

1 WRITTEN DECISION - NOT FOR PUBLICATION

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CLERK, U.S. BANKRUPTCY COURT
SOUTHERN DISTRICT OF CALIFORNIA
BY [Signature] DEPUTY

21 UNITED STATES BANKRUPTCY COURT
22 SOUTHERN DISTRICT OF CALIFORNIA

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In re)	Case No. 09-01282-PB7
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RICHARD FREDERICK LANES and)	Adv. No. 09-90119-PB
MELANIE MOSES LANES,)	
)	
Debtors.)	
_____)	MEMORANDUM DECISION
)	
REGINALD H. & VICKI LYNN JONES,)	
)	
Plaintiffs,)	
)	
v.)	
)	
RICHARD FREDERICK LANES,)	
)	
Defendant.)	
_____)	

21 This adversary proceeding came on regularly for trial on
22 the Jones' complaint objecting to the dischargeability of the
23 debt owed to them by Mr. Lanes.

24 The Court has subject matter jurisdiction over the
25 proceeding pursuant to 28 U.S.C. § 1334 and General Order
26 No. 312-D of the United States District Court for the Southern

1 District of California. This is a core proceeding under
2 28 U.S.C. § 157(b)(2)(I).

3 Debtor Lanes operated a mortgage company, an escrow service
4 and a realty office. By the late 1980's he and the Joneses were
5 friends, combining business with pleasure. In 2000, debtor
6 arranged a loan for the Joneses on their home with Greenpoint
7 Mortgage. Thereafter, there were refinancings of the Joneses'
8 property in 2002 and 2003 through Lanes. In 2004 the Joneses
9 arranged their own transaction with Wells Fargo.

10 Meanwhile, in late Spring, 2005 Lanes purchased property on
11 Los Coches Road. His plan was to build a first house, then split
12 the property into three parcels, then build out the other two.
13 He testified that he borrowed the money from Hendrickson to
14 purchase the land, paying \$100,000 down and giving Hendrickson
15 a \$395,000 note secured by other land on Dehesa Road.
16 Subsequently, debtor arranged a construction loan for the
17 Los Coches property of about \$460,750.

18 The Joneses were interested in putting \$100,000 down to hold
19 a place in a development at Las Vegas Motor Speedway. To do
20 that, they would need to borrow against their home yet again.
21 Debtor also needed additional funds, and when the appraisal came
22 back at \$1.1 million, discussions ensued about the Joneses
23 applying for more than they needed so they could loan debtor
24 \$240,000, later increased to \$250,000. The Joneses did agree to
25 loan Lanes \$250,000 from the excess loan proceeds. The total
26 loan was for \$880,000, and was processed through Lanes' Blossom

1 Valley Mortgage. When the loan closed, the prior debts against
2 the Jones' property were retired, and \$351,000 remained. Lanes
3 forwarded the \$100,000 to the Las Vegas project, received
4 \$250,000 himself, and the Joneses received what was left.

5 The Joneses testified they had a different understanding
6 than Lanes about the duration of the loan. They said they
7 understood Lanes just needed a short term loan of 60-90 days over
8 which the funds would be on deposit in his accounts, all to make
9 his balance sheet look better. Lanes testified the duration
10 of the loan was to be a maximum of three years, or less if the
11 Los Coches lot split and additional two homes were completed
12 sooner.

13 The different understandings about the duration of the loan
14 surfaced early, in part because Mrs. Jones was starting up her
15 own dental lab. The \$880,000 loan closed around April 19, 2006.
16 Mr. Jones testified he contacted Lanes and asked for some of the
17 loan back. He said he had to put pressure on Lanes, but Lanes
18 did come through. On June 15, 2006, less than two months after
19 the loan was made, Lanes provided a personal check for \$31,875.
20 Thirty thousand of that amount was a paydown on the loan
21 principal, to \$220,000. The other \$1,875 constituted a monthly
22 interest payment from Lanes to the Joneses for the portion of the
23 \$880,000 loan that was attributable to the portion Lanes
24 received.

25 Apparently, one of the loan terms that is not disputed
26 between the Joneses and Lanes is that he would pay them a portion

1 of their monthly mortgage payment in relation to the amount he
2 borrowed as a portion of the total debt. The loan itself was a
3 10 year fixed rate, interest payment only loan. The record
4 established that Lanes made payments each month starting in May
5 2006, through May 1, 2008. Indeed, Mr. Jones testified his wife
6 opened a special account to put those payments in.

7 The complexities of this case are compounded by the unusual
8 nature of the subject loan and the lack of signed documentation
9 supporting it. For example, in the escrow instructions for the
10 \$880,000, there is nothing suggesting any of the proceeds were
11 authorized to be distributed to Lanes. Lanes contended at trial
12 that this was an informal "handshake" loan. Yet he also insists
13 it was for up to 3 years in duration and, during discovery of his
14 files copies of unsigned promissory notes and nonrecorded trust
15 deeds were found. Lanes testified that all of those documents
16 were provided by him to the Joneses, while they deny seeing any
17 until the note for \$190,000 dated May 16, 2007, more than a year
18 after the loan was made. (Ex. 97).

19 Debtor's version is that the loan always was intended to be
20 three years or less, and that he agreed to pay an interest
21 portion during the life of the loan. Moreover, he agreed to
22 repay up to \$100,000 on not less than two weeks notice. Further,
23 he always intended that the Joneses would be secured by an
24 interest in the Los Coches property, but he could not record that
25 security interest until the construction financing was finished
26 and the completion notice was issued. He testified that he

1 instructed his staff accordingly, but that his staff failed to
2 ever record the trust deed in favor of the Joneses.

3 The testimony and documentary evidence at trial establishes
4 that Lanes owed a \$460,750 construction loan to National City
5 Bank on the Los Coches property, which was also to provide
6 security for the Joneses. In addition, he owed Hendrickson
7 \$395,000 for the money to purchase Los Coches, but that debt was
8 secured by property on Dehesa Road. When the first house on
9 Los Coches was completed, debtor obtained an appraisal setting
10 the value of Los Coches at \$765,000. That was the "as is" value,
11 but debtor believed its value was higher because of the lot split
12 potential and additional homes. In any event, debtor proceeded
13 to borrow against the Los Coches property, first to \$612,000,
14 then an additional \$78,000, and as of November, 2006 there was
15 over \$1.1 million recorded as debt on the Los Coches property,
16 not including the \$220,000 owed to the Joneses. In none of the
17 loan applications submitted by Lanes did he disclose the debt to
18 the Joneses, whether as secured or unsecured debt. He testified
19 that the nature of the loans themselves did not require that
20 information, and that he used his credit report to complete the
21 application, which would not have included the private,
22 unrecorded loan to him from the Joneses.

23 The Joneses continued to press Lanes for repayment, while
24 Lanes continued to pay the monthly fractional interest payments.
25 On or about May 16, 2007 Lanes paid them another \$40,000. At the
26 same time, he presented them with a promissory note for \$190,000,

1 signed by him, and reciting it was secured by a deed of trust on
2 Los Cochés. The Joneses testified this was the first promissory
3 note they had seen and first time they realized that Lanes would
4 not be required to repay the balance for almost two more years.
5 Finally, in about May, 2008 Lanes met with the Joneses at their
6 home, told them his financial world had collapsed, that he could
7 not make any more payments, and intended to file bankruptcy. The
8 Joneses seek a judgment that Lanes owes them \$180,000 plus
9 interest from May, 2008, and that that debt is nondischargeable
10 under 11 U.S.C. § 523(a)(2), (a)(4), and (a)(6).

11 One of the Joneses' contentions in arguing
12 nondischargeability is that Lanes had a duty to disclose the true
13 state of his financial condition at the time he requested the
14 loan. However, to be a ground for nondischargeability statements
15 - or failure to disclose - financial condition must be in
16 writing, and must have been reasonably relied upon. Since there
17 is no writing, as § 523(a)(2)(B) requires, the claim must fail.

18 Turning to § 523(a)(2)(A), it provides that a debt "for
19 money . . . to the extent obtained, by - (A) false pretenses, a
20 false representation, or actual fraud, other than a statement
21 respecting the debtor's . . . financial condition" is not
22 discharged. The Joneses have failed to carry their burden of
23 proof that the loan was made in reliance on false pretenses or
24 representations. While there is a factual dispute about the
25 agreed duration of the loan, the separate account and monthly
26 interest payments suggest the Joneses understood the loan would

1 run longer than 60 - 90 days. The Joneses offered no explanation
2 for why such a procedure would be set up for only 2 - 3 monthly
3 payments.

4 The Court is persuaded, however, that the loss of \$180,000
5 plus interest by the Joneses was the result of actual fraud by
6 Lanes. Lanes testified that while he intended to secure the debt
7 to the Joneses with a junior deed on the Los Coches property, he
8 knew he could not record it until he received the completion
9 notice on the first house without jeopardizing his construction
10 financing. Lanes did not discuss how the proposed lot split and
11 possible construction financing for the other two houses would
12 have affected a trust deed in favor of the Joneses. But
13 regardless of that, when he received the completion notice, the
14 trust deed to the Joneses was not recorded. Lanes testified he
15 told his staff to record it when the construction financing was
16 completed, and his staff's error resulted in the Joneses' loss,
17 not his. Instead, a deed in favor of Hendrickson, to replace the
18 Dehesa Road security, was inadvertently recorded on Los Coches,
19 leaving no collateral value for the Joneses, who would then be in
20 junior position. The Court is not persuaded by Lanes'
21 contentions. Even assuming such a series of major mistakes
22 occurred in his office, Lanes had to know the Joneses' trust deed
23 was not recorded against the property when he sought to borrow
24 against it. In borrowing, Lanes was looking to draw cash out
25 from new loans, with new appraisals. In order to draw cash out,
26 both he and the lender needed to know what debt against the

1 property was of record. That, plus the appraisal, plus the
2 lender's loan-to-value ratio, would determine how much he could
3 borrow. He had to know there was no record of any debt for
4 \$220,000 in favor of the Joneses when he borrowed against the
5 Los Coches property in the Fall of 2006, all before the
6 Hendrickson trust deed was recorded in November, 2006. With
7 all that in mind, Lanes' failure to disclose the debt owed to
8 the Joneses on any of his Summer-Fall 2006 loan applications
9 suggests his intentions of unilaterally subordinating his
10 obligation to the Joneses to many other things he wanted to do.

11 The Court finds and concludes that the foregoing constitutes
12 actual fraud by Lanes against the Joneses, and therefore the debt
13 owed to them is nondischargeable under 11 U.S.C. § 523(a)(2)(A).

14 The same facts support nondischargeability under
15 § 523(a)(6), which imposes the requirements that Lanes' conduct
16 be both willful and malicious. Those are separate requirements.
17 In re Su, 290 F.3d 1140, 1146-47 (9th Cir. 2002). In this
18 Court's view, debtor Lanes knew he had issued trust deeds to his
19 commercial lenders as well as his private lenders - Hendrickson
20 and the Joneses. Issuing those trust deeds were willful acts,
21 whether recorded or not. Moreover, the acts were malicious
22 within the meaning of § 523(a)(6) because Lanes had to know there
23 was not sufficient contemporaneous value in the Los Coches
24 property to fully secure both the commercial lenders and his
25 private lenders. Recording of the private trust deeds - or
26 failure to record - is not the issue. Recording protects the

1 beneficiary against the world, but failure to record still leaves
2 an otherwise enforceable agreement as between the private lender
3 and Lanes. The malicious element is satisfied by Lanes knowingly
4 issuing promises to repay from collateral he knew at the time
5 could not support the debt. Accordingly, the debt is also
6 nondischargeable under § 523(a)(6).

7 Finally, the Joneses seek nondischargeability under
8 § 523(a)(4) for breach of fiduciary duty. To be sure, Lanes is a
9 fiduciary under applicable California law as a loan broker, real
10 estate agent, and escrow official. Lanes argues this was not a
11 brokered loan, but a private loan, despite the fact that his
12 office took its full one percent commission on the whole \$880,000
13 loan, not the net of \$880,000 minus \$250,000. But that misses
14 the point. A fiduciary under (a)(4) may be different from state
15 law fiduciaries, with a more stringent requirement of a pre-
16 existing trust res. In re Lewis, 97 F.3d 1182, 1185 (9th Cir.
17 1996). Here, the trust res was the trust deed Lanes held to
18 perfect a security interest for the Joneses in the Los Coches
19 property. When Lanes applied for additional funds with Los
20 Coches as collateral, he had to know such borrowings would, at
21 that point in time, leave the Joneses without collateral value,
22 especially with the debt to Hendrickson also in existence. He
23 had a duty not to reduce or eliminate collateral value for the
24 security he claims he gave them with the unrecorded deed of

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26 ///

1 trust. That was wrongful conduct on his part and makes the
2 debt he owes to the Joneses nondischargeable under 11 U.S.C.
3 § 523(a)(4).

4 Conclusion

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6 For all the foregoing reasons, the Joneses are entitled to
7 judgment in the principal amount of \$180,000 plus interest to the
8 date of judgment herein at ten (10) percent. Post-judgment,
9 interest shall accrue at the federal post-judgment interest rate.
10 The full amount of the debt plus interest as set out herein is
11 nondischargeable under 11 U.S.C. § 523(a)(2)(A), (a)(4), and
12 (a)(6).

13 Counsel for plaintiffs shall prepare a separate form of
14 judgment consistent with the foregoing, and lodge and serve it
15 within twenty (20) days of the date of this Memorandum Decision.

16 IT IS SO ORDERED.

17 DATED: JUL 19 2010

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19 
20 PETER W. BOWIE, Chief Judge
United States Bankruptcy Court