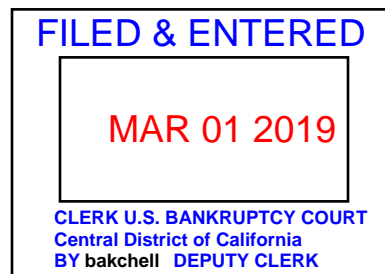


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NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY COURT

CENTRAL DISTRICT OF CALIFORNIA

LOS ANGELES DIVISION

In re:
REGGIE BISHOP,

Debtor.

THOMAS PATTON and
AUDREY PATTON, Successors-in-
interest to WILLIE PHELPS, Original
Plaintiff,

Plaintiffs,
vs.
REGGIE BISHOP,

Defendant.

Case No. 2:16-bk-16503-RK
Chapter 7
Adv. No. 2:16-ap-01388-RK

**MEMORANDUM DECISION AFTER
TRIAL ON COMPLAINT FOR
NONDISCHARGEABILITY OF DEBT
PURSUANT TO 11 U.S.C. § 523(a)(6)
AND § 523(a)(2)**

This adversary proceeding came on for trial before the undersigned United States Bankruptcy Judge on February 1, 2018 and March 8, 2018, on the Complaint ("Complaint") of former Plaintiff Willie Phelps ("Phelps") for non-dischargeability of debts allegedly incurred through willful and malicious injury or false pretenses, false representation, or actual fraud (11 U.S.C. § 523(a)(6) and § 523(a)(2)(A)), Electronic Case Filing Number

1 ("ECF") 1, filed on August 22, 2016. Alexander G. Boone, of the law firm of Campbell &
2 Farahani, LLP, appeared for Phelps. Defendant and Debtor Reggie Bishop ("Defendant"
3 or "Bishop") appeared for himself.

4 On May 11, 2018, counsel of record for Phelps lodged proposed findings of fact and
5 conclusions of law after trial on her behalf. ECF 129. On June 11, 2018, Bishop lodged
6 his proposed findings of fact and conclusions of law after trial and filed his objections to
7 Phelps's proposed findings of fact and conclusions of law. ECF 133 and 134. On August
8 17, 2018, counsel for Phelps filed objections to Bishop's proposed findings of fact and
9 conclusions of law. ECF 137. Also, on August 17, 2018, Thomas Patton and Audrey
10 Patton filed their motion to substitute themselves as successors-in-interest for Phelps, who
11 had died on May 1, 2018. ECF 138. By order filed and entered on September 21, 2018,
12 the court granted the motion to substitute proper party plaintiffs and substituted Thomas
13 Patton and Audrey Patton as successors-in-interest to Phelps as the proper plaintiffs in this
14 matter. ECF 146. Accordingly, Thomas Patton and Audrey Patton (collectively, the
15 "Plaintiffs") are now the proper Plaintiffs as Phelps's successors-in-interest in this
16 adversary proceeding.

17 After trial, Bishop filed several post-trial motions to dismiss and strike, which the
18 court considered. On May 16, 2018, Bishop filed a motion to dismiss for failure to comply
19 with a court order, ECF 130, which was taken under submission on the papers and denied
20 by order filed on June 14, 2018, ECF 135. On September 19, 2018, Bishop filed a motion
21 to strike pleadings, ECF 147, which was heard on November 19, 2018 after the filing of
22 supplemental briefing, ECF 154 and ECF 155, and which was denied by an order filed on
23 December 7, 2018, ECF 157.

24 Having considered the testimony of witnesses at trial, the documentary evidence
25 received at trial, the oral and written arguments of the parties, the proposed findings of fact
26 and conclusions of law and objections thereto, and the other matters of record before the
27 court, the court hereby makes the following findings of fact and conclusions of law pursuant
28

1 to Rule 52 of the Federal Rules of Civil Procedure, made applicable here by Rule 7052 of
2 the Federal Rules of Bankruptcy Procedure.

3 **I. FACTS**

4 Phelps was a tenant of a rent-controlled apartment located at 3305 Stocker Street,
5 Los Angeles, California 90008. *Appellate Opinion, Case No. B252583 dated May 28,*
6 *2015, Plaintiffs' Exhibit 25; Bishop Letter of April 13, 2011, Plaintiffs' Exhibit 3.* Bishop was
7 Phelps's landlord at these premises. *Id.* Bishop made several attempts to evict Phelps
8 from the premises. *Id.*

9 On February 2, 2012, Phelps initiated a civil action in the Superior Court of
10 California for the County of Los Angeles by filing a complaint against Bishop, which bore
11 Case Number BC478175 (the "State Court Action"). *Complaint, Plaintiffs' Exhibit 1.* The
12 Complaint in the State Court Action alleged claims for: (1) breach of warranty of
13 habitability; (2) constructive eviction; (3) negligent maintenance of the premises;
14 (4) violation of California Civil Code § 789.3; and (5) intentional infliction of emotional
15 distress. *Id.*

16 On November 19, 2013, the Superior Court entered a judgment after a jury verdict,
17 which indicated that judgment was being rendered in favor of Phelps against Bishop for
18 damages of \$154,500.00, costs of \$2,305.35 and attorneys' fees of \$106,924.00 on her
19 claims under California Civil Code § 789.3 and constructive eviction. *Judgment, Plaintiffs'*
20 *Exhibit 22.* No judgment was rendered in favor of Phelps on her claim for intentional
21 infliction of emotional distress because the jury found that Bishops did not intend to cause
22 Phelps emotional distress. *Id.* The judgment did not address Phelps's claims for breach of
23 warranty of habitability and negligent maintenance of the premises. *Id.*

24 Bishop appealed the Superior Court's judgment to the California Court of Appeal for
25 the Second Appellate District, which affirmed the judgment. *Appellate Opinion, Case No.*
26 *B252583 dated May 28, 2015, Plaintiffs' Exhibit 25.* In its opinion affirming the judgment of
27 the Superior Court, the appellate court set forth a detailed statement of the factual and
28 procedural background of the case on appeal, which this court quotes verbatim because it

1 set forth the following findings of fact and conclusions of law of the appellate court, which
2 are relevant here:

3
4 Respondent [Phelps] lived in a rent-controlled apartment on Stocker Street
5 in the city of Los Angeles from 1997 through 2011. Respondent testified
6 that she had a good relationship with her previous landlord, but after
7 appellant [Bishop] became the landlord in 2009, he began to harass her in
8 what she believed was an attempt to force her to move out. For example,
9 in April 2011, appellant demanded that respondent complete a new rental
10 application on the basis that she had exceeded the allowable number of
11 occupants in the apartment, even though the previous landlord had
12 approved the number of occupants. In addition, appellant repeatedly
13 demanded that respondent allow entry to her apartment for unneeded
14 repairs and then failed to send a repair person. In June and August 2011,
15 appellant served respondent with notices to quit for her alleged refusal to
16 allow access for repairs, although no repairs were needed and no one
17 came to make repairs. In September 2011, appellant serve respondent
18 with a notice to quit for the alleged failure to pay rent, even though she
19 had paid it.

20 In August 2011, appellant sued respondent for unlawful detainer,
21 demanding that respondent give him access to her apartment. However,
22 in October 2011, there was a fire in a different apartment at the property.
23 Appellant notified respondent that the utilities at the building were being
24 discontinued for an indefinite time due to fire damage and advised her to
25 seek shelter with the Red Cross.

26 Felipe Hernandez, a code enforcement officer with the Los Angeles
27 Housing Department (housing department) inspected the property after
28 the fire and told appellant to restore the gas and water to respondent's
apartment, but appellant refused. Hernandez testified that there was
nothing wrong with the property that required the utilities to remain off. On
October 18, 2011, a housing department inspector posted a two-day
notice to restore the utilities to respondent's apartment. Appellant claimed
that he had been ordered not to turn on the utilities. However, Hernandez
checked with the Los Angeles Fire Department, the Los Angeles
Department of Building and Safety, and appellant's insurance company,
and none of those entities had instructed appellant to keep the utilities off.
Because appellant refused to turn on the utilities, the housing department
issued a Notice to Vacate Substandard Building, ordering appellant to
evict respondent and pay her relocation fees.

Respondent moved out of the building from approximately October 14,
2011 through the end of November 2011, paying \$3,600 for housing in a
neighborhood she felt was dangerous. She had not wanted to move out
of her apartment because she had strong ties to the community there.
Respondent was 77 years at the time of trial and on a fixed income and
thus had limited resources to obtain housing in a safer neighborhood.

Respondent's attorney advised respondent to settle the unlawful detainer
case so that she would not need to return to an apartment with no utilities,
and therefore sue appellant for constructive eviction. On November 9,
2011, appellant and respondent settled the unlawful detainer action by a

1 superior court form, "Unlawful Detainer Stipulation and Judgment."
2 Respondent's attorney informed appellant's attorney that respondent
3 planned to sue appellant for constructive eviction and refused to waive her
4 right to do so. Pursuant to the agreement, respondent agreed to vacate
5 the apartment by November 30, 2011, and appellant agreed to pay
6 respondent the \$17,000 relocation fee ordered by the housing department.
7 The agreement provided that judgment would be entered in favor of
8 appellant only if respondent failed to vacate the premises. Appellant
9 agreed that if respondent vacated the premises, he would dismiss the
10 action with prejudice. Respondent vacated the premises pursuant to the
11 agreement, and the action was dismissed.

12 In February 2012, respondent filed a complaint against appellant alleging
13 five causes of action: breach of the warranty of habitability, constructive
14 eviction, negligent maintenance of the premises, violation of section 789.3,
15 and intentional infliction of emotional distress. The trial court overruled
16 appellant's demurrer to the complaint and sustained respondent's
17 demurrer to appellant's cross-complaint. The court denied appellant's
18 summary judgment motion, and the case proceeded to a jury trial.

19 The jury returned a special verdict in favor of respondent on her section
20 789.3 claim and her constructive eviction claim. The jury found that
21 appellant had willfully caused respondent's gas and water to remain off for
22 the purpose of terminating her occupancy and that he constructively
23 evicted her. The jury awarded respondent damages in the amount of
24 \$154,000. The trial court entered judgment in respondent's favor,
25 awarding her \$154,000 in damages, \$2,305.35 in costs, and \$106,924 in
26 attorney fees. Appellant timely appealed.

27 *Appellate Opinion, Case No. B252583 dated May 28, 2015, Plaintiffs' Exhibit 25 at 2-5.*

28 Thereupon, the appellate court considered and rejected Bishop's arguments and affirmed
the Superior Court's judgment in favor of Phelps. *Id.*

On May 17, 2016, Bishop commenced this bankruptcy case by filing a voluntary
petition for relief under Chapter 7 of the Bankruptcy Code, 11 U.S.C. *Petition*, Main
Bankruptcy Case, ECF 1, filed on May 17, 2016. On July 28, 2016, the Chapter 7 Trustee
in Bishop's bankruptcy case filed a "no distribution" report.

On August 22, 2016, Phelps commenced this adversary proceeding by filing her
complaint for nondischargeability of debt. *Complaint*, ECF 1. In her Complaint, Phelps
alleged two claims: (1) a claim under 11 U.S.C. § 523(a)(6) that the debts owed by Bishop
to her from the state court judgment are excepted from discharge on grounds that such
debts arose from willful and malicious injury to her by Bishop; and (2) a claim under 11
U.S.C. § 523(a)(2)(A) that the debts owed by Bishop to her from the state court judgment
are excepted from discharge on grounds that Bishop fraudulently transferred property to

1 his daughter to prevent Phelps from collecting on the debts. *Id.* Based on these
2 allegations, Phelps prayed for a judgment that Bishop's debts to her be found
3 nondischargeable pursuant to 11 U.S.C. §§ 523(a)(6) and 523(a)(2)(A). *Id.*

4 On February 1, 2018 and March 8, 2018, the court conducted the trial in this
5 adversary proceeding. Based on the evidence admitted at trial, the court makes the
6 following further findings of fact. As Phelps's landlord, Bishop made several attempts to
7 evict her from her apartment at 3305 Stocker Street, Los Angeles, California 90008
8 through notices to quit. *Bishop Letter of April 13, 2011*, Plaintiffs' Exhibit 3; *Three-Day*
9 *Notice to Perform of Quit dated April 25, 2011*, Plaintiffs' Exhibit 5; *Sixty-Day Notice to Quit*
10 *dated June 8, 2011*, Plaintiffs' Exhibit 10; *Complaint in Unlawful Detainer dated August 26,*
11 *2011*, Plaintiffs' Exhibit 11; *Three-Day Notice to Perform Lawful Obligation or Quit dated*
12 *August 17, 2011*, Plaintiffs' Exhibit 14; *Three-Day Notice to Pay Rent or Quit dated*
13 *September 3, 2011*, Plaintiffs' Exhibit 15. The City of Los Angeles Housing Department
14 notified Bishop that his notices to Phelps to quit were defective and in violation of city
15 ordinances and gave Bishop instructions to cancel the notices to quit. *Three-Day Notice to*
16 *Perform of Quit dated April 25, 2011*, Plaintiffs' Exhibit 5; *LAHC letter of May 5, 2011*,
17 Plaintiffs' Exhibit 7; *LAHC letter of May 16, 2011 with notice of cancellation*, Plaintiffs'
18 Exhibit 8; *Sixty-Day Notice to Quit dated June 8, 2011*, Plaintiffs' Exhibit 10; *LAHC letter of*
19 *July 15, 2011*, Plaintiffs' Exhibit 14.

20 On October 14, 2011, there was a fire at 3309 Stocker Street, which was another
21 apartment in the building where Phelps's apartment was located. *Bishop letter of October*
22 *15, 2011*, Plaintiffs' Exhibit 17. In a letter dated October 15, 2011, Bishop wrote Phelps,
23 stating that as result of the fire on October 14, 2011, it "became necessary for the Los
24 Angeles Fire Department to turn-off the water and gas lines to the building because of
25 damages to the pipes which carry those utilities." *Id.* After the fire in the building, the
26 water and gas utilities in Phelps's apartment at 3305 Stocker Street were turned off. *Direct*
27 *Testimony Declaration of Reggie Bishop*, ECF 98, at 3-5; *Bishop letter of October 15,*
28 *2011*, Plaintiffs' Exhibit 17; *LAHC Work Log*, Plaintiffs' Exhibit 20. However, Bishop

1 admitted during his testimony at trial that he did not have personal knowledge that it was
2 the Fire Department that shut off the utilities, but that he just assumed that. *Trial*
3 *Testimony of Reggie Bishop*, February 1, 2018, at 11:51 a.m. According to Bishop in his
4 trial declaration and his trial testimony, after the fire, he was unable to make the necessary
5 repairs of the building and to restore utility services in the building before Phelps vacated
6 her apartment in November 2011 because he was financially unable to do so. *Direct*
7 *Testimony Declaration of Reggie Bishop*, ECF 98, at 5; *Trial Testimony of Reggie Bishop*,
8 February 1, 2018, at 10:14-10:18 a.m.

9 According to Felipe Hernandez, an inspector with the City of Los Angeles Housing
10 Department who went out to Phelps's apartment at 3305 Stocker Street to investigate her
11 complaint that Bishop refused to turn on her utilities after the fire on October 14, 2011, the
12 fire did not require that her utilities be turned off. *Trial Testimony of Felipe Hernandez*,
13 February 8, 2018 at 10:50-10:52 a.m. Hernandez testified that he inspected Phelps's
14 apartment at 3305 Stocker Street and the area surrounding the apartment, though he did
15 not inspect the entire building, and observed that the fire did not affect the gas and utility
16 lines to Phelps's apartment at 3305 Stocker Street and that no repairs were necessary for
17 the utility lines. *Id.* at 10:52 a.m., 10:59 a.m. and 11:02 a.m. Hernandez made this
18 determination because the fire was in the rear of the building on the second floor, Phelps's
19 apartment was in the front of the building on the first floor, he saw no visible fire damage in
20 her apartment, there were separate gas and electrical utility meters for each apartment, the
21 gas utility line for Phelps's apartment did not go through the rear and did not see that the
22 water utility line was affected by the fire. *Id.* at 10:54-10:56 a.m., 11:02 a.m. Hernandez
23 testified that he would have sent a city approved licensed contractor to inspect the utility
24 lines for Phelps's apartment to see if repairs were needed and provide repair cost
25 estimates, but Bishop refused to allow this and told Hernandez to get off the property,
26 using the "f" word. *Id.* at 10:57 a.m. The court finds Hernandez's testimony to be credible.

27 On October 18, 2011, the City of Los Angeles Housing Department issued a two-
28 day order to repair to Bishop instructing him to repair and restore Phelps's water and gas

1 utility service at her apartment. *Two-Day Order to Repair dated October 18, 2011*,
2 Plaintiffs' Exhibit 18. Bishop had told the Los Angeles city housing inspectors that he was
3 told by the Los Angeles Department of Building and Safety and his insurance company not
4 to turn on the utilities for Phelps's apartment at 3305 Stocker Street, but he did not offer
5 evidence corroborating that he was so instructed. *Trial Testimony of Felipe Hernandez*,
6 February 8, 2018 at 10:50-10:52 a.m.; *LAHC Work Log*, Plaintiffs' Exhibit 20 (log entry
7 dated November 2, 2011). In support of his testimony, Bishop offered an incident report for
8 the fire at the apartment of Lewis Williams at 3309 Stocker Street with an estimated
9 property loss of \$130,000, photographs taken of the fire damage in the building and a fire
10 department premises closure notice. *Incident Report*, Defendant's Exhibit 104;
11 *Photographs*, Defendant's Exhibit 105; *Premises Closure Notice*, Defendant's Exhibit 105.
12 None of these exhibits indicate that Bishop was required by the city building and safety
13 department or his insurance company not to turn on Phelps's utilities because these
14 exhibits relate to the other apartment, 3309, and do not show that they relate to Phelps's
15 unit, 3305. For example, the Premises Closure Notice, Defendant's Exhibit 105 was
16 posted only on the door of the other apartment at 3309 Stocker Street. *Trial Testimony of*
17 *Reggie Bishop*, February 1, 2018, at 11:49 a.m.

18 As noted earlier, the housing inspector, Hernandez, inspected Phelps's apartment
19 after the fire and saw no visible damage to her apartment from the fire. Bishop's evidence
20 of fire damage appears to have pertained to the other apartment occupied by another
21 tenant in a different part of the building. Moreover, Hernandez testified that as part of his
22 investigation of Phelps's complaint that Bishop would not turn on her utilities, he contacted
23 the Los Angeles Building and Safety Department and a fire investigator with Bishop's
24 insurance company about Bishop's representation that they instructed him not to turn on
25 Phelps's utilities, but they said they could not confirm that. *Trial Testimony of Felipe*
26 *Hernandez*, February 8, 2018 at 10:50-10:52 a.m.; *LAHC Work Log*, Plaintiffs' Exhibit 20
27 (log entry dated November 2, 2011). Because Bishop would not act to turn on Phelps's
28 utilities, such as starting any repairs, if necessary, based on Hernandez's recommendation,

1 the city housing department issued the notice to vacate Phelps's apartment because the
2 apartment was uninhabitable due to the substandard condition of the lack of functioning
3 utilities. *Trial Testimony of Felipe Hernandez*, February 8, 2018, at 10:52-10:53 a.m.,
4 11:05-11:06 a.m.; *Notice to Vacate Substandard Building dated November 2, 2011*,
5 Plaintiffs' Exhibit 19. Based on this record showing that Bishop had previously attempted
6 to evict Phelps in violation of city ordinances, the absence of fire damage to her apartment
7 and Bishop's lack of cooperation with the city housing department in its investigation of
8 Phelps's complaint that he would not allow inspection and repair of her utility lines or would
9 otherwise make efforts to have her utilities turned on, the court finds Bishop's
10 uncorroborated testimony that he was required to keep Phelps's utilities turned off is not
11 credible, and therefore, agrees with the jury verdict and judgment of the Superior Court that
12 there was no justification for keeping Phelps's utilities turned off and that he intended to
13 terminate her occupancy of the apartment she rented from him, resulting in her
14 constructive eviction, through his refusal to take remedial action to have her utilities turned
15 on after the fire.

16 On November 26, 2013, Bishop transferred the subject real property at 3305
17 Stocker Street, Los Angeles, California 90008 as a gift to his daughter by grant deed.
18 *Grant Deed dated November 26, 2013*, Plaintiffs' Exhibit 23. However, by a judgment filed
19 on July 13, 2016, the Superior Court declared Bishop's title to the subject real property at
20 3305 Stocker Street, Los Angeles, California 90008 to be null and void in the case of
21 *Richards v. Willis (In the Matter of Gwendolyn R. Moore Trust)*, Case Number BP120811
22 (Superior Court of California, County of Los Angeles), quieting title in the property in the
23 Gwendolyn R. Moore Trust of 2004 as of May 17, 2013 and cancelling the deed of property
24 to Bishop, and therefore, as of November 26, 2013, Bishop lacked title to the property to
25 transfer to his daughter. *First Amended Judgment after Bench Trial on: Quiet Title;*
26 *Cancellation of Deed; Financial Elder Abuse; Fraud, Constructive Fraud; Breach of*
27 *Fiduciary Duty; Negligence; Constructive Fraud; and Constructive Trust, Richards v. Willis*
28 *(In re Gwendolyn R. Moore Trust)*, Case Number BP120811 (Superior Court of California,

1 County of Los Angeles), filed on Jul 13, 2016, appeal of Bishop dismissed by order filed on
2 August 16, 2016, Case Numbers B265622 and B270074 (California Court of Appeal,
3 Second Appellate District, Division One), ECF 58-5 and ECF 58-6, *Richards v. Bishop*,
4 Adversary Proceeding Number 2:16-ap-01383-RK (Bankr. C.D. Cal., filed on February 6,
5 2017); *see also Statement of Uncontroverted Facts and Conclusions of Law on Plaintiffs'*
6 *Motion for Summary Judgment, Richards v. Bishop*, ECF 205, filed and entered on
7 February 22, 2018 (Bankr. C.D. Cal.); *Trial Testimony of Reggie Bishop*, February 1, 2018,
8 at 9:24-9:25 a.m.

9 II. ANALYSIS

10 A. Res Judicata on the Amount of Bishop's Debt to Phelps

11 "Bankruptcy courts recognize and apply the basic principles of *res judicata* in
12 determining the effect to be given in bankruptcy proceedings to judgments rendered in
13 other forums." *Comer v. Comer (In re Comer)*, 723 F.2d 737, 739 (9th Cir. 1984) (citation
14 omitted). In determining the res judicata effect of a state court judgment, federal courts
15 must, as a matter of full faith and credit, apply that state's law of res judicata. 28 U.S.C.
16 § 1738; *see also, In re Comer*, 723 F.2d at 739-741; *Bugna v. McArthur (In re Bugna)*, 33
17 F.3d 1054, 1057 (9th Cir. 1994) (full faith and credit applied to state court judgments for
18 collateral estoppel purposes), (citing 28 U.S.C. § 1738). Bankruptcy courts must therefore
19 give the preclusive effect to a state court judgment that it would receive in the courts of
20 that state. *In re Comer*, 723 F.2d at 740. If a state court judgment is entitled to res
21 judicata effect, the bankruptcy court may not look behind that judgment to determine the
22 actual amount of the judgment debt obligation. *Id.* at 739-741. However, res judicata
23 does not apply to the determination of whether a debt is excepted from discharge under
24 the Bankruptcy Code since that matter is litigated for the first time in a debt
25 dischargeability proceeding, not in a prebankruptcy collection proceeding. *Id.* (citing
26 *Brown v. Felsen*, 442 U.S. 127 (1979)).

27 In California, "[r]es judicata, or claim preclusion, prevents relitigation of the same
28 cause of action in a second suit between the same parties or parties in privity with them."

1 *Mycogen Corp. v. Monsanto Co.*, 28 Cal.4th 888, 896 (2002) (citation omitted). Res
2 judicata precludes the relitigation of a cause of action only if (1) the decision in the prior
3 proceeding is final and on the merits; (2) the present action is on the same cause of action
4 as the prior proceeding; and (3) the parties in the present action or parties in privity with
5 them were parties to the prior proceeding. *Busick v. Workmen's Compensation Appeals*
6 *Board*, 7 Cal.3d 967, 974 (1972).

7 Regarding the amount of Plaintiffs' claim, this court finds that the Plaintiffs have
8 shown by a preponderance of the evidence that the judgment in the state court action is
9 final and on the merits, that the present action as to the amount of the liability is the same
10 as the prior proceeding, and that the parties in the present action or parties in privity with
11 them were parties to the prior proceeding.

12 The Superior Court's judgment was entered on November 19, 2013 and Notice of
13 Entry of Judgment was filed November 19, 2013. *Judgment dated November 19, 2013*,
14 Plaintiffs' Exhibit 22 (evidencing the entry of judgment on November 19, 2013). Bishop
15 timely appealed the Superior Court's judgment to the California Court of Appeal, Second
16 Appellate District, Division One, which affirmed the Superior Court's judgment on May 28,
17 2015. *Appellate Opinion, Case No. B252583 dated May 28, 2015*, Plaintiffs' Exhibit 25 at
18 2-5. There was no evidence presented of a timely further appeal by Bishop. Thus, the
19 state court judgment as to the amount of the liability of Bishop on the debt owed to Phelps
20 is final for res judicata purposes. As previously noted, the Superior Court entered a
21 judgment in favor of Phelps against Bishop for damages of \$154,500.00, costs of
22 \$2,305.35 and attorneys' fees of \$106,924.00 on her claims under California Civil Code
23 § 789.3 and constructive eviction. *Judgment dated November 19, 2013*, Plaintiffs' Exhibit
24 22.

25 **B. Claim under 11 U.S.C. § 523(a)(6)**

26 As the parties seeking a determination that the debt owed by Bishop is excepted
27 from discharge under 11 U.S.C. §§ 523(a)(6) and (a)(2)(A), Plaintiffs bear the burden of
28 proving their claims by a preponderance of the evidence. *Grogan v. Garner*, 498 U.S. 279,

1 289 (1991). Moreover, 11 U.S.C. § 523 should be narrowly construed against the
2 objecting creditor and liberally in favor of the debtor. *In re Miller*, 39 F.3d 301, 304 (11th
3 Cir. 1994) (citation omitted).

4 Under 11 U.S.C. § 523(a)(6), an individual debtor may not discharge a debt to the
5 extent that such debt was obtained "for willful or malicious injury by the debtor to another"
6 or "to the property of another." *Petralia v. Jercich (In re Jercich)*, 238 F.3d 1202, 1208 (9th
7 Cir. 2001). "The Supreme Court in *Kawaauhau v. Geiger (In re Geiger)*, 523 U.S. 57, 118
8 S. Ct. 974, 140 L.Ed.2d 90 (1998), made it clear that for section 523(a)(6) to apply, the
9 actor must intend the consequences of the act, not simply the act itself." *Ormsby v. First*
10 *American Title Co. of Nevada (In re Ormsby)*, 591 F.3d 1199, 1206 (9th Cir. 2010). "The
11 injury must be deliberate or intentional, 'not merely a deliberate or intentional **act** that leads
12 to injury.'" *In re Plyam*, 530 B.R. 456, 463 (9th Cir. BAP 2015) (quoting *Kawaauhau v.*
13 *Geiger*, 523 U.S. 57, 61 (1998)) (emphasis in original).

14 **1. Tortious Conduct**

15 A debtor's conduct supports a claim of willful and malicious injury under 11 U.S.C.
16 § 523(a)(6) only if it constitutes tortious conduct. *Lockerby v. Sierra*, 535 F.3d 1038, 1041-
17 1043 (9th Cir. 2008). Conduct is not tortious simply because the injury is intended or
18 substantially likely to occur; rather, conduct is tortious if it constitutes a tort under state law.
19 *Id.* (citing *In re Jercich*, 238 F.3d at 1206).

20 The court first considers whether the conduct by Bishop alleged by Plaintiffs in
21 support of their claim under 11 U.S.C. § 523(a)(6) constitutes tortious conduct under
22 California law, which is the state law applicable here. In support of Plaintiffs' claim under
23 11 U.S.C. § 523(a)(6), Plaintiffs argue that Bishop wrongfully evicted Phelps from her
24 apartment by causing her utilities to remain off:

25 Here, Defendant willfully caused the utilities in [Phelps]'s rental unit to
26 remain off out of a desire to terminate her tenancy, motivated by his dislike
27 of [Phelps]. Defendant engaged in a consistent pattern of unsuccessful
28 attempts to evict [Phelps], before she finally vacated.

1 *[Plaintiffs' Proposed] Findings of Fact and Conclusions of Law*, ECF 129, filed on May 11,
2 2018, at 6. In other words, the alleged conduct by Bishop was that he constructively
3 evicted Phelps by interrupting or terminating her utility services with an intent to terminate
4 the tenancy. However, whether this conduct is tortious conduct under California law for
5 purposes of 11 U.S.C. § 523(a)(6) appears to be an issue of first impression.

6 The court determines that the conduct alleged here constitutes tortious conduct
7 under California law because the alleged conduct violated a statute embodying a public
8 policy that gave rise to a duty or standard of conduct. Phelps was protected by two
9 remedies for Bishop's alleged misconduct, a common law remedy of wrongful eviction,
10 which may be actual or constructive, and a statutory remedy under California Civil Code
11 § 789.3. *Hale v. Morgan*, 22 Cal.3d 388 (1976); *Stoiber v. Honeychuck*, 101 Cal.App.3d
12 903, 925-926 (1980); California Civil Code § 789.3; Friedman, Garcia and Hoy, *Rutter*
13 *Group California Practice Guide: Landlord-Tenant*, ¶¶ 7.1 et seq. (online ed., October 2018
14 update).

15 The common law remedy of wrongful eviction is an independent damages action
16 available whenever a landlord ousts a tenant of possession not using orderly judicial
17 processes in good faith and pursuant to a properly issued writ of possession, which may
18 subject a landlord to consequential damages, amounts paid for future rent, and punitive
19 damages. Friedman, Garcia and Hoy, *Rutter Group California Practice Guide: Landlord-*
20 *Tenant*, ¶¶ 7.37 and 7.7.5 (citing, *inter alia*, *Daluiso v. Boone*, 71 Cal.2d 484, 488-489
21 (1969) and *Spinks v. Equity Residential Briarwood Apartments*, 17 Cal.App.4th 1004, 1039
22 (2009)).

23 The statutory remedy of California Civil Code § 789.3 bars a landlord from willfully
24 causing, directly or indirectly, the interruption or termination of a utility service to a tenant's
25 residence with the intent to terminate occupancy, and it authorizes a civil action against a
26 landlord for actual damages and statutory penalties. California Civil Code § 789.3;
27 Friedman, Garcia and Hoy, *Rutter Group California Practice Guide: Landlord-Tenant*,
28 ¶¶ 7.43.1 - 7:45 (citing, *inter alia*, *Hale v. Morgan*, 22 Cal.2d at 393). There is a strong

1 public policy in California law for these remedies codified in the summary possession
2 statutes relating to unlawful detainer and forcible entry and detainer, California Code of
3 Civil Procedure §§ 1159 *et seq.*, which set forth procedural mechanisms for effecting a
4 lawful eviction as a replacement for the common law "self-help" repossession remedy,
5 which often led to violence between landlords and tenants. Friedman, Garcia and Hoy,
6 *Rutter Group California Practice Guide: Landlord-Tenant*, ¶ 7.1 (citing, *inter alia*, *Daluiso v.*
7 *Boone*, 71 Cal.2d at 495). Under California law, "violation of a statute embodying a public
8 policy is generally actionable even though no specific remedy is provided in the statute;
9 any injured member of the public for whose benefit the statute was enacted may bring an
10 action." *Castillo v. Friedman*, 197 Cal.App.3d Supp. 6 (1987) (holding a private tort action
11 for damages exists if a residential tenancy is terminated as a result of a violation of the City
12 of Los Angeles Rent Stabilization Ordinance) (citing *inter alia* *Czap v. Credit Bureau of*
13 *Santa Clara Valley*, 7 Cal.App.3d 1, 6 (1970). "The effect of such statutes, in essence, is
14 to create a duty or standard of conduct, the breach of which, where it causes injury, gives
15 rise to liability in tort." *Id.* (citing *inter alia*, *Middlesex Insurance Co. v. Mann*, 124
16 Cal.App.3d 558, 570 (1981)).

17 Thus, Bishop's alleged conduct in constructively evicting Phelps constitutes tortious
18 conduct under California law because the alleged conduct violated a statute embodying a
19 public policy that gave rise to a duty or standard of conduct.

20 **2. Collateral Estoppel**

21 The Plaintiffs also argue that the evidence at trial and the collateral estoppel effect
22 of the prior state court judgment prove their claim for willful and malicious injury under 11
23 U.S.C. § 523(a)(6):

24 Defendant willfully caused the utilities in [Phelps]'s rental unit to remain off
25 out of a desire to terminate her tenancy, motivated by his dislike of [Phelps].
26 Defendant engaged in a consistent pattern of unsuccessful attempts to evict
27 [Phelps], before she finally vacated. . . In addition, the trial Court in *Phelps*
28 *v. Bishop*, BC478175 already made sufficient factual findings to
demonstrate that Defendant acted willfully and with malice, which were
affirmed on appeal.

1 [Plaintiffs' Proposed] Findings of Fact and Conclusions of Law, ECF 129, filed on May 11,
2 2018, at 6-7.

3 The court first considers the applicability of collateral estoppel to this case. The
4 principles of collateral estoppel (also called issue preclusion) apply in discharge exception
5 proceedings under 11 U.S.C. § 523(a). *Sasson v. Sokoloff (In re Sasson)*, 424 F.3d 864,
6 872 (9th Cir. 2005) (quoting *Grogan v. Garner*, 498 U.S. 279, 284 n. 11 (1991)). The full
7 faith and credit requirement of 28 U.S.C. § 1738 requires that the bankruptcy court give
8 collateral estoppel effect to a prior state court judgment in a debt dischargeability
9 proceeding under 11 U.S.C. § 523(a). *Gayden v. Nourbakhsh (In re Nourbakhsh)*, 67 F.3d
10 798, 801 (9th Cir. 1995). Courts look to the law of the state where the judgment was
11 obtained to apply collateral estoppel. *Id.* at 800. Plaintiffs bear the burden of proof on their
12 claims to prove by a preponderance of the evidence that collateral estoppel applies to bar
13 relitigation of the judgment that Phelps obtained in the state court action. *Grogan v.*
14 *Garner*, 498 U.S. 279, 289 (1991).

15 In California, five elements must be met for the court to give collateral estoppel
16 effect to a judgment: (1) the issue must be identical to the issue litigated in the prior
17 proceeding; (2) the issue must have been actually litigated; (3) the issue must have been
18 necessarily decided in the prior proceeding, (4) the decision in the prior proceeding must
19 be final and on the merits, and (5) the party against whom preclusion will be applied must
20 be the same as, or in privity with, the original party. *In re Cantrell*, 329 F.3d 1119, 1123
21 (9th Cir. 2003) (citing *Harmon v. Kobrin (In re Harmon)*, 250 F.3d 1240, 1245 (9th Cir.
22 2001)) (citing *Lucido v. Superior Court*, 51 Cal.3d 335, 341 (1990)); see also *Plyam v.*
23 *Precision Development, LLC (In re Plyam)*, 530 B.R. 456, 462 (9th Cir. BAP 2015).

24 "The party seeking to assert collateral estoppel has the burden of proving all the
25 requisites for its application." *Kelly v. Okoye (In re Kelly)*, 182 B.R. 255, 258 (9th Cir. BAP
26 1995); see also *In re Plyam*, 530 B.R. at 462. "This means providing a record sufficient to
27 reveal the controlling facts and pinpoint the exact issues litigated in the prior action." *In re*
28 *Kelly*, 182 B.R. at 258; *In re Plyam*, 530 B.R. at 462. "Any reasonable doubt as to what

1 was decided by a prior judgment should be resolved against allowing the collateral
2 estoppel effect." *Id.* (citations omitted). While Plaintiffs in their arguments set forth in their
3 proposed findings of fact and conclusions of law do not address the elements for collateral
4 estoppel under California law and generally do not demonstrate how collateral estoppel
5 applies here, the court determines that the elements of collateral estoppel under California
6 law are applicable here for the reasons discussed below.

7 **a. Willfulness**

8 For purposes of 11 U.S.C. § 523(a)(6), an injury is "willful" "when it is shown either
9 that the debtor had a subjective motive to inflict the injury *or* that the debtor believed that
10 injury was substantially certain to occur as a result of his conduct." *Petralia v. Jercich (In*
11 *re Jercich)*, 238 F.3d 1202, 1208 (9th Cir. 2001) (emphasis in original). "Willful" intent does
12 not require that the debtor had the specific intent to injure the creditor, if the act was
13 intentional and the debtor knew that it would necessarily cause injury. *Id.* at 1207. "Willful"
14 means "voluntary" or "intentional," *Kawaauhau v. Geiger*, 523 U.S. 57, 61-62 (1998) (citing
15 Restatement (Second) of Torts, § 8A, comment A (1964)). This standard focuses on the
16 debtor's subjective intent, and not "whether an objective, reasonable person would have
17 known that the actions in question were substantially certain to injure the creditor." *Carillo*
18 *v. Su (In re Su)*, 290 F.3d 1140, 1145-1146 (9th Cir. 2002).

19 Here, the evidence at trial shows that Bishop intended to terminate Phelps's
20 occupancy of her apartment as his tenant, thus inflicting injury on her by willfully causing
21 her gas and water utilities to remain off when he did not need to keep them off. Based on
22 the trial testimony of Felipe Hernandez, the city housing inspector who inspected the
23 premises, including Phelps's apartment after the fire, whose testimony the court finds to be
24 credible, and documents showing Bishop's efforts to evict her and the housing
25 department's rulings that these efforts were impermissible and requiring Bishop to turn on
26 Phelps's utilities after the fire in the apartment building, the evidence indicates here that
27 while the fire took place in another unit of the apartment building, it did not affect Phelps's
28 unit, and Bishop has not shown otherwise. As shown by the actions and notices of the

1 housing department, Bishop's refusal to have Phelps's gas and water utilities in her
2 apartment turned on made the apartment unsafe for human occupancy, resulting in the
3 housing department's issuance of the notice to vacate substandard building for her
4 apartment. The circumstances here of Bishop's prior attempts to evict Phelps due to
5 disagreements over his claimed right to require her to complete another rental application
6 and the lack of showing of the necessity to keep the utilities off despite the housing
7 department's orders to repair and restore her utilities indicate that the preponderance of the
8 evidence shows that he willfully intended to terminate her occupancy of the apartment by
9 keeping her utilities off when it was not necessary to do so, thus rendering her apartment
10 unsafe to live and forcing her to move out and incur economic damage from relocation and
11 housing costs.

12 In this regard, (1) the Superior Court's judgment, based on the findings from a jury
13 verdict that Bishop is liable to Phelps for constructive eviction and under California Civil
14 Code § 789.3 and that he is liable to her for economic damages, and (2) the state appellate
15 court's findings affirming the judgment are entitled to collateral estoppel and support a
16 finding that Bishop acted intentionally with specific intent to willfully injure Phelps through
17 constructive eviction and causing her utilities to remain off for purpose of terminating her
18 tenancy.

19 As to willfulness, the five elements to give collateral estoppel effect to a judgment
20 under California law are met: (1) the issue here is identical to the issue litigated in the prior
21 proceeding, that is, the issue of willfulness in this proceeding is identical the issue in the
22 state court action relating to Phelps's claim under California Civil Code § 789.3 because
23 that cause of action requires the intent of a landlord to terminate the occupancy of a tenant
24 of property used by the tenant as a residence by willfully causing directly or indirectly the
25 interruption or termination of any utility service, including gas and water; (2) the issue here
26 was actually litigated, that is, the issue of willfulness was actually litigated in the state court
27 action determining Phelps's claim under California Civil Code § 789.3 that Bishop willfully
28 caused Phelps's gas and water utilities to remain off after the fire with the intent to

1 terminate her occupancy of the premises; (3) the issue here was necessarily decided in the
2 prior proceeding, that is, the issue of Bishop's willfulness in causing Phelps's utilities to
3 remain off after the fire with the intent to terminate her occupancy was necessarily decided
4 by the jury in finding him liable under her claim under California Civil Code § 789.3; (4) the
5 decision in the prior proceeding is final and on the merits, that is, the decision of the
6 Superior Court on Phelps's claim under California Civil Code § 789.3 was final and on the
7 merits after being affirmed by the California Court of Appeal, and (5) the party against
8 whom preclusion will be applied is the same as, or in privity with, the original party, that is,
9 Bishop is the party in both actions against whom preclusion is to be applied. *In re Cantrell*,
10 329 F.3d at 1123 (citing *Harmon v. Kobrin (In re Harmon)*, 250 F.3d at 1245) (citing *Lucido*
11 *v. Superior Court*, 51 Cal.3d at 341).

12 **i. California Civil Code § 789.3**

13 The Superior Court's judgment on Phelps's claim under California Civil Code
14 § 789.3 may be given collateral estoppel effect as to the willfulness element under 11
15 U.S.C. § 523(a)(6) because willful intent to injure by causing a tenant's utilities to be
16 interrupted or terminated is an element of the claim. California Civil Code § 789.3(a)
17 provides as follows:

18 A landlord shall not with intent to terminate the occupancy under any lease
19 or other tenancy or estate at will, however created, of property used by a
20 tenant as his residence willfully cause, directly or indirectly, the interruption
21 or termination of any utility service furnished the tenant, including, but not
limited to, water, heat, light, electricity, gas, telephone, elevator, or
refrigeration, whether or not the utility service is under the control of the
landlord.

22 California Civil Code § 789.3(a). A landlord who violates the section is liable to the tenant
23 for (1) actual damages and (2) fines up to \$100 per day that the landlord is in violation of
24 the statute. California Civil Code § 789.3(c).

25 **ii. Constructive Eviction**

26 The Superior Court's judgment on Phelps's claim for constructive eviction cannot be
27 given collateral estoppel effect as to the willfulness element under 11 U.S.C. § 523(a)(6)
28 because willful intent to injure is not required to prove a claim for constructive eviction. As

1 stated in *Groh v. Kover's Bull Pen, Inc.*, 221 Cal.App.2d 611 (1963), "[a] constructive
2 eviction occurs when the acts or omissions to act of a landlord, or any disturbance or
3 interference with the tenant's possession by the landlord, renders the premises, or a
4 substantial portion thereof, unfit for the purposes for which they were leased, or which has
5 the effect of depriving the tenant for a substantial period of time of the beneficial[]
6 enjoyment or use of the premises." 221 Cal.App.2d at 614 (citing *Sierad v. Lilly*, 204
7 Cal.App.2d 770 (1962)); accord *Stoiber v. Honeychuck*, 101 Cal.App.3d at 925-926.
8 Based on this formulation of the claim of constructive eviction, no willful intent is required to
9 establish the claim. Therefore, the judgment on a claim for constructive eviction does not
10 have collateral estoppel effect as to willfulness on a claim under 11 U.S.C. § 523(a)(6).

11 * * *

12 Based on the foregoing, the court finds that willful injury under 11 U.S.C. § 523(a)(6)
13 has been shown by a preponderance of the evidence based on the evidence adduced at
14 trial and on the collateral estoppel effect of the Superior Court's judgment in favor of Phelps
15 and against Bishop on her claim under California Civil Code § 789.3.

16 **b. Maliciousness**

17 For purposes of 11 U.S.C. § 523(a)(6), the "malicious" injury requirement is
18 separate from the "willful" requirement. *In re Su*, 290 F.3d at 1146. An injury is "malicious"
19 if it involves "(1) a wrongful act, (2) done intentionally, (3) which necessarily caused injury,
20 and (4) is done without just cause or excuse." *In re Jercich*, 238 F.3d at 1209 (citing
21 *Murray v. Bammer (In re Bammer)*, 131 F.3d 788, 791 (9th Cir. 1997)). This definition
22 "does not require a showing of biblical malice, i.e. personal hatred, spite, or ill-will." *In re*
23 *Bammer*, 131 F.3d at 791.

24 Here, the evidence at trial shows that Bishop acted maliciously in injuring Phelps
25 because he intended to terminate Phelps's occupancy of her apartment as his tenant, thus
26
27
28

1 inflicting injury on her by willfully causing her gas and water utilities to remain off when he
2 did not need to keep them off.¹

3 **i. "Wrongful Act"**

4 Bishop's acts were wrongful within the meaning of 11 U.S.C. § 523(a)(6) because
5 they constitute tortious conduct under California law as recognized in Phelps's claims for
6 constructive eviction under common law and causing wrongful interruption or termination of
7 a tenant's utilities for the purpose of terminating occupancy of rented residential premises
8 under statutory law. *Groh v. Kover's Bull Pen, Inc.*, 221 Cal.App.2d at 639; *Stoiber v.*
9 *Honeychuck*, 101 Cal.App.3d at 925-926; California Civil Code § 789.3. As discussed
10 above, the evidence based on the trial testimony of the city housing inspector, Hernandez,
11 and the documentary evidence relating to the housing inspections after the building fire
12 shows that Bishop refused to turn on Phelps's gas and water utilities after the fire in the
13 building when he did not need to keep them off and after the housing department ordered
14 him to turn them on, and Bishop's acts in refusing to keep Phelps's gas and water utilities
15 off when he did not have to were wrongful because such refusal rendered her apartment
16 unsafe to live and forcing her to vacate the apartment. In this regard, the Superior Court's
17 judgment finding Bishop liable on two of Phelps's tort claims against him for constructive
18 eviction and intentional interruption or termination of her utilities with intent to terminate her
19 occupancy under California Civil Code § 789.3 is entitled to collateral estoppel effect as to
20 showing the wrongful act element for malice under 11 U.S.C. § 523(a)(6). As shown by

21 _____
22 ¹ As stated previously, based on the trial testimony of Felipe Hernandez, the city housing inspector who
23 inspected the premises, including Phelps's apartment after the fire, whose testimony the court finds to be
24 credible, and documents showing Bishop's efforts to evict her, and the housing department's rulings that
25 these efforts were impermissible and requiring Bishop to turn on Phelps's utilities after the fire in the
26 apartment building, the evidence indicates here that while the fire took place in another unit of the apartment
27 building, it did not affect Phelps's unit, and Bishop has not shown otherwise. As shown by the actions and
28 notices of the housing department, Bishop's refusal to have Phelps's gas and water utilities in her apartment
turned on made the apartment unsafe for human occupancy, resulting in the housing department's issuance
of the notice to vacate substandard building for her apartment. The circumstances here of Bishop's prior
attempts to evict Phelps due to disagreements over his claimed right to require her to complete another rental
application and the lack of showing of the necessity to keep the utilities off despite the housing department's
orders to repair and restore her utilities indicate that the preponderance of the evidence shows that he
willfully intended to terminate her occupancy of the apartment by keeping her utilities off when it was not
necessary to do so, thus rendering her apartment unsafe to life and forcing her to move out and incur
economic damage.

1 the Superior Court's judgment and the opinion of the Court of Appeal affirming the
2 judgment, (1) the issue of Bishop's wrongful acts under 11 U.S.C. § 523(a)(6) is identical to
3 the issue litigated in the prior state court action in determining whether he is liable for the
4 wrongful acts of constructive eviction and causing interruption or termination of Phelps's
5 utility services with intent to terminate her occupancy; (2) the issue of Bishop's wrongful
6 acts was actually litigated in the prior state court action; (3) the issue of Bishop's wrongful
7 acts was necessarily decided in the prior state court action, (4) the decision in the prior
8 state court action is final and on the merits, and (5) Bishop is the party against whom
9 preclusion will be applied must be the same as the original party in the prior state court
10 action. *In re Cantrell*, 329 F.3d at 1123 (citing *In re Harmon*, 250 F.3d at 1245) (citing
11 *Lucido v. Superior Court*, 51 Cal.3d at 341).

12 Thus, the wrongful act element of a claim under 11 U.S.C. § 523(a)(6) is met.

13 **ii. "Done Intentionally"**

14 Bishop's acts were done intentionally within the meaning of 11 U.S.C. § 523(a)(6) as
15 shown by the evidence based on the trial testimony of the city housing inspector,
16 Hernandez, that Bishop kept Phelps's gas and water utilities off after the fire in the building
17 when he did not need to keep them off and after the housing department ordered him to
18 turn them on and based on testimony and documentary evidence showing Bishop's prior
19 attempts to evict Phelps without just cause. In this regard, the Superior Court's judgment
20 finding Bishop liable on Phelps's tort claim against him for intentional interruption or
21 termination of her utilities with intent to terminate her occupancy under California Civil
22 Code § 789.3 is entitled to collateral estoppel effect as to showing the element of intent for
23 malice under 11 U.S.C. § 523(a)(6). As shown by the Superior Court's judgment and the
24 opinion of the Court of Appeal affirming the judgment, (1) the issue of Bishop's intent under
25 11 U.S.C. § 523(a)(6) is identical to the issue litigated in the prior state court action in
26 determining whether he is liable for Phelps's claim of causing interruption or termination of
27 Phelps's utility services with intent to terminate her occupancy; (2) the issue of Bishop's
28 intent was actually litigated on this claim in the prior state court action; (3) the issue of

1 Bishop's wrongful acts was necessarily decided on this claim in the prior state court action,
2 (4) the decision on this claim in the prior state court action is final and on the merits, and
3 (5) Bishop is the party against whom preclusion will be applied must be the same as the
4 original party in the prior state court action. *In re Cantrell*, 329 F.3d at 1123 (citing *In re*
5 *Harmon*, 250 F.3d at 1245) (citing *Lucido v. Superior Court*, 51 Cal.3d at 341).

6 Thus, the element of intentionally done acts under 11 U.S.C. § 523(a)(6) is met.

7 **iii. "Which Necessarily Caused Injury"**

8 Bishop's acts necessarily caused injury to Phelps within the meaning of 11 U.S.C.
9 § 523(a)(6) because the evidence that he kept her gas and water utilities off when he did
10 not need to do so rendered her apartment uninhabitable and unsafe to live, thus forcing her
11 to move and incur economic damage in having to find a new place to live. In this regard,
12 the Superior Court's judgment finding Bishop liable on two of Phelps's tort claims against
13 him for constructive eviction and intentional interruption or termination of her utilities with
14 intent to terminate her occupancy under California Civil Code § 789.3 resulting in
15 determinations of damages incurred by her is entitled to collateral estoppel effect as to
16 showing the necessarily caused injury element for malice under 11 U.S.C. § 523(a)(6). As
17 shown by the Superior Court's judgment and the opinion of the Court of Appeal affirming
18 the judgment, (1) the issue of Bishop's acts necessarily causing injury to Phelps under 11
19 U.S.C. § 523(a)(6) is identical to the issue litigated in the prior state court action of
20 damages caused by Phelps for the wrongful acts of constructive eviction and causing
21 interruption or termination of Phelps's utility services with intent to terminate her
22 occupancy; (2) the issue of Bishop's acts necessarily causing injury was actually litigated in
23 the prior state court action as shown by the specific awards of damages of actual economic
24 damages of \$2,000 on the claim under California Civil Code § 789.3 and past economic
25 damages of \$23,000, past non-economic damages of \$8,000 and future economic
26 damages of \$120,000 on the constructive eviction claim; (3) the issue of Bishop's acts
27 necessarily causing injury to Phelps was necessarily decided in the prior state court action,
28 (4) the decision in the prior state court action is final and on the merits, and (5) Bishop is

1 the party against whom preclusion will be applied must be the same as the original party in
2 the prior state court action. *In re Cantrell*, 329 F.3d at 1123 (citing *In re Harmon*, 250 F.3d
3 at 1245) (citing *Lucido v. Superior Court*, 51 Cal.3d at 341).

4 Thus, the element of an act necessarily causing injury under 11 U.S.C. § 523(a)(6)
5 is met.

6 **iv. "Done Without Just Cause or Excuse"**

7 Bishop's acts were done without just cause or excuse within the meaning of 11
8 U.S.C. § 523(a)(6) because as discussed above, the evidence based on the trial testimony
9 of the city housing inspector, Hernandez, and the documentary evidence relating to the
10 housing inspections after the building fire shows that Bishop refused to turn on Phelps's
11 gas and water utilities after the fire in the building when he did not need to keep them off
12 and after the housing department ordered him to turn them on, and Bishop's acts in
13 refusing to keep Phelps's gas and water utilities off when he did not have to were wrongful
14 because such refusal rendered her apartment unsafe to live and forcing her to vacate the
15 apartment. In this regard, the Superior Court's judgment finding Bishop liable on two of
16 Phelps's tort claims against him for constructive eviction and intentional interruption or
17 termination of her utilities with intent to terminate her occupancy under California Civil
18 Code § 789.3 is entitled to collateral estoppel effect as to showing the elements that
19 Bishop's wrongful acts were done without just cause or excuse for malice under 11 U.S.C.
20 § 523(a)(6). As shown by the Superior Court's judgment and the opinion of the Court of
21 Appeal affirming the judgment, (1) the issue of Bishop's wrongful acts under 11 U.S.C.
22 § 523(a)(6) done without just cause or excuse is identical to the issue litigated in the prior
23 state court action in determining whether he is liable for the wrongful acts of constructive
24 eviction and causing interruption or termination of Phelps's utility services with intent to
25 terminate her occupancy; (2) the issue of Bishop's wrongful acts done without just cause or
26 excuse was actually litigated in the prior state court action; (3) the issue of Bishop's
27 wrongful acts done without just cause or excuse was necessarily decided in the prior state
28 court action, (4) the decision in the prior state court action is final and on the merits, and

1 (5) Bishop is the party against whom preclusion will be applied must be the same as the
2 original party in the prior state court action. *In re Cantrell*, 329 F.3d at 1123 (citing *In re*
3 *Harmon*, 250 F.3d at 1245) (citing *Lucido v. Superior Court*, 51 Cal.3d at 341).

4 Thus, the element of Bishop's acts being done without just cause or excuse is met.

5 Based on the foregoing, the court finds that malicious injury under 11 U.S.C.
6 § 523(a)(6) has been shown by a preponderance of the evidence based on the evidence
7 adduced at trial and on the collateral estoppel effect of the Superior Court's judgment in
8 favor of Phelps and against Bishop on Plaintiffs' claims for constructive eviction and under
9 California Civil Code § 789.3.

10 * * *

11 Therefore, the court finds that Plaintiffs have proven their claim under 11 U.S.C.
12 § 523(a)(6) by a preponderance of the evidence that the debts owed to Phelps by Bishop
13 based on the judgment of the Superior Court are not dischargeable.

14 **C. Claim under 11 U.S.C. § 523(a)(2)(A)**

15 The Plaintiffs' Complaint asserts one claim under 11 U.S.C. § 523(a)(2)(A) to
16 determine that the debt owed by Bishop to Phelps is excepted from discharge as a debt
17 incurred by the Debtor under "false pretenses, a false representation, or actual fraud . . . "
18 In the claim under 11 U.S.C. § 523(a)(2)(A), Plaintiffs allege that the debts owed by Bishop
19 to Phelps from the state court judgment are excepted from discharge on grounds that
20 Bishop fraudulently transferred property to his daughter to prevent Phelps from collecting
21 on the debts. *Complaint*, ECF 1.

22 For Plaintiffs to prevail on their claim under 11 U.S.C. § 523(a)(2)(A), they must
23 prove by a preponderance of the evidence each of the following five elements:
24 "(1) misrepresentation, fraudulent omission or deceptive conduct by the debtor;
25 (2) knowledge of the falsity or deceptiveness of his statement or conduct; (3) an intent to
26 deceive; (4) justifiable reliance by the creditor on the debtor's statement or conduct; and
27 (5) damage to the creditor proximately caused by its reliance on the debtor's statement or
28 conduct." *Slyman v. Slyman (In re Slyman)*, 234 F.3d 1081, 1085 (9th Cir. 2000) (citation

1 omitted). "[E]ither actual knowledge of the falsity of a statement, or reckless disregard for
2 its truth, satisfies the scienter requirement for nondischargeability of a debt." *In re Grabau*,
3 151 B.R. 227, 234 (N.D. Cal. 1993) (quoting *In re Houtman*, 568 F.2d 651, 656 (9th Cir.
4 1978)). In addition, "[t]he term 'actual fraud' in § 523(a)(2)(A) encompasses forms of
5 fraud . . . that can be effected without a false representation." *Husky International*
6 *Electronics, Inc. v. Ritz*, 136 S.Ct. 1581, 1586 (2016). A fraudulent transfer may serve as
7 the basis for excepting a debt from discharge under 11 U.S.C. § 523(a)(2)(A). *DZ Bank*
8 *AG Deutsche Zentral-Genossenschaft Bank v. Meyer*, 869 F.3d 839, 842-844 (9th Cir.
9 2017) (citing, *inter alia*, *Husky International Electronics, Inc. v. Ritz*, 136 S.Ct. at 1586-
10 1588).

11 The Plaintiffs' claim under 11 U.S.C. § 523(a)(2)(A) is not based on an alleged
12 misrepresentation by Bishop, but based on an alleged actual fraud, specifically an alleged
13 fraudulent transfer of property to hinder, delay or defraud Phelps in the collection of the
14 debt owed by Bishop to Phelps. Since the alleged fraudulent transfer involves a transferor
15 who is domiciled in California and real property situated in California, the court applies
16 California law in determining whether a fraudulent transfer occurred. See *DZ Bank AG*
17 *Deutsche Zentral-Genossenschaft Bank v. Meyer*, 869 F.3d at 840-844. The applicable
18 California statute, California Civil Code § 3439.04(a)(1), provides that "[a] transfer made or
19 obligation incurred by a debtor is voidable as to a creditor . . . if the debtor made the
20 transfer or incurred the obligation . . . [w]ith actual intent to hinder, delay, or defraud any
21 creditor of the debtor." "Bankruptcy courts examining transfers under [California Civil Code
22 § 3439.04(a)(1)] must focus on the debtor's state of mind." *Ezra v. Seror (In re Ezra)*, 537
23 B.R. 924, 930 (9th Cir. BAP 2015). "As long as the debtor had the requisite intent, a
24 transfer will qualify as actually fraudulent even if reasonably equivalent value was
25 provided." *Id. citing Wolkowitz v. Beverly (In re Beverly)*, 374 B.R. 221, 235 (9th Cir. BAP
26 2007)).

27 "Because direct evidence regarding the debtor's fraudulent or obstructive intent
28 rarely is available, courts typically infer the debtor's intent from the surrounding

1 circumstances." *In re Ezra*, 537 B.R. at 930. Courts often consider the following "badges
2 of fraud" when deciding whether the requisite intent existed:

- 3 (1) Whether the transfer or obligation was to an insider.
- 4 (2) Whether the debtor retained possession or control of the property
transferred after the transfer.
- 5 (3) Whether the transfer or obligation was disclosed or concealed.
- 6 (4) Whether before the transfer was made or obligation was incurred,
7 the debtor had been sued or threatened with suit.
- 8 (5) Whether the transfer was of substantially all the debtor's assets.
- 9 (6) Whether the debtor absconded.
- 10 (7) Whether the debtor removed or concealed assets.
- 11 (8) Whether the value of the consideration received by the debtor was
12 reasonably equivalent to the value of the asset transferred or the
amount of the obligation incurred.
- 13 (9) Whether the debtor was insolvent or became insolvent shortly after
the transfer was made or the obligation was incurred.
- 14 (10) Whether the transfer occurred shortly before or shortly after a
15 substantial debt was incurred.
- 16 (11) Whether the debtor transferred the essential assets of the business
17 to a lienholder who transferred the assets to an insider of the
debtor."

18 *Id.* "No single factor necessarily is determinative, and no minimum or maximum number of
19 factors dictates a particular outcome. . . . [T]he list should not be applied formulaically.
20 Instead, the trier of fact should consider all of the relevant circumstances surrounding the
21 transfer." *Id.* (citations omitted).

22 The evidence before the court indicates that Bishop transferred the subject real
23 property at 3305 Stocker Street, Los Angeles, California 90008 by grant deed as a gift to
24 his daughter on November 26, 2013, right after judgment was entered in favor of Phelps
25 against him on November 19, 2013.² *Judgment dated November 19, 2013*, Plaintiffs'
26 Exhibit 23; *Grant Deed dated November 26, 2013*, Plaintiffs' Exhibit 23. This evidence

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28 ² The issue of fraudulent transfer was not previously decided in the state court litigation between Phelps and Bishop. See *Appellate Opinion, Case No. B252583 dated May 28, 2015*, Plaintiffs' Exhibit 25 at 5 n 6.

1 indicates a number of the badges of fraud listed above for intentional fraudulent transfer
2 under *In re Ezra*, 537 B.R. at 930.

3 However, as reflected in the other litigation against Bishop before the Superior Court
4 and this court, Bishop's title to the subject real property at 3305 Stocker Street, Los
5 Angeles, California 90008 was declared null and void when the Superior Court in *Richards*
6 *v. Willis (In the Matter of Gwendolyn R. Moore Trust)*, Case Number BP120811 (Superior
7 Court of California, County of Los Angeles), filed and entered its judgment on July 13,
8 2016, quieting title in the property in the Gwendolyn R. Moore Trust of 2004 as of May 17,
9 2013 and cancelling the deed of property to Bishop, and therefore, as of November 26,
10 2013, Bishop lacked title to the property to transfer to his daughter. *First Amended*
11 *Judgment after Bench Trial on: Quiet Title; Cancellation of Deed; Financial Elder Abuse;*
12 *Fraud, Constructive Fraud; Breach of Fiduciary Duty; Negligence; Constructive Fraud; and*
13 *Constructive Trust, Richards v. Willis (In re Gwendolyn R. Moore Trust)*, Case Number
14 BP120811 (Superior Court of California, County of Los Angeles), filed on Jul 13, 2016,
15 appeal of Bishop dismissed by order filed on August 16, 2016, Case Numbers B265622
16 and B270074 (California Court of Appeal, Second Appellate District, Division One), ECF
17 58-5 and ECF 58-6, *Richards v. Bishop*, Adversary Proceeding Number 2:16-ap-01383-RK
18 (Bankr. C.D. Cal., filed on February 6, 2017); *see also Statement of Uncontroverted Facts*
19 *and Conclusions of Law on Plaintiffs' Motion for Summary Judgment, Richards v. Bishop*,
20 ECF 205, filed and entered on February 22, 2018 (Bankr. C.D. Cal.).

21 Because Bishop's title to the subject real property was nullified, he could not transfer
22 the property to his daughter as of the date of the purported transfer on November 26, 2013,
23 and because there was no transfer, there could be no fraudulent transfer. Thus, Phelps's
24 claim under 11 U.S.C. § 523(a)(2)(A) cannot succeed because the element of damage to
25 the creditor proximately caused by the debtor's conduct cannot be shown. *See In re*
26 *Slyman*, 234 F.3d at 1085.

27 For the reasons set forth above, the court finds that the Plaintiffs have not met their
28 burden of proving by a preponderance of the evidence their claim under 11 U.S.C.

1 § 523(a)(2)(A) that Bishop's debt to Phelps is excepted from discharge due to actual fraud
2 based on an alleged fraudulent transfer.

3 **III. CONCLUSION**

4 For the foregoing reasons, the court determines that the Plaintiffs have established
5 by a preponderance of the evidence the elements required for a finding of
6 nondischargeability under 11 U.S.C. § 523(a)(6), but not under 11 U.S.C. § 523(a)(2)(A).
7 This memorandum decision constitutes the court's findings of fact and conclusions of law
8 pursuant to Rule 52 of the Federal Rules of Civil Procedure, made applicable here by Rule
9 7052 of the Federal Rules of Bankruptcy Procedure. A separate judgment is being filed
10 and entered concurrently.

11 IT IS SO ORDERED.

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24 Date: March 1, 2019



Robert Kwan
United States Bankruptcy Judge