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U.S. Bankruptcy Appellate Panel
of the Tenth Circuit
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Blaine F. Bates
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NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL

OF THE TENTH CIRCUIT

IN RE LOREN EUGENE ENNIS and LAUREL JUNE ENNIS, Debtors.	BAP No. CO-12-008
DONALD PACINI and CARITA PACINI, Plaintiffs – Appellants, v. LOREN EUGENE ENNIS and LAUREL JUNE ENNIS, Defendants – Appellees.	Bankr. No. 10-17075 Adv. No. 10-01458 Chapter 7 OPINION*

Appeal from the United States Bankruptcy Court
for the District of Colorado

Before NUGENT, KARLIN, and HALL*, Bankruptcy Judges.

KARLIN, Bankruptcy Judge.

Plaintiffs Donald and Carita Pacini filed an adversary complaint, seeking a determination that their state court judgment against debtors was non-dischargeable. In that complaint, the Pacinis alleged that a loan they made to debtors' company had been obtained by fraud committed by both debtors while

* This unpublished opinion may be cited for its persuasive value, but is not precedential, except under the doctrines of law of the case, claim preclusion, and issue preclusion. 10th Cir. BAP L.R. 8018-6.

* Honorable Sarah A. Hall, United States Bankruptcy Judge, United States Bankruptcy Court for the Western District of Oklahoma, sitting by designation.

they acted in a fiduciary capacity. After they completed the presentation of their evidence at trial, the bankruptcy court issued a judgment as a matter of law, holding that the Pacinis had failed to prove their claims. We affirm.

I. Background

Debtor Loren Ennis ("Ennis") had been a real estate developer for approximately ten years, and had successfully completed a number of projects within Mesa County, Colorado during that time.[2] In 2006, Ennis was involved with the development of several projects, including one called "Jade Falls." Jade Falls was an ambitious undertaking, involving the planned development of a 26-acre property into a 13-acre park, a 1.5-acre lake with waterfalls, and six luxury homes.[3] It was also the first project Ennis had personally undertaken, although he had successfully completed approximately 10 other development projects in partnership with others.

Ennis managed each of his property developments through separate limited liability companies.[4] He thus owned, or partially owned, a number of LLCs, which were used to develop different projects. In the case of Jade Falls, that entity was Ennis Consulting and Investments, LLC ("Ennis LLC"); it was solely owned by Ennis and his wife, debtor Laurel Ennis.[5] These LLCs frequently

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[2] Appellants' Appendix ("Appx.") at 133, 137.

[3] *Id.* at 145.

[4] *Id.* at 136.

[5] Laurel Ennis ("Laurel") is not a developer, and did not participate in her husband's projects. *Id.* at 136; 141; 250-51. Her only significant role in connection with Jade Falls was that she was a guarantor on the financing. *Id.* at 247-49. In addition, she helped name the project. *Id.* at 255. Laurel did not participate in any of the Jade Falls loan negotiations, including the one with the Pacinis. *Id.* at 151. This fact was verified by Carita Pacini, who testified that she relied solely on Loren Ennis's representations and never spoke to Laurel prior to making the loan. *Id.* at 266-67. It was also admitted at oral argument, when counsel for the Pacinis forthrightly admitted that their case against her was only "tangential."

overlapped on projects, and Ennis was not particularly careful about always using the appropriate LLC account to pay project expenses. For example, Ennis carried his contractor's license through Lear Construction, another of his LLCs, and used Lear as "the construction arm" of his developments.[6] As such, the lines between Lear and Ennis LLC expenses were not always clear.[7]

At trial, Ennis described the process of obtaining approval of a planned development such as Jade Falls.[8] It typically begins with obtaining control of the land. After the real property is purchased, an outline of the development plan must be submitted to the governing authorities in order to receive preliminary approval. This includes drawings of the project and verification that it will meet all development code requirements. The county's preliminary approval of the Jade Falls project was first given in April 2006 and finalized in June 2006.[9]

Once preliminary approval is obtained, the process for obtaining final approval begins. The final approval process requires satisfying all controlling entities, such as county engineers, fire department, etc., that the construction will meet all codes. Once that is successfully completed, verbal final approval is given, after which a detailed project plat must be filed. Filing the final plat requires the developer's guarantee that it will have sufficient funds to complete the development. This requires posting a cash bond or a letter of credit from an approved bank.

As with most of the other projects Ennis had developed, Capital Funding

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6 *Id.* at 169.

7 Ennis testified that in the years before this bankruptcy, he quite often paid Jade Falls expenses through Lear (*id.* at 178-79), and that he sometimes paid business credit lines out of his personal account (*id.* at 171-74).

8 *See id.* at 133-35.

9 *Id.* at 149.

Advisors, LLC ("Capital") provided the primary lending for Jade Falls.[10] Ennis LLC purchased the Jade Falls property in June 2005, using $500,000 of a $650,000 loan from Capital ("Capital Loan"). The Capital Loan was intended to initiate the project to allow purchase of the property and to provide funding through county preliminary approval.[11] Capital was secured by a first deed of trust on the Jade Falls property, a promissory note from Loren and Laurel Ennis individually, and a lien on the Ennises' home.[12] Loan proceeds in excess of the property purchase price were used for initial development costs and interest payments on the Capital Loan.

In mid-2006, Ennis LLC requested additional funding from Capital to complete development of Jade Falls. The requested funds would bring the total principal owed by Ennis LLC to Capital to $1.43 million. Capital agreed to increase its funding if, among other things, Ennis LLC infused cash into the project equivalent to 10% of the total debt, or $143,000.[13]

Plaintiffs Don and Carita Pacini knew the Ennises socially. In 2006, the couples discussed the local real estate market over dinner.[14] In the course of their conversation, the Pacinis indicated that they were interested in investing approximately $100,000 in real estate because the Grand Junction market was doing so well.[15] Soon thereafter, Ennis phoned Don Pacini about possibly

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[10] James Simon, Capital's President, testified that Capital's professional relationship with Ennis was good, and that all previous development loans they had financed for Ennis had been successfully paid. *Id.* at 432.

[11] *Id.* at 138.

[12] *Id.* at 146-48.

[13] Capital issued a conditional loan proposal to increase Jade Falls' funding on August 31, 2006. *Id.* at 304-06.

[14] *Id.* at 107, 152.

[15] *Id.* at 217.

investing in the Jade Falls project. From his discussions with Ennis, Don Pacini understood that Capital was requiring a $143,000 investment in order for it to increase its funding of the Jade Falls project.

The Pacinis agreed to invest $143,000 in Jade Falls. They understood that their money would be used to obtain additional funding from Capital and, once that funding was obtained, to develop the project.[16] The Ennises, individually and as "member/managers" of Ennis LLC, executed a promissory note in favor of the Pacinis for the $143,000.[17] The note, which provided for both a 10% interest rate and 20% of the net profits from the Jade Falls project, was secured by a deed of trust on the Jade Falls property.[18] Prior to making the loan, the Pacinis were shown the Jade Falls development plans, but they opted to conduct no independent investigation of the project.[19]

Because Capital already had the first deed of trust on the Jade Falls property, all parties intended and expected that the Pacinis' deed of trust would take second position. Ennis had previously used Meridian for loan documentation on other projects, and he suggested that Meridian prepare the paperwork for the Pacini loan, as well.[20] Both Ennis and Don Pacini expected that Meridian would record the deed of trust on behalf of the Pacinis. But Meridian did not record the Pacinis' deed and, as a result, it was not recorded until approximately eight months later, on May 15, 2007.[21]

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16 *Id.* at 220-21.

17 *Id.* at 19. The note was payable on September 5, 2007, but also contained an "automatic" one year extension of the maturity date to September 5, 2008.

18 *Id.* at 73-76.

19 *Id.* at 218-20; 262-65.

20 *Id.* at 152.

21 *Id.* at 73.

In January, 2007, Ennis LLC obtained a short-term, high interest loan for Jade Falls from Sam Baldwin, which was also secured by a deed of trust on the Jade Falls property.[22] From his review of final loan documentation provided by Baldwin, Ennis discovered that the Pacinis' deed of trust had not been recorded.[23] Ennis immediately contacted Don Pacini to inquire why his deed was not of record.[24] As a result of Ennis's call, the Pacinis had their deed recorded approximately two months later,[25] but it was at that point inferior to Baldwin's.[26] The Baldwin loan was subsequently fully paid and that deed of trust released, at which point the Pacinis' deed moved into the second position as originally contemplated.[27]

The Jade Falls project was significantly delayed by numerous engineering problems. Initially, in June 2005, Ennis hired High Country Engineering ("High Country") to provide engineering work on the project. It was the first time Ennis

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[22] Ennis described Baldwin as a "hard money lender," who charged 28% interest on his loan, partly because of Ennis's need for quick money. *Id.* at 160. The Baldwin loan was also short-term, having a maturity date of only six months. *Id.* at 159. The high interest rate motivated Ennis to pay this loan as quickly as he could. *Id.* at 160.

[23] *Id.* at 159.

[24] *Id.* at 210, 213.

[25] *Id.* at 216-17.

[26] *Id.* at 241-42. Ennis LLC also subsequently borrowed $300,000 from John Starr. But that loan, which was apparently resolved by transfer of Garnet Glen, LLC to John Starr in August of 2009 (*id.* at 407), is not at issue in this appeal.

[27] *Id.* at 161. One of the Pacinis' original claims was that they were deceived into believing that their deed of trust would receive second priority when it did not. This factual claim was resolved by the bankruptcy court in favor of the Ennises, based on both the trial judge's positive assessment of Loren Ennis's credibility and the lack of any harm to the Pacinis, who were only temporarily in third position. *Id.* at 288-90. The Pacinis did not argue the trust deed recording issue on appeal, and it has therefore been waived. *See Gen. Elec. Capital Corp. v. Manager of Revenue (In re W. Pac. Airlines, Inc.)*, 273 F.3d 1288, 1293 (10th Cir. 2001) (issue not raised in appellant's opening brief is waived).

had used High Country, an "out-of-town" firm, and it did not go well.[28] According to Ennis, High Country was inefficient and ineffective, and "had no idea what they were dealing with," particularly with respect to the project's many water issues.[29] Eventually, Ennis hired a local company, Maverick Engineering ("Maverick"), to replace High Country on Jade Falls. Maverick was owned by the son of the county's planning department head. However, according to Ennis, Maverick's owner "had a nervous breakdown and disappeared" in 2007, ultimately ending up in the hospital.[30] Ennis was then forced to switch to a third company –Vista Engineering, also a local firm, and it finally completed the engineering needed for approval of the project.

Because these engineering issues significantly delayed final approval of the project by the county, Ennis was still negotiating with Capital for additional funding in September 2007.[31] Ennis was unable to obtain final county approval until April 2008, and could not record the project plat, or further develop the property, without a letter of credit from Capital.[32] Ennis testified he expected that additional funding from Capital would be obtained by year-end when he negotiated the Pacinis' loan, and that the engineering delays were the "sole cause" of his inability to obtain that funding.[33]

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28 *Id.* at 162.

29 *Id.*

30 *Id.* at 163.

31 Capital's President testified that he was aware of "numerous challenges to the [Jade Falls] project," and that Ennis "was always very good about keeping us informed of the challenges he was having, the time delays he was having, the additional costs that were involved." *Id.* at 445.

32 *Id.* at 156-57.

33 *Id.* at 164.

As of June 2006, Ennis LLC had used up all of the Capital Loan funds.[34] As a result, interest on the loan was not paid in July or August of that year. Nonetheless, Capital did not declare the loan to be in default.[35] In an effort to relieve some financial pressure, Ennis requested a buy-out from his partners in another real estate venture, which he expected to occur by the end of 2006, but did not. Ennis was also counting on proceeds from a property sale that was expected to close in September, but that sale closing was also delayed. Further complicating matters, in or around September 2006, Lyle Arent (who was Ennis's partner in another LLC –LALE Developments) retired. Believing that he could use proceeds from the property sale he expected to imminently close, Ennis agreed to loan money to Arent that would allow Arent to postpone using retirement funds until the next tax year.[36]

Ennis testified that, although it is a common industry practice for developers to take a salary, he typically did not do so.[37] Instead, he counted on profits from sales of his development projects to cover his personal expenses, and purposefully "staged" projects so that he would periodically receive proceeds.[38] However, in late 2006, delay of his anticipated funding sources resulted in Ennis at least temporarily relying on proceeds from the Pacinis' loan to cover those personal expenses.

Unfortunately for all parties involved, the Jade Falls project ultimately

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34 *Id.* at 106.

35 *Id.*

36 *Id.* at 120. This loan to Arent was ultimately repaid. *Id.* at 177.

37 *Id.* at 137.

38 *Id.*

failed, and Capital foreclosed its lien on the Jade Falls property in 2008.[39] In December 2008, the Pacinis filed suit against the Ennises in Colorado state court, based on their personal guarantee, and obtained a judgment against them.[40]

Thereafter the Ennises filed for Chapter 7 bankruptcy relief, and the Pacinis timely filed an adversary proceeding against them. In the complaint, the Pacinis sought a general denial of discharge under 11 U.S.C. § 727(a)(4),[41] and non-dischargeability of the debt under § 523(a)(2) and (4). In May 2011, the bankruptcy court entered summary judgment for the Ennises on the Pacinis' § 523(a)(4) fiduciary fraud claim. A trial was then held on the other two causes of action, false oath under § 727(a)(4) and obtaining money by fraud under § 523(a)(4). After completion of the Pacinis' evidence, the bankruptcy court granted judgment as a matter of law for the Ennises. The Pacinis moved for a new trial, arguing only that the evidence satisfied their burden of proof on their fraud claim. That motion was denied, and the Pacinis appealed.

II. Appellate Jurisdiction

The bankruptcy court's November 29, 2011, judgment fully resolved the Pacinis' complaint, but it did not resolve the counterclaim the Ennises had filed against the Pacinis alleging violation of the automatic stay. This Court issued an order to show cause why the appeal should not be dismissed as having been taken from a non-final order. Shortly thereafter, the parties stipulated to dismissal, with prejudice, of that counterclaim. In addition, on July 17, 2012, the bankruptcy court entered an order, *nunc pro tunc* to November 19, 2011, dismissing the

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[39] *Id.* at 148; 212; 442.

[40] *Id.* at 188. The Pacinis did not allege fraud in the state court action.

[41] Unless otherwise noted, all further statutory references in this decision will be to the Bankruptcy Code, which is Title 11 of the United States Code.

counterclaim with prejudice. The jurisdictional issue has thus been resolved.[42]

On December 12, 2011, the Pacinis timely filed a motion for new trial pursuant to Rule 59 of the Federal Rules of Civil Procedure.[43] That motion was denied by the bankruptcy court in a judgment entered on January 24, 2012, and the Pacinis thereafter timely filed their notice of appeal from the partial summary judgment, the judgment as a matter of law, and the denial of their Rule 59 motion. No party has elected to have the appeal heard by the Colorado district court, and therefore this Court has jurisdiction.[44]

III. Issues and Standard of Review

The Pacinis have argued only two issues on appeal:[45]

A. Whether summary judgment was appropriately granted as to the existence of a fiduciary duty. This is a legal issue that is reviewed *de novo*.

B. Whether the bankruptcy court erred in finding that the Pacinis had failed to prove fraud. This issue requires review of the court's factual findings, which are reviewed for clear error.

IV. Discussion

As a preliminary matter, we note that the Pacinis' allegations in support of the non-dischargeability of their claims relate to Laurel Ennis in only the most tangential way. The Pacinis essentially made no direct allegations of misconduct against Laurel Ennis, and their brief cites to no evidence in the record of statements or conduct by her upon which they relied. Instead, the Pacinis' claims

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[42] *See Wadsworth v. Word of Life Christian Ctr. (In re McGough)*, 467 B.R. 220, 223 (10th Cir. BAP 2012) (parties' stipulation, followed by bankruptcy court order, to dismiss unlitigated claims cured jurisdictional issue).

[43] Made applicable to bankruptcy proceedings by Federal Rule of Bankruptcy Procedure 9023.

[44] 28 U.S.C. § 158(b)-(c); Fed. R. Bankr. P. 8001.

[45] Because the Pacinis did not assert on appeal any error with respect to their § 727 false oath claim, they have waived that claim. *See, e.g., Gen. Elec. Capital Corp. v. Manager of Revenue (In re W. Pac. Airlines, Inc.)*, 273 F.3d 1288, 1293 (10th Cir. 2001) (issue not raised in appellant's opening brief is waived).

against Laurel Ennis are solely based on the alleged conduct of her husband. This is simply insufficient to establish any non-dischargeability claims against Laurel.[46] We therefore affirm the bankruptcy court's denial of the Pacinis' claims in Laurel's favor.

A. Summary Judgment on Fiduciary Status (§ 523(a)(4))

> "We review the grant of a summary judgment motion *de novo*, applying the same standards as the district court. Summary judgment is appropriate when there is no genuine issue as to any material fact and ... the movant is entitled to judgment as a matter of law. We view all evidence and draw reasonable inferences therefrom in the light most favorable to the nonmoving party. We may affirm the [bankruptcy] court's decision for any reason supported by the record."[47]

The bankruptcy court granted the Ennises' motion for summary judgment on the Pacinis' § 523(a)(4) claim. Section 523(a)(4) provides, in pertinent part, that a Chapter 7 discharge does not discharge a debt "for fraud or defalcation while acting in a fiduciary capacity[.]"[48] "The existence of a fiduciary relationship under § 523(a)(4) is determined under federal law," but state law is also relevant to the inquiry.[49] A party relying on § 523(a)(4) is required to show, by a preponderance of the evidence, that there is both a fiduciary relationship between the parties and a defalcation by the debtor in the course of that

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[46] *See, e.g., Hartwig v. Markley (In re Markley)*, 446 B.R. 484, 488 (Bankr. D. Kan. 2011) (fraud by one spouse is not automatically imputed to the other spouse for non-dischargeability purposes). We also note that, during oral argument of this appeal, upon direct questioning by the panel, the Pacinis' counsel admitted that they were not pursuing a claim against Laurel for fiduciary defalcation, and were only "very tangentially" pursuing a claim against her for fraud. Counsel was unable to point to any evidence in the record during oral argument to support this claim against Laurel, and we have been unable to find any.

[47] *Mosier v. Callister, Nebeker & McCullough*, 546 F.3d 1271, 1275 (10th Cir. 2008) (citations and internal quotation marks omitted).

[48] The Pacinis did not allege either embezzlement or larceny, the other § 523(a)(4) grounds for non-dischargeability.

[49] *Fowler Bros. v. Young (In re Young)*, 91 F.3d 1367, 1371 (10th Cir. 1996).

relationship.[50] Well-established jurisprudence in the Tenth Circuit construes a § 523(a)(4) fiduciary relationship narrowly; that relationship "exists only where a debtor has been entrusted with money pursuant to an express or technical trust."[51]

The Pacinis do not claim a technical trust, which is imposed by statute, exists. Instead, they rely solely on their assertion of an express trust. An express trust is one that is "intentionally entered into by the parties," and "may involve a formal declaration of trust or a situation where the intention of the parties to form a trust relationship may be inferred by the surrounding facts and circumstances."[52] Significantly, neither a general duty of confidence and trust, nor an unequal balance of power in the relationship, is sufficient.[53] And under Colorado law, creation of an express trust requires unequivocal and unambiguous language or conduct.[54] Finally, this Court has previously noted that relationships defined as "fiduciary" in non-bankruptcy contexts frequently do not satisfy the fiduciary capacity requirement of § 523(a)(4).[55]

The Pacinis assert that the nature of their relationship with the Ennises was fiduciary, as opposed to merely commercial, relying almost entirely on a

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[50] *Antlers Roof-Truss & Builders Supply v. Storie (In re Storie)*, 216 B.R. 283, 286 (10th Cir. BAP 1997). Determination of the existence of a fiduciary duty is "a legal, rather than a factual, finding." *In re Young*, 91 F.3d at 1373.

[51] *Sawagerd v. Sawaged (In re Sawaged)*, CO-10-058, 2011 WL 880464, at *3 (10th Cir. BAP Mar. 15, 2011) (internal quotation marks omitted).

[52] *Id.* (internal quotation marks omitted).

[53] *In re Young*, 91 F.3d at 1371-72.

[54] *Morgan v. Wright*, 399 P.2d 788, 790-91 (Colo. 1965).

[55] *Employers Workers' Comp. Ass'n v. Kelley (In re Kelley)*, 215 B.R. 468, 473 (10th Cir. BAP 1997) (many non-bankruptcy fiduciary relationships do not satisfy *In re Young's* narrow view of § 523(a)(4)). *See also In re Evans*, 161 B.R. 474, 477 (9th Cir. BAP 1993) (broad general definition of fiduciary relationship inapplicable to dischargeability determinations).

California case, *In re Nassbridges*.[56] In *Nassbridges*, a bankruptcy court determined that the relationship between investors and an investment broker was fiduciary for purposes of § 523(a)(4), despite a contractual provision to the contrary, and also without evidence of a clear intent to create such a relationship. The factual basis behind this determination was that, although the debtor broker specifically represented to plaintiffs that their investments would be used to purchase gold, they were instead used to purchase highly leveraged gold futures. Both plaintiffs and their primary contact at debtor's investment firm believed that only gold bullion had been purchased with their account, based partly on company statements that described their holdings as "gold bar .999."

Although the Pacinis do not, and cannot, deny that the fund transfer they made to Ennis LLC was a "loan," they attempt to characterize that transfer as more of an "investment," analogizing their situation to the one in *Nassbridges*.[57] But *Nassbridges* is neither factually nor legally relevant to the Pacinis' § 523(a)(4) claim. First, *Nassbridges*, a California bankruptcy decision, holds no precedential value in this Circuit, but more importantly, it is simply inconsistent with the specific requirements for proving the existence of a § 523(a)(4) fiduciary relationship that were articulated by the Tenth Circuit Court of Appeals well over

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[56] *Dimichele v. Nassbridges (In re Nassbridges)*, 434 B.R. 573 (Bankr. C.D. Ca. 2010), *aff'd*, 464 B.R. 494, 2011 WL 3244396 (9th Cir. BAP July 15, 2011).

[57] The Pacinis argue that their contractual right to share in profits from Jade Falls created a "special duty to ensure the Jade Falls project would be successful." Appellants' Opening Brief at 9. Their argument on this point evolved from essentially an *analogy* to an investment relationship, in response to the summary judgment motion in the bankruptcy court (Appx. at 79), to something more akin to *re-characterization* of the entire transaction, on appeal (Appellant's Opening Brief at 9). Although we have elected to address this argument on its merits, we view it as perilously close to a "new" argument raised on appeal, which we would not ordinarily consider. *See In re Cozad*, 208 B.R. 495, 498 (10th Cir. BAP 1997) (appellate court should not consider issues not properly raised before the trial court).

a decade ago, in *In re Young*.[58] Moreover, as a factual matter, the Pacinis' loan was a simple commercial transaction that does not rise to the level of a § 523(a)(4) fiduciary relationship, rather than an investment as in *Nassbridges*. The fact the borrower is entitled to share in the profits of the project for the specific loan does not magically create a fiduciary relationship that involves an express trust.

Accordingly, since the material facts regarding the transaction at issue were uncontested, summary judgment on this issue was appropriate.

B. Judgment on Fraud Count (§ 523(a)(2)(A))

After the Pacinis completed presentation of their evidence at trial, the bankruptcy court *sua sponte* granted judgment as a matter of law in favor of the debtors on the Pacinis' § 523(a)(2)(A) claim.[59] This statute provides that a debt obtained by "false pretenses, a false representation, or actual fraud" is not discharged in bankruptcy. In order to obtain a judgment of non-dischargeability, a debt holder must prove that "[t]he debtor made a false representation; the debtor made the representation with the intent to deceive the creditor; the creditor relied on the representation; the creditor's reliance was reasonable; and the debtor's representation caused the creditor to sustain a loss."[60]

Only the first two of these elements are at issue, and we review the

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[58] 91 F.3d at 1371 (§ 523(a)(4) requires: 1) a fiduciary relationship, defined as entrusting money to the debtor pursuant to an express or technical trust; and 2) fraud or defalcation committed in the course of that relationship).

[59] *See* bankruptcy court's oral ruling, beginning at Appx. at 284. As noted previously, the court also granted debtors judgment on the Pacinis' false oath claim, which they elected not to appeal.

[60] *In re Young*, 91 F.3d at 1373. The "reasonable" reliance element set forth in *Young* was modified by the United States Supreme Court to "justifiable" reliance in *Field v. Mans*, 516 U.S. 59, 74-75 (1995).

bankruptcy court's fact findings as to those elements for clear error.[61]

> A finding of fact is clearly erroneous if it is without factual support in the record or if the appellate court, after reviewing all the evidence, is left with a definite and firm conviction that a mistake has been made. Review of a case under the clearly erroneous standard is significantly deferential, requiring a definite and firm conviction that a mistake has been committed. When findings are based on determinations regarding the credibility of witnesses, Rule 52(a) [Fed. R. Bankr. P. 7052] demands even greater deference to the trial court's findings; for only the trial judge can be aware of the variations in demeanor and tone of voice that bear so heavily on the listener's understanding of and belief in what is said.[62]

At trial, the Pacinis asserted two factual bases for their allegation of § 523(a)(2)(A) fraud: 1) they were deceived into believing that their deed of trust would receive second priority when it originally did not; and 2) they were falsely told that their loan would be used only to obtain a new loan from Capital and to develop Jade Falls. The first of these factual claims was resolved by the bankruptcy court in favor of the Ennises based on both Loren Ennis's credibility and the lack of any harm to the Pacinis by their deed of trust having temporarily been in third position.[63] The Pacinis have not pursued the trust deed issue on appeal, and it has therefore been waived.[64]

As to the second issue, the record supports the Pacinis' assertion that the loan proceeds were used for a number of Ennis's financial needs that were not directly related to the Jade Falls development. But the totality of the evidence overwhelmingly supports the bankruptcy court's determination that most of those

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[61] *Copper v. Lemke (In re Lemke)*, 423 B.R. 917, 919 (10th Cir. BAP 2010) (bankruptcy court's findings regarding required elements of § 523(a) claims are factual determinations reviewed for clear error).

[62] *Mathai v. Warren (In re Warren)*, 350 B.R. 628, *5 (10th Cir. BAP 2006), *aff'd*, 512 F.3d 1241 (10th Cir. 2008) (internal quotation marks and footnotes omitted).

[63] *See* Appx. at 288-90.

[64] *See Gen. Elec. Capital Corp. v. Manager of Revenue (In re W. Pac. Airlines, Inc.)*, 273 F.3d 1288, 1293 (10th Cir. 2001) (issue not raised in appellant's opening brief is waived).

uses resulted from financial pressures and delays that Ennis did not reasonably foresee when the loan was made.[65]

For example, Ennis testified that a number of significant delays were caused by problems with his project engineers, and also that he had expected to receive funds from other sources (including a partnership buyout in a different project and the sale of some completed houses) within the first few months of the Pacini loan, which did not materialize. As a result, Ennis did use some of the Pacini funds, at least temporarily, to cover expenses unrelated to Jade Falls, including personal expenses.[66]

Clearly, Ellis was not a skilled accountant. He owned, or partially owned, a number of LLCs, which he used to develop different projects. These LLCs frequently overlapped on projects, and the accounting of project expenses sometimes became murky. For example, Ennis carried his contractor's license through Lear Construction, another of his LLCs, and used Lear as "the construction arm" of his developments. But the lines between Lear and Ennis

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[65] It can fairly be argued that when the Pacini loan was made, Ennis was already facing some financial pressures and knew he would need to use the loan proceeds to at least temporarily relieve them. For example, Ennis's immediate use of the proceeds to make a loan to Lyle Arent was likely anticipated by Ennis when the Pacini loan was made, and was not technically an "authorized" use of that money. However, the bankruptcy court found from the evidence at trial that Ennis intended to (and did) replace funds that he used for expenses other than for Jade Falls, and thus did not have a fraudulent intent. Based on all the evidence, we cannot conclude that this finding is clearly erroneous.

[66] Ennis also testified that, although it is common in the development industry for developers to take a salary, he typically did not do so. Instead, he counted on profits from the sale of his development projects to cover his personal expenses, and he "staged" his projects for that purpose. Appx. at 137. Ennis's use of loan proceeds to temporarily cover personal expenses, when taking a salary easily could have been a legitimate project cost, supports the bankruptcy court's determination that he was not acting with fraudulent intent, especially given his credible testimony that he only used the loan proceeds in this way because his other income sources were delayed.

LLC expenses were not always clear.[67] Ennis quite often paid expenses of Jade Falls through Lear, and sometimes paid business credit lines out of his personal account.[68] But such accounting inconsistencies do not necessarily equate with fraud.

The Pacinis' primary complaint is that their money was not used exclusively for Jade Falls expenses. Although this may have been the parties' general intent and the Pacinis' personal expectation, the loan documentation places no such conditions on Ennis LLC's use of the loan proceeds.[69] In any event, the bankruptcy court found, even assuming the loan proceeds were to be used solely for development of Jade Falls, that was "substantially" what occurred.[70]

Significantly, a promise to act in the future is only fraudulent if it is made with a present intention not to perform.[71] As such, the Pacinis had a duty to establish at trial that Ennis did not intend to perform under the terms of the parties' contract at the time it was executed. It was this requirement that the bankruptcy court found that the Pacinis failed to establish. We agree.

The fact, without more, that Ennis at times used Pacini loan proceeds for things other than Jade Falls expenses does not satisfy the Pacinis' burden for at least two reasons. First, their agreement did not limit the use of proceeds to Jade

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67 *Id.* at 169; *see also supra* nn. 6-7.

68 Appx. at 171-74, 178-79.

69 Although Capital conditioned extension of additional funds to Ennis LLC on its obtaining $143,000 from an outside source, it did not specify how those funds, once obtained, were to be used.

70 This determination took into account that some, if not all, of the money used for non-Jade Falls expenses was "repaid or came back into" the Ennis LLC account. Appx. at 291-92. For example, the $21,000 Arent loan was repaid by LALE. *Id.* at 177.

71 *Roberts v. Wells Fargo AG Credit Corp.*, 990 F.2d 1169, 1172 (10th Cir. 1993).

Falls expenses. Second, the fact Ennis subsequently used some of the proceeds for other projects does not alone establish that Ennis did not intend to comply with the parties' agreement when the deal was made.

While the Pacinis clearly disagree with the bankruptcy court's determinations of fact regarding Ennis's intent, they have done little to establish that those findings are clearly erroneous. Instead, they largely direct this Court only to the evidence that they believe supports their position, rather than showing how, in light of all of the evidence, the bankruptcy court's findings are clearly erroneous. Since "[i]t is the appellant's burden to demonstrate why the bankruptcy court's findings of fact are clearly erroneous,"[72] their failure to explain how the bankruptcy court's determinations are clearly erroneous is fatal.

The Pacinis rely heavily on the legal precept that intent may be (and often can only be) proven by circumstantial evidence. It is clear, however, that the bankruptcy court relied heavily on its assessment of the witnesses' credibility, and this Court is required to give "due regard" to such assessments by the fact finder.[73] The appellants have simply failed to convince this Court that those assessments are not supported by the evidence.

V. Conclusion

The bankruptcy court properly found, as a matter of law, that the Pacinis did not establish the existence of a fiduciary relationship. Furthermore, because the bankruptcy court's finding that Loren Ennis had no intent to mislead the Pacinis at the time they executed the loan is well supported by the evidence, it is not clearly erroneous. We AFFIRM.

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[72] *In re Paige*, 439 B.R. 786, 792 (D. Utah 2010), *aff'd*, 685 F.3d 1160 (10th Cir. 2012).

[73] Fed. R. Bankr. P. 8013.