





1 embodying the basic policy animating the Code of affording relief  
2 only to the "honest but unfortunate debtor." Cohen v. de la  
3 Cruz, 523 U.S. 213, 216 (1998).

4 The provision of the Bankruptcy Code which excepts from  
5 discharge debts arising from fraud is § 523(a)(2)(A). In  
6 applying § 523(a)(2)(A), courts in the Ninth Circuit employ a  
7 five-part test:

- 8 (1) that the debtor made . . . representations;
- 9 (2) that the debtor knew the representations were  
false when made;
- 10 (3) that the debtor made the representations with  
the intention and purpose of deceiving the  
creditor;
- 11 (4) that the creditor relied on such  
representations; and
- 12 (5) that the creditor sustained the alleged loss  
and damage as the proximate result of the  
13 misrepresentations having been made.

14 In re Hashemi, 104 F.3d 1122, 1125 (9<sup>th</sup> Cir. 1997); In re Apte,  
15 96 F.3d 1319, 1322 (9<sup>th</sup> Cir. 1996). In order to prevail on a  
16 claim asserted under § 523(a)(2)(A), a creditor must establish  
17 each of the five elements by a preponderance of the evidence.

18 1. Representation

19 The first element, or part, of a cause of action under  
20 § 523(a)(2)(A) is that the debtor made one or more  
21 representations. The statute itself makes clear that any  
22 representation must be "other than a statement respecting the  
23 debtor's or an insider's financial condition".

24 Can the representation be about anything, or are there  
25 limits on what representations may be actionable under  
26 § 523(a)(2)(A)? As the Supreme Court recognized in Field v.

1 Mans, 516 U.S. 59, 70 (1995), it must be a "representation of  
2 fact". The Ninth Circuit has recognized the same, and used to  
3 include the phrase "representation of fact" in stating the  
4 elements of a cause of action under § 523(a)(2)(A). In re Rubin,  
5 875 F.2d 755, 759 (1989); In re Gertsch, 237 B.R. 160, 167  
6 (9<sup>th</sup> Cir. BAP 1999).

7 Other courts have elaborated. In re Schwartz & Meyers,  
8 180 B.R. 416, 423 (Bankr. S.D.N.Y. 1991), the court stated:

9 To be actionable, the representation must be  
10 one of existing fact and not merely an  
11 expression of opinion, expectation or  
12 declaration of intention. [Citations  
13 omitted.] Also falling within the purview of  
14 nonactionable language are those statements  
15 which amount to no more than sales "puffery"  
16 upon which reliance should not be placed.

17 Similarly, in In re Spar, 176 B.R. 321, 326 (Bankr. S.D.N.Y.  
18 1994), the court wrote:

19 In order for Spar's representations to be a  
20 false representation or false pretense under  
21 Code § 523(a)(2)(A), the representations must  
22 "encompass statements that falsely purport to  
23 depict current or past facts. [Citation  
24 omitted.] A promise to perform in the future  
25 is insufficient. . . . Representations as to  
26 opinion, expectation or declarations of  
intention do not relate to existing fact and  
are not actionable.

See, also Greenberg v. Chrust, 2002 WL 31444902 (S.D.N.Y. 2002).

In In re Evans, 181 B.R. 508, 512 (Bankr. S.D. Cal. 1995),  
that court stated:

To support a § 523(a)(2)(A) action, the  
creditor must establish that the debtor made  
a false representation with respect to an

1 existing and ascertainable fact. [Citation  
2 omitted.] A representation of value generally  
3 is merely a statement of opinion and, as  
4 such, it "does not support a fraud claim  
5 either under common law or under the  
6 Bankruptcy Code."

7 Despite the clear requirement that the representation be of  
8 an existing or past fact, some courts have evaded the element.  
9 In Evans, after stating what is quoted above, the court added:  
10 "However 'this rule presupposes that such a representation does  
11 in fact represent the declarant's opinion.'" It is not at all  
12 clear why an opinion of value, which is not actionable because it  
13 is not a representation of an existing fact, somehow becomes  
14 actionable if the declarant doesn't believe in its truth.  
15 Nevertheless, as the Evans court wrote:

16 When the debtor represented that the lot  
17 had a value in excess of the existing \$65,000  
18 deed of trust and the plaintiff's \$65,000  
19 deed of trust, he knew that the  
20 representation was false. He made the  
21 representation with reckless indifference to  
22 the truth solely to induce the plaintiff to  
23 make the loan. Representations of value  
24 "which the declarant does not, in fact, hold  
25 or declarations made with reckless  
26 indifference for the truth may be found to be  
27 fraudulent." [Citations omitted.] "A false  
28 statement regarding the value of property,  
29 which is not made in good faith, and which is  
30 not warranted by the knowledge or belief of  
31 the owner, may furnish the basis of an action  
32 for rescission on the ground of fraud or  
33 deceit."

34 In Spar, the court considered the same issue, and stated:

35 Only when the debtor "does not hold these  
36 opinions or utters them with reckless  
37 indifference for their truth" can the

1 requisite fraud be found. . . . When, at the  
2 time a representation is made, the debtor has  
3 no intention of performing as promised, a  
4 debtor's misrepresentation of his intentions  
5 will constitute a false representation under  
6 Code § 523(a)(2)(A).

7 176 B.R. at 326.

8 In In re Lund, 202 B.R. 236, 130-31 (9<sup>th</sup> Cir. BAP 1996), the  
9 appellate court observed:

10 However, if the Debtors made false  
11 representations regarding payment for the  
12 purpose of inducing Kuan to permit them to  
13 stay longer without paying rent, then the  
14 Debtors obtained "property" (possession of  
15 the house without presently making rent  
16 payments) through "false pretenses, false  
17 representation, or actual fraud" within the  
18 meaning of 11 U.S.C. § 523(a)(2)(A). . . .

19 Further, the representation that the  
20 Debtors would pay the debt upon receiving  
21 the proceeds of a lawsuit is a promise,  
22 not a statement of fact. A debtor must  
23 make a promise while knowing it to be  
24 false at the time in order to support a  
25 nondischargeability action under 11 U.S.C.  
26 § 523(a)(2)(A).

27 In 1989, the Ninth Circuit made similar statements in In re  
28 Rubin, 875 F.2d 755, 759, where the court quoted from a Florida  
29 bankruptcy decision, the court repeated:

30 "[O]pinions as to future events which the  
31 declarant does not, in fact, hold or  
32 declarations made with reckless indifference  
33 for the truth may be found to be fraudulent."  
34 [Citation omitted.] Moreover, even though  
35 Rubin can characterize the second  
36 representation as a promise, a promise made  
37 with a positive intent not to perform or  
38 without a present intent to perform satisfies  
39 § 523(a)(2)(A).

1 Curiously, Rubin says that at the same time that it recognizes  
2 that a representation must be a representation of fact.

3       The cases are, at the least, confusing. If a statement of  
4 opinion, for instance, of value, is not actionable because it is  
5 not a representation of an existing fact, how does the lack of a  
6 good faith belief in its accuracy transform it into a  
7 representation of fact? It does not. Rather, the lack of good  
8 faith belief or reckless disregard for the truth goes to the  
9 second element of a § 523(a)(2)(A) cause of action - whether the  
10 declarant knew it was false. That is a separate and independent  
11 requirement, but proof of the known falsity does not make a  
12 statement of opinion into an existing fact. The first element  
13 still is that the representation, to be actionable, must be one  
14 of an "existing and ascertainable" fact. Some suggest that the  
15 false representation is the express or implicit representation  
16 that the speaker "believes" it to be so. This Court disagrees.  
17 Whether the speaker believes the statement or not does not turn a  
18 non-actionable opinion into one a listener can sue on unless  
19 there is some other duty on the speaker.

20       To return to the beginning, the first element of a cause of  
21 action under § 523(a)(2)(A) is that debtor made a representation  
22 of an existing or past fact. Such a representation may be made  
23 affirmatively, or may be inferred by omission when the debtor has  
24 a duty to disclose it.

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2. Falsity of the Representation

The second element of a cause of action under § 523(a)(2)(A) is that the debtor knew the representation was false when made. As already noted, some courts appear to have elided the first and second elements, suggesting that any kind of representation is actionable if the declarant lacked a good faith belief in its accuracy. See, In re Evans, 181 B.R. 508, 512 (Bankr. S.D. Cal. 1995); In re Spar, 176 B.R. 312, 327 (Bankr. S.D.N.Y. 1994); In re Lund, 202 B.R. 127, 130-31 (9<sup>th</sup> Cir. BAP 1996); In re Rubin, 875 F.2d 755, 759 (9<sup>th</sup> Cir. 1989).

This Court believes the language of the foregoing cases really focuses on satisfaction of the second element - that the debtor knew the representation was false at the time it was made. The opinion of the Bankruptcy Appellate Panel in In re Kong, 239 B.R. 815, 816-27 (1999) lays it out fairly well. There, the court wrote:

The Ninth Circuit, as well as other appellate courts, have recognized that "reckless disregard for the truth of a representation satisfies the element that the debtor has made an intentionally false representation in obtaining credit." . . . The Ninth Circuit uses the phrase "reckless indifference to his actual circumstances" interchangeably with "reckless disregard for the truth of a representation." . . . [R]eckless conduct must involve more than simple, or even inexcusable negligence; it requires such extreme departure from the standards of ordinary care that it represents a danger of misleading [those whom [sic] rely on the truth of the representation]." . . . Fraudulent misrepresentation is established where the maker of a statement chooses to assert it as a fact even though he is

1 conscious that he has neither knowledge nor  
2 belief in its existence "and recognizes that  
3 there is a chance, more or less great, that  
4 the fact may not be as it is represented."  
5 . . . "This is often expressed by saying  
6 that fraud is proved if it is shown that a  
7 false representation has been made without  
8 belief in its truth or recklessly, careless  
9 of whether it is true or false." . . .  
10 ("' [R]eckless indifference to the actual  
11 facts, without examining the available source  
12 of knowledge which lay at hand, and with no  
13 reasonable ground to believe that it was in  
14 fact correct' [is] sufficient to establish  
15 the knowledge element . . . which completely  
16 bar[s] a discharge of all debts if the  
17 bankrupt made a materially false statement in  
18 order to obtain property on credit.")

### 11 3. Intent to Deceive

12 The third element of a § 523(a)(2)(A) cause of action is an  
13 intent on the part of the debtor to deceive the creditor. It has  
14 become axiomatic that direct proof of an intent to deceive is  
15 rarely available. So courts have recognized that the requisite  
16 intent to deceive may be inferred from proof of the surrounding  
17 circumstances "if the facts and circumstances of a particular  
18 case present a picture of deceptive conduct by the debtor."  
19 In re Eashai, 87 F.3d 1082 (9<sup>th</sup> Cir. 1996).

### 20 4. Reliance

21 Even where a creditor can prove a knowingly false  
22 representation was made, and further establish an intent to  
23 deceive, a creditor generally cannot succeed unless the creditor  
24 also can prove reliance on the false representation. Field v.  
25 Mans, 516 U.S. 59 (1995). While § 523(a)(2)(A) does not, on its  
26 face, expressly require reliance, the requirement has been

1 inferred from the fact that the debt must have been "obtained by"  
2 the fraud or misrepresentation. Field, 516 U.S. at 66. That is,  
3 the fraud must have caused the debt which, in turn, requires that  
4 the claimant have relied upon the misrepresentation.

5 In Field, the Supreme Court addressed the level of reliance  
6 required under (a)(2)(A). The Court held that reliance need not  
7 be reasonable, as expressly required in § 523(a)(2)(B), but it  
8 must be justifiable. The Court explained that "a person is  
9 justified in relying on a representation of fact 'although he  
10 might have ascertained the falsity of the representation had he  
11 made an investigation.'" Id. at 70 [quoting § 540 Restatement  
12 (Second) of Torts (1976)]. Unlike reasonable reliance, this is a  
13 subjective standard - that is, it depends upon the knowledge and  
14 experience of the person to whom the representations were made.  
15 Citing to the Restatement of Torts, the Supreme Court in Field  
16 explained:

17 [A] person is "required to use his  
18 senses, and cannot recover if he blindly  
19 relies upon a misrepresentation the  
20 falsity of which would be patent to him  
21 if he had utilized his opportunity to  
22 make a cursory examination or  
23 investigation. Thus, if one induces  
24 another to buy a horse by representing  
25 it to be sound, the purchaser cannot  
26 recover even though the horse has but  
one eye, if the horse is shown to the  
purchaser before he buys it and the  
slightest inspection would have  
disclosed the defect. On the other  
hand, the rule stated in this Section  
applies only when the recipient of the  
misrepresentation is capable of  
appreciating its falsity at the time by  
the use of his senses. Thus, a defect



1 representation that was made with the intent to deceive. In re  
2 Britton, 950 F.2d 602, 604 (9<sup>th</sup> Cir. 1991). "Proximate cause is  
3 sometimes said to depend on whether the conduct has been so  
4 significant and important a cause that the defendant should be  
5 legally responsible." Id. at 604. The United States Supreme  
6 Court explained in Field, a court may turn to the Restatement  
7 (Second) of Torts, "the most widely accepted distillation of the  
8 common law of torts", for guidance on this issue. Field, 516  
9 U.S. at 68-70, 116 S.Ct. at 443.

10 The Restatement (Second) of Torts (1976) explains that  
11 proximate cause entails (1) causation in fact, which requires a  
12 defendant's misrepresentations to be a substantial factor in  
13 determining the course of conduct that results in loss (§ 546);  
14 and (2) legal causation, which requires a creditor's loss to  
15 "reasonably be expected to result from the reliance." (§ 548A).  
16 In determining the presence of proximate cause, however, courts  
17 must refrain from relying on speculation to determine whether and  
18 to what extent a creditor would have suffered a loss absent  
19 fraud. In re Siriani, 967 F.2d 302, 306 (9<sup>th</sup> Cir. 1992).

20 B. 523(a)(6)

21 Section 523(a)(6) of Title 11 provides:

22 (a) A discharge under section 727 . . .  
23 does not discharge an individual debtor from  
any debt -

24 . . .

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1                   (6) for willful and malicious  
2                   injury by the debtor to another entity  
3                   or to the property of another entity  
4                   . . . .

4           The United States Supreme Court had occasion to consider the  
5 reach of § 523(a)(6) in Kawaauhau v. Geiger, 523 U.S. 57 (1998).  
6 There, the Court noted:

7                   The word "willful" in (a)(6) modifies  
8                   the word "injury," indicating that  
9                   nondischargeability takes a deliberate or  
                 intentional injury, not merely a deliberate  
                 or intentional act that leads to injury.

10          523 U.S. at 61. Accordingly, the Court held "that debts arising  
11 from recklessly or negligently inflicted injuries do not fall  
12 within the compass of § 523(a)(6)." 523 U.S. at 64.

13          The facts in Geiger help explain the holding. The plaintiff  
14 sought treatment for a foot injury from Dr. Geiger. He admitted  
15 her to the hospital for treatment and intentionally chose a  
16 course of oral penicillin over intravenous because of the  
17 plaintiff's desire to minimize cost, although he knew intravenous  
18 administration was more effective. Dr. Geiger left plaintiff in  
19 the care of other physicians and went on a business trip. On his  
20 return he found the doctors had referred the plaintiff to an  
21 infectious disease expert. He cancelled the referral and ordered  
22 the antibiotics discontinued because he thought the infection had  
23 subsided. Plaintiff lost her leg, sued, and obtained a judgment.  
24 Dr. Geiger carried no malpractice insurance, so the plaintiff  
25 chased him into bankruptcy. There, the bankruptcy court found  
26 the debt nondischargeable and the district court affirmed.

1 A panel of the Eighth Circuit reversed, and the court *en*  
2 *banc* agreed, and held that § 523(a)(6) was "confined to debts  
3 'based on what the law has for generations called an intentional  
4 tort.'" 523 U.S. at 60. Before the Supreme Court plaintiff  
5 argued that "Dr. Geiger intentionally rendered inadequate medical  
6 care to [plaintiff] that necessarily led to her injury." *Id.* at  
7 61. Plaintiff contended that Dr. Geiger "deliberately chose less  
8 effective treatment because he wanted to cut costs, all the while  
9 knowing that he was providing substandard care." *Id.* The  
10 Supreme Court affirmed the Eighth Circuit's decision and rejected  
11 the plaintiff's argument that Dr. Geiger's conduct met the  
12 'willful and malicious injury' standard of § 523(a)(6).

13 Subsequent to Geiger, in In re Jercich, 38 F.3d 1201 (2001),  
14 the Ninth Circuit explained:

15 In Geiger, the U.S. Supreme Court held  
16 that debts arising out of a medical  
17 malpractice judgment, i.e., "debts arising  
18 from reckless or negligently inflicted  
19 injuries," do not fall within § 523(a)(6)'s  
20 exception to discharge. In so holding, the  
21 Court clarified that it is insufficient under  
22 § 523(a)(6) to show that the debtor acted  
willfully and that the injury was negligently  
or recklessly inflicted; instead, it must be  
shown not only that the debtor acted  
willfully, but also that the debtor inflicted  
the injury willfully and maliciously rather  
than recklessly or negligently.

23 238 F.3d at 1207.

24 The Ninth Circuit next examined "the precise state of mind  
25 required to satisfy § 523(a)(6)'s 'willful standard.'" *Id.* The  
26 court concluded:

1           We hold . . . that under Geiger, the  
2 willful injury requirement of § 523(a)(6) is  
3 met when it is shown either that the debtor  
4 had a subjective motive to inflict the injury  
or that the debtor believed that injury was  
substantially certain to occur as a result of  
his conduct.

5 23 F.3d at 1208. The court then defined the separate requirement  
6 of § 523(a)(6), maliciousness, as follows:

7           A "malicious" injury involves "(1) a  
8 wrongful act, (2) done intentionally, (3)  
9 which necessarily causes injury, and (4) is  
done without just cause or excuse."

10 23 F.3d at 1209.

11           Still more recently, the Ninth Circuit looked at § 523(a)(6)  
12 again, this time in In re Su, 290 F.3d 1140 (2002). There,  
13 debtor was driving a van in downtown San Francisco during the  
14 morning rush hour. He went speeding into an intersection when  
15 the light was already red, crashed into another car, then hit  
16 plaintiff, a pedestrian lawfully crossing the street. Plaintiff  
17 prevailed in state court and Mr. Su filed bankruptcy. The  
18 bankruptcy court found the debt nondischargeable under  
19 § 523(a)(6), but the BAP reversed, holding the court applied the  
20 wrong legal standard. The Ninth Circuit affirmed the BAP. As  
21 the Ninth Circuit put it:

22           The question presented on appeal is whether a  
23 finding of "willful and malicious injury"  
24 must be based on the debtor's subjective  
25 knowledge or intent or whether such a finding  
can be predicated upon an objective  
evaluation of the debtor's conduct.

26 290 F.3d at 1142. The court then stated its conclusion:

1 We hold that § 523(a)(6)'s willful injury  
2 requirement is met only when the debtor has a  
3 subjective motive to inflict injury or when  
4 the debtor believes that injury is  
5 substantially certain to result from his own  
6 conduct.

7 Id.

8 In rejecting the objective standard used by the bankruptcy  
9 court, the appellate court stated its view:

10 [T]hat failure to adhere strictly to the  
11 limitation expressly laid down by In re  
12 Jercich will expand the scope of  
13 nondischargeable debt under § 523(a)(6) far  
14 beyond what Congress intended. By its very  
15 terms, the objective standard disregards the  
16 particular debtor's state of mind and  
17 considers whether an objective reasonable  
18 person would have known that the actions in  
19 question were substantially certain to injure  
20 the creditor. In its application, this  
21 standard looks very much like the "reckless  
22 disregard" standard used in negligence. That  
23 the Bankruptcy Code's legislative history  
24 makes it clear that Congress did not intend  
25 § 523(a)(6)'s willful injury requirement to  
26 be applied so as to render nondischargeable  
any debt incurred by reckless behavior  
reinforces application of the subjective  
standard. The subjective standard correctly  
focuses on the debtor's state of mind and  
precludes application of § 523(a)(6)'s  
nondischargeability provision short of the  
debtor's actual knowledge that harm to the  
creditor was substantially certain.

290 F.3d at 1145 - 1146.

#### Discussion

As noted, this case arises from a dispute between the  
DeGuzmans and the debtor, Mr. Hawk, concerning a contract to  
build the DeGuzmans' home on 9 - 10 acres of raw land. At a  
point in the process, the DeGuzmans fired Mr. Hawk as the

1 contractor and hired a replacement. Thereafter, the successor  
2 contractor had the home 80 - 90% finished when it was destroyed  
3 in a major area wildfire. This case concerns whether Mr. Hawk's  
4 conduct was of the kind sufficient to render any debt owed by him  
5 to the DeGuzmans nondischargeable.

6 Certain basic facts are not in dispute. Well prior to any  
7 contact with Mr. Hawk the DeGuzmans acquired title to a sizeable  
8 piece of raw land, with ingress and egress from the west side.  
9 While there was no testimony about it, at some point they had  
10 plans for the house drawn up. A friend, who was a contractor,  
11 Mr. Loftus, helped them put together a package for a construction  
12 loan with IndyMac Bank, although it was never their intention  
13 that he would accomplish the construction. IndyMac approved the  
14 loan in the Spring of 2002, and the loan agreement gave them one  
15 year to have the house built.

16 Sometime in the next few months they employed Mr. Spear to  
17 develop a site grading plan to submit to obtain a grading permit  
18 from the County. He did so, and the permit was apparently issued  
19 around July 26, 2002 (Ex. 62). It is not clear when the  
20 DeGuzmans had their first contact with Mr. Hawk. He testified he  
21 thought it was about one month before the contract date of  
22 October 18, 2002. Mr. Hawk testified he drove them around to see  
23 several of the projects he had completed or was working on.  
24 Mrs. DeGuzman testified that they got references from Mr. Hawk  
25 and talked with two of them. The references were favorable.  
26 They also checked to see whether he had a contractor's license,

1 which he did. Mrs. DeGuzman testified they met with Mr. Hawk at  
2 least two times before hiring him.

3 On October 11, 2002 the DeGuzmans gave Mr. Hawk a check for  
4 \$1,000 as a "down payment". Mr. Hawk gave them a receipt so  
5 indicating (Ex. 1). A week later, they signed a contract (Ex.  
6 2). Mrs. DeGuzman testified that although the contract provided  
7 for Prime Construction, Mr. Hawk's dba, to provide labor and  
8 materials, Mr. Hawk told them the process would go faster if he  
9 had money in his hands rather than having to apply to the bank  
10 for each disbursement. While he asked for \$50,000, she gave him  
11 a check for \$10,000 on October 28 (Ex. 3). On the same date, she  
12 paid \$8,893 to San Diego Gas & Electric for hookup (Ex. 4).

13 The very next day, October 29, the DeGuzmans and Mr. Hawk  
14 signed an addendum to the original contract. It provided for  
15 four changes to the original and, most relevant, it provided, for  
16 the first time, a completion date, March 5, 2003. Specifically,  
17 paragraph 1 stated:

18 1. Prime Construction will have the  
19 Deguzman's residence in Poway built  
20 according to provided approved set of  
21 plans by 3/05/03.  
Change orders, County of San Diego  
delays, and stormy weathers will cause a  
delay to this date of completion.

22 The record is unclear about what, if anything, took place  
23 over the next three weeks or so. On November 22, Mr. Hawk  
24 applied to the City of Poway to have water turned on at the  
25 property and paid a \$700 deposit (Ex. 53). A week later, on  
26 November 29, Prime Construction purchased silt fencing, rice

1 straw fibre rolls, and bags of gravel – so called BMP materials.  
2 Prime paid \$700 in cash and another \$201.27 on its MasterCard.

3 Mr. Hawk testified that the November delay in getting  
4 started was caused by the DeGuzmans wanting him to create an East  
5 entrance to the property, in conjunction with a neighbor on that  
6 side. The County had approved the grading plan with the West  
7 driveway, but there had been no approval for an East drive.  
8 Mrs. DeGuzman testified that a neighbor did want an East entrance  
9 and while the DeGuzmans were not opposed, they did not plan to  
10 pay for it. Why grading did not start in late October or early  
11 November is not clear on the record, unless it was something like  
12 an issue with an East entrance. Abetting the confusion is a  
13 modification to the earlier addendum to the contract dated  
14 December 14 (Ex. 10). Paragraph 1 of that document states:

15 1. Due to the delay before grading, the  
16 DeGuzmans are allowing a 1-month extension  
17 for the house to be build. Barring any  
18 delays caused by the acts of God, delays by  
the city, stormy weather, uncontrollable or  
unforeseen circumstances, the DeGuzman  
residence MUST be built by April 30, 2003.

19 Mrs. DeGuzman testified she did not recall what "delay before  
20 grading" referred to.

21 Meanwhile, on December 5 Mrs. DeGuzman paid a development  
22 fee to the Poway school district of over \$8,700 (Ex. 6). While  
23 that was going on, the soils engineers, the C.W. La Monte Co.,  
24 were at work on the site starting December 3, according to their  
25 invoice (Ex. 15). So, also, was Spear & Associates, the company  
26 that did the grading plan and initial stakes for grading months

1 before Mr. Hawk met the DeGuzmans. Apparently, the grading  
2 company needed additional staking done, which appears to have  
3 been accomplished on December 3, and another part on December 10  
4 (Ex. 14).

5 The grading company, Dirt Works, started their grading work  
6 on December 2, and billed for full days on December 2, 3, 4, 5,  
7 6, 9, 20, 22, 12, 13, 14 and 16. It is not clear exactly when  
8 they finished. Mrs. DeGuzman testified she wrote a \$20,000 check  
9 (Ex. 12) payable to Dirt Works and Prime Construction on December  
10 21 at the property site, and that Dirt Works had been grading  
11 that week. Mr. Hawk testified that additional grading was  
12 necessary because the DeGuzmans wanted the pad cut lower for the  
13 back side yard to fit the pool.

14 Once the grading was completed it had to be inspected by the  
15 County. Mr. Hawk testified that took several weeks. He said  
16 they had to complete the BMP to be included in the inspection.  
17 The first time the inspector came out he wanted more wattles.  
18 Once those were placed, grading was approved.

19 In the meantime, Mrs. DeGuzman had written a check to the  
20 County for a building permit (Ex. 9), while at the same time she  
21 wrote the County a check to extend the life of the earlier plan  
22 check (Ex. 8). It appears that the receipt for the building  
23 permit fee is dated January 29, 2003, although the check was  
24 dated December 11, 2002.

25 In early January, Mr. Hawk ordered windows from Dixieline  
26 and block from RCP. Mr. DeGuzman gave him checks payable to each

1 of those entities. The check to RCP was dated 1/9/03 and their  
2 invoice shows they received it (Ex. 18). Dixieline Receipted for  
3 theirs on January 10 (Ex. 19). Prime Construction rented  
4 equipment to jackhammer some of the large boulders found on the  
5 property that needed to be dealt with in trenching for the  
6 foundations. That equipment rental started at least by January  
7 23 (Ex. 57). According to the testimony, the jackhammers proved  
8 inadequate to the task, and Mr. Hawk found it necessary to rent  
9 a backhoe, which was used between February 19 and February 25  
10 (Ex. 59).

11 In the interim, the DeGuzmans had lost confidence in  
12 Mr. Hawk and Prime Construction. According to Mrs. DeGuzman,  
13 friends of theirs told them Mr. Hawk was not handling the bills  
14 the way other contractors did. She said she tried to get an  
15 accounting from Mr. Hawk, but to no avail. They received bills  
16 from subcontractors such as Dirt Works, Spear, and La Monte, for  
17 which they thought they had already provided to Mr. Hawk the  
18 money to pay them. The DeGuzmans contacted Mr. Fennema, who was  
19 a licensed contractor and did a lot of work as a contractor's  
20 representative on job sites. They asked him to review both the  
21 plans and the progress, and advise them on how they should  
22 proceed. After meeting with them at their residence, he sent  
23 them a proposal, and they decided to hire him.

24 On February 19 the DeGuzmans sent a letter to Mr. Hawk  
25 advising him that they had hired Mr. Fennema, at their own  
26 expense, to represent them on the job, and that he was the person

1 Mr. Hawk should deal with (Ex. 22). Mr. Hawk responded the next  
2 day, apparently enthusiastically (Ex. 23). On February 22  
3 Mr. Fennema met with Mr. Hawk at the building site. Mr. Hawk's  
4 new site supervisor, Bill Krall, was also present. Mr. Fennema  
5 memorialized the meeting in his letter dated February 24  
6 (Ex. 24), in which he set out a number of items they had  
7 discussed that constituted a "to do" list. In addition, he noted  
8 that Mr. Hawk's contractor's license had been suspended for lack  
9 of a current bond. That same date, in response to Mr. Fennema's  
10 notice, Mr. Hawk sent him a copy of the bond application and  
11 check for the premium (Ex. 69). Mr. Fennema testified he  
12 considered it a technical breach and not of consequence.

13 On February 25, Mr. Hawk sent the DeGuzmans a note  
14 indicating they could not work that day because of heavy rain,  
15 and hoped to return to work on 2/26, if the rain stopped. On  
16 February 27, Mrs. DeGuzman sent Mr. Hawk a letter demanding a  
17 detailed accounting of all money spent on their project by  
18 March 3 (February 27 was a Thursday and March 3 was the following  
19 Monday). Mrs. DeGuzman also demanded that Mr. Hawk pay the  
20 outstanding bills of Spear and La Monte Co. by Friday, February  
21 28 (Ex. 27).

22 Neither bill was paid by Mr. Hawk, then or later. On  
23 March 6, the DeGuzman's attorney sent Mr. Hawk a letter telling  
24 him that because of his failure to provide an accounting, as well  
25 as the suspension of his license, they were terminating the

26 ///

1 construction contract (Ex. 18). So far as the record reveals,  
2 Mr. Hawk never provided the DeGuzmans with a written accounting.

3 Mr. Hawk testified that his business failed in mid 2004,  
4 that they were evicted from the office space, and that he has  
5 very few records of the business' operations.

6 The DeGuzmans have made many allegations against Mr. Hawk  
7 which, they contend, demonstrate that he perpetrated a fraud upon  
8 them by representing that he was competent and capable of  
9 building the home he contracted to build. Based on the record  
10 adduced at trial, the Court would not want to employ Mr. Hawk to  
11 build a house for it. But that begs the question.

12 Mr. Hawk began work in construction around 1992, working for  
13 others. Over time, he took a number of courses on various facets  
14 of the trade. While working, he was involved in construction of  
15 several single family residences, including one on a hillside in  
16 Spring Valley. He earned his contractor's license in 2000. The  
17 DeGuzmans contacted him, met with him, checked with at least two  
18 references, and saw projects that he identified as his.

19 To be actionable under § 523(a)(2)(A), plaintiffs must show  
20 that Mr. Hawk made a false representation about a fact, and he  
21 must have known it was false when made. The Court finds and  
22 concludes that plaintiffs have failed to establish either of  
23 those elements by a preponderance of the evidence.

24 In support of their argument, they assert indicia of  
25 Mr. Hawk's lack of business skills. An example is Mr. Hawk's  
26 testimony that in his practice change orders were generally oral,

1 even though the basic contract calls for them to be in writing.  
2 In the main, change orders come from the owners, and requiring  
3 them to be in writing is often for the protection of the  
4 contractor, to ensure the contractor can be compensated for the  
5 extra or different work entailed. Dealing with change orders on  
6 an oral basis may not be smart business, but it does not  
7 establish that Mr. Hawk made a false representation about his  
8 competence as a contractor, assuming such a claim is even  
9 actionable.

10 The same is true for the supposedly premature purchase of  
11 windows from Dixieline. Mr. Hawk testified windows normally took  
12 about six weeks to arrive after ordering. He wanted to make sure  
13 they were on site and would not hold up progress. In fact, the  
14 windows were on site, paid for, and were used by the successor  
15 contractor on the project.

16 One of the central arguments advanced by plaintiffs  
17 concerned the representation of an ability to build the house by  
18 a date certain. That representation was first made, so far as  
19 the record shows, in the addendum dated October 29, 2002 (Ex. 5).  
20 There, it was agreed the completion date would be March 5, 2003,  
21 over five months later. A similar representation was made on  
22 December 14 when the date was extended to April 30, 2003, four  
23 and one-half months later. Even there the written agreement only  
24 provided for a relatively nominal penalty if it was not completed  
25 on time (Ex. 10).

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1           In February, 2003 the DeGuzmans hired Mr. Fennema, who  
2 testified that he initially thought continuing with Mr. Hawk was  
3 the preferred course, particularly because of the new job site  
4 superintendent, Mr. Krall. However, after he received a proposed  
5 construction schedule, which he concluded was unrealistic, he  
6 changed his mind. He testified he spoke with Mr. Krall about his  
7 concerns about the schedule and understood Mr. Krall disagreed  
8 with him. Whatever the merits of their respective positions,  
9 plaintiffs have proffered no evidence of any representation by  
10 Mr. Hawk about a completion date after December 14, much less one  
11 on which they relied at all. It is doubtful that a  
12 representation about a future date is even actionable under  
13 § 523(a)(2)(A), especially one like an expected completion date.  
14 That is even more the case when the written contract expressly  
15 recognizes there may be delays for Acts of God, delays by public  
16 authorities, "stormy weather" or other unforeseen or  
17 uncontrollable circumstances.

18           One of the more confusing aspects of this case concerns how  
19 payments to suppliers, subcontractors, and others were handled.  
20 On the one hand, the October 18 contract (Ex. 2) provided that  
21 Prime Construction would "furnish all materials and perform all  
22 labor necessary", and was "responsible to pay and pull the  
23 permits from the county." (The contract referenced a progress  
24 payment schedule, which was not provided to the Court as part of  
25 the exhibit.) Mrs. DeGuzman complained at the outset of her  
26 testimony that notwithstanding the language of the contract she

1 had to write checks to get the necessary approvals to move the  
2 project along. On October 28 she wrote the check to San Diego  
3 Gas & Electric for hookup. On December 5, she paid the  
4 development fee to the Poway Unified School District.

5 In addition to the testimony about plaintiffs making money  
6 available to Mr. Hawk and then getting reimbursed from the  
7 construction lender, both Mr. DeGuzman and Mr. Hawk testified  
8 about discussing the DeGuzmans paying third party suppliers  
9 directly, at least those that could assert a lien on the  
10 property. Mr. DeGuzman wanted to do that.

11 Consistent with the foregoing, Mrs. DeGuzman wrote the check  
12 to the County on December 11, 2002 to obtain an extension on the  
13 plan check by the County. On the same day she also wrote the  
14 County the check for the building permit. She testified she was  
15 not sure who took the checks to the County, her husband or the  
16 home designer, Mr. Filiponi.

17 On December 21, on the job site, the plaintiffs wrote a  
18 check for \$20,000 jointly payable to Dirt Works and Prime  
19 Construction. That money was delivered by someone to Dirt Works,  
20 apparently on December 21. According to the invoices from Dirt  
21 Works (Ex. 11), approximately \$4,350 remained owing. Mr. Hawk  
22 testified it was not good practice to pay the entire grading bill  
23 until the grading had passed inspection, which did not happen for  
24 some weeks after December 21.

25 Also on December 21, Mrs. DeGuzman wrote a check to Prime  
26 Construction for \$3,000, with nothing indicated on the memo line.

1 In her testimony she said it may have been to pay the bills for  
2 both Spear and La Monte, but that seems unlikely since their  
3 bills were dated January 2 and January 6, respectively.  
4 Moreover, it is inconsistent with the DeGuzmans' preference to  
5 pay third parties directly. On the other hand, the total of the  
6 two bills is close to \$3,000.

7 The most puzzling day, though, is January 9, 2003. On that  
8 date, Mr. DeGuzman wrote three checks, and a cover memo, and  
9 shoved them under the door after hours at Prime Construction.  
10 Check No. 506 was made payable to Dixieline Lumber; Check No. 507  
11 was made payable to RCP Block and Brick; and Check No. 508 was  
12 made payable to Prime Construction and/or Mike Hawk, and was in  
13 the amount of \$10,882.12. Written on the memo line of Check No.  
14 508 are the words "4,350.00 should be paid to Dirt Works". The  
15 cover memo indicated that Mr. Hawk had requested the checks.  
16 Mr. DeGuzman indicated he wanted receipts "from Dixieline and RCP  
17 showing they were paid". It then says: "The check I wrote to you  
18 (ck #508) - \$4,350.00 must go to Dirt Works to pay the balance.  
19 I need the lien release from Dirt Works for my files!"

20 It is puzzling that Mr. DeGuzman did not write a check for  
21 \$4,350 directly payable to Dirt Works, or at least jointly  
22 payable to Dirt Works and Prime Construction, like the \$20,000  
23 check written on December 21, just twenty days before. It is  
24 even more puzzling when the check to Prime (No. 508) is put next  
25 to the ones to Dixieline and RCP, written at the same sitting.  
26 Add to that Mr. DeGuzman's testimony that he wrote two of the

1 checks directly to the suppliers because he was concerned  
2 Mr. Hawk was not accounting for funds paid to him. Regardless of  
3 that puzzlement, it is uncontroverted that Check No. 508 was  
4 deposited in the Prime Construction account, and that neither  
5 Prime Construction nor Mike Hawk ever paid \$4,350 to Dirt Works.

6 So then the question is whether Mr. Hawk knew of the  
7 instructions contained in the cover memo or on the memo line of  
8 Check No. 508. Mr. Hawk testified he did not see the cover memo  
9 until after litigation started. He said someone from the office  
10 received Check No. 508 and deposited it. He testified he could  
11 not say that the endorsing signature on the back of the check was  
12 his. He said he had authorized Caroline of his office to sign  
13 his name, including on checks. That was corroborated by another  
14 employee of Prime, who testified.

15 Conclusion

16 When all the evidence is considered, the Court finds and  
17 concludes that plaintiffs have failed to meet their burden of  
18 showing that Mr. Hawk made false representations or otherwise  
19 committed fraud on the plaintiffs sufficient to make any debt he  
20 might owe to them nondischargeable. They have failed to show  
21 that his implicit representation that he could build their house  
22 was known to him to be false when he made it. The DeGuzmans  
23 performed a measure of due diligence and were satisfied with what  
24 they learned. None of that has been shown to be false.  
25 Similarly, there was no showing that he did not believe he could  
26 complete the house when he represented on October 29, 2002, and

1 then on December 14, 2002 that he would. There was no showing of  
2 any representation after that date, and even Mr. Fennema  
3 testified that he initially thought the DeGuzmans' better option  
4 was to have Mr. Hawk finish the job, especially with the new  
5 project supervisor, Mr. Krall on site.

6 Mr. Hawk and/or Prime Construction did receive funds from  
7 the DeGuzmans. There was a \$1,000 down payment on October 11,  
8 2002 and \$10,000 on October 28. There is no evidence to suggest  
9 that Mr. Hawk made any false representation to induce the  
10 DeGuzmans to part with those funds, much less that he knew the  
11 representations were false when made. The next monies shown to  
12 go to him or his company were the December 21 checks for \$20,000  
13 and \$3,000. The \$20,000 did go to the co-payee, Dirt Works.  
14 There is no evidence that the \$3,000 was specifically earmarked  
15 for any particular bill, aside from Mrs. DeGuzman's thought that  
16 it might be to pay Spear and La Monte, although they had not even  
17 issued their invoices at the time. The January 9 checks to  
18 Dixieline and RCP Block both were received by those businesses.  
19 So the only check remaining is Check No. 508, which has been  
20 discussed. While its circumstances are puzzling, there is no  
21 showing that Mr. Hawk induced them to part with the funds while  
22 intending not to use them for the stated purpose.

23 In short, there is no basis on which the Court could find  
24 that any debt Mr. Hawk might owe the DeGuzmans is  
25 nondischargeable under 11 U.S.C. § 523(a)(2)(A). The same is  
26 even more true under § 523(a)(6), the claim under which is

1 predicated on fraud. The Court finds and concludes that  
2 plaintiffs have failed to show willful and malicious conduct by  
3 Mr. Hawk within the meaning of § 523(a)(6).

4 For all the foregoing reasons, the Court finds and concludes  
5 that judgment shall be entered in favor of defendant Hawk, and  
6 any pre-petition debt owing from Mr. Hawk to the DeGuzmans is  
7 dischargeable in this bankruptcy.

8 Counsel for Mr. Hawk shall prepare and lodge, or obtain  
9 approval as to form, of a separate form of judgment consistent  
10 with the foregoing within twenty-one (21) days of the date of  
11 entry of this Memorandum Decision.

12 IT IS SO ORDERED.

13 DATED: SEP 27 2006

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16 PETER W. BOWIE, Chief Judge  
17 United States Bankruptcy Court  
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