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28UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

KI O. SON,

No. C 10-00085 MHP

Appellant,

MEMORANDUM & ORDER

v.

Re: Appeal from Bankruptcy Court Judgment
of Nondischargeability

HEUNG SER PARK,

Appellee.

Appellant Ki O. Son (“Son”) appeals a Bankruptcy Court decision holding that a Superior Court judgment entered against debtor, Son, in favor of Appellee, Heung Ser Park (“Park”), is nondischargeable under 11 U.S.C. § 523(a)(2)(A). Son also challenges the Bankruptcy Court’s calculation of Park’s damages. Having considered the parties’ arguments and submissions, for the reasons set forth below, this court enters the following memorandum and order.

BACKGROUND

This action arose from a dispute between Son and Park over a single-family residence construction contract. In 2004, Son, doing business as Son General Contracting, contracted to build a residence for Park at 22810 Mercedes Road, Cupertino, California. Docket No. 14 (Appellant’s Excerpts of Record), Exh. K (*Park v. Son (In re Son)*, Case No. 08-3011 (Bankr. N.D. Cal. 2009) (Memorandum Decision)) at 1. A dispute over the contract arose in 2005, and Son filed suit against Park, seeking to foreclose Son’s mechanic’s lien on the property. Appellant’s Excerpts of Record,

1 Exh. C (*Son v. Park*, Case No. 1-05-CV-044656 (Super. Ct. Santa Clara Cnty. January 8, 2009)
2 (Order)) at 1. After the dispute arose, Park lost the lot and its improvements to foreclosure.
3 Appellant’s Excerpts of Record, Exh. K (Memorandum Decision) at 4.

4 In response, Park filed a cross-complaint for breach of contract, fraud, negligence, negligent
5 misrepresentation, breach of fiduciary duty, conversion, constructive trust, constructive fraud,
6 contractor’s licence revocation, and unfair business practices against Son and his company.
7 Appellant’s Excerpts of Record, Exh. E (Cross-Complaint) at 17-21. Park alleged that Son made a
8 series of misrepresentations regarding the progress of construction. *Id.* at 10-12. The alleged
9 misrepresentations included Son’s assertions that the foundation had passed city inspections, that the
10 lumber used in the framing was new and complied with the contract terms, and that Son had paid the
11 sub-contractors as necessary. *Id.* Park alleged that in fact the foundation’s reinforcing steel rebar
12 had failed the city inspections, and thus the city would not allow the foundation to be used at all. *Id.*
13 Park also alleged that the sub-contractors had not in fact been paid on time, and that the lumber used
14 in the framing was old. *Id.* After Son filed an answer denying the allegations, and after
15 consolidation with several other cases relating to the same construction contract, the parties reached
16 a settlement. Appellant’s Excerpts of Record, Exh. C (*Son v. Park*, Case No. 1-05-CV-044656
17 (Super. Ct. Santa Clara Cnty. 2009) (Stipulated Judgment)) at 1.

18 The pertinent settlement for this case is the agreement settling Park’s cross-claims against
19 Son. The parties recited the terms of the settlement agreement on the record before Judge Leslie C.
20 Nichols of the Santa Clara County Superior Court on October 3, 2007. Appellant’s Excerpts of
21 Record, Exh. B (*Son v. Park*, Case No. 1-05-CV-044656 (Super. Ct. Santa Clara Cnty. October 3,
22 2007) (Settlement Hearing Transcript)). The settlement provided that Son would pay Park
23 \$380,000, to be paid in specified installments, with the first payment of \$170,000 due on November
24 2, 2007. *Id.* at 17:1-9. If any payment was missed, the agreement provided that Park could move
25 the Superior Court *ex parte* to issue a stipulated judgment in the amount of \$480,000, and Son could
26 seek a determination of partial satisfaction for any amounts already paid. *Id.* at 18:10-16. Son and
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1 Park agreed that the stipulated judgment would be based on a finding of fraud, but did not agree on
2 specific language. *Id.* at 22:10-12.

3 Son failed to make the first payment and instead filed a bankruptcy petition on November 1,
4 2007. Appellant's Excerpts of Record, Exh. K (Memorandum Decision) at 2. On February 6, 2008,
5 Park filed an adversary proceeding seeking a determination that Son's liability under the settlement
6 agreement was nondischargeable under 11 U.S.C. § 523(a)(2)(A) as a debt for money obtained by
7 fraud. *Id.* The Bankruptcy Court granted Park relief from the automatic stay. *Id.* This allowed Park
8 to return to Santa Clara County Superior Court and seek entry of the stipulated judgment, per the
9 terms of the settlement agreement. *Id.* On June 19, 2008, Judge Nichols entered judgment against
10 Son in the amount of \$480,000 plus interest, for a total of \$505,643.84. Appellant's Excerpts of
11 Record, Exh. C (Stipulated Judgment) at 2. The judgment included findings of fraud, based on the
12 facts admitted to by Son at the settlement hearing, and pursuant to the agreement that the judgment
13 would be entered with a finding of fraud. *Id.* at 2-3. Son filed an appeal which the California Court
14 of Appeal dismissed for failure to prosecute. Appellant's Excerpts of Record, Exh. K
15 (Memorandum Decision) at 3. Son also petitioned the Superior Court to set aside the judgment. *Id.*
16 The Superior Court denied the motion to set aside the judgment in an order which emphatically
17 reaffirmed the stipulated judgment. Appellant's Excerpts of Record, Exh. C (Order) at 3.

18 Park then returned to the Bankruptcy Court and made a motion for summary judgment under
19 section 523(a)(2)(A), arguing that the Superior Court judgment established all of the required
20 elements to show that the debt is nondischargeable. The Bankruptcy Court granted the motion in
21 part, finding that the judgment established that: 1) Son had obtained money from Park by false
22 representations; 2) Son knew the representations were false when he made them; 3) Son made the
23 representations with the intent to deceive Park; 4) Park relied on the representations; and 5) Park
24 sustained damages as a result of Son's representations. Appellant's Excerpts of Record, Exh. I
25 (*Park v. Son (In re Son)*, Case No. 08-3011 (Bankr. N.D. Cal. 2009) (Order Granting Partial
26 Summary Judgment)) at 2.

1 The Bankruptcy Court then held a trial on the remaining element, whether Son’s
2 misrepresentations caused the damages awarded by the judgment. Appellant’s Excerpts of Record,
3 Exh. K (Memorandum Decision) at 3. The court found that Son’s failure to obtain the necessary
4 permits for the steel reinforcement for the foundation and his continued construction without
5 obtaining approval from the city caused the city to conclude that the house could not be completed
6 without replacing the foundation and framing. *Id.* The court then found that Son’s
7 misrepresentations regarding these facts caused Park to lose both the amount he paid Son and the
8 value of the lot itself. *Id.* The court found that as a result of Son’s misrepresentations, Park lost the
9 lot to foreclosure, because he did not have sufficient funds to both rebuild the foundation and pay the
10 mortgage on the lot. *Id.* The court found that Son’s misrepresentations caused damages totaling at
11 least the entire amount of the state court judgment. *Id.* Based on these findings, the Bankruptcy
12 Court held that the entire amount of the judgment against Son was nondischargeable under section
13 523(a)(2)(A). *Id.* Son now appeals the Bankruptcy Court’s judgment finding the entire amount of
14 the Superior Court judgment nondischargeable to this court.

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16 LEGAL STANDARD

17 Under 28 U.S.C. § 158(c)(1), this court has jurisdiction to hear appeals from final judgments
18 of the United States Bankruptcy Court for the Northern District of California. The district court
19 reviews the bankruptcy court’s findings of fact for clear error and its conclusions of law *de novo*.
20 *Sigma Micro Corp. v. Healthcentral.com (In re Healthcentral.com)*, 504 F.3d 775, 783 (9th Cir.
21 2007). The bankruptcy court’s finding of whether an element of a section 523(a)(2)(A) claim is
22 present is a factual determination reviewed for clear error. *Anastas v. Am. Sav. Bank (In re Anastas)*,
23 94 F.3d 1280, 1283 (9th Cir. 1996). A factual finding is clearly erroneous if the appellate court,
24 after reviewing the record, has a definite conviction that a mistake has been made. *Beauchamp v.*
25 *Hoose (In re Beauchamp)*, 236 B.R. 727, 729 (B.A.P. 9th Cir. 1999).

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1 DISCUSSION

2 I. Nondischargeability of the Judgment

3 A debt for money “obtained by false pretenses, a false representation, or actual fraud” is
4 nondischargeable in bankruptcy. 11 U.S.C. § 523(a)(2)(A). To prove that a debt stems from fraud
5 and is exempt from discharge, a creditor must establish the following elements: 1) the debtor made
6 representations; 2) the debtor knew those representations to be false at the time they were made;
7 3) the debtor made those representations with the intent to deceive the creditor; 4) the creditor
8 justifiably relied on the debtor’s representations; 5) the creditor sustained damages as a proximate
9 result of those representations. *In re Eashai*, 87 F.3d 1082, 1086 (9th Cir. 1996). The creditor
10 seeking to establish that a debt is nondischargeable must prove these elements by a preponderance of
11 the evidence. *Grogan v. Garner*, 498 U.S. 279, 284 (1991).

12 Appellant contends that the Bankruptcy Court erred in determining that the entire amount of
13 the Superior Court judgment is nondischargeable as a debt for money obtained by false
14 representations under 11 U.S.C. § 523(a)(2)(A). Son argues that the debt is dischargeable because
15 Park allegedly failed to prove facts sufficient to allow the Bankruptcy Court to rely on the Superior
16 Court judgment to find that the debt from the settlement agreement is nondischargeable.

17 The Bankruptcy Court partially granted Park’s motion for summary judgment, holding that
18 the Superior Court judgment established four of the five elements necessary to show
19 nondischargeability, leaving only the amount of damages caused by Son’s fraud to be shown at trial.
20 Appellant’s Excerpts of Record, Exh. K (Memorandum Decision) at 3. The Bankruptcy Court
21 proceeded to hold a trial to determine whether the amount of damages awarded in the Superior Court
22 judgment was the proximate result of Son’s fraud. *Id.* After trial, the Bankruptcy Court found that
23 the entire amount of the judgment was a result of Son’s fraud and held that the judgment was
24 nondischargeable. *Id.* at 3-4.

25 In concluding the settlement agreement, Son agreed that if he breached the terms of the
26 agreement, then the stipulated judgment would resolve Park’s fraud claims against him. Appellant’s
27 Excerpts of Record, Exh. B (Settlement Hearing Transcript) at 22:4-7. While the settlement
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1 agreement contained a general release of all claims and no admission of liability, the parties agreed
2 that the stipulated judgment, if signed by the Superior Court upon Son's failure to comply with the
3 agreement, would state an admission of fraud. *Id.* at 28:25-29:3. The Superior Court asked counsel
4 to confirm the court's understanding that the settlement agreement would not contain an admission
5 of liability by either party, but that the stipulated judgment would contain an admission by Son that
6 he had committed fraud against Park. *Id.* at 31:14-23. Son's counsel confirmed that "[t]he
7 stipulated judgment that Mr. Son will execute will contain language that it is entered based on the
8 finding of fraud." *Id.* at 22:10-12. The Superior Court then directed its questioning to Son himself,
9 who affirmed that he understood the agreement his counsel recited, and that he was indeed agreeing
10 to the settlement, and all its provisions. *Id.* at 33:23-34:2. The Superior Court then approved the
11 settlement and directed the parties to act in accordance with its terms. *Id.* at 37:21-26.

12 The stipulated judgment made by the Superior Court after Son failed to make the first
13 payment noted the fact that Son had agreed in the settlement that the judgment issued if he failed to
14 comply with the settlement agreement would be based upon the court's findings of fact and law that
15 he had committed fraud, based on his admission that he had committed fraud against Park in the
16 settlement conference hearing. Appellant's Excerpts of Record, Exh. C (Stipulated Judgment) at 2.
17 In the judgment, the Superior Court found "that Son committed actual fraud against Park based on
18 the facts admitted to by Son at the Hearing." *Id.* at 2-3. The court went on to make specific findings
19 of fraud:

20 The Court makes the following legal and factual findings: (a) that Son willfully
21 deceived and made material misrepresentations to Park, including that he had
22 obtained the necessary permits and approvals from the City of Cupertino for the
23 foundation work and the excavation work he performed at Park's real property; (b)
24 Son made the misrepresentations set forth above in paragraph 2(a) with knowledge of
25 their falsity, with intent to induce Park to tender payments pursuant to the
26 construction contract; (c) Park justifiably relied on Son's misrepresentations set forth
27 above in paragraph 2(a); and (d) as a proximate and direct result of Son's
28 misrepresentations set forth above in paragraph 2(a), Park has been damaged in an
amount substantially more than the amount agreed upon by the parties.

Id. at 3.

The Bankruptcy Court relied on these specific findings made by the Superior Court, on the
settlement agreement, and the settlement hearing, in finding that the judgment established four of the

1 five elements necessary to prevent discharge of the debt but did not establish the exact amount of the
2 debt that was due to fraud. Appellant's Excerpts of Record, Exh. I (Order Granting Partial Summary
3 Judgment) at 2. The Bankruptcy Court found that Son failed to obtain the necessary permits for the
4 foundation's steel reinforcement, and had continued construction while unable to prove to the city
5 that he had the permits. Appellant's Excerpts of Record, Exh. K (Memorandum Decision) at 3-4.
6 Due to Son's failure to secure city inspection and approval of the foundation, the city refused to
7 allow the house to be completed without removing and replacing the framing and foundation, as the
8 inspectors could not assess whether Son had properly reinforced the foundation. *Id.* Son did not
9 remove and replace the defective foundation, instead leaving that task to Park. *Id.* The Bankruptcy
10 Court then found that Park was unable to pay for both the removal and replacement and the
11 mortgage on the lot. *Id.* The Bankruptcy Court concluded that Park lost the value of the lot,
12 \$280,000, and the value of the payments made by Park to Son, at least \$328,790, as a result of Son's
13 misrepresentations. *Id.* Therefore, the Bankruptcy Court held as a matter of law that, based on those
14 factual findings, the entire amount of the judgment arose from Son's fraudulent conduct and is
15 nondischargeable under 11 U.S.C. § 523(a)(2)(A). *Id.* Finding no clear error, this court affirms the
16 Bankruptcy Court's holding that Park established every element of nondischargeability of Son's debt.

17 Son further contends that the Bankruptcy Court improperly gave collateral estoppel effect to
18 the stipulated judgment, arguing that the issue of fraud was not actually litigated and that there was
19 no fraud admission by Son. Federal courts, including bankruptcy courts, must apply a state's law
20 regarding collateral estoppel when deciding whether a state court judgment is entitled to issue
21 preclusive effect. *Jung Sup Lee v. TCAST Comm., Inc. (In re Lee)*, 335 B.R. 130, 136 (B.A.P. 9th
22 Cir. 2005). Applying California law, five elements must be met for the court to give collateral
23 estoppel effect to a judgment: 1) the issue must be identical as the issue litigated in the prior
24 proceeding, 2) the issue must have been actually litigated, 3) the issue must have been necessarily
25 decided in the prior proceeding, 4) the decision in the prior proceeding must be final and on the
26 merits, and 5) the party against whom preclusion will be applied must be the same as, or in privity
27 with, the original party. *Cal-Micro, Inc. v. Cantrell (In re Cantrell)*, 329 F.3d 1119, 1123 (9th Cir.
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1 2003). While stipulated judgments are not generally given collateral estoppel effect, where the
2 record or the judgment evidences an intent by the parties for a judgment to be given collateral
3 estoppel effect, a court can give effect to such a judgment. *In re Berr*, 172 B.R. 299 (B.A.P. 9th Cir.
4 1994); *see Hayhoe v. Cole (In re Cole)*, 226 B.R. 647, 655 (B.A.P. 9th Cir. 1998) (“[I]f the parties
5 stipulated to the underlying facts that support a finding of nondischargeability, the Stipulated
6 Judgment would then be entitled to collateral estoppel application.”). In this case, the settlement
7 agreement hearing and the judgment itself both provide strong evidence that the parties intended the
8 stipulated judgment to have collateral estoppel effect in any future proceedings as to the issue of
9 fraud. At the hearing counsel for both Park and Son declared to the court that they intended the
10 stipulated judgment, if entered, to survive bankruptcy, as a judgment resolving Park’s fraud claim
11 against Son. Appellant’s Excerpts of Record, Exh. B (Settlement Hearing Transcript) at 24:15-25:4.
12 Son agreed that the admission of fraud and sufficient findings of fact supporting the fraud finding
13 would be included in the stipulated judgment. *Id.* at 22:10-12, 33:23-34:2. The parties also
14 indicated their intent that the settlement agreement and stipulated judgment would resolve all claims
15 arising from this transaction. *Id.* at 30:2-31:23. This court finds no clear error in the Bankruptcy
16 Court’s application of collateral estoppel effect to the Superior Court judgment thus finding that Son
17 committed fraud and establishing the first four elements of nondischargeability.

18 Son also contends that the judgment cannot be found nondischargeable as a matter of public
19 policy, arguing that the agreement to include findings of fraud in the stipulated judgment amounted
20 to an invalid pre-petition waiver of dischargeability, relying on *In re Huang*, 275 F.3d 1173, 1178
21 (9th Cir. 2002) for support. Pre-petition waivers of dischargeability are invalid, as a pre-petition
22 waiver of a debt defeats the Bankruptcy Code’s goal of allowing a “fresh start” to “the honest but
23 unfortunate debtor,” because creditors would simply force debtors to agree to waive dischargeability
24 as a condition of incurring a debt. *Grogan v. Garner*, 498 U.S. 279, 286-87 (1991). However, this
25 rule is not implicated where the underlying facts show that the debt at issue falls within one of the
26 statutory discharge exceptions. *Id.* at 287. These exceptions include debts for child support,
27 alimony, fraud, and educational loans. *Id.* For these types of debts, Congress has determined that
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1 the creditor's interest in securing a full recovery trumps the debtors' interest in a fresh start, by
2 providing that debts which meet these exceptions cannot be discharged in bankruptcy. *Id.*

3 As the Supreme Court stated in *Archer v. Warner*, 538 U.S. 314, 321 (2003), a judgment can
4 be nondischargeable in bankruptcy as a debt for money obtained from fraud, when the settlement
5 agreement and stipulated judgment enforcing that settlement agreement resolve state-law claims for
6 fraud. In *Archer*, the parties settled an action brought by Archer against Warner for fraud in the
7 context of a business dispute. *Id.* at 317. The settlement agreement released all claims, stated that
8 no party admitted liability, and provided for an initial payment by Warner to Archer of \$200,000,
9 with the remaining \$100,000 to be paid over time, secured by a promissory note for that amount. *Id.*
10 Warner failed to make the first payment on the note, and instead filed for bankruptcy. *Id.* at 317-18.
11 Archer then filed an adversary proceeding before the bankruptcy court, seeking a determination that
12 the \$100,000 note was nondischargeable as a debt for fraud. *Id.* at 318. The Court found that even
13 though the settlement resolved and embodied all of the state-law claims raised by Archer, the
14 bankruptcy court retains the power to determine if the settlement agreement is a debt for money
15 obtained by fraud, rejecting Warner's theory that the settlement agreement replaced the original debt
16 with a new, purely contractual debt. *Id.* at 320. Allowing a bankruptcy court to look beyond the
17 settlement and judgment to determine if the debt is a debt for fraud fulfills Congress' intent "to
18 ensure that all debts arising out of fraud are excepted from discharge, no matter what their form."
19 *Id.* at 321 (citations omitted). The court remanded the case to allow the Archers to show that the
20 settlement debt arose from fraud. *Id.* at 323.

21 In this case, the Bankruptcy Court undertook this analysis, determining whether the
22 stipulated judgment is a debt for fraud by looking to the settlement agreement and underlying facts.
23 The debt at issue in *Archer v. Warner* was a debt for monies promised in a settlement agreement, but
24 the Court relied on its decision in *Brown v. Felsen* where the Court considered a similar situation
25 where the debt was due under a stipulated consent decree, finding that the bankruptcy court has the
26 power to look beyond the judgment or settlement agreement to determine the nature of the
27 debt—whether it is a debt for fraud. 442 U.S. at 128-29, 138-39. As the Court stated in *Archer v.*

1 Warner, “[a] debt embodied in the settlement of a fraud case ‘arises’ no less ‘out of’ the underlying
2 fraud than a debt embodied in a stipulation and consent decree.” 538 U.S. at 321. Here, the debt at
3 issue derives from a settlement agreement resolving all claims held by Park against Son and is
4 embodied in a stipulated judgment. Further, the Superior Court issued a judgment per the terms of
5 the settlement agreement between Son and Park, which provided specifically that the judgment was
6 for fraud. The Bankruptcy Court considered the nature of this debt in its memorandum decision, and
7 concluded that it is a debt for fraud, relying on the language of the Superior Court judgment, and on
8 the fact that, just as in *Archer* and *Brown*, the debt arose out of an agreement to resolve a dispute
9 involving underlying claims of fraud. Appellant’s Excerpts of Record, Exh. K (Memorandum
10 Decision) at 3-4 (finding facts showing that Son’s debt to Park arose out of Son's fraud).

11 Further, Son’s reliance on *Huang* is misplaced, as he admitted in the settlement agreement
12 hearing that the judgment would contain an admission of fraud, and the facts support that finding of
13 fraud as made by the Superior Court and confirmed by the Bankruptcy Court. In *Huang*, the creditor
14 and the debtor entered into a settlement agreement resolving the creditor's claims for fraud and other
15 causes of action against the debtor. *In re Huang*, 275 F.3d at 1178. The settlement agreement
16 included no admission of fraud on the debtor's part, nor did the agreement include any facts showing
17 that the debtor had committed fraud. *Id.* While the settlement resolved claims including fraud, the
18 court found that since the agreement included no admission of fraud by the debtor nor any facts
19 supporting fraud, the agreement was an invalid pre-petition waiver of the debtor's discharge rights.
20 *Id.* The court relied on the fact that the settlement agreement included an explicit admission by the
21 defendant debtors that the agreement would not be dischargeable in bankruptcy and that the debtors
22 would not challenge any attempt by creditors to have the debt declared nondischargeable, but
23 without any underlying facts showing fraud by the debtor. *Id.* at 1176. Unlike *Huang*, this is not a
24 case where the creditor forced the debtor to waive discharge pre-petition, without any underlying
25 facts supporting a finding of fraud; but instead is a case where the facts, including the admission by
26 Son at the settlement hearing, show that the settlement agreement and associated judgment are debts
27 for fraud. *See In re Cole*, 226 B.R. at 655-56 (granting discharge of a debt where a stipulated
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1 judgment contained a nondischargeability provision, but lacked facts supporting a fraud
2 determination; amounting to an invalid pre-petition waiver of discharge). The Bankruptcy Court’s
3 factual determination that the judgment is a debt for fraud under 11 U.S.C. § 523(a)(2)(A) is not
4 clearly erroneous, as the court’s findings are supported by the underlying facts.

5
6 II. Damages Calculation

7 Son contends the Bankruptcy Court erred in determining the amount of damages attributable
8 to his fraud. Son argues first that the payments made by Park to Son are irrelevant, and second that
9 the proper measure of damages is the difference between what was contracted for, a completed
10 house, and what was received, a partially completed structure. Son contends that Park did not prove
11 the amount of his damages because he did not include evidence as to the value of the foundation or
12 other improvements received, relying instead on the payments made by Park to Son as his evidence
13 regarding the amount of damages. Son further contends that the damages determination cannot be
14 made without evidence of what a solution to repair the foundation would have cost.

15 The measure of damages in a fraud case under California law, applicable in this case because
16 the stipulated judgment is a California judgment for fraud, provides that a person “defrauded in the
17 purchase, sale or exchange of property is entitled to recover the difference between the actual value
18 of that with which the defrauded person parted and the actual value of that which he received.” Cal.
19 Civ. Code § 3343. In addition, the statute provides that “[a]mounts actually and reasonably
20 expended in reliance upon the fraud” are recoverable. *Id.*; see *Alliance Mortgage Co. v. Rothwell*,
21 10 Cal. 4th 1226, 1240-41 (1995); *McCauley v. Dennis*, 220 Cal. App. 2d 627, 632-33 (1963). In its
22 decision partially granting Park’s summary judgment motion, the Bankruptcy Court found that the
23 stipulated judgment alone did not establish the amount of damages caused by Son’s false
24 representations. Appellant’s Excerpts of Record, Exh. K (Memorandum Decision) at 3. During a
25 trial on this issue, the Bankruptcy Court heard testimony from the Chief Building Official of the City
26 of Cupertino as to what had occurred on the property. Appellant’s Excerpts of Record, Exh. M
27 (*Park v. Son (In re Son)*, Case No. 08-3011 (Bankr. N.D. Cal. 2009) (Trial Transcript)) at 4-5. After
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1 trial, the Bankruptcy Court found as a factual matter that Son poured the foundation without
2 obtaining the necessary permits and that he was unable to prove to the city that the foundation was
3 properly reinforced once poured. Appellant's Excerpts of Record, Exh. K (Memorandum Decision)
4 at 3-4. The court further found that Son had continued construction on the flawed foundation
5 without obtaining approval from the city. *Id.* at 4. As a result of this failure, the city stopped
6 construction, and instead required that the framing be demolished and the foundation replaced. *Id.*
7 Son failed to remedy the situation by replacing the foundation. *Id.* The court found that Park lost
8 the property to foreclosure due to Son's misrepresentations, as Park did not have sufficient funds to
9 pay both the mortgage and another contractor to replace the defective foundation. *Id.* The court
10 thus found that Son's conduct caused Park to lose the value of the lot, \$280,000, and the payments
11 already made to Son for the construction, at least \$328,790; totaling more than the amount of the
12 stipulated judgment. *Id.* The court relied on these factual findings to conclude that the entire
13 amount of the stipulated judgment, \$505,643.84, was nondischargeable as a debt for fraud arising
14 from Son's misrepresentations to Park. *Id.*

15 Contrary to Son's contention, the Bankruptcy Court did not err in determining the measure of
16 damages without considering what it would cost to replace or repair the foundation. The measure of
17 damages requires evidence of what Park received, which the court implicitly determined was
18 nothing. Son argues that the foundation as delivered is not valueless, relying on the fact that the new
19 (post-foreclosure) owner of the property has not removed the foundation yet. Appellant's Excerpts
20 of Record, Exh. M (Bankruptcy Court Trial Transcript) at 32:24-33:13, 34:11-18. Son also cites
21 statements by the City of Cupertino official that the city has not issued an order requiring removal of
22 the foundation and a consultant's report that the steel reinforcement was correctly placed. *Id.* at
23 27:10-15, 40:19-23. After the trial, the Bankruptcy Court concluded that the foundation was
24 defective and unusable, based on the testimony of a City of Cupertino official. Appellant's Excerpts
25 of Record, Exh. K (Memorandum Decision) at 4. The city official testified that the city never issued
26 a formal order requiring removal of the foundation because it was not necessary, as the new owners
27 acknowledged that they will have to remove the foundation before continuing with any plans to use
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1 the property. Appellant's Excerpts of Record, Exh. M (Bankruptcy Court Trial Transcript) at 13:18-
2 14:2, 17:3-8, 17:15-18:2. Further, the foundation cannot be removed until the new owner
3 implements a removal and rebuilding plan, given the hillside lot and the city's stability concerns. *Id.*
4 at 28:2-6. Contrary to Son's assertions, while the official noted that the new owners have the option
5 to come up with a plan to use the site in constructing a house, the official stated clearly that the
6 foundation cannot be used and will have to be removed. *Id.* at 33:18-20. Thus, the fact that Park did
7 not present evidence as to the cost of replacing the foundation is irrelevant; as the proper measure of
8 damages turns on the value of what Park received—here an unusable foundation and not the cost of
9 what it would take to repair Son's construction errors. The Bankruptcy Court's determination that
10 the property received by Park is of no value is not clearly erroneous, and thus his damages are
11 measured as the amount paid to Son together with the losses proximately caused by Son's fraud.

12 Son further contends that there was insufficient evidence proffered by Park connecting Son's
13 fraud with the loss of the lot due to foreclosure. The Bankruptcy Court found the loss of the lot to be
14 a foreseeable result of Son's fraud, finding that Park lost the lot to foreclosure because he could not
15 afford to both pay the mortgage and demolish and rebuild the foundation and framing. Appellant's
16 Excerpts of Record, Exh. K (Memorandum Decision) at 4. While the Bankruptcy Court did not
17 include in its findings an estimate of the cost to demolish and rebuild the foundation and framing,
18 the court reasonably inferred that the cost to demolish and replace the foundation and framing would
19 be at least as much as was paid initially and that Park did not have sufficient funds to pay again what
20 he had already paid in addition to the mortgage and thus the value of the lot lost to foreclosure is
21 included within the losses caused by Son's fraud. Moreover, as the measure of damages for fraud in
22 California includes amounts reasonably expended in reliance on the fraud, this court finds no clear
23 error in the Bankruptcy Court's conclusion that the loss of the lot in foreclosure was attributable to
24 Son's fraud. Park's down payment on the lot was paid in reasonable reliance on the expectation that
25 Son would complete the contract as promised and that he would not have to pay twice for the
26 foundation, once to Son and once to repair Son's mistake. Once Son failed to complete the contract
27 as expected, Park's loss of the lot in foreclosure included the loss of the down payment, money
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1 reasonably expended in reliance on Son's fraudulent performance under the contract. This court
2 finds no clear error in the Bankruptcy Court's factual findings that the loss of the lot to foreclosure
3 was a result of Son's fraud and affirms its legal conclusion that the entire amount of the judgment is
4 nondischargeable under section 523(a)(2)(A).

5

6 CONCLUSION

7 The court AFFIRMS the order, the partial summary judgment, and the final judgment of the
8 Bankruptcy Court. The Clerk shall enter judgment affirming the order and judgment of the
9 Bankruptcy Court appealed herein.

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11 IT IS SO ORDERED.

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Dated: November 18, 2010

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MARILYN HALL PATEL
United States District Court Judge
Northern District of California