
13 however, does not preclude the possibility that Defendant and Mr. Green were working
14 together. Indeed, there is evidence of several facts that show that Green and Bell were
15 working together. First, Defendant testified that Mr. Green used Defendant's license on
16 several occasions, Defendant verbally told Mr. Green not to do so, that Mr. Green did not
17 have his permission to use his license, but that Defendant did know Mr. Green was using
18 his license anyway. *Bell Trial Testimony*, September 5, 2013, at 10:50-10:55 a.m.
19 Defendant admitted that he never reported Mr. Green's unauthorized use of Defendant's
20 contractor's license number even though Defendant was apparently aware that Mr.
21 Green continued using Defendant's contractor's license number after Defendant forbid
22 Mr. Green from doing so. This suggests to the court that both men may have had some
23 business relationship. Second, on July 2, 2007, Mr. Green and Defendant Bell met with
24 Plaintiff at Plaintiff's house (the job site). *Hart Trial Testimony*, September 5, 2013, at
25 9:23-9:24 a.m.; *see also, Proposed Findings* at 3.

26 At that time, Mr. Green told Plaintiff that Defendant was the foreman of Topaz
27 Construction. *Id.* Third, in his testimony at trial, Defendant admitted that Mr. Green
28 approached Defendant when he (Green) began having problems with Plaintiff's project,

1 and that Defendant intended to help rectify the situation. *Bell Trial Testimony*, September
2 5, 2013, at 11:04-11:05 a.m. Fourth, when Green abandoned the project, Bell stepped in
3 for Green and planned to complete the project. *Bell Trial Testimony*, September 5, 2013,
4 at 11:06-11:08 a.m. Each of these facts indicates that Green and Bell were working
5 together, suggestive of a partnership.

6 In *Haig v. Shart (In re Shart)*, ___B.R. ___, 2014 WL 309241 (Bankr. C.D. Cal.
7 2014), the court held that fraudulent conduct by a debtor-husband could not be imputed
8 based on agency/partnership principles to the debtor-wife for purposes of discharge
9 exception of debts where the debtor-wife's involvement in debtor-husband's business
10 was minimal and limited. *Id.*, slip op. at 13-14. The court in *In re Shart* stated:

11 The court in *Tsurukawa II* found that the wife's involvement in
12 her husband's business was extensive and on a steady
13 continuous basis. The court pointed to the following factors,
14 among others, that evidence a "business partner". First, in the
15 creation of the business the debtor went together with her
16 husband to apply for a business license. Second, the debtor
17 opened a bank account for the company and designated
herself as the sole signatory. Third, the debtor made an initial
contribution to the business from her bank account. Fourth,
the debtor wrote hundreds of checks and regularly balanced
the account. Fifth, the debtor represented herself as the sole
owner of the business on tax returns.

18 *In re Shart*, slip op. at 14. In contrast to the *Tsurukawa* case, the *Shart* court found that:

19 [Debtor-wife]'s involvement in the business . . . was minimal
20 and limited to her capacity as a wife, who was also an
21 attorney. The business was established by Mr. Shart alone,
22 and he was the sole owner of the business. Ms. Schardt was
23 not involved in the day to day operations and did not even live
in Tennessee where the [business] was located. The fact that
Ms. Schardt may have reviewed notes and letters sent to
creditor and advised Mr. Shart with regard to the dispute is not
indicative of a "business partner."

24 *Id.* Similar to *Shart*, and as discussed above, the evidence presented in this case fails to
25 show that Mr. Green's level of involvement with Defendant's business "was extensive and
26 on a steady continuous basis." *In re Shart*, slip op. at 14. While it is possible that Mr.
27 Green and Defendant were working together, the only evidence that the court has for this
28 is conflicting and mostly circumstantial. Plaintiff failed to offer direct evidence of profit

1 sharing between Mr. Green and Defendant Bell to conclusively establish the existence of
2 a partnership between them, but the court may draw an inference indirectly that
3 Defendant and Mr. Green were working together. Nevertheless, in the court's view, the
4 evidence is not conclusive that there was an extensive or continuous partnership or
5 agency relationship between Defendant and Mr. Green, so that any of Mr. Green's
6 alleged fraudulent representations can be imputed to Defendant under *Tsurukawa*.¹

7 Any Alleged Misrepresentation was not the Proximate Cause of Damages

8 Even assuming *arguendo* that a partnership existed between Mr. Green and
9 Defendant, or that Mr. Green was an agent of Defendant, the evidence before the court
10 does not establish by a preponderance that Mr. Green's misrepresentations regarding
11 licensing and the ownership of Topaz Construction were the proximate cause of the
12 damages suffered by Plaintiff.

13 Plaintiff states that his damages included the cost of correcting the construction
14 defects and completing the omissions caused by Defendant's and Topaz Construction's
15 failure to furnish all of the materials or perform all the labor necessary for completion of
16 the construction project. *Proposed Findings* at 5 and 17. Plaintiff further states that the
17 defects in the work and construction problems were due to "poor workmanship" and "lack
18 of oversight." *Id* at 14. Plaintiff's damages were also due to the fact that Topaz

19 _____
20 ¹ *Shart* was decided after the trial in this case, and the court discusses it here as illustrative of how the
21 court should apply the principles of *Tsurukawa*. The court in *Shart* alternatively concluded that the
22 development of the case law, it is inappropriate to impute the fraud of one person to another under §
23 523(a)(2)(A). *In re Shart*, slip op. at 1-8, citing *inter alia*, *Grogan v. Garner*, 498 U.S. 279 (1991),
24 *Kawaauhau v. Geiger*, 523 U.S. 57 (1998) and *Bullock v. BankChampaign, N.A.*, ___ U.S. ___, 133 S.Ct.
25 1754 (2013)(cases strictly construing exceptions to discharge and holding that exceptions to discharge
26 should apply only to debtors who are actually responsible for the wrongdoing which caused the debt). The
27 court takes no position regarding this alternative holding in *Shart* in deciding the case at bar. Moreover, the
28 court observes that although plaintiff obtained a default judgment against defendant in state court, plaintiff
did not argue in this case that collateral estoppel or res judicata precludes defendant from defending here.
Therefore, the court will not address such arguments not only because they were not asserted, but
because default judgment was entered on nonfraud claims to base an argument against defendant through
a preclusion doctrine. See *Trial Exhibits 13 and 14*, Judgment by Default, and Verified Complaint for
Damages, *Hart v. Green*, No. BC 411522 (judgment entered on January 24, 2011 and complaint filed on
April 9, 2009); see also, *Lucido v. Superior Court*, 51 Cal. 3d 335, 341 (1990). Because fraud was not
actually or necessarily decided in the prior state court action, plaintiff cannot assert liability on a preclusion
claim under §523(a)(2). *Id*.

1 Construction never actually completed the work on the project. *Id.* at 4. Because
2 Plaintiff's damages are a result of poor workmanship and Topaz Construction's failure to
3 complete the project, Plaintiff's damages were directly caused by Defendant's defective
4 work on the construction project, failure to perform, and failure to deliver a completed
5 product. Topaz Construction was a licensed contractor, and it appears that Mr. Green
6 and Defendant were working together as Topaz Construction because of Defendant's
7 actions working with Mr. Green. Therefore, Plaintiff's damages were not caused by Mr.
8 Green's or Defendant's misrepresentation of licensing and the ownership of Topaz
9 Construction. Rather, Plaintiff's damages were directly caused by the abandonment of
10 an unfinished project that was left in disrepair by Mr. Green and Defendant as Topaz
11 Construction.

12 Even after Defendant, who was licensed by the California State Contractor
13 Licensing Board and the true owner of Topaz Construction, took over supervision of the
14 project from Green, the defective work was never corrected and the project was
15 ultimately abandoned. Plaintiff suggests that "if Bell had performed the work instead of
16 simply lending his license to Green" that the construction problems may have been
17 avoided. *Proposed Findings* at 14. However, Plaintiff admits that even after demanding
18 in October 2007 that Defendant take over the project from Green, complete the remaining
19 work, and correct the defective work performed by Green, "Defendant Bell would come to
20 work alone, once every 3-4 days, and only for a few hours." *Proposed Findings* at 4. In
21 November 2007, "Plaintiff Hart told Defendant Bell that the performance of Topaz
22 Construction continued to be unacceptable, that work was not being done, and that the
23 work being done was defective." *Proposed Findings* at 4. Defendant failed to complete
24 the remaining work or to correct the defective work by December 25, 2007 as demanded
25 by Plaintiff. *Id.* Plaintiff states that Defendant Bell returned to the project "from time to
26 time . . . but without measurable progress" in January 2008, then ultimately abandoned
27 the project in February 2008. *Id.* at 4-5. Defendant was licensed and the true owner of
28 Topaz Construction, yet even after he took over the project from Green, the defective

1 construction was never corrected and the project was ultimately abandoned by him. This
2 indicates that Plaintiff's damages did not stem from the fact that Mr. Green
3 misrepresented the fact that he was licensed and owned Topaz. The damages were
4 directly caused by the poor workmanship and work ethic of Green and Defendant as
5 Topaz Construction, which is indicative of a nonfraud tort, negligence from a lack of due
6 care. California Civil Code, § 1714(a); Witkin, *Summary of California Law, Torts*, § 833 at
7 49-50 (3d ed. 2005 and 2013 Supp.), *citing inter alia, Rowland v. Christian*, 69 Cal.2d 108
8 (1968).

9 C. No Omission by the Defendant

10 A false representation can also be established by an omission when there is a
11 duty to disclose. *In re Eashai*, 87 F.3d at 1089. Plaintiff testified that Defendant was
12 introduced to Plaintiff by Mr. Green as the foreman, and Defendant did not speak up and
13 state that he was actually the owner. However, Plaintiff also testified that he did not meet
14 with Defendant prior to entering the Home Improvement Contract with Mr. Green and that
15 Defendant did not do anything to induce Plaintiff to enter into the contract. There is no
16 evidence that Defendant was aware that Mr. Green had used the name Topaz
17 Construction or Defendant's contractor's license in negotiating the project with Plaintiff.
18 Without such knowledge, Defendant would not have known that it was a
19 misrepresentation to be introduced as only foreman of that particular project. While
20 Defendant's testimony controverts Plaintiff's testimony in that he claims this meeting did
21 not occur and he did not meet Plaintiff in July 2007, the court finds that Plaintiff's
22 testimony that Mr. Green introduced Defendant at the house when the project was
23 commencing in July 2007 to be credible. But even so, the court finds that Plaintiff's
24 testimony does not establish a material omission by Defendant. The court does not find
25 this omission to be material because the evidence indicates that Mr. Green and
26 Defendant were probably working together as Topaz, that Topaz itself was a licensed
27 contracting entity and performed the work on the project, through poorly, and the
28 omission by Defendant that he was true owner of Topaz did not have a material impact in

1 causing the damages to Plaintiff.

2 D. Conclusion

3 Plaintiff has failed to carry his burden to prove by a preponderance of the evidence
4 that Defendant made a material misrepresentation, affirmatively, through omission, or
5 through imputation, proximately causing injury to Plaintiff. That there might have been
6 some relationship between Defendant and Mr. Green is insufficient to establish proximate
7 cause to establish Defendant's liability under § 523(a)(2)(A). Thus, the court finds that
8 Plaintiff has not proven the required elements of a claim under that subsection, a
9 misrepresentation by Defendant, and proximate cause, and therefore, the court holds in
10 favor of Defendant on the first cause of action for nondischargeability under §
11 523(a)(2)(A).

12 **II. 11 U.S.C. § 523(a)(4)**

13 Plaintiff's third cause of action in the complaint alleged a claim under 11 U.S.C. §
14 523(a)(4). *First Amended Complaint* at ¶¶ 52-56. Section 523(a)(4) excepts debts from
15 discharge which are obtained by "fraud or defalcation while acting in a fiduciary capacity,
16 embezzlement, or larceny." A fiduciary for purposes of § 523(a)(4) requires a relationship
17 arising from an express or technical trust imposed prior to the wrongdoing. *In re Lewis*,
18 97 F.3d 1182, 1185 (9th Cir. 1996). Defalcation is defined as the misappropriation of
19 money held in any fiduciary capacity or the failure to properly account for such funds. *Id.*
20 at 1186-1187. Plaintiff concedes that there was insufficient evidence presented at trial to
21 find that Defendant committed either fraud or defalcation while acting in a fiduciary
22 capacity, or embezzlement, or larceny. *Proposed Findings* at 15:3-11. Therefore, the
23 court holds for Defendant on the third cause of action under 11 U.S.C. § 523(a)(4).

24 **III. 11 U.S.C. § 523(a)(6)**

25 Plaintiff's second cause of action alleges a claim for nondischargeability under 11
26 U.S.C. § 523(a)(6). *First Amended Complaint* at ¶¶ 57-60. A debt is excepted from
27 discharge under § 523(a)(6) for willful and malicious injury by the debtor. A malicious
28 injury requires "(1) a wrongful act, (2) done intentionally, (3) which necessarily causes

1 injury, and (4) is done without just cause or excuse." *Petralia v. Jercich (In re Jercich)*,
2 238 F.3d 1202, 1209 (9th Cir. 2001). The willful injury requirement is met where "either
3 the debtor had a subjective motive to inflict the injury" or "believed the injury was
4 substantially certain to occur as a result of his conduct." *Id.* at 1208. The creditor bears
5 the burden of proving willful and malicious injury by a preponderance of the evidence. *In*
6 *re Littleton*, 942 F.2d 551, 554 (9th Cir. 1991).

7 Plaintiff contends that the debt owed by Defendant is nondischargeable under
8 §523(a)(6) when he knowingly permitted Mr. Green to use his contractor's license in
9 violation of the California Business and Professions Code. *Proposed Findings* at 15:28-
10 16:27. However, the mere fact that discharge of an enforceable legal obligation may run
11 counter to a state law policy does not by itself mean that the debt is not dischargeable. *In*
12 *re Sabban*, 600 F.3d at 1224. Even if Plaintiff did prove that Defendant knowingly
13 violated the California Business and Professions Code, the inquiry would not stop there
14 and Defendant's actions would need to be analyzed under the standards set forth above.
15 *Id.*

16 As discussed above, it is undisputed that Mr. Green used the Defendant's
17 contractor's license number in connection with the work performed on Plaintiff's
18 residence. Based on the record before the court, it appears that Mr. Green and
19 Defendant were doing the work on Plaintiff's house as agents of Topaz Construction, and
20 Topaz Construction was indeed licensed. Both Mr. Green and Defendant held
21 themselves out as agents of Topaz Construction when they met, together, with Plaintiff.
22 Mr. Green took money on behalf of Topaz for the construction work that was to be
23 performed on Plaintiff's residence. Mr. Green was introduced as a foreman on the
24 project and later brought construction crews to the work site to perform the work on
25 behalf of Topaz. The work performed by the construction crews and overseen by Mr.
26 Green was defective and incomplete. At Plaintiff's request and Defendant's suggestion,
27 Defendant took over the construction project from Mr. Green. However, Defendant took
28 over the project and worked on it only intermittently, and the defective construction was

1 never fixed, the project was never completed and the project was ultimately abandoned.

2 In order for an act to be malicious for purposes of §523(a)(6) it must be done
3 intentionally. *In re Jercich*, 238 F.3d at 1209. Here, Plaintiff has failed to carry his
4 burden to prove that Defendant intended to defraud Plaintiff. Topaz Construction did hire
5 a construction crew, purchase materials, and perform work at the site. Topaz did not
6 take money from Plaintiff for the project, and then failed to ever purchase materials, show
7 up, or work on the site. The work performed was simply shoddy, slow, then finally
8 abandoned, which is more indicative of a nonfraud tort, negligence, from a lack of due
9 care in completing the construction work. Based on this record, Plaintiff has not shown
10 that Defendant intentionally defrauded him.

11 Similarly, there is insufficient evidence to find a willful injury, which requires a
12 subjective motive to inflict injury or belief that injury was substantially certain. *In re*
13 *Jercich*, 238 F.3d at 1208. As stated above, the evidence appears to indicate that Topaz
14 Construction took on Plaintiff's construction project with the intent to perform. Topaz
15 Construction provided a work crew, purchased materials, and performed work for several
16 months. The construction work done was defective. The evidence before the court
17 indicates that at most, Defendant was negligent in supervising Mr. Green and in working
18 on the project. Neither reckless nor negligent injuries are sufficient to except a debt from
19 discharge under § 523(a)(6). *Kawaauhau v. Geiger*, 523 U.S. 57, 64 (1998). The court
20 therefore holds for Defendant on the second cause of action for nondischargeability
21 under § 523(a)(6).

22 **IV. Conclusion**

23 For the foregoing reasons, the court finds in favor of Defendant on all three causes
24 of action under 11 U.S.C. §§ 523(a)(2)(A), (a)(4), and (a)(6).

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This memorandum decision constitutes the court's findings of fact and conclusions of law. A separate judgment is being entered concurrently herewith.

IT IS SO ORDERED.

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Date: March 10, 2014



Robert Kwan
United States Bankruptcy Judge