



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

In re:

STEFAN P. KOPCHAK & WYNELL D. KOPCHAK,  
Debtors.

BANKRUPTCY NO. 18-05553-CL13

DIRK CAHAAN,  
Plaintiff.

ADVERSARY NO. 18-90216-CL

v.

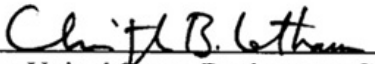
STEFAN P. KOPCHAK & WYNELL D. KOPCHAK,  
Defendants.

Name of Judge: Christopher B. Latham

### **FINDINGS, CONCLUSIONS, AND ORDER AFTER TRIAL**

IT IS HEREBY ORDERED as set forth on the continuation page(s) attached, numbered two (2) through nine (9).

DATED: October 23, 2019

  
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Judge, United States Bankruptcy Court

DEBTORS: STEFAN & WYNELL KOPCHAK  
CAHAAN V. KOPCHAK, ET AL.

Bankruptcy No. 18-05553-CL13  
Adversary No. 18-90216-CL

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Plaintiff Dirk Cahaan filed suit against Defendants Stefan and Wynell Kopchak to except their \$5,148.50 debt to him from discharge under § 523(a)(2)(A). After carefully considering the testimony and other admitted evidence at trial, the court finds that Mr. Cahaan is not entitled to a finding of nondischargeability.

### **Jurisdiction and Venue**

The court has jurisdiction over this adversary proceeding under 28 U.S.C. § 157(b)(2)(I). Venue is proper under 28 U.S.C. § 1409(a).

### **Factual Background**

The Kopchaks hired Mr. Cahaan to sell their property at 1541 Melody Lane, El Cajon, CA 92019 (the “Property”) in June 2017. They also asked him to advance money for home improvements and other repairs to the Property. Mr. Cahaan obliged and generously lent the Kopchaks the sum of \$4,000, for which they agreed to give a trust deed as consideration. Although they accepted the money eagerly, the Kopchaks did not fulfill their end of the bargain – they never executed the trust deed. Now the Kopchaks are seeking to discharge the debt owed to Mr. Cahaan through their Chapter 13 bankruptcy.

### **Procedural History**

#### *Defendants’ Bankruptcy*

On September 14, 2018, the Kopchaks filed a voluntary Chapter 13 petition (Bankr. ECF No. 1). They listed the Property with a fair market value of \$516,000. *Id.* at p. 10. And they scheduled Mr. Cahaan as a creditor with a disputed, unsecured \$4,500 debt. *Id.* at 22. Mr. Cahaan timely filed a \$5,148.50 proof of claim (Claim No. 5-1). The Kopchaks did not object to it.

#### *Defendants’ Adversary Proceeding*

Mr. Cahaan brought this adversary proceeding to hold his \$5,148.50 debt nondischargeable under §§ 523(a)(2)(A) and (a)(2)(B). The Kopchaks moved to dismiss, or alternatively, for a more definite statement (ECF No. 8). Since the complaint did not allege that the Kopchaks gave any written statement concerning their financial condition, the court dismissed the § 523(a)(2)(B) claim with leave to amend (ECF No. 14). It, however, denied the motion as to the § 523(a)(2)(A) cause of action. *Id.* And it denied the alternative Rule 12(e) motion. *See id.* The § 523(a)(2)(B) claim was stricken from the complaint. *Id.* Mr. Cahaan did not seek to amend.

At the outset, the parties wanted to proceed immediately to trial. So the court deemed the Kopchaks’ obligation to provide an answer satisfied through their assertions and denials at the March 20, 2019 pre-trial status conference and in their motion to dismiss (ECF No. 16). It then delivered an oral pre-trial order from the bench. *Id.* And the parties exchanged exhibits for trial

DEBTORS: STEFAN & WYNELL KOPCHAK  
CAHAAN V. KOPCHAK, ET AL.

Bankruptcy No. 18-05553-CL13  
Adversary No. 18-90216-CL

and discussed potential witnesses. *Id.* The court set the matter for trial on April 4, 2019. *Id.*; see also ECF No. 17. That date was soon changed to May 2, 2019 due to a scheduling conflict (ECF No. 18). The court eventually set an August 2019 trial.

Ultimately, mediation was not successful. So the case proceeded to trial. The Kopchaks retained an attorney, Gerald E. Smith (ECF No. 32). Mr. Cahaan remained pro se.

#### *Trial Evidentiary Rulings<sup>1</sup>*

Mr. Cahaan did not file an exhibit list or a witness list (ECF No. 35). The Kopchaks submitted an exhibit list (ECF No. 31) but not a witness list (ECF No. 35). Nevertheless, the court allowed both sides' exhibits and received certain of them in evidence as noted on the record (ECF No. 34).

#### **Factual Findings**

##### *The Parties' History*

The parties have known each other for several years. Mr. Cahaan is a real estate agent. So when the Kopchaks were looking to purchase the house they now live in, they reached out to Mr. Cahaan. They were considering hiring him as their agent for that transaction. They had lost their lease because their landlord had sold the rental property they lived in. Between that time and the purchase of the house, Mr. Cahaan let them and their child live in a trailer or camper that he owned.<sup>2</sup> Yet despite this generosity on Mr. Cahaan's part, the Kopchaks opted to hire a different agent to represent them in the eventual purchase.

##### *The June 8, 2017 Note*

The Kopchaks contacted Mr. Cahaan about selling the Property in April 2017. Soon after, they and he settled on a listing price and jointly determined what upgrade work would be needed to make the house more attractive for marketing. That would mostly involve landscaping improvements, repairs, walkway resurfacing, and yard clean up. The parties figured the work would cost \$2,000 based on a contractor's written estimate (Exhibit 1). But because the Kopchaks did not have sufficient funds – Mrs. Kopchak had recently lost her job – Mr. Cahaan kindly offered to lend them the money to cover the cost, thereby protecting his anticipated commission as well.

So on June 8, 2017, Mr. Cahaan prepared a promissory note (Exhibit 2), which by its terms was to be secured by a trust deed. It called for three monthly \$20 interest-only installments, followed by a balloon payment to be made as part of the sale escrow. When Mr. Cahaan presented the note, the parties went over its terms – including the trust deed requirement. Mr. Cahaan provided a draft \$2,000 trust deed at that time as well. Mrs. Kopchak inquired about what the term “bona fide

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<sup>1</sup> All evidentiary rulings not discussed in this section may be found in the trial record.

<sup>2</sup> The parties differ on whether it was located in the side yard of Mr. Cahaan's house or elsewhere, but the point is immaterial.

DEBTORS: STEFAN & WYNELL KOPCHAK  
CAHAAN V. KOPCHAK, ET AL.

Bankruptcy No. 18-05553-CL13  
Adversary No. 18-90216-CL

---

purchaser” meant in the document, indicating that she had read it closely. The very next sentence contains the trust deed provision.<sup>3</sup> The Kopchaks then signed the note, dated June 8, 2017, and Mr. Cahaan handed them a \$2,000 check based on it (Exhibits 2 & 3). Mrs. Kopchak promptly cashed it.

#### *The June 15, 2017 Note*

The Kopchaks’ financial situation continued to worsen, however. So on June 15, 2017, Mr. Cahaan agreed to a new, larger note for \$4,545 (Exhibit 4, the “Note”). In language identical to the initial note, this one also required the Kopchaks to sign over a trust deed to secure the debt. And Mr. Cahaan provided an updated draft deed in the increased amount of \$4,545.

The Note’s terms allowed the Kopchaks to keep the original \$2,000 *and* called for Mr. Cahaan himself to pay the \$2,000 contractor bill directly. This was because the Kopchaks were in financial difficulty. It also created a \$500 hold-back to aid with moving expenses after escrow closed. Monthly payments were to be \$45 for interest only in July and again in August of 2017. There would then be a \$4,545 balloon payment made through escrow.

The Kopchaks only complaint about the new arrangement was the interest charge (some \$135). In response, Mr. Cahaan agreed to waive all interest if the Kopchaks complied with the new note in every other respect. They then signed the Note, apparently on June 15, 2017 as well.<sup>4</sup>

#### *Renovations to Help Sell the Property*

The renovations in aid of sale started immediately. They included the intended landscaping, miscellaneous repairs, walkway resurfacing, and general yard clean up. Mr. Cahaan paid for all of this directly, as the Note required. The court rejects the Kopchaks’ varying suggestions that he did not really cover this expense or that the work was never done. To the first point, there are two checks drawn on Mr. Cahaan’s business account totaling \$2,700 and made out to the contractor, Hvri Barrera (Exhibits 5 & 6). In addition, photos in evidence plainly show the work done and how it bettered the property’s appearance (Exhibit 11).

From this, the court concludes that Mr. Cahaan fulfilled his duties under the Note – indeed, surpassed them. He paid Herrera \$2,700, not the \$2,000 anticipated. In addition, he voluntarily

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<sup>3</sup> This is further ground for the court’s factual finding below that the Kopchaks were aware of the trust deed requirement by June 8.

<sup>4</sup> In the Note, there is a discrepancy between the signature line – which calls out June 8, 2017 – and the June 15 date in the recitations. The Kopchaks claim that they initialed every page of the Note before signing it. Yet the Note (Exhibit 4) does not contain any initialed sections. The court rejects as unsubstantiated and not credible the Kopchaks’ assertion that Mr. Cahaan either forged their signatures or otherwise modified the new note after the parties’ June 15 meeting. And the Kopchaks did not offer any written proof of that at trial. More to the point, in her testimony Mrs. Kopchak admitted that page 3 of the note she signed was identical to page 3 of Exhibit 4.

DEBTORS: STEFAN & WYNELL KOPCHAK  
CAHAAN V. KOPCHAK, ET AL.

Bankruptcy No. 18-05553-CL13  
Adversary No. 18-90216-CL

---

purchased other supplies and materials for the project as well, totaling several hundred dollars. He thus lost significantly more than the \$4,545 Note amount.<sup>5</sup>

Finally, in connection with renovations, the court notes that the Kopchaks also took out a \$48,000 HERO loan to cover even more improvements, including PV solar panels, synthetic grass, pavers, mulching, and further yard clean up (Exhibit D). But these upgrades were not intended to make the house saleable. The improvements shown in the photos (Exhibit 11), however, were. So far as the Kopchaks are suggesting otherwise, the court rejects the assertion.

*The Kopchaks Refused to Give a Trust Deed*

After paying for – and carrying out – the improvements to market the house, Mr. Cahaan asked the Kopchaks repeatedly for a trust deed (Exhibit 8). Yet they never provided one despite the promise to do so. Mr. Cahaan was notably patient with them, not pressing the Kopchaks after their new baby was born or during the holidays. Still, while acknowledging the \$4,000 in loan money, they steadfastly refused to give over a trust deed.

Here, the trust deed was a material and key part of the parties’ agreement. Mr. Cahaan had insisted on it because he did not entirely trust the Kopchaks after they switched to a new realtor at the last minute when they bought the house they were now selling. He felt, not unreasonably, that the Kopchaks had taken advantage of him.<sup>6</sup>

*The Kopchaks Agreed to Deliver a Trust Deed*

The court rejects the Kopchaks’ assertion that they were unaware at signing that the notes contained a trust deed provision. The operative language is typographically highlighted in bolded and underlined text, after all. Mrs. Kopchak, at least, had read the June 8 document closely given her question as to the meaning of a “bona fide purchaser.” And there is no persuasive evidence that Mr. Cahaan tampered with either note after signing – and certainly no indication that he doctored both of them after the fact. The court credits Mr. Cahaan’s testimony that the notes the Kopchaks signed are the very ones presented in Exhibits 2 and 4.<sup>7</sup> Simply put, a trust deed was promised, and the Kopchaks knew it.

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<sup>5</sup> Mr. Cahaan was not called on to make the \$500 move-out payment, however (since escrow, not being initiated, never closed). Even still, he was out more than \$5,000 not including that component.

<sup>6</sup> For greater security and peace of mind, Mr. Cahaan incorporated the trust deed provision into his standard note (as he had made such loans to other clients to facilitate listings and sales). He now requires it every time.

<sup>7</sup> The court also finds that Exhibit 12, another copy of the Note (this one from Mr. Cahaan’s file), is identical to Exhibit 4. The only apparent differences are due to re-sizing resulting from the photocopying process.

DEBTORS: STEFAN & WYNELL KOPCHAK  
CAHAAN V. KOPCHAK, ET AL.

Bankruptcy No. 18-05553-CL13  
Adversary No. 18-90216-CL

### Legal Standards

Section 523(a)(2)(A) excepts from discharge any debt “arising from ‘false pretenses, a false representation, or actual fraud, other than a statement respecting the debtor’s . . . financial condition.’” *Lamar, Archer & Cofrin, LLP, v. Appling*, 138 S. Ct. 1752, 1758 (2018) (quoting 11 U.S.C. § 523(a)(2)(A)).

The standard for nondischargeability under § 523(a)(2)(A) is well established:

[The Ninth Circuit has] consistently held that making out a claim of nondischargeability under § 523(a)(2)(A) requires the creditor to demonstrate five elements: (1) the debtor made . . . representations; (2) that at the time he knew they were false; (3) that he made them with the intention and purpose of deceiving the creditor; (4) that the creditor relied on such representations; [and] (5) that the creditor sustained the alleged loss and damage as the proximate result of the misrepresentations having been made.

*Ghomeshi v. Sabban (In re Sabban)*, 600 F.3d 1219, 1222 (9th Cir. 2010) (citing *Am. Express Travel Related Servs. Co. v. Hashemi (In re Hashemi)*, 104 F.3d 1122, 1125 (9th Cir. 1996)).

Fraud for § 523(a)(2)(A) purposes “mirrors the concept of common law fraud, and requires a showing of: 1) misrepresentation of a material fact; 2) knowledge of the falsity of the representation; 3) intent to induce reliance; 4) justifiable reliance; and 5) damages.” *In re Tsurukawa*, 287 B.R. 515, 520 (B.A.P. 9th Cir. 2002) (citing *In re Tobin*, 258 B.R. 199, 203 (B.A.P. 9th Cir. 2001)). These elements are virtually identical to California’s cause of action for fraud. *See In re Tobin*, 258 B.R. at 203 (citing *Serv. by Medallion, Inc. v. Clorox Co.*, 52 Cal. Rptr. 2d 650, 655 (1996)); *see also Stewart v. Ragland*, 934 F.2d 1033, 1043 (9th Cir. 1991) (“Under California law, a fraud action requires: 1) misrepresentation; 2) knowledge of the falsity of the representation; 3) intent to induce reliance; 4) justifiable reliance; and 5) damages.”).

### Knowledge of Falsity

It is well settled that “a promise made with a positive intent not to perform or without a present intent to perform satisfies [the false representation requirements of] § 523(a)(2)(A).” *In re Rubin*, 875 F.2d 755, 759 (9th Cir. 1989); *accord In re Karelin*, 109 B.R. 943, 947 (B.A.P. 9th Cir. 1990). Indeed, California contract law holds much the same. *See CAL. CIV. PROC. CODE § 1710(4)*; *see also Lazar v. Superior Court*, 49 Cal. Rptr. 2d 377, 381 (1996) (“A promise to do something necessarily implies the intention to perform; hence, where a promise is made without such intention, there is an implied misrepresentation of fact that may be actionable fraud.”) (citations omitted); *Union Flower Mkt., Ltd. v. S. Cal. Flower Mkt., Inc.*, 76 P.2d 503, 506 (1938) (“A promise made without any intention of performing it constitutes fraud.”) (citations omitted).

Now, intent may be inferred from the surrounding circumstances. *Citibank (S.D.), N.A. v. Eashai (In re Eashai)*, 87 F.3d 1082, 1087 (9th Cir. 1996) (finding that a court may draw inferences “if

DEBTORS: STEFAN & WYNELL KOPCHAK  
CAHAAN V. KOPCHAK, ET AL.

Bankruptcy No. 18-05553-CL13  
Adversary No. 18-90216-CL

---

the facts and circumstances of a particular case present a picture of deceptive conduct by the debtor”). For example, “[a] complete failure to take steps towards carrying out a promise can support an inference that the promisor never intended to perform.” *In re Arciniega*, BAP No. CC-15-1123-KiGD, 2016 Bankr. LEXIS 343, at \*21 (B.A.P. 9th Cir. Feb. 3, 2016) (citations omitted).

#### *Intent to Deceive*

To find nondischargeability under § 523(a)(2)(A), the debtor must have had the subjective intent to deceive at the time of the transaction. *Cowen v. Kennedy (In re Kennedy)*, 108 F.3d 1015, 1018 (9th Cir. 1997) (citing *In re Kurdoghlian*, 30 B.R. 500, 502 (B.A.P. 9th Cir. 1983)). So when a “promisor knew or should have known of his prospective inability to perform, the promise can be found to be fraudulent.” *In re Tran*, 301 B.R. 576, 582 (Bankr. N.D. Cal. 2003).

#### *Reliance*

Further, “[t]he United States Supreme Court has held that the proper standard under § 523(a)(2)(A) is that of justifiable reliance.” *In re Ekrem*, 192 B.R. 982, 994 (Bankr. C.D. Cal. 1996) (citing *Field v. Mans*, 516 U.S. 59, 74-75 (1995)). And while “justifiable reliance” and “reasonable reliance” are closely related terms, the former is a less demanding, intermediate level of reliance. *Field*, 516 U.S. at 73. Additionally, “the justifiable reliance standard is an *individual* standard that requires examination of the surrounding circumstances and the qualities of the *particular* plaintiff.” *In re Ekrem*, 192 B.R. at 994 (emphasis supplied) (citing *Field*, 516 U.S. at 72).

### **Legal Analysis and Conclusions**

#### *Liability on the Note*

The Kopchaks were liable to Mr. Cahaan on the Note. They owed him the \$4,000 he paid on their behalf, and they never gave him the trust deed that the Note obliged them to provide. But to hold these obligations nondischargeable, Mr. Cahaan must prove the elements of § 523(a)(2)(A) fraud, to which the court now turns.

#### *Nondischargeability*

##### Representation

The Kopchaks promised that they would give Mr. Cahaan a trust deed if he lent them the funds called for in the Note. This was a representation, so this element is satisfied. See *In re Gonzales*, Nos. 05-09757-B7, 05-90521-B7, 2007 Bankr. LEXIS 4791, at \*11 (Bankr. S.D. Cal. Mar. 23, 2007) (describing that “the first element of a cause of action under § 523(a)(2)(A) is that debtor made a representation of an existing or past fact”).

DEBTORS: STEFAN & WYNELL KOPCHAK  
CAHAAN V. KOPCHAK, ET AL.

Bankruptcy No. 18-05553-CL13  
Adversary No. 18-90216-CL

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### Knowledge of Falsity

The second element requires that, at the time they signed the Note, the Kopchaks had no intention of giving over a trust deed. See *In re Brody*, BAP No. NC-15-1315-SKuB, 2017 Bankr. LEXIS 696, at \*14 (B.A.P. 9th Cir. Mar. 15, 2017) (“[T]he debtor’s lack of intent to perform must exist at the time he entered the contract.”) (citations omitted). Unfortunately for Mr. Cahaan, however, the evidence does not support such a conclusion.

The court has found that the Kopchaks knew full well that the Note required them to provide security in the form of a trust deed. But it is not persuaded that they lacked an intent, at the time they signed the Note, of ever giving over a trust deed. Mrs. Kopchak’s testimony, at least, is to the contrary. More likely, the Kopchaks signed without mentally internalizing what it would mean to give that security. They were in a hurry and in financial need; they were not sufficiently focused on the trust provision to have developed a wrongful intent of never complying. Only later, after Mr. Cahaan’s repeated demands, did they balk and decisively resolve not live up to what they had promised in the Note.

The Kopchaks may very well have been negligent in assenting to the trust deed provision when they executed the Note. But this is insufficient for Mr. Cahaan’s ends in this matter. See *In re Pascucci*, 90 B.R. 438, 444 (Bankr. C.D. Cal. 1988) (“Negligent misrepresentation does not support a dischargeability claim.”). Without *knowing* – at the Note’s signing – that they would ultimately refuse to carry out their clear obligation, the falsity element is lacking.

### Intent to Deceive

For the same reason – since the Kopchaks, upon signing, had not conclusively resolved never to give a trust deed as mandated – it cannot be said that they acted with a purpose to deceive. See *Cowen*, 108 F.3d at 1018 (finding that debtors must have had the subjective intent to deceive at the time of the transaction). Now, deceive they ultimately did. But that was not their intention in signing the Note. This element is therefore also unsatisfied.

### Reliance, Causation, and Damages

Mr. Cahaan plainly relied on the Kopchaks’ promise, and that reliance was entirely justifiable: he had little apparent reason in the circumstances to suspect that they would not live up to their contractual word. And their failure to sign a trust deed caused Mr. Cahaan to lose all the money he had given them and paid out to improve the property for sale – more than \$4,700. These three elements are thus satisfied. But this is cold comfort for Mr. Cahaan. Since he has not shown knowledge of falsity or intent to deceive, he is not entitled to nondischargeability under § 523(a)(2)(A).

DEBTORS: STEFAN & WYNELL KOPCHAK  
CAHAAN V. KOPCHAK, ET AL.

Bankruptcy No. 18-05553-CL13  
Adversary No. 18-90216-CL

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### **Conclusion**

Mr. Cahaan has been notably kind to the Kopchaks – and more than once. In the transaction at hand, he lent them \$4,000 to put their house in a saleable condition and to help them out financially when they were in distress. They agreed to give him a trust deed to secure that obligation but never followed through. Thus, for the second time in the parties’ dealings, they did not complete a sale with Mr. Cahaan as envisioned.

The Kopchaks took advantage of Mr. Cahaan’s generous nature – twice – in a dishonorable manner. Moreover, they have compounded the offensiveness of their inequitable dealings by now accusing him of unethical conduct. The court rejects entirely the suggestion that Mr. Cahaan behaved improperly in any way in this matter.

Nevertheless, he is not entitled to a nondischargeability finding: he has not demonstrated knowledge of falsity or intent to deceive on the Kopchaks’ part. For these reasons, the court reluctantly concludes that Mr. Cahaan has not proven all of § 523(a)(2)(A)’s elements. The law mandates this dissatisfying result, and the court is duty-bound to give it effect.

A separate judgment for the Kopchaks will issue.

IT IS SO ORDERED.