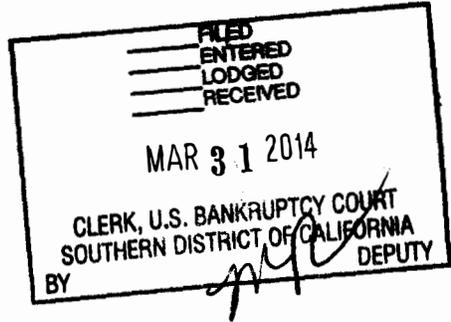


WRITTEN DECISION – FOR PUBLICATION



UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF CALIFORNIA

13	In re:)	BANKRUPTCY NO: 12-12625-MM7
14	MICHAEL YAIKIAN,)	CHAPTER: 7
15)	
16	Debtor,)	ADV. PROC. 12-90431-MM
17)	MEMORANDUM DECISION
18	KARAPET YAIKIAN,)	DATE: February 12, 2014
19	Plaintiff,)	TIME: 9:30 a.m.
20)	CRTRM: 1
21	v.)	
22	MICHAEL YAIKIAN,)	JUDGE: Margaret M. Mann
23	Defendant.)	
24)	

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1 This case involves a father, Karapet Yaikian ("Karapet"),¹ who sued his son, Michael
2 Yaikian ("Michael"), for fraud; first in state court resulting in a stipulated judgment, and then in
3 this Court when Michael filed bankruptcy. Karapet's conduct observed and recounted at trial did
4 not reflect high personal standards, and included arson, bribery of prison officials, evading
5 collection of a restitution judgment, intentionally misleading immigration authorities, and
6 submitting a false declaration in this case. Karapet also contradicted himself on the witness
7 stand, suffered from significant memory lapses, was evasive as a witness, and even appeared to
8 sleep during some of the proceedings. The clearly biased testimony of Karapet's state court
9 counsel did not assuage these credibility problems. Certain of Michael's actions, such as
10 maintaining inadequate records and not reading the documents he signed, may not have been
11 according to Hoyle, but on balance, Michael's testimony was largely credible.

12 While the Court thus can easily conclude Karapet failed to carry his burden of proving
13 his nondischargeability claims, *Grogan v. Garner*, 498 U.S. 279, 283 (1991) (burden of proof on
14 the plaintiff), it must still address issue preclusion. Karapet and Michael had stipulated to
15 judgment in state court on both breach of contract and fraud grounds, and also that the stipulated
16 judgment would be nondischargeable in bankruptcy. Karapet based his claims on Michael's
17 admission of fraud in state court, and later asserted that the fraud stipulation should be afforded
18 preclusive effect. Given Karapet's credibility challenges, issue preclusion is the only ground on
19 which he could prevail, and may be outcome determinative. *See also Gayden v. Nourbakhsh (In*
20 *re Nourbakhsh)*, 67 F.3d 798, 801 (9th Cir. 1995) (per curiam) ("The full faith and credit
21 requirement of [28 U.S.C.] § 1738 compels a bankruptcy court in a § 523(a)(2)(A)
22 nondischargeability proceeding to give collateral estoppel effect to a prior state court
23 judgment.").

24 Karapet also has the burden of proof on the preclusion issue, but fails to sustain it.
25 Generally, stipulated judgments in California are afforded claim preclusive effect, but not issue
26 preclusive effect. The reason is that these judgments are the product, not of litigation but of

27 ¹ The Court will refer to the parties, who are all family members and share a surname, by their
28 given names to avoid confusion. It intends no disrespect by this reference.

1 negotiation. The role of the state court in entering the judgment on a stipulation is more
2 circumscribed so that unless the state court record reflects that it considered evidence of the
3 wrongdoing at issue, the substantive issues are neither actually nor necessary decided by the state
4 court. While stipulated judgments can preclude relitigation of specified issues if the parties make
5 that intent sufficiently clear, the evident goal of Karapet's stipulated judgment was only to
6 except Michael's debt from discharge in bankruptcy. This intention cannot be enforced by this
7 Court as a matter of public policy. Because issue preclusion does not apply here, this case will be
8 decided on the evidence at trial that Michael did not defraud his father.

9 **I. JURISDICTION**

10 This Court has jurisdiction under 28 U.S.C. §§ 157 and 1334(b), and constitutional
11 authority to enter a final judgment in this action. *Deitz v. Ford (In re Deitz)*, 469 B.R. 11, 24
12 (B.A.P. 9th Cir. 2012) (citing *Sasson v. Sokoloff (In re Sasson)*, 424 F.3d 864, 867 (9th Cir.
13 2005)). This dischargeability matter was identified as statutorily core, and the parties also
14 implicitly consented to the Court's final adjudication of it. *Exec. Benefits Ins. Agency v. Arkison*
15 (*In re Bellingham Ins. Agency*), 702 F.3d 553 (9th Cir. 2012), *cert. granted by* 133 S. Ct. 2880
16 (2013).

17 **II. FINDINGS OF FACT**

18 In the fall of 2002, Michael's parents, Maria and Karapet began divorce proceedings in
19 which restraining orders were issued against Karapet. The restraining orders and Karapet's severe
20 alcoholism made it difficult for him to retain any role in the family business, San Diego Country
21 Caterers, Inc. ("SDCC") in which Michael had also worked since the age of 15 and was owned
22 by Michael and his parents. SDCC serviced catering trucks and also owned a gas station in Chula
23 Vista, California. To facilitate the divorce and extricate Karapet from the business, Michael as
24 the president of SDCC and his parents began negotiating a Stock Repurchase Agreement
25 ("SRA"). Karapet was assisted by separate counsel. Under the SRA, Karapet was promised
26 lifetime financial support from SDCC in exchange for his sale of his interests in SDCC back to
27 the corporation.
28

1 The final version of the SRA was not signed until March 13, 2003, about a half year after
2 the negotiations began, because Karapet repeatedly evaded signing it. Despite this later execution
3 date, the SRA was expressly made effective as of December 31, 2002. The support SDCC agreed
4 to provide to Karapet constituted weekly payments of \$750 plus health insurance for life, and
5 advance notice to Karapet if the assets of SDCC were later sold. Although they were individual
6 parties to the SRA, Michael and Maria had no direct payment obligations under the SRA. They
7 did, however, personally guarantee SDCC's obligations under the SRA. After the SRA was
8 signed, SDCC made 12 of the required payments to Karapet and also provided health insurance.

9 Despite the adversarial nature of his parent's divorce, Michael remained on friendly terms
10 with Karapet. When Karapet was required to move out of the family home in the fall of 2002, he
11 moved in with Michael before moving to Los Angeles to live with Karapet's sister.

12 In January 2003, after the effective date of the SRA but before it was signed, Karapet for
13 "secret" reasons set fire to Maria's house with gasoline. Karapet explained that he was angry
14 about losing the house in the divorce. Twelve people, including Michael, Maria and other family
15 members, were present inside when the fire was set. Everyone inside managed to escape and no
16 one was harmed, but Karapet was arrested and charged with arson.

17 Karapet underwent detoxification for his alcoholism in a substance abuse treatment
18 program called the Etheridge Center in April 2003. While there, Karapet severely burned his
19 foot, and he was hospitalized in June for that problem and also for pneumonia and delirium
20 tremors from detox. He suffered a heart attack while hospitalized and remained there for a
21 month. Karapet later sued the Etheridge Center, and the case was settled for an undisclosed
22 amount. Michael remained supportive of his father and paid the legal fees and assisted the
23 prosecution of that civil suit.

24 After pleading guilty in August 2003 to the arson charges, Karapet was sentenced to three
25 years in prison. A \$350,000 restitution judgment was entered against him as part of the criminal
26 proceedings. Michael assisted his father's criminal defense by testifying at his sentencing
27 hearing. Karapet served three years in prison and then about a year in detention by immigration
28 authorities while awaiting deportation to Armenia. Karapet proudly testified that he manipulated

1 the immigration authorities to falsely believe he was too sick to travel due to risk of death, and
2 thereby secured his release from detention in 2007 instead of being deported to Armenia.

3 Michael remained an attentive son while Karapet remained in custody, visiting Karapet
4 and providing him with care packages, cash, and a Rolex watch. Michael also complied with
5 Karapet's request to pay cash to "Chris," who was somehow involved in the prison system, so
6 that Karapet would secure a more favorable prison assignment. Karapet requested these favors in
7 lieu of the weekly payments required under the SRA because Karapet was concerned that regular
8 payments might be seized to satisfy the restitution judgment. Karapet also did not want Michael
9 to deposit the payments into the joint bank account Karapet shared with his sister out of fear that
10 his sister's son, a methamphetamine addict, would somehow get the money. Neither party kept
11 records of the cash payments, nor was any exact accounting provided. This testimony, largely by
12 Michael, was either corroborated by Karapet or undisputed, so the Court accepts it as true. The
13 record was also clear that the parties were accustomed to dealing in cash in their business.

14 When he was released from custody, Karapet filed a complaint in state court on February
15 6, 2008, against Michael, Maria and SDCC for recovery of the amounts due under the SRA.
16 Karapet alleged breach of contract and numerous other theories including fraud. The state court
17 suit settled in August 2008 with a \$210,000 initial payment that brought Karapet current under
18 the SRA, and SDCC then resumed the \$3,000 monthly payments to Karapet. Michael settled
19 since he had always intended to pay his father under the SRA contract and also sought to save
20 the family business from further disruption from the attachment motions Karapet filed in the
21 state court suit. After the initial payment was made by SDCC under the settlement agreement in
22 September 2008, Karapet dismissed the suit with no judgment being entered. The parties agreed
23 as part of the settlement that upon default a stipulation for entry of judgment signed could be
24 filed to enter a nondischargeable judgment against Michael, Maria and SDCC. The stipulation
25 "stipulated" and "admitted" to both breach of contract and fraud in the inducement regarding the
26 SRA.

27 After SDCC made an additional \$72,000 in payments to Karapet under the settlement,
28 SDCC and Michael encountered financial problems and defaulted in the fall of 2010. Before

1 then, Michael had sold the SDCC gas station in San Diego without complying with the due on
2 sale clause in the SRA and bought a gas station in Los Angeles with the proceeds. Michael
3 moved the family business to Los Angeles where he was living so that he could better protect his
4 mother and sister from his father. The new gas station then failed after problems with a leaky gas
5 tank and the economic decline beginning in 2008.

6 After default, Karapet had the dismissal of the state court case set aside and submitted the
7 stipulation for entry of judgment. At a hearing on November 2, 2010, the state court "accepted"
8 the stipulation and entered judgment without making any independent findings of fraud.

9 Although Michael and his counsel appeared at the hearing, what occurred there is unclear from
10 the record, but there is no evidence Michael testified or that he or his counsel spoke at the
11 hearing. The judgment anticipated liquidating the amount owed under the settlement by an
12 arbitration process that took place the next month. In that arbitration, Karapet argued to the
13 arbitrator that he had an additional 18.5 year life expectancy. To explain the discrepancy between
14 what he told the immigration authorities about his imminent death and the arbitrator about his
15 good health, Karapet testified at trial: "My brain is a computer. I can figure out that." The
16 arbitrator entered an award of \$562,559 that was affirmed by the state court in an amended
17 judgment entered on January 25, 2011. No findings of fraud were made in the arbitration award,
18 either. Rather, the dispute was described as for "Breach of contract and other related causes of
19 action."

20 Michael testified he was not aware that the judgment was for fraud until the
21 nondischargeability action was filed. He considered the action to be for breach of the SRA that
22 he always intended to perform under, and did perform under, until he encountered financial
23 difficulties. Michael testified he only defended the state court suit initially because the complaint
24 demanded more than what was owed under the SRA. There was no evidence that the fraud
25 component of the stipulated judgment was ever discussed with Michael, although there is
26 evidence that the parties' attorneys discussed this issue. The Court notes Michael's relationship
27 with his state court counsel was frayed by the time of the settlement.
28

1 Michael filed for bankruptcy relief under chapter 7 on September 14, 2012, and then
2 Karapet timely filed this adversary proceeding, alleging four causes of action for denial of
3 discharge pursuant to 11 U.S.C. § 727² and one for willful and malicious injury under
4 § 523(a)(6) based upon the fraud admission of the stipulated judgment. The parties did no
5 discovery and were unable to successfully mediate the matter. At the pretrial hearing, Karapet
6 abandoned his § 727 claims and sought to amend his complaint to include a § 523(a)(2) claim
7 based on the stipulated judgment, which the Court permitted, since this claim was based on
8 identical facts as the original complaint.

9 The Court's pretrial order required all testimony to be presented by declaration, subject to
10 cross examination. It also required briefing on the preclusive effect of the state court judgment
11 because Karapet had raised the issue in his complaint. Trial began and concluded on February
12 12, 2014. When Karapet testified at trial he lacked personal knowledge of all of his declaration's
13 content, the Court struck it from the record, but gave Karapet an opportunity to present his case
14 in chief thereafter.

15 **III. CONCLUSIONS OF LAW - PRECLUSION**

16 Although the Latin terms "res judicata" and "collateral estoppel" have historically been
17 used to describe preclusion principles generally, in modern usage these terms have been retitled
18 and their distinct meanings emphasized. "Res judicata" is now referred to as claim preclusion,
19 and "collateral estoppel" is referred to as issue preclusion. The California Supreme Court in
20 *Lucido v. Superior Court*, 51 Cal.3d 335, 341 n.3 (Cal. 1990), recognized the doctrines were
21 sometimes used imprecisely because the "doctrine of collateral estoppel is one aspect of the
22 concept of res judicata." Technically, "claim preclusion" prevents relitigation of the same
23 primary right in a second suit between the same parties or parties in privity with them, while
24 "issue preclusion" precludes relitigation of issues argued and decided in prior proceedings among
25 these parties. *Mycogen Corp. v. Monsanto Co.*, 28 Cal.4th 888, 896 (Cal. 2002) (California law);
26 *see also Taylor v. Sturgell*, 553 U.S. 880, 892 (2008) (federal law).

27
28 ² References to statutory sections for the remainder of this decision will refer to the United States
Bankruptcy Code, Title 11 United States Code, unless otherwise noted.

1 The Court's preclusion analysis will focus on California law where Karapet's fraud
2 judgment arose. *See Kremer v. Chem. Constr. Corp.*, 456 U.S. 461, 482 (1982) (the full faith and
3 credit statute looks to the genesis of the judgment to determine what law to apply); *White v. City*
4 *of Pasadena*, 671 F.3d 918, 926-27 (9th Cir. 2012) (same). The Court will apply each of these
5 preclusion concepts to the stipulated judgment here.

6 A. CLAIM PRECLUSION

7 Claim preclusion generally applies to compromise judgments under California law since
8 the settlement extinguishes the specific causes of action between the parties. *See Travelers*
9 *Indem. Co. v. State Farm Mut. Auto. Ins. Co.*, 330 F.2d 250, 262 (9th Cir. 1964) (a compromise
10 judgment "extinguishes the particular cause of action which the parties were settling" but does
11 not extinguish other claims between parties); *Taylor v. Hawkins*, 47 Cal.2d 893, 895 (Cal. 1957)
12 (the parties' compromise judgment "constitutes a bar to any further prosecution of their original
13 claims"). In *California State Auto. Assn. Inter-Ins. Bureau v. Superior Court*, 50 Cal.3d 658,
14 664 n.2 (Cal. 1990) ("*CSAA*"), the California Supreme Court relied on *Travelers*, 330 F.2d at
15 262, and *Taylor*, 47 Cal. 2d at 896, to hold that a consent judgment between an insurer, the
16 insured and the plaintiff determining liability and damages barred the new claim as a matter of
17 "collateral estoppel." Despite this reference to "collateral estoppel"³ the analysis of the case was
18 actually of claim preclusion, because the holding barred relitigation between the insurer and
19 insured on the issue of liability because the parties were determined to have intended this
20 outcome in their stipulation. *CSAA*, 50 Cal.3d at 664.

21 Although claim preclusion could conceivably apply if a second fraud suit were to be
22 brought by Karapet, it does not apply in this nondischargeability case. *Brown v. Felsen*, 442 U.S.
23 127, 139 (1979). Nondischargeability claims are separate from the fraud and breach of contract
24 claims resolved by a stipulated judgment. *Garner*, 498 U.S. at 284. Determining

25 ³ The reference to "collateral estoppel" in *CSAA* was likely a reference to the subset of claim
26 preclusion mentioned in *Lucido*, 51 Cal.3d at 341 n.3, because *CSAA* relied upon the classic
27 definition of claim preclusion identified in *Taylor*, 47 Cal. 2d at 896, to bar the insurer's attempt
28 to relitigate the issue of liability. As interpreted by later cases, the effect of *CSAA* on the issue
preclusion analysis for consent judgments is to require that the intent of consent judgments be
assessed. *Tennison v. Cal. Victim Comp. & Gov't Claims Bd.*, 152 Cal.App.4th 1164, 1176-77
(1st Dist. 2007). The Court does so in the issue preclusion section of this decision.

1 nondischargeability of debts is also the exclusive province of this Court, which must look behind
2 a state court settlement to determine if the underlying debt arose from fraud. *See Archer v.*
3 *Warner*, 538 U.S. 314, 323 (2003) (creditor's settlement judgment is not a novation obviating the
4 bankruptcy court's independent assessment of dischargeability).

5 **B. ISSUE PRECLUSION**

6 Unlike claim preclusion, issue preclusion may apply to a dischargeability claim. *See*
7 *Garner*, 498 U.S. at 284 n.11 ("We now clarify that collateral estoppel principles do indeed
8 apply in discharge exception proceedings pursuant to § 523(a)."). Six criteria must be met for
9 issue preclusion to apply to a California judgment under *Lucido*, 51 Cal.3d at 341-43: (1) the
10 issue "must be identical to that decided in a former proceeding"; (2) it "must have been actually
11 litigated in the former proceeding"; (3) it "must have been necessarily decided in the former
12 proceeding"; (4) "the decision in the former proceeding must be final and on the merits"; (5) "the
13 party against whom preclusion is sought must be the same as, or in privity with, the party to the
14 former proceeding"; and (6) application of issue preclusion must be consistent with the public
15 policies of "preservation of the integrity of the judicial system, promotion of judicial economy,
16 and protection of litigants from harassment by vexatious litigation." Whether the elements of
17 issue preclusion are met is a factual issue on which Karapet has the burden to "introduce a record
18 sufficient to reveal the controlling facts and pinpoint the exact issues litigated in the prior
19 action." *Kelly v. Okoye (In re Kelly)*, 182 B.R. 255, 258 (B.A.P. 9th Cir. 1995); *Berr v. FDIC (In*
20 *re Berr)*, 172 B.R. 299, 306 (B.A.P. 9th Cir. 1994). This burden is made weightier by the
21 presumption against applying issue preclusion in nondischargeability cases. *Honkanen v. Hopper*
22 *(In re Honkanen)*, 446 B.R. 373, 384 (B.A.P. 9th Cir. 2011).

23 Taking the issue preclusion elements in turn, the first (identical issue) is met because
24 fraud and nondischargeability under § 523(a)(2)(A) have identical elements. *Younie v. Gonya (In*
25 *re Younie)*, 211 B.R. 367, 374 (B.A.P. 9th Cir. 1997), *aff'd*, 163 F.3d 609 (9th Cir. 1998). The
26 fourth (decision is final) and fifth (same parties) elements are undisputed. The second (actually
27 litigated), third (necessarily litigated) and sixth (public policy concerns) elements remain to be
28 analyzed to determine if the stipulated judgment should have issue preclusive effect.

1 In California, compromise settlements entered under Cal. Code Civ. Pro § 998 do not
2 have issue preclusive effect because they are not the product of actual litigation, and factual
3 issues germane to the merits are not determined by the court. *See Eichman v. Fotomat Corp.*, 759
4 F.2d 1434, 1437 (9th Cir. 1985) (finding no preclusive effect in the context of a Cal. Code Civ.
5 Pro. § 998 settlement). As stated in *Milicevich v. Sacramento Medical Center*, 155 Cal.App.3d
6 997, 1004 (Cal. App. 3d Dist. 1984) (internal citations and quotations omitted):

7 "Compromise" connotes mutual concessions; it reflects the
8 settling parties' temporal resolution of the risks of suit as between
9 them. A compromise agreement does not as such constitute an
10 adjudication of either liability or damages. The language
11 "compromise settlement" makes it clear that the element of
12 litigated issues is absent, and that the judgment cannot be used as
13 a collateral estoppel.

14 Even outside of the Cal. Code Civ. Pro § 998 context, the inability of consent judgments
15 to satisfy the *Lucido* actual and necessary elements has resulted in these judgments being denied
16 issue preclusive effect. *See Tennison*, 152 Cal.App.4th at 1176-77 (stipulation of factual
17 innocence created "serious doubts" that the issue was necessarily litigated and should not bar a
18 later compensation claim due to lack of any evident intent to affect the later proceeding as
19 required by *CSAA*, 50 Cal.3d at 664); *Landeros v. Pankey*, 39 Cal.App.4th 1167, 1172 (2d Dist.
20 1995) (warranty of habitability claims not barred in a stipulated judgment for possession in an
21 unlawful detainer action since they had not been litigated and were outside the intent of the
22 stipulation, applying *CSAA*, 50 Cal.3d at 664).

23 The only intent of the stipulated judgment here was to deem Michael's debt to Karapet
24 nondischargeable in a future bankruptcy. Even if this intent could satisfy the second and third
25 elements of California issue preclusion (if applicable despite the holding of *CSAA*, 50 Cal.3d at
26 664 actually applying to claim preclusion), this intent would fail the sixth public policy element
27 of the *Lucido*, 51 Cal.3d at 341, test. Waivers of discharge are not consistent with public policy.
28 *See Continental Ins. Co. v. Thorpe Insulation Co. (In re Thorpe Insulation Co.)*, 671 F.3d 1011,
1026 (9th Cir. 2012) (prepetition waivers of bankruptcy protections unenforceable in plan
confirmation litigation); *Bank of China v. Huang (In re Huang)*, 275 F.3d 1173, 1177 (9th Cir.

1 2002) (waiver of discharge provision unenforceable); *Hayhoe v. Cole (In re Cole)*, 226 B.R. 647,
2 651-55 (B.A.P. 9th Cir. 1998) (discharge waivers violate public policy to provide a debtor a
3 fresh start).

4 The record before this Court does not establish that the stipulation was intended to
5 establish fraud for any reason other than waiver of discharge. The stipulation had no intended
6 impact outside of a future bankruptcy since the state court action was dismissed until Michael
7 defaulted. No findings of fraud of any kind were made by the state court in any event. The initial
8 and the amended judgment entered by the state court passively accepted the stipulation, rather
9 than adopting the facts in the stipulation. The arbitrator, when calculating damages, made no
10 fraud findings, and in fact described the case as primarily a breach of contract action. The fraud
11 referenced in the stipulation was conclusory and devoid of any details of the elements of fraud,
12 particularly reliance and intent to deceive. *See Britton v. Price (In re Britton)*, 950 F.2d 602, 604
13 (9th Cir. 1991) (listing elements of fraud). This lack of detail in the stipulation establishes that
14 there are insufficient facts of fraud for the state court to have made the necessary findings had it
15 tried to do so. *See Cole*, 226 B.R. at 655 (conclusion of fraud not sufficiently detailed to apply
16 issue preclusion). Michael did not testify nor admit to fraud in state court, and then he credibly
17 proved a contrary intention supported by his payment history in his testimony in this Court. *See*
18 *Wank v. Gordon (In re Wank)*, __ B.R. __, 2014 Bankr. LEXIS 389, at *25-27 (B.A.P. 9th Cir.
19 Jan. 29, 2014) (fraud admission in unfiled declaration supporting a consent judgment could not
20 sustain summary judgment on a nondischargeability action). *Cf. Son v. Park*, 2010 U.S. Dist.
21 LEXIS 123068, at *19-20 (N.D. Cal. Nov. 18, 2010) (detailed testimony by debtor of fraud in
22 state court supported grant of summary judgment).

23 Because the state court judgment was not a default judgment but instead arose from a
24 stipulation, the Court cannot independently infer that the state court made findings of fraud that
25 are missing from the record. Such an inference may be appropriate to afford issue preclusive
26 effect to a default judgment based only on fraud, *Younie*, 211 B.R. at 374, but not with a
27 stipulated judgment. There are different procedural bases for each type of judgment. A default
28 judgment requires the state court judge to independently review the evidence including

1 admissions to ensure each element is satisfied. *See Harbour Vista, LLC v. HSBC Mortgage*
2 *Services Inc.*, 201 Cal.App.4th 1496, 1503 n.6 (4th Dist. 2011) (trial court may only enter default
3 judgment after plaintiff produces evidence establishing prima facie case). As is clear from the
4 state court merely "accepting" the stipulated judgment, its role is more limited than in the default
5 context. *See Conservatorship of McElroy*, 104 Cal.App.4th 536, 544 (4th Dist. 2002) (court's
6 role is to ensure clear settlement terms understood by the parties); *Viejo Bancorp, Inc. v. Wood*,
7 217 Cal.App.3d 200, 209 n.4 (4th Dist. 1989) (court's power to make factual determinations is
8 "generally limited to whether the parties entered into a valid and binding settlement agreement").
9 Because California stipulated judgments are not based upon independent findings of the elements
10 of the claim, these findings cannot be inferred.

11 **IV. CONCLUSIONS OF LAW - FRAUD CLAIMS**

12 **A. SECTION 523(A)(2) CLAIM**

13 The elements of fraud to be proven by a preponderance of the evidence to establish a
14 § 523(a)(2)(A) cause of action are: (1) the debtor made representations; (2) he knew that the
15 representations were false at the time they were made; (3) the representations were made with
16 the intention and purpose of deceiving the creditor; (4) the creditor relied on the representations;
17 and (5) the creditor sustained the alleged loss and damage as the proximate result of the
18 representations having been made. *Eugene Parks Law Corp. Defined Benefit Pension Plan v.*
19 *Kirsh (In re Kirsh)*, 973 F.2d 1454, 1457 (9th Cir. 1992). "[F]raudulent intent may be established
20 by circumstantial evidence, or by inferences drawn from a course of conduct." *Devers v. Bank of*
21 *Sheridan (In re Devers)*, 759 F.2d 751, 753-54 (9th Cir. 1985).

22 The fraud alleged here is that Michael guaranteed the SRA, including the due on sale
23 provision, without intending to perform it, inducing Karapet to give up his business for a lifetime
24 of support payments that Michael planned to stop when Karapet was ill and facing prison. These
25 allegations, if proven, could have resulted in the debt being nondischargeable. *See McCrary v.*
26 *Barrack (In re Barrack)*, 217 B.R. 598, 606-07 (B.A.P. 9th Cir. 1998) (false promise to provide
27 security for a loan resulted in nondischargeable judgment). The intention not to perform must be
28 present when the agreement is formed; otherwise only a breach of contract is proven. *See Rubin*

1 *v. West (In re Rubin)*, 875 F.2d 755, 759 (9th Cir. 1989) ("[A] promise made with a positive
2 intent not to perform or without a present intent to perform satisfies § 523(a)(2)(A).");
3 *Strominger v. Giquinto (In re Giquinto)*, 388 B.R. 152, 166 (Bankr. E.D. Pa. 2008) (explaining
4 that "failure to perform as promised, standing alone, gives rise to a case for breach of contract,
5 not actionable fraud."). Karapet here only proved a dischargeable breach of contract.

6 Karapet conceded that the SRA was negotiated in connection with his divorce in the fall
7 of 2002, which was not a time Karapet was particularly vulnerable as established by the
8 chronology of the events. When the SRA became effective at year end 2002, Karapet had not yet
9 burned down the family home, leaving him facing prison. The SRA was signed before Karapet
10 injured himself or became hospitalized. Michael also performed under his guarantee for many
11 years until that became impossible as reflected by the extensive history of payments and other
12 support provided to Karapet: lodging in 2002; \$24,000 and health insurance in 2003; care
13 packages, cash, and a watch while Karapet was in custody; moneys to "Chris;" \$210,000 paid
14 under the settlement; and \$72,000 for two years thereafter. Ultimately, the total paid under the
15 SRA was more than \$320,000. These payments support a benign intent rather than fraud. *See*
16 *Anastas v. Am. Savings Bank (In re Anastas)*, 94 F.3d 1280, 1287 (9th Cir. 1996) (partial
17 payment supports no intent to defraud). Karapet received much of what he was promised over
18 time, and in accordance with his dishonest preferences.

19 The Court concludes Karapet failed to prove intent to deceive or a false promise; each a
20 necessary element of Karapet's § 523(a)(2)(A) claim.

21 **B. SECTION 523(A)(6) CLAIM**

22 Karapet relied on the same fraud in the inducement claims to support his § 523(a)(6)
23 cause of action, alleging Michael's alleged fraud caused him "willful and malicious injury." The
24 "willful" element requires the debtor has a subjective intent to harm or the subjective belief that
25 harm is substantially certain. *Carrillo v. Su (In re Su)*, 290 F.3d 1140, 1144-45 (9th Cir. 2002).
26 The "malicious" element requires that a debtor's intentional injurious act was also without just
27 cause or excuse. *Id.* at 1146-47. Debts incurred by fraud are not necessarily willful and malicious
28 injury. *See Mills v. Gergely (In re Gergely)*, 110 F.3d 1448, 1451 (9th Cir. 1997) (debt from

1 performing an amniocentesis does not constitute willful and malicious injury but remanded on
2 the issue of fraud). But despite the differences between the two causes of action, the same facts
3 constituting fraud may separately support a § 523(a)(6) cause of action for willful and malicious
4 injury. *Romesh Japra, M.D., F.A.C.C., Inc. v. Apte (In re Apte)*, 180 B.R. 223, 231 (B.A.P. 9th
5 Cir. 1995).

6 As explained above, Karapet did not establish that Michael initially guaranteed or later
7 breached the SRA with the intent to injure him. To the contrary, the facts establish that Michael
8 helped his father in myriad ways during Karapet's imprisonment and health problems. There is
9 no credible evidence that Michael had the subjective intent to harm. Absent this necessary
10 element, the Court need not address whether Michael's conduct in stopping payment under the
11 SRA was malicious. The Court nevertheless finds Michael did not act with malice: Michael
12 breached the SRA because his gas station business in Los Angeles failed, leaving him unable to
13 make payments to his father. The Court cannot find malice because the injury to Karapet caused
14 by Michael's breach was neither deliberate nor intentional as required by *Kawaauhau v. Geiger*,
15 523 U.S. 57, 61-62 (1998).

16 Karapet has also failed to prove his § 523(a)(6) claim for fraud.

17 **V. CONCLUSION**

18 Karapet has neither proven his case for fraud nor the preclusive effect of the stipulated
19 judgment. Accordingly, judgment will be entered in Michael's favor on all grounds. Michael is to
20 lodge a judgment consistent with this decision within ten days.

21 Dated: March 31, 2014

22 
23 MARGARET M. MANN, JUDGE
24 United States Bankruptcy Court
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26
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28

**UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF CALIFORNIA
325 West "F" Street, San Diego, California 92101-6991**

In re Michael Yaikian
Bankruptcy Case No. 12-12625-MM7
Yaikian v. Yaikian (In re Yaikian)
Adv. Case No. 12-90431-MM

CERTIFICATE OF MAILING

The undersigned, a regularly appointed and qualified clerk in the office of the United States Bankruptcy Court for the Southern District of California, at San Diego, hereby certifies that a true copy of the attached document, to wit:

MEMORANDUM DECISION

was enclosed in a sealed envelope bearing the lawful frank of the Bankruptcy Judges and mailed to each of the parties at their respective address listed below:

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Said envelopes containing such document were deposited by me in a regular United States mail box in the City of San Diego, in said district on March 31, 2014.



Megan Seliber, Law Clerk