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SUSAN M. SPRAUL, CLERK
U.S. BKCY. APP. PANEL
OF THE NINTH CIRCUIT

NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT

In re:)	BAP No. NV-14-1575-DJuKi
)	
ERIK B. HEBERT,)	Bk. No. 13-17429-MKN
)	
Debtor.)	Adv. Proc. No. 13-01213-MKN
)	
ERIK B. HEBERT,)	
)	
Appellant,)	
)	
v.)	MEMORANDUM ¹
)	
SANDY RAKICH,)	
)	
Appellee.)	

Argued and Submitted on February 18, 2016
at Las Vegas, Nevada

Filed - February 23, 2016

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

Honorable Mike K. Nakagawa, Bankruptcy Judge, Presiding

Appearances: Christopher P. Burke argued for Appellant; Matthew
C. Zirzow of Larson & Zirzow LLC argued for
Appellee.

Before: DUNN, JURY, and KIRSCHER, Bankruptcy Judges.

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

1 Sandy Rakich loaned \$280,000 to NOE Investments, Inc.
2 ("NOE"), which loan was guaranteed by Debtor Erik B. Hebert and
3 his cousin, Todd Jagiello.

4 In 2011, Ms. Rakich obtained a judgment ("Jagiello
5 Bankruptcy Judgment") in Mr. Jagiello's bankruptcy case in the
6 Bankruptcy Court for the Eastern District of Michigan,
7 determining that Mr. Jagiello's obligation to her was
8 nondischargeable pursuant to § 523(a)(2).²

9 Mr. Hebert testified as a witness on behalf of Mr. Jagiello
10 at the nondischargeability trial. In entering the Jagiello
11 Bankruptcy Judgment, the Michigan Bankruptcy Court determined,
12 inter alia, that Mr. Jagiello and Mr. Hebert had acted together
13 to cheat Ms. Rakich out of her money for their own personal
14 purposes.

15 After Mr. Hebert filed his own bankruptcy case in the
16 Bankruptcy Court for the District of Nevada, the Nevada
17 Bankruptcy Court granted summary judgment on Ms. Rakich's
18 § 523(a)(2)(A) claim based upon Mr. Hebert's testimony given at
19 the Jagiello nondischargeability trial and based upon the
20 Jagiello Bankruptcy Judgment.

21 We AFFIRM.

22 I. FACTUAL BACKGROUND

23 The parties to this dispute are Sandy Rakich and Erik B.
24

25
26 ² Unless otherwise indicated, all chapter and section
27 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532, and
28 all "Rule" references are to the Federal Rules of Bankruptcy
Procedure, Rules 1001-9037. The Federal Rules of Civil Procedure
are referred to as "Civil Rules."

1 Hebert. Ms. Rakich met Mr. Hebert while they were students at
2 the University of Southern California. In early 2006, Ms. Rakich
3 and Mr. Hebert were in a personal relationship. At some point
4 Ms. Rakich, a teacher, expressed to Mr. Hebert a need to make
5 more money; she recently had become a licensed real estate agent
6 and hoped to take advantage of the hot real estate market in
7 Southern California. Mr. Hebert, who describes himself as an
8 "entrepreneur," had begun exploring options to "flip" properties
9 to take advantage of the rising market.

10 Mr. Hebert learned of a project involving property in Long
11 Beach, California, owned by a friend of his. Mr. Hebert spoke
12 with his cousin, Todd Jagiello, who did construction work in
13 Michigan, about coming to Southern California to act as
14 contractor for the Long Beach project. He then discussed with
15 Ms. Rakich the possibility of her participation in the Long Beach
16 project as a lender or investor.

17 Ultimately, in April 2006, Mr. Hebert formed NOE.
18 Ms. Rakich contends that Mr. Hebert promised her that if she
19 invested in NOE she would receive a 50% return on her money and
20 would be retained as the real estate agent for the purchase and
21 sale of properties.

22 On April 29, 2006, Ms. Rakich entered into a written
23 agreement ("NOE Agreement"), pursuant to which she agreed to loan
24 NOE \$280,000. The NOE Agreement was signed by Mr. Jagiello on
25 behalf of NOE and by Mr. Hebert and Mr. Jagiello as guarantors.

26 On May 24, 2006, at the direction of Mr. Jagiello,
27 Ms. Rakich transferred \$280,000 to Mr. Jagiello's personal bank
28 account at Wells Fargo Bank. Shortly thereafter, Mr. Jagiello

1 transferred at least \$158,000 to Mr. Hebert, personally. Without
2 informing Ms. Rakich, Mr. Hebert and Mr. Jagiello agreed between
3 themselves that they would not go forward with the Long Beach
4 project, but rather, each would diversify their opportunities
5 using Ms. Rakich's funds without using the NOE company name for
6 the investments.

7 For his part, Mr. Hebert invested the \$158,000 in a
8 restaurant remodel/expansion that would serve a large housing
9 development in Los Angeles. However, the housing development
10 stalled, the restaurant project failed, and Mr. Hebert lost the
11 entire investment. Mr. Jagiello used a portion of the \$280,000
12 he retained on projects of his own, none of which were in
13 California and none of which proved successful. Much of his use
14 of the funds appears to have been personal.

15 The NOE Agreement required that Ms. Rakich receive monthly
16 payments. She did receive seven payments that cleared. Each
17 payment came from Mr. Jagiello, using the funds he originally had
18 received from Ms. Rakich. When the payments stopped, and
19 Ms. Rakich learned that her funds never had been invested in the
20 Long Beach project, she commenced litigation against Mr. Hebert
21 and Mr. Jagiello in the Superior Court for the County of Los
22 Angeles, California. After the defendants failed to file
23 answers, on May 21, 2008, Ms. Rakich obtained a default judgment
24 ("California Judgment") against each of them in the amount of
25 \$342,594.41. The underlying complaint asserted claims for relief
26 for breach of contract, for account stated, and for monies due on
27 an open account. No fraud claim was included.

28 On October 28, 2011, Mr. Jagiello filed a chapter 7 petition

1 in the United States Bankruptcy Court for the Eastern District of
2 Michigan. On August 8, 2013, a judgment ("Jagiello Bankruptcy
3 Judgment") excepting the debt owed to Ms. Rakich from discharge
4 was entered in the adversary proceeding Ms. Rakich initiated
5 pursuant to § 523(a)(2).

6 Mr. Hebert appeared at the trial in the adversary proceeding
7 as a witness on behalf of Mr. Jagiello. Of significance to this
8 appeal, Mr. Hebert testified under oath that Mr. Jagiello was his
9 "cousin and business partner."

10 In support of the Jagiello Bankruptcy Judgment, the Michigan
11 Bankruptcy Court made extensive findings and conclusions with
12 respect to the NOE Agreement and NOE itself:

13 Quite clearly, based on the language of the [NOE]
14 Agreement itself and the testimony, [NOE], as a
15 separate entity, was to be the focal point of the [NOE]
16 Agreement and the principal party in interest with
17 regard to the loan. [NOE] was supposed to use proceeds
18 of the loan to enter into real estate transactions
19 contemplated by the [NOE] Agreement, and it was to be
20 the beneficiary of those transactions.

21 Thus, the existence and status of [NOE] is an important
22 aspect of this proceeding. As to that, the Court
23 concludes the facts are as follows: (a) [NOE] was
24 incorporated in Nevada on April 24, 2006, by Hebert,
25 who is listed as its Resident Agent with a Las Vegas
26 street address (although he was apparently living in
27 California at the time); (b) its initial capitalization
28 was \$2,000.00, it being unclear whether or not any
stock certificates were ever in fact issued or whether
that rather small amount was paid into the entity by
Hebert for that stock; (c) its sole initial shareholder
was Hebert; (d) its charter was at some point revoked;
(e) it appears, based on [Mr. Jagiello's] Exhibit B,
that its business license had at some point expired;
(f) there is no evidence that it filed a list of its
officers, which said exhibit indicates was due on
May 31, 2006; (g) it never had a bank account and did
not, itself as an entity, engage in any business or
transactions contemplated by the [NOE] Agreement, let
alone any other transactions, within its stated purpose
of "Real estate and inventions"; (h) it did not ever as
an entity receive any of the monies that [Ms. Rakich]

1 put into the project; (I) [Mr. Jagiello] did not become
2 and was not an officer or director of that entity; and
3 (j) no corporate records, resolutions, tax returns, or
4 any other such documentation was produced evidencing
5 any corporate books, records, or activity relevant to
6 this proceeding or its existence.

7

8 From the foregoing and the other surrounding facts the
9 Court concludes that (1) the formation of [NOE] was
10 essentially a window dressing created to be able to
11 show only that such an entity actually existed, in case
12 anyone asked about it; (2) it was never intended that
13 it would have any substance or role, or that it would
14 operate or carry out the purposes of the [NOE]
15 Agreement (or likely be used for any other purpose), as
16 was clearly contemplated it would do by the language of
17 that [NOE] Agreement; (3) if there was ever any other
18 purpose or need for that entity, it was to serve the
19 personal or business purposes of Hebert. That these
20 factual conclusions are appropriate are buttressed by
21 the testimony and demeanor of Hebert himself, which, as
22 viewed by the Court, reflected an attitude of disdain,
23 or if not that, what might be termed a form of
24 financial amorality or attitude of unimportance or lack
25 of appreciation when it came to such things as
26 (a) observing the distinctness between a corporate
27 entity and its shareholder, (b) proper accounting and
28 record keeping, (c) filing tax returns, (d) observing
ordinary commercial practices and rules and
requirements relative to proper documentation of
transactions, and (e) other such things as were likely
the subject of, and taught him, in his college classes
in entrepreneurship and marketing. He seemed to
believe that such things were just bothersome or
technical niceties that could either be initially
ignored or later, and after the fact, easily
manipulated or corrected if the need arose.

29

30 When you add together (a) the recited facts and
31 conclusions as respects [NOE]; (b) the facts
32 surrounding the formation and entering into the [NOE]
33 Agreement itself; (c) what actually happened to the
34 money soon after it was paid by [Ms. Rakich], i.e.: to
35 whom it was actually paid over to, what it was used
36 for, and by whom it was used; and (d) the exclusion of
37 [Ms. Rakich] from the process, i.e.: given the nature
38 and uses of the monies, she did not and likely could
not have provided services as or benefitted as an agent
or broker in connection with any of the actual
transactions that took place, despite the fact that
such was one of the "purposes" of the [NOE] Agreement;

1 the Court concludes that what was involved here was a
2 scheme and artifice to obtain the funds from
3 [Ms. Rakich] in order to use them, not for what the
4 [NOE] Agreement initially contemplated (more likely
5 particularly the Long Beach Project but even arguably
6 other transactions as well), but for Hebert and
7 [Mr. Jagiello's] personal and separate uses, projects,
8 or investments. The Court concludes that this was
9 their intention certainly as of the date the [NOE]
10 Agreement was signed (and maybe before), in the
11 apparent hope that in doing so they might benefit to
12 the extent that they would be able to make the payments
13 to [Ms. Rakich] required and guaranteed by the [NOE]
14 Agreement - payments that to the limited extent made,
15 were entirely made from the funds she had paid in and
16 not from any transactions entered into by Hebert or
17 [Mr. Jagiello] that produced any income or funds which
18 could have been available to repay the obligation.

19 In the Court's view, the facts support a conclusion
20 that [Ms. Rakich's] funds were obtained by way of
21 deceit, artifice, trick or design involving direct and
22 active operation of [Mr. Jagiello] and Hebert's minds,
23 with the result of essentially cheating [Ms. Rakich]
24 out of her money, for their own personal purposes.

25 Mr. Hebert filed his own chapter 7 bankruptcy petition in
26 the United States Bankruptcy Court for the District of Nevada on
27 August 28, 2013. Mr. Hebert listed Ms. Rakich as a creditor on
28 his Schedule F. Ms. Rakich filed a timely complaint seeking a
determination that the debt Mr. Hebert owed Ms. Rakich in the
amount of the California Judgment was nondischargeable pursuant
to § 523(a)(2)(A) ("Hebert Adversary Proceeding"). Mr. Hebert
filed an answer which contained twenty-five affirmative defenses.

Ms. Rakich filed a motion for summary judgment
("SJ Motion"), supported by her statement of undisputed material
facts and her declaration. The record in support of the
SJ Motion included a complete transcript of the trial in the
Jagiello Adversary Proceeding. Ms. Rakich asserted she was
entitled to summary judgment, because (1) Mr. Hebert, in his
testimony in the Jagiello Adversary Proceeding which involved the

1 same transaction that was the subject of the Hebert Adversary
2 Proceeding, acknowledged that he was the decision-maker with
3 regard to the transaction, (2) based upon the testimony of
4 Ms. Rakich and admissions by Mr. Hebert and Mr. Jagiello, the
5 Jagiello Bankruptcy Judgment was entered holding Mr. Jagiello's
6 debt to Ms. Rakich nondischargeable pursuant to § 523(a)(2), and
7 (3) Mr. Hebert acknowledged that his was greater culpable conduct
8 than Mr. Jagiello with regard to the transaction involving
9 Ms. Rakich because he was the one directing and telling
10 Mr. Jagiello what to do.

11 Mr. Hebert opposed the SJ Motion. In his "Separate
12 Statement of Disputed Facts," and in his declaration in
13 opposition to the SJ Motion, Mr. Hebert asserted, inter alia,
14 that Mr. Jagiello was the authorized agent of NOE, that
15 Ms. Rakich was paid back approximately \$25,000 over a seven month
16 period, that the California Judgment contained no cause of action
17 for fraud, and that Ms. Rakich conducted no discovery in the
18 Hebert Adversary Proceeding. Mr. Hebert later filed a supplement
19 to his opposition to the SJ Motion, which included his
20 supplemental declaration, the purpose of which appears to have
21 been to dispute the assertion that Ms. Rakich had been "swindled
22 out of any money." In particular, he attached an email
23 Ms. Rakich sent him approximately three months after the
24 California Judgment had been entered, which he interpreted as an
25 indication Ms. Rakich wanted to do further business with him.

26 The Nevada Bankruptcy Court granted the SJ Motion. In its
27 opinion, the Nevada Bankruptcy Court reviewed the transcript of
28 the trial in the Jagiello Adversary Proceeding and the findings

1 of fact and conclusions of law in support of the Jagiello
2 Bankruptcy Judgment. The Nevada Bankruptcy Court determined that
3 those findings were sufficient to establish a § 523(a)(2)(A)
4 claim against Mr. Hebert, based on preclusion principles, where
5 Mr. Hebert was in privity with Mr. Jagiello with respect to
6 Ms. Rakich's loan.

7 Mr. Hebert appealed the order granting the SJ Motion and the
8 Summary Judgment itself.

9 **II. JURISDICTION**

10 The bankruptcy court had jurisdiction under 28 U.S.C.
11 §§ 1334 and 157(b)(2)(I). We have jurisdiction under 28 U.S.C.
12 § 158.

13 **III. ISSUES³**

14 Whether the Nevada Bankruptcy Court erred when it granted
15 summary judgment against Mr. Hebert based upon the Jagiello
16 Bankruptcy Judgment, which involved a different defendant in a
17 different state.

18 Whether the Nevada Bankruptcy Court erred when it used the
19 Jagiello Bankruptcy Judgment to hold that the California
20 Judgment, a default judgment, was nondischargeable.

21
22
23 ³ Mr. Hebert also asserts on appeal that the Nevada
24 Bankruptcy Court erred in relying on the Jagiello Bankruptcy
25 Judgment where the Michigan Bankruptcy Court did not consider
26 whether Bullock v. BankChampaign NA, 133 S.Ct. 1754 (2013),
27 affected the interpretation of § 523(a)(2) elements. We
28 previously have rejected this argument. Hart v. Karaeff
(In re Hart), 2015 WL 845569 (9th Cir. BAP Feb. 26, 2015) ("There
is no indication that the holding in Bullock heightens the state
of mind required for fraud under § 523(a)(2)(A) as already
required in this Circuit.").

1 **IV. STANDARDS OF REVIEW**

2 We review summary judgment determinations de novo. See
3 Fresno Motors, LLC v. Mercedes Benz USA, LLC, 771 F.3d 1119, 1125
4 (9th Cir. 2014); Shahrestani v. Alazzeh (In re Alazzeh), 509 B.R.
5 689, 692-93 (9th Cir. BAP 2014). "Viewing the evidence in the
6 light most favorable to the non-moving party, we must determine
7 whether there are any genuine issues of material fact and
8 whether the trial court correctly applied relevant substantive
9 law.'" New Falls Corp. v. Boyajian (In re Boyajian), 367 B.R.
10 138, 141 (9th Cir. BAP 2007), aff'd, 564 F.3d 1088 (9th Cir.
11 2009) (quoting Tobin v. San Souci Ltd. P'ship (In re Tobin),
12 258 B.R. 199, 202 (9th Cir. BAP 2001)). "Summary judgment is
13 proper if the pleadings, depositions, answers to interrogatories,
14 and admissions on file, together with the affidavits, if any,
15 show that there is no genuine issue as to any material fact and
16 that the moving party is entitled to a judgment as a matter of
17 law." Celotex Corp. v. Catrett, 477 U.S. 317, 322
18 (1986) (internal quotation marks omitted).

19 We also review de novo the preclusive effect of a judgment;
20 whether issue preclusion is available is a mixed question of law
21 and fact. Stephens v. Bigelow (In re Bigelow), 271 B.R. 178, 183
22 (9th Cir. BAP 2001). If issue preclusion is available, the
23 bankruptcy court's decision to apply it is reviewed for abuse of
24 discretion. Lopez v. Emergency Serv. Restoration, Inc.
25 (In re Lopez), 367 B.R. 99, 104 (9th Cir. BAP 2007). Under that
26 standard, we reverse where the bankruptcy court applied an
27 incorrect legal rule or where its application of the law to the
28 facts was illogical, implausible or without support in inferences

1 that may be drawn from the record. Ahanchian v. Xenon Pictures,
2 Inc., 624 F.3d 1253, 1258 (9th Cir. 2010), citing United States
3 v. Hinkson, 585 F.3d 1247, 1262 (9th Cir. 2009) (en banc).

4 "We may affirm 'on any ground supported by the record,
5 regardless of whether the [bankruptcy] court relied upon,
6 rejected, or even considered that ground.'" Fresno Motors,
7 771 F.3d at 1125; see also ASARCO, LLC v. Union Pac. R.R. Co.,
8 765 F.3d 999, 1004 (9th Cir. 2014); Shanks v. Dressel, 540 F.3d
9 1082, 1086 (9th Cir. 2008).

10 **V. DISCUSSION**

11 A. The Nevada Bankruptcy Court Properly Applied Preclusion

12 Mr. Hebert asserts that the bankruptcy court erred when it
13 gave preclusive effect to the California Judgment. Mr. Hebert is
14 mistaken. It is not the California Judgment to which the
15 bankruptcy court gave preclusive effect, but rather the Jagiello
16 Bankruptcy Judgment. We therefore review whether the bankruptcy
17 court erred when it gave the Jagiello Bankruptcy Judgment
18 preclusive effect.

19 In Parklane Hosiery Co. v. Shore, 439 U.S. 322 (1979), the
20 Supreme Court outlined some potential hazards that could arise if
21 offensive issue preclusion were applied under inappropriate
22 circumstances. The Supreme Court then concluded that the
23 advantages of avoiding burdensome relitigation on identical
24 issues and promoting judicial economy warranted permitting the
25 use of offensive issue preclusion at the discretion of the trial
26 court: "[T]he preferable approach for dealing with [the tension
27 between issue preclusion's advantages and disadvantages] in the
28 federal courts is not to preclude the use of offensive collateral

1 estoppel, but to grant trial courts broad discretion to determine
2 when it should be applied." Id. at 331.

3 The preclusive effect of a prior federal judgment is
4 determined by federal law. See, e.g., Fed. Deposit Ins. Corp. v.
5 Daily (In re Daily), 47 F.3d 365, 368 (9th Cir. 1995) (applying
6 federal law to determine the preclusive effect of a prior federal
7 judgment in an action under the Racketeer Influenced and Corrupt
8 Organizations Act); Robi v. Five Platters, Inc., 838 F.2d 318,
9 322 (9th Cir. 1988) (stating that "we apply California law of res
10 judicata to the California judgment, New York law to the New York
11 judgment, and federal law to the federal judgments"); Genel Co.
12 v. Bowen (In re Bowen), 198 B.R. 551, 555 (9th Cir. BAP 1996)
13 (stating that "we apply federal law to determine the preclusive
14 effect of a prior federal diversity judgment"). Issue preclusion
15 applies in dischargeability proceedings. Grogan v. Garner,
16 498 U.S. 279, 284 n.11 (1991).

17 Under federal law, issue preclusion may be raised
18 offensively when "(1) there was a full and fair opportunity to
19 litigate the issue in the previous action; (2) the issue was
20 actually litigated in that action; (3) the issue was lost as a
21 result of a final judgment in that action; and (4) the person
22 against whom collateral estoppel is asserted in the present
23 action was a party or in privity with a party in the previous
24 action." IRS v. Palmer (In re Palmer), 207 F.3d 566, 568 (9th
25 Cir. 2000); Pena v. Gardner, 976 F.2d 469, 472 (9th Cir. 1992).

26 It is not disputed that the Jagiello Bankruptcy Judgment is
27 a final judgment issued by a federal court. The issue in the
28 Jagiello Adversary Proceeding was identical to that raised by

1 Ms. Rakich in the Hebert Adversary Proceeding: whether the debt
2 represented by her loan to NOE, guaranteed by Mr. Jagiello and by
3 Mr. Hebert, is nondischargeable pursuant to § 523(a)(2). There
4 is no dispute that the issue of nondischargeability was actually
5 litigated at trial in the Michigan Bankruptcy Court. The only
6 variation in the issue is whether Mr. Hebert's obligation as
7 opposed to Mr. Jagiello's on the debt is nondischargeable. Thus,
8 the determination of whether it was appropriate to give
9 preclusive effect turns on the issue of whether Mr. Hebert was in
10 privity with Mr. Jagiello in connection with the previous
11 litigation.

12 As noted by the Nevada Bankruptcy Court, the Ninth Circuit
13 has found privity for purposes of preclusion in a variety of
14 contexts, making it a flexible concept.

15 (1) where a non-party has succeeded to a party's
16 interest in property; (2) where a non-party controlled
17 the original suit; (3) where the non-party's interests
18 were adequately represented by a party in the original
19 suit; (4) where there is a "substantial identity"
20 between the party and the non-party; (5) where the
21 non-party had a significant interest in and
22 participated in the prior action; (6) where the
23 interests of the non-party and the party are so closely
24 aligned as to be virtually representative; and
25 (7) where there is an express or implied legal
26 relationship by which the parties to the first suit are
27 accountable to non-parties who file a subsequent suit
28 with identical issues.

23 F.T.C. v. Garvey, 383 F.3d 891, 897 n.5 (9th Cir. 2004), citing
24 U.S. v. Schimmels (In re Schimmels), 127 F.3d 875, 881 (9th Cir.
25 1997).

26 The bankruptcy court held that Mr. Hebert was in privity
27 with Mr. Jagiello in connection with the Jagiello Bankruptcy
28 Judgment:

1 There was a substantial identity between [Mr. Hebert]
2 and his cousin, Jagiello, not due to their familial
3 relationship, but because they engaged in "a scheme and
4 artifice to obtain the funds from [Ms. Rakich]."
5 Jagiello Opinion at 14. [Mr. Hebert] also voluntarily
6 appeared as a witness and had a direct interest in the
7 outcome: if Jagiello had convinced Judge Shapero that
8 there was no fraudulent scheme, [Mr. Hebert] could
9 assert issue preclusion as a defense in any future
10 bankruptcy proceeding; if Jagiello failed to convince
11 Judge Shapero, then [Mr. Hebert] could point to his
12 cousin Jagiello as a continuing source of payment of
13 the [California Judgment]. The interests of Jagiello
14 and [Mr. Hebert] were closely aligned and both sought
15 to convince Judge Shapero that their intentions were
16 benign. [Mr. Hebert] was not a party to the Jagiello
17 Adversary but clearly was in privity with Jagiello.

18 The "substantial identity" between Mr. Jagiello and
19 Mr. Hebert independently supports imputation of Mr. Jagiello's
20 fraud to Mr. Hebert. See Sachan v. Huh (In re Huh), 506 B.R. 257
21 (9th Cir. BAP 2014) (en banc). Applied to the appeal now before
22 us, Huh stands for the proposition that in order to hold
23 Mr. Hebert liable for the fraud of a business partner,
24 Mr. Jagiello, Ms. Rakich must show that Mr. Hebert knew, or
25 should have known, of Mr. Jagiello's fraud. Here, the record is
26 clear that not only did Mr. Hebert know of Mr. Jagiello's fraud,
27 he orchestrated it. Significantly, in the Jagiello Adversary
28 Proceeding, Mr. Hebert testified that NOE was his brainchild,
that the "ventures" he and Mr. Jagiello went into were his call,
and that Mr. Jagiello gave him a portion of the money from
Ms. Rakich because Mr. Hebert told him to. "I'm the guy who's
going to make decisions based on what I think and where we're
going to raise the money and where we're going to make profits
and where we're not going to make profits." Under Huh,
Mr. Jagiello's fraud as found by the Michigan Bankruptcy Court
can be imputed to Mr. Hebert.

1 The Nevada Bankruptcy Court correctly identified the law in
2 determining whether preclusion was available with respect to the
3 SJ Motion based on the Jagiello Adversary Judgment. Further, we
4 cannot say that the Nevada Bankruptcy Court's application of the
5 law to the facts was illogical, implausible or without support in
6 inferences that may be drawn from the record. This is
7 particularly true where, as noted by the Nevada Bankruptcy Court,
8 Mr. Hebert never suggested in any declarations that his testimony
9 in a trial in the Nevada Bankruptcy Court would be different in
10 any way from his testimony under oath in the Michigan Bankruptcy
11 Court.

12 We now review de novo whether the SJ Motion was
13 appropriately granted based upon the Jagiello Bankruptcy
14 Judgment.

15 B. Summary Judgment Purpose and Standards.

16 The purpose of summary judgment is to avoid unnecessary
17 trials when there is no dispute as to the material facts before
18 the court. Nw. Motorcycle Ass'n v. U.S. Dep't of Agric., 18 F.3d
19 1468, 1471 (9th Cir. 1994). Genuine issues of material fact are
20 those "factual issues that make a difference to the potential
21 outcome and that properly can be resolved only by a finder of
22 fact because they may reasonably be resolved in favor of either
23 party.'" Svob v. Bryan (In re Bryan), 261 B.R. 240, 243 (9th
24 Cir. BAP 2001) (internal citation omitted). Once the moving
25 party's burden is met by presenting evidence which, if
26 uncontroverted, would entitle the moving party to a directed
27 verdict at trial, the burden then shifts to the respondent to
28 produce "significantly probative evidence" of specific facts

1 showing there is a genuine issue of material fact requiring a
2 trial. T.W. Elec. Serv. v. Pac. Elec. Contractors Ass'n,
3 809 F.2d 627, 630 (9th Cir. 1987), citing First Nat'l Bank v.
4 Cities Serv. Co., 391 U.S. 253, 290 (1968). The respondent will
5 not be able to withstand a motion for summary judgment merely by
6 making allegations, but must go beyond its pleadings and
7 designate specific facts by use of affidavits, depositions,
8 admissions, or answers to interrogatories showing there is a
9 genuine issue for trial. A mere "scintilla" of evidence
10 supporting the respondent's position will not be sufficient.
11 Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48 (1986).

12 In deciding whether a fact issue has been created, the court
13 must view the facts and the inferences to be drawn therefrom in a
14 light most favorable to the nonmoving party. See Jonas v.
15 Resolution Trust Corp. (In re Comark), 971 F.2d 322, 324 (9th
16 Cir. 1992). All reasonable doubt as to the existence of genuine
17 issues of material fact must be resolved against the moving
18 party. Anderson, 477 U.S. at 248. Inferences may also be drawn
19 from underlying facts that are not in dispute. T.W. Elec. Serv.,
20 809 F.2d at 631.

21 "Where the record taken as a whole could not lead a rational
22 trier of fact to find for the non-moving party, there is no
23 'genuine' issue for trial." Matsushita Elec. Indus. Co. v.
24 Zenith Radio Corp., 475 U.S. 574, 588 (1986).

25 To establish nondischargeability as a result of fraud under
26 § 523(a)(2)(A), courts in the Ninth Circuit employ the following
27 five-part test: (1) misrepresentation, fraudulent omission or
28 deceptive conduct by the debtor; (2) knowledge of the falsity or

1 deceptiveness of his statement or conduct; (3) an intent to
2 deceive; (4) justifiable reliance by the creditor on the debtor's
3 statement or conduct; and (5) damage to the creditor proximately
4 caused by its reliance on the debtor's statement or conduct.

5 Harmon v. Kobrin (In re Harmon), 250 F.3d 1240, 1246 (9th Cir.
6 2001).

7 The Nevada Bankruptcy Court carefully reviewed the findings
8 made in support of the Jagiello Bankruptcy Judgment and
9 determined that they satisfied every element to establish a
10 § 523(a)(2)(A) claim. We reach the same result in our
11 independent review.

12 The findings which support the first three elements of a
13 claim based upon fraudulent representations, are set forth in the
14 factual discussion above. Distilled to their essence they are:

15 - The formation of NOE was window dressing which
16 Mr. Hebert never intended would have any substance or
17 role or that it would operate or carry out the
18 purpose(s) of the NOE Agreement.

19 - At the time the NOE Agreement was entered,
20 Mr. Hebert knew that the Long Beach Project's estimated
21 costs had increased to the point of being prohibitive.

22 - Mr. Hebert never told Ms. Rakich that the Long
23 Beach Project would not be pursued.

24 - Notwithstanding his inability to comply with the
25 NOE Agreement, Mr. Hebert went forward with the
26 transaction pursuant to which Ms. Rakich was divested
27 of \$280,000.

28 - The foregoing constituted a scheme or artifice to
obtain Ms. Rakich's funds for use by Mr. Hebert and
Mr. Jagiello personally.

With respect to the element of justifiable reliance, the
Michigan Bankruptcy Court found that Ms. Rakich had been "put
under pressure [by Mr. Jagiello and Mr. Hebert] to produce the

1 funds in a very short . . . time frame," and to enter into the
2 NOE Agreement, drafted by Mr. Hebert's attorney, "in a time frame
3 and under circumstances in which she at least felt precluded her
4 from obtaining her own attorney." These actions created a
5 situation which "put a premium on [Ms. Rakich's] trust of
6 [Mr. Hebert]" based upon their personal relationship, "a trust
7 which [Mr. Hebert] took undue advantage of at the time the [NOE]
8 Agreement was discussed and signed."

9 As pointed out by the Nevada Bankruptcy Court, in his
10 supplemental declaration in opposition to the SJ Motion,
11 Mr. Hebert stated that after the California Judgment was entered
12 Ms. Rakich emailed him for business advice, a "fact" which he
13 asserts evidences that Ms. Rakich "was not swindled out of any
14 money." However, the email was introduced into evidence at the
15 Michigan trial and therefore was considered by the Michigan
16 Bankruptcy Court when it ruled. Notwithstanding this evidence,
17 the Michigan Bankruptcy Court reached the conclusion that
18 Ms. Rakich in fact had been "swindled."

19 Finally, with respect to the final element required to
20 establish a § 523(a)(2)(A) claim, the Michigan Bankruptcy Court
21 found that based on the discussions relating to the NOE
22 Agreement, Ms. Rakich loaned \$280,000 to NOE, making those
23 representations the proximate cause of her loss of the funds.

24 Based on the foregoing, summary judgment on Ms. Rakich's
25 § 523(a)(2)(A) claim against Mr. Hebert was properly granted.

26 The Summary Judgment determined only that the debt
27 Mr. Hebert owed to Ms. Rakich is nondischargeable. That the debt
28 currently is in the form of the default California Judgment on

1 claims other than fraud does not render such a finding erroneous.

2 **VI. CONCLUSION**

3 The Nevada Bankruptcy Court correctly identified the law
4 regarding the preclusive effect of the Jagiello Bankruptcy
5 Judgment. It did not abuse its discretion when it applied
6 preclusion to the SJ Motion. Both the Nevada Bankruptcy Court
7 and this Panel in its de novo review have determined that the
8 factual findings and conclusions of law which support the
9 Jagiello Bankruptcy Judgment establish all of the elements to
10 support summary judgment in favor of Ms. Rakich on her
11 § 523(a)(2)(A) claim against Mr. Hebert.

12 We AFFIRM.