

1 **WRITTEN DECISION - NOT FOR PUBLICATION**

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3 ENTERED 8/24/12  
4 FILED  
5 **AUG 24 2012**  
6 CLERK, U.S. BANKRUPTCY COURT  
7 SOUTHERN DISTRICT OF CALIFORNIA  
8 BY 152 HLS DEPUTY

9 UNITED STATES BANKRUPTCY COURT  
10 SOUTHERN DISTRICT OF CALIFORNIA

11 In re ) Adversary No. 10-90372-PB  
12 TANYA SHUKIN, )  
13 Debtor. ) ORDER  
14 \_\_\_\_\_ )  
15 BRONIA GENIN, )  
16 Plaintiff, )  
17 v. )  
18 TANYA SHUKIN, aka TANYA SHUKINA, )  
19 aka TANTIANTA CHOUKINA, )  
20 Defendants. )

21 This adversary proceeding took an unusual path in that  
22 debtor's bankruptcy case was filed in the Western District of  
23 New York, after debtor moved there from the San Diego area.  
24 Plaintiff Genin had commenced suit in the California Superior  
25 Court prior to the bankruptcy filing, and brought this adversary  
26 proceeding seeking a determination of nondischargeability in the

1 Western District of New York, as well. Thereafter, plaintiff  
2 moved for a change of venue to San Diego in the adversary  
3 proceeding, which was granted.

4 Pretrial proceedings were conducted with debtor appearing by  
5 phone, and trial was set for dates when debtor represented she  
6 could appear, in person, in San Diego. As in other cases, the  
7 Court set dates for the parties to exchange witness lists and  
8 copies of all exhibits each side intended to introduce in their  
9 respective cases in chief. In addition, the Court set a deadline  
10 for filing and serving any trial brief. Plaintiff, through her  
11 attorneys, timely complied with each of the Court's requirements.  
12 Debtor complied with none.

13 This adversary then came on regularly for trial on  
14 August 23, 2012. Plaintiff and her counsel were present, with  
15 witnesses, and were prepared to proceed. There was no appearance  
16 by or on behalf of the debtor, nor were any communications  
17 received from the debtor regarding her non-appearance. The  
18 Court thereafter asked counsel for plaintiff for an offer of  
19 proof as to the elements of nondischargeability under  
20 11 U.S.C. § 523(a)(2)(A), and as to plaintiff's damages. After  
21 that was provided in open court, the matter was taken under  
22 submission.

23 As stated in In re Britton, 950 F.2d 602, 604 (9<sup>th</sup> Cir.  
24 1991):

25 The Ninth Circuit has employed a five-part test  
26 for determining when a debt is nondischargeable under  
section 523(a)(2)(A). The creditor must show that:

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- 2 (1) the debtor made the representations;
- 3 (2) that at the time he knew they were false;
- 4 (3) that he made them with the intention and  
purpose of deceiving the creditor;
- 5 (4) that the creditor relied on such representations;
- 6 (5) that the creditor sustained the alleged loss  
7 and damage as the proximate result of the  
8 representations having been made.

9 Subsequent to the Britton decision, the Ninth Circuit held  
10 that the level of reliance required under § 523(a)(2)(A) is  
11 "justifiable", not "reasonable". In re Kirsh, 973 F.2d 1454  
12 (1992). The Supreme Court subsequently so held, as well, in  
13 Field v. Mans, 516 U.S. 59 (1995). As reiterated by the Ninth  
14 Circuit in In re Apte, 96 F.3d 1319, 1322 (1996):

15 "[A] person is justified in relying on a  
16 representation of fact 'although he might have  
17 ascertained the falsity of the representation had  
18 he made an investigation.'" [Citation omitted].  
19 Although one cannot close his eyes and blindly  
rely, mere negligence in failing to discover an  
intentional misrepresentation is no defense to  
fraud,

20 The uncontroverted evidence is that debtor befriended  
21 Mr. And Mrs. Genin, an elderly couple of Russian origins.  
22 Mr. Genin was frail and in a wheelchair. Debtor is also of  
23 Russian origin. Debtor approached the Genins in the Fall of 2004  
24 about a loan to improve real estate at 2341-2345 Manchester Ave.  
25 She said she needed the money to prepare the property for sale,  
26 and that their money would be protected by a trust deed on the

1 property, thus representing there was value in the property to  
2 which their deed of trust would attach. In fact, the property  
3 was under water, with no value left for the Genins after senior  
4 debt was satisfied.

5       Aside from that representation of value, debtor also  
6 represented what the loaned funds would be used for. However,  
7 they were not so used. The initial loan by the Genins was made  
8 on November 2, 2004, in the principal amount of \$120,000, at 10%  
9 interest, for a one year term. Debtor was obligated to pay \$500  
10 per month toward interest over that period, and she did make some  
11 payments on this and the other loans. Debtor did provide a  
12 promissory note and deed of trust on the first loan.

13       Shortly thereafter, debtor told the Genins she needed more  
14 money to fix some problems on the property. On January 21, 2005  
15 she borrowed another \$75,000, for a 13 month term, at 10%  
16 interest, with interim payments to be made of \$350 per month.  
17 She gave the Genins another promissory note and trust deed on the  
18 Manchester property, although the trust deed was not recorded for  
19 over three months.

20       Just over two months later, debtor borrowed another \$130,000  
21 from the Genins. Debtor provided a promissory note and deed of  
22 trust dated March 30, 2005. That trust deed was not recorded  
23 until May 8, 2006. In the meantime, debtor granted a security  
24 interest in the same property to Kristina Zinovieva. The deed  
25 of trust was dated November 15, 2005 and was not recorded until

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1 May 2, 2006. Still, the latter was recorded before the  
2 March 30, 2005 trust deed given the Genins.

3 Still more curious is a trust deed from debtor to Kristina  
4 Zinovieva, purportedly dated August 9, 2005, but not notarized  
5 until June 8, 2006 and recorded the same date, to secure an  
6 interest in the same real property. Plaintiff asserts without  
7 controversion by debtor that Kristina Zinovieva is debtor's  
8 daughter.

9 The final "borrowing" is more complex. After persuading the  
10 Genins to borrow money to purchase a lot, the debtor arranged for  
11 her daughter to purchase it from a putative partnership between  
12 debtor and the Genins. The net proceeds exceeded \$102,000, and  
13 the Genins' share was \$51,112. Instead of paying those funds to  
14 the Genins, debtor gave them yet another promissory note and  
15 another trust deed on the Manchester property. The trust deed  
16 was dated March 14, 2006, and recorded April 10, 2006. The note  
17 was due and payable August 15, 2007.

18 As a threshold matter, debtor's failure to comply with this  
19 Court's stated requirements of exchanging a witness list and a  
20 copy of all exhibits to be offered in her case-in-chief permits  
21 the Court to enter judgment in plaintiff's favor pursuant to  
22 Bankruptcy Local Rule 7016-11, for abandonment of her position.

23 Further, plaintiff's offer of proof established that  
24 Mrs. Genin would testify to the representations debtor made about  
25 the use to which the loan proceeds would be put (improving the  
26 property securing the loans) and about debtor's representations

1 concerning the safety and protection of the loaned funds as  
2 represented by the deeds of trust.

3 Plaintiff's trial exhibits, received without opposition,  
4 show that debtor had granted trust deeds on the 2341 Manchester  
5 property to KST Associates on February 6, 2004 and  
6 March 15, 2004, for a total of \$75,000. On May 11, 2004  
7 she gave a note and trust deed to Univest Mortgage for \$675,000.  
8 So the 2341 property was already encumbered by at least \$750,000  
9 before debtor asked the Genins for the first loan.

10 The property at 2345 Manchester was encumbered by a loan  
11 of \$560,000 from Pacific West Syndication, and a trust deed  
12 dated December 12, 2002, recorded December 31, 2002. That was  
13 followed by another \$40,000 debt on December 9, 2003, recorded  
14 December 22, 2003. Then, on April 12, 2004 debtor borrowed  
15 \$675,000 from Saxon Mortgage. The trust deed was recorded  
16 April 28, 2004. That loan presumably paid off the Pacific West  
17 loans. It appears 2345 was thus encumbered by at least \$675,000  
18 before debtor approached the Genins.

19 Based on all the foregoing, the Court finds and concludes  
20 that the debts owed by debtor Shukin to Mrs. Genin are  
21 nondischargeable. Further, the Court finds and concludes that  
22 the Court has authority to enter a money judgment incident to  
23 determination of nondischargeability. In re Sasson, 424 F.3d 864  
24 (9<sup>th</sup> Cir. 2005); In re Kennedy, 108 F.3d 1015 (9<sup>th</sup> Cir. 1997).

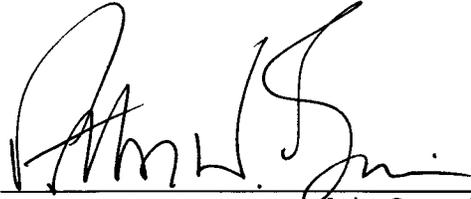
25 Mrs. Genin has established that the Genins made loans to  
26 Ms. Shukin totalling \$376,112. Each of the promissory notes

1 provided for 10% interest per year. Mrs. Genin acknowledges  
2 debtor made some payments, and Mrs. Genin has agreed to accept  
3 debtor's representation, made pretrial, that debtor made a total  
4 of \$31,970 in payments. Including interest on each of the notes,  
5 Mrs. Genin seeks a net award of \$627,971.21, which reflects the  
6 loan principal plus 10% simple interest, minus the payments  
7 Mrs. Genin has agreed to credit debtor with having made.

8 Counsel for plaintiff shall prepare and submit a separate  
9 form of judgment consistent with the foregoing within twenty-one  
10 days of the date of entry of this Order, and providing for a  
11 judgment in the amount of \$627,971.21, plus costs as assessed  
12 upon application to the Clerk of Court. From date of entry of  
13 said judgment, it shall accrue interest at the federal post-  
14 judgment rate as applicable, until paid in full. Said judgment  
15 shall be nondischargeable under 11 U.S.C. § 523(a)(2)(A).

16 IT IS SO ORDERED.

17 DATED: AUG 24 2012

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