

FEB 07 2008

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U.S. BKCY. APP. PANEL  
OF THE NINTH CIRCUIT

NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL  
OF THE NINTH CIRCUIT

52383

6	In re:	)	BAP No.	NC-07-1268-JuMkK
7	KEVIN CHIEN,	)	Bk. No.	05-32677
8	Debtor.	)	Adv. No.	05-03412
9	_____			
10	KHANM KIM LUC,	)		
11	Appellant,	)		
12	v.	)	M E M O R A N D U M <sup>1</sup>	
13	KEVIN CHIEN,	)		
14	Appellee.	)		

Argued and Submitted on January 24, 2008  
at San Francisco, California

Filed - February 7, 2008

Appeal from the United States Bankruptcy Court  
for the Northern District of California

Honorable Thomas E. Carlson, Bankruptcy Judge, Presiding

Before: JURY, MARKELL and KLEIN, Bankruptcy Judges.

<sup>1</sup> This disposition is not appropriate for publication. Although it may be cited for whatever persuasive value it may have (see Fed. R. App. P. 32.1) it has no precedential value. See 9th Cir. BAP Rule 8013-1.

1 I. INTRODUCTION

2 Creditor-Appellant Khanm Kim Luc ("Luc") appeals the  
3 bankruptcy court's judgment in favor of Debtor-Appellee Kevin  
4 Chien ("Chien" or "Debtor"), finding that a debt owed by Chien to  
5 Luc based on a California judgment for \$160,000 was not excepted  
6 from discharge under § 523(a)(6).<sup>2</sup>

7 In this appeal, Luc seeks to expand the parameters of what  
8 constitutes a willful injury as defined by the United States  
9 Supreme Court in Kawaauhau v Geiger, 523 U.S. 57 (1998) and the  
10 Ninth Circuit in Carrillo v. Su (In re Su), 290 F.3d 1140 (9th  
11 Cir. 2002). Luc contends that it is enough for her to prove that  
12 Debtor knew his intentional act would result in harm to some  
13 group of persons or entities, even if she was not one of those  
14 harmed. Luc also argues that the willful conduct of another  
15 person should be imputed to Debtor because he was the surrogate  
16 or alter ego of the wrongdoer or the wrongdoer's partner.

17 We reject the expansion of § 523(a)(6) liability on either  
18 of these theories, conclude the trial court did not err in  
19 finding the debt at issue dischargeable, and AFFIRM.

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24 <sup>2</sup> Unless otherwise indicated, all chapter, section and rule  
25 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1330, and  
26 to the Federal Rules of Bankruptcy Procedure, Rules 1001-9037, as  
27 enacted and promulgated prior to the effective date of The  
28 Bankruptcy Abuse Prevention and Consumer Protection Act of 2005,  
Pub. L. 109-8, 119 Stat. 23, because the case from which this  
appeal arises was filed before its effective date (generally  
October 17, 2005).

1 II. FACTS

2 The complex factual and legal background which led to Chien  
3 and Luc's battle in the bankruptcy court has been well documented  
4 in two state court trials, a jury verdict, a judgment on the  
5 verdict, a trial judge's statement of decision and judgment, and  
6 two appellate decisions. We take the facts pertinent to our  
7 determination in this case largely from the second appellate  
8 decision, which followed the trial of Luc v. Chien in the San  
9 Francisco County Superior Court and upheld the \$160,000 judgment  
10 against Chien.<sup>3</sup>

11 Chien became friends with Donald Chiu ("Chiu") in 1995 soon  
12 after he graduated from college. On a number of occasions, he  
13 helped Chiu obtain money by taking out loans in his name on  
14 property Chiu owned and temporarily deeded to Chien. For  
15 example, in 1997 Chien helped Chiu obtain refinancing for a  
16 condominium Chiu's mother purportedly owned (the "Condo"),  
17 although title was in Chiu's name. To take advantage of Chien's  
18 good credit, Chiu deeded title to the Condo to Chien, Chien  
19 signed the loan papers and, three days later, deeded the property  
20 back to Chiu's mother.

21 On May 1, 1997, one day after the close of the Condo  
22 refinance, Chiu purchased property which he planned to develop.  
23 The only building on the property was rented out to Luc (the  
24 "Rental Property"), which was subject to San Francisco rent  
25 control law. The following November, Chiu commenced to evict  
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27 <sup>3</sup> This appellate decision, along with the entire superior  
28 court transcript, exhibits, rulings, and statement of decision,  
was before the bankruptcy judge at trial below.

1 Luc from the Rental Property by giving her a thirty-day notice  
2 based on his purported intent to rent the apartment to his  
3 brother.<sup>4</sup> He later served her with a three-day notice based on  
4 nonpayment of rent. While the unlawful detainer was pending,  
5 Chiu and Luc entered into a settlement agreement (the  
6 "Stipulation"), whereby she agreed to vacate the Rental Property  
7 and give a general release to Chiu in exchange for a waiver of  
8 some rent and receipt of \$1000.

9       Meanwhile, lacking sufficient credit to obtain a  
10 construction loan for the development of the Rental Property,  
11 Chiu turned again to Chien. In meetings among Chiu, Chien, and a  
12 mortgage broker, Chiu represented in Cantonese that Chien was his  
13 partner and they jointly submitted loan applications. Chien did  
14 not deny the partnership assertions, although the record reflects  
15 he did not speak Cantonese. After submitting the loan  
16 applications, Chiu conveyed the Rental Property to Chien for no  
17 consideration. Chien secured a loan to pay off the existing  
18 financing and additional loans to complete the construction and  
19 renovation of the Rental Property.

20       In November 1998, while the improvements to the Rental  
21 Property were under way, Luc sued Chiu for wrongful eviction  
22 under the rent control law and asked for a jury trial. The  
23 litigation between Luc and Chiu was still pending in February  
24 2000 when Chien sold the Rental Property to a bona-fide purchaser  
25 for \$1.01 million. At the time of the sale, Chien was unaware of  
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28       <sup>4</sup> Rental for a year to a family member was grounds for  
eviction under the rent control law.

1 the wrongful eviction litigation commenced by Luc.<sup>5</sup>

2 The sale netted \$160,000 after all the costs of acquisition  
3 and construction were paid. The \$160,000 was paid from the sale  
4 escrow to a Chien bank account, but Chien only received \$100 and  
5 the balance went to Chiu.

6 On April 28, 2000, Luc obtained a judgment against Chiu for  
7 approximately \$635,000 after a jury verdict setting aside the  
8 Stipulation as a "fraudulent inducement." The large judgment was  
9 based in part on treble damages awarded under the rent control  
10 law. The Chiu judgment was upheld on appeal.

11 In August 2000, while attempting to collect on her judgment  
12 against Chiu, Luc sued Chiu, Chiu's mother, and Chien for  
13 recovery of the Rental Property or its value based on state  
14 fraudulent conveyance theories. After a five-day bench trial and  
15 a written statement of decision, the trial court entered judgment  
16 against Chien for the profit attributable to the sale of the  
17 property on the ground that Chiu's conveyance of the property to  
18 Chien was fraudulent and, therefore, Chien held the proceeds in  
19 constructive trust for Chiu's creditors, among them Luc.<sup>6</sup>

20 This judgment against Chien was affirmed on appeal, the  
21 damages being upheld on the constructive trust theory. The  
22 appellate court commented on Chien's liability:

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24 <sup>5</sup> The record is ambiguous as to when exactly Chien learned  
25 of the Luc litigation and judgment against Chiu. However, the  
26 record does not reflect that Chien knew about the litigation  
before the Rental Property was sold.

27 <sup>6</sup> Judgment in the same sum was entered against Chiu and his  
28 mother. Chiu has fled the country and his mother is apparently  
not responsive to the judgment.

1 There is no direct evidence Chien intended to defraud  
2 Luc. When he acquired the property, Luc was not a  
3 judgment creditor and had not yet filed her wrongful  
4 eviction action. When he sold the property, he  
5 conveyed it to a good faith purchaser, without knowing  
6 about Luc's wrongful eviction action....Likewise,  
7 there is no direct evidence Chien wrongfully handled  
8 the \$160,000 profit....

9 The appellate court also quoted the trial court's comments  
10 about Chien's responsibility:

11 Moreover, the trial court concluded that Chien acted  
12 wrongfully, even if he did not act with a fraudulent  
13 intent. At the hearing on the statement of decision,  
14 the court explained: 'I don't think that Mr. Chien is  
15 without some responsibility. I said it before and I  
16 will say it again. Mr. Chien allowed himself to be  
17 used. I'm sorry, Mr. Chien. That's how I see it...I  
18 don't think that Mr. Chien is involved in any active  
19 fraud, in any active willful or malicious conduct. I  
20 wouldn't find that he is, you know, if there were an  
21 issue of punitive damages here, which there isn't, that  
22 he was subject to that....'

23 Chien filed his chapter 7 petition on August 19, 2005, and  
24 Luc timely filed her adversary complaint seeking to except the  
25 judgment from discharge under § 523(a)(6). The complaint  
26 purported to be based solely on the statement of decision and  
27 judgment rendered in the California Superior Court action,  
28 claiming the basis of the judgment was willful and malicious  
injury. The parties brought cross motions for summary judgment  
based on the doctrine of issue preclusion, which the bankruptcy  
court denied.<sup>7</sup> Accordingly, the parties proceeded to trial

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<sup>7</sup> The bankruptcy court noted at the trial on this matter  
that even though the state court had found that Chien had not  
acted willfully or maliciously, the state court used a different  
standard.

1 before the bankruptcy judge based on a stipulation.<sup>8</sup>

2 After a one-day trial that consisted of the live testimony  
3 of Chien, argument of counsel, and reference to the stipulated  
4 evidence, the bankruptcy judge found that Chien did not have the  
5 subjective malicious intent to injure Luc as required by Su and  
6 entered judgment for Debtor. Luc timely appealed.

### 7 III. JURISDICTION

8 The bankruptcy court had jurisdiction pursuant to 28 U.S.C.  
9 §§ 1334 and 157(b)(2)(I). We have jurisdiction under 28 U.S.C.  
10 § 158.

### 11 IV. ISSUES

12 Whether the bankruptcy court erred in determining that the  
13 debt owed to Luc was dischargeable.

### 14 V. STANDARDS OF REVIEW

15 Whether a claim is nondischargeable presents mixed questions  
16 of fact and law and is reviewed de novo. Su, 290 F.3d at 1142.

17 If two views of the evidence are possible, the trial judge's  
18 choice between them cannot be clearly erroneous. Anderson v.  
19 Bessemer City, 470 U.S. 564, 574 (1985). If a trial court's  
20 account of the evidence is plausible in light of the record  
21 viewed in its entirety, the appellate court may not reverse it,  
22 even though convinced if it had been sitting as the trier of fact  
23 it would have weighed the evidence differently. Phoenix Eng'g &  
24 Supply, Inc. v. Universal Elec., Inc., 104 F. 3d 1137, 1141 (9th  
25 Cir. 1997).

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27 <sup>8</sup> The stipulation provided that the transcript of the entire  
28 trial and ruling, including exhibits, in the San Francisco  
Superior Court in the matter entitled Luc, et al. v. Chien, et  
al., No. CAC-00-314060, would be deemed admissible.

1 VI. DISCUSSION

2 Pursuant to § 523(a)(6), a discharge under § 727 does not  
3 discharge an individual from any debt -- "(6) for willful and  
4 malicious injury by the debtor to another entity or to the  
5 property of another entity." 11 U.S.C. § 523(a)(6). The  
6 "willful and malicious" inquiry requires a two-step analysis.  
7 Khaligh v. Hadaegh (In re Khaligh), 338 B.R. 817, 831 (9th Cir.  
8 BAP 2006). The first step of the inquiry is whether there was a  
9 "willful" injury, while the second step concerns whether the  
10 conduct was "malicious." Id. In this appeal we are concerned  
11 only with the first step of the inquiry: whether there was a  
12 willful injury.<sup>9</sup> Such an inquiry focuses on a debtor's  
13 subjective intent.

14 A. The Standards for the Willful Inquiry

15 Debts arising from unintentionally inflicted injuries do not  
16 fall within the scope of § 523(a)(6). Geiger, 523 U.S. at 61-62  
17 (1998) (noting that "the (a)(6) formulation triggers in the  
18 lawyer's mind the category of 'intentional torts'" which  
19 "generally require that the actor intend 'the consequences of an  
20 act,' not simply the 'act itself.'"). Geiger held that debts  
21 based on a medical malpractice judgment allegedly arising from  
22 intentionally rendered inadequate medical care that necessarily  
23 led to plaintiff's injuries were dischargeable because the doctor  
24 did not intend the injury. The court concluded that "debts  
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26 <sup>9</sup> The parties and court below focused their briefs and  
27 argument solely on this prong. Since we agree with the trial  
28 court that Appellant did not to establish the willful prong, a  
discussion of malicious conduct is unnecessary.



1 arising from recklessly or negligently inflicted injuries do not  
2 fall within the compass of § 523(a)(6).” Id. at 64.

3 The Ninth Circuit clarified Geiger in two cases pertinent to  
4 this analysis, Petralia v. Jercich (In re Jercich), 238 F.3d 1202  
5 (9th Cir. 2001), cert. denied, 533 U.S. 930, and Su, 290 F.3d at  
6 1140. In Jercich the court considered whether a prepetition  
7 state court judgment against a chapter 7 debtor held by the  
8 debtor’s employee for unpaid wages was excepted from discharge  
9 under § 523(a)(6). The debtor-employer had deliberately breached  
10 the employment contract with the creditor-employee. He elected  
11 not to pay wages owed to his employee even though he had the  
12 funds to do so and spent the money instead on personal  
13 investments. In examining whether these acts led to a debt based  
14 on the debtor’s willful and malicious injury, the court  
15 emphasized that willful and malicious was a two pronged test.

16 Answering a question not addressed in Geiger and relying on  
17 an earlier Supreme Court case, McIntyre v. Kavanaugh 242 U.S. 138  
18 (1916) and Restatement (Second) of Torts § 8A, cmt a, p. 15  
19 (1965), the Ninth Circuit held that the willful injury  
20 requirement of § 523(a)(6) is met “when it is shown either that  
21 the debtor had a subjective motive to inflict the injury or that  
22 the debtor believed that injury was substantially certain to  
23 occur as a result of his conduct.” Jercich, 238 F.3d at 1207-8  
24 (emphasis in original).<sup>10</sup>

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25  
26 <sup>10</sup> The court, finding that its earlier definition of  
27 malicious injury in Murray v. Bammer (In re Bammer), 131 F.3d  
28 788, 791 (9th Cir. 1997) (en banc), survived Geiger, reiterated  
the definition: “A ‘malicious’ injury involves ‘(1) a wrongful

(continued...)

1 The Ninth Circuit in Su, the case largely relied on by the  
2 trial court below, was compelled to resolve confusion it had  
3 created itself in Jercich.<sup>11</sup> The Court in Jercich had cited both  
4 a Fifth Circuit case, Miller v. J.D., Abrams, Inc. (In re  
5 Miller), 156 F.3d 598 (5th Cir. 1998), and a Sixth Circuit case,  
6 Markowitz v. Campbell (In re Markowitz), 190 F.3d 455 (6th Cir.  
7 1999) with favor in discussing its definition of willful injury.  
8 The Su court recognized that Miller had employed an objective  
9 standard for willfulness ("...[c]onversely, the Fifth Circuit's  
10 interpretation of § 523(a)(6) exemplifies the objective approach,  
11 in which debt is nondischargeable under § 523(a)(6) either if  
12 there is a subjective intent to cause an injury or if there is an  
13 objective substantial certainty of harm"), Su, 290 F.3d at 1143-  
14 44, whereas Markowitz had employed the subjective standard which  
15 the Ninth Circuit meant to adopt.

16 Utilizing only the subjective test, the Su court agreed with  
17 this Panel that the bankruptcy court was required to analyze the  
18 debtor's state of mind in order to make findings of malice,  
19 rather than use the objective test (substantial certainty of  
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21 <sup>10</sup>(...continued)  
22 act, (2) done intentionally, (3) which necessarily causes injury,  
23 and (4) is done without just cause or excuse.'" Jercich at 1209.  
The malicious prong is not at issue in this appeal.

24 <sup>11</sup> In Su the judgment creditor had been injured as a result  
25 of a chapter 7 debtor's allegedly deliberate decision to run a  
26 red light. The jury had found that the debtor/driver was guilty  
27 of malice by clear and convincing evidence based on the state  
28 court definition of malice: either conduct intended to cause  
injury to the plaintiff or despicable conduct carried on with a  
willful and conscious disregard for the safety and rights of  
others. Su, 290 F.3d at 1141.

1 harm) as it had done, relying on Miller. In so doing, the Ninth  
2 Circuit explicitly rejected "reckless disregard" as a basis for  
3 the nondischargeability of a debt under § 523(a)(6). Su, 290  
4 F.3d at 1145-46.

5 In sum, both Geiger and Su demonstrate that the standard for  
6 meeting the willful prong of the two-part test under § 523(a)(6)  
7 is high. That is, the creditor must prove that the debtor had  
8 the subjective intent to cause harm or the subjective knowledge  
9 that harm was substantially certain to occur.

#### 10 B. Debtor's Culpability

11 As detailed above, the trial before the bankruptcy judge  
12 consisted of the live testimony of one witness, Chien, and the  
13 court's consideration of all the evidence, oral and documentary,  
14 submitted into the record in the state court trial of Luc v.  
15 Chien. The record of the one-day proceeding reflects that the  
16 trial judge made an independent review of all the evidence from  
17 the state court trial and considered it, along with Chien's  
18 testimony, in making its decision.<sup>12</sup>

19 Throughout the trial and in closing argument, Luc sought to  
20 establish Debtor had the subjective knowledge that harm to Luc  
21 was substantially certain to occur when Chiu transferred the  
22 Rental Property to him. The trial judge was mindful of the Su  
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24 <sup>12</sup> Appellant argues obliquely on occasion in its appellate  
25 briefs, as well as before the trial court, that the court "must"  
26 give collateral estoppel (i.e., issue preclusive) effect to  
27 findings of the state court. This argument, however, is not  
28 developed in the briefs nor is it merited, given the stipulation  
by the parties as to the evidence before the trial court.  
Therefore, we will ignore these arguments. Issue preclusion has  
no effect on the outcome of this case.

1 requirements when he ruled and knew he must find Debtor's  
2 subjective intent to injure Luc in order to except the debt from  
3 discharge. He articulated the standard in a question to Luc's  
4 counsel:

5 "Okay. Let me ask you. He has to intentionally perform an  
6 act with the subjective knowledge that harm is substantially  
7 certain to occur?"

8 To which counsel responded: "Absolutely," then went on to  
9 argue that the "act" was taking title to the Rental and  
10 conspiring to violate the rent control laws.

11 Applying the standard for analyzing the willful prong as  
12 articulated under Su, the trial judge found Chien did not  
13 intentionally take title to the Rental Property with the  
14 subjective knowledge that harm to Luc was substantially certain  
15 to occur. Specifically, the court found two "breaks in the  
16 chain." The first break was the Stipulation between Chiu and  
17 Luc. The court noted that the Stipulation was resolving Chiu's  
18 claim for rent against Luc and that there was no lawsuit at that  
19 time. The second break was that there was a logical reason for  
20 Chien to take title to the Rental Property: to facilitate the  
21 financing necessary for development. Thus, the court observed  
22 that while the Debtor's act of taking title may have been  
23 deceptive to the banks, the evidence did not support Luc's  
24 argument that Debtor took title to the Rental Property to evade  
25 the rent control laws and a judgment for that affect. Also,  
26 almost as an aside, the trial court found there was no harm with  
27 the sale of the Rental Property to a third party because it  
28 appeared to be for fair market value and Debtor took no profits.

1           Based upon the record, we perceive no defect in the  
2 bankruptcy court's conclusion that the requisite intent under the  
3 Su test was not satisfied. We give deference to his weighing of  
4 the evidence and find no clear error. Price v. Lehtinen (In re  
5 Lehtinen), 332 B.R. 404, 415 (9th Cir. BAP 2005) (noting that  
6 findings of fact based upon credibility are given particular  
7 deference by appellate courts). In sum, the rule of law set  
8 forth in Su is clear and the court's factual findings satisfy the  
9 Su standards.

10 C.    **Intent to Harm Parties Other Than Luc**

11           Luc takes issue with the court's finding that there was no  
12 connection between Debtor's act of taking title to the Rental  
13 Property and the harm to Luc. Luc contends all that she needs to  
14 prove under the willful test is that Debtor's intentional act of  
15 taking title and using his good credit to obtain the loans needed  
16 to develop the Rental Property could foreseeably harm someone  
17 (presumably the lenders) and she need not prove foreseeable harm  
18 to her.

19           Luc's argument is not supported by any case law cited in her  
20 brief, nor did we find any. This lack of case law is no surprise  
21 because the statute and Su require that the debtor must commit  
22 some type of act that he or she subjectively knows would cause  
23 injury to the creditor, and not just subjective knowledge that  
24 his or her acts would cause injury to parties other than the  
25 creditor.

26           Further, implementation of § 523(a)(6) is established by the  
27 statute itself under subsection (c), which provides:

28

1 Except as provided in subsection (a)(3)(B) of this  
2 section, the debtor shall be discharged from a debt of  
3 a kind specified in paragraph . . . (6)... of  
4 subsection (a) of this section, unless, on request of  
5 the creditor to whom such debt is owed, and after  
6 notice and a hearing, the court determines such debt to  
7 be excepted from discharge under paragraph... (6)... as  
8 the case may be, of subsection (a) of this section. 11  
9 U.S.C. § 523(c) (emphasis added).

6 As highlighted above in the statute, the creditor to whom  
7 the debt caused by the willful and malicious conduct is owed must  
8 bring the action for nondischargeability within a specified time  
9 frame as established by Rule 4007 (c). Otherwise, the debt is  
10 discharged.

11 Appellant having presented no case law to support this  
12 argument and the statutory scheme providing the scope of  
13 claimants, we summarily reject Luc's suggested expansion of the  
14 willful test. Here, Luc admits she was not a lender or within  
15 the class of people foreseeably damaged by the fraudulent lending  
16 schemes concocted by Chiu and Chien. Thus, Luc cannot assert  
17 nondischargeability because Debtor's acts would potentially harm  
18 lenders because she was not a lender.

19 **D. Imputed Conduct**

20 Appellant articulates her proposed expansion of the willful  
21 inquiry in her Reply Brief:

22 Appellant sought to exempt her judgment as 'wilful  
23 (sic) and malicious,' under Bkrtcy. C. § 523(a)(6), but  
24 the Bankruptcy Court denied relief under In re Su, 290  
25 F. 3d 1149 (9th Cir. 2002). Appellant argued in the  
26 Bankruptcy trial court, and now, here, that In re Su  
27 should not apply to broad-based conspiracies (as here)  
and certainly not to Mr. Chien who was deemed to be a  
facilitator, complicit, partner, and instrumental, that  
Kevin and Donald worked together, with ongoing  
participation....

28 Luc's consistent vision is that Debtor's conduct was instrumental

1 to Chiu's success, which was precisely the finding of the state  
2 court of appeal. She therefore seeks to avoid the holding of Su  
3 and the plain meaning of § 523(a)(6) by maintaining that the  
4 court erred by not imputing Chiu's conduct to Chien. In other  
5 words, the standards set forth in Su are inapplicable because  
6 they do not cover injuries caused by the willful conduct of  
7 another which should be imputed to Debtor through application of  
8 alter ego, agency, conspiracy, or partnership principles.

9 Whether Chiu's willful conduct should have been imputed to  
10 Debtor under any of these theories was not addressed by the  
11 bankruptcy court.<sup>13</sup> The court found in Debtor's favor based on  
12 Su and nothing more.

13 Luc cites Tsurukawa v. Nikon Precision, Inc. (In re  
14 Tsurukawa), 287 B.R. 515 (9th Cir. BAP 2002) in support of her  
15 position. Close analysis of this § 523(a)(2)(A)  
16 nondischargeability case belies its applicability. In Tsurukawa,  
17 the debtor and her husband were engaged in a business partnership  
18 and, based on that partnership, the husband's fraud was imputed  
19 to debtor for purposes of creditor's § 523(a)(2)(A) argument.  
20 The genesis of this finding was the definition of a partnership  
21 under California law and the agency principles it engenders,  
22 along with the court's observation that the United States Supreme  
23 Court had already found that the fraud of a partner could be

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24  
25 <sup>13</sup> We note that the bankruptcy judge in this case made no  
26 explicit findings on these issues. He did not find that Debtor  
27 was the partner of Chiu, never discussed alter ego or enabling  
28 behavior, and made no finding on conspiracy. For purposes of our  
discussion, we assume without deciding that Debtor was at least  
an implicit partner of Chiu.

1 imputed to a debtor for nondischargeability purposes. Id. at 525  
2 citing Strang v Bradner, 114 U.S. 555, 561 (1885). Thus, even  
3 though the statute was silent regarding whether a partner's fraud  
4 could be imputed to the debtor under partnership or agency  
5 principles, the court found the existing case law imputed fraud  
6 under an § 523(a)(2)(A) analysis. See also, BancBoston Mortgage  
7 Corp. v. Ledford (In re Ledford), 970 F.2d 1556 (6th Cir.  
8 1992) (finding the fraud of a partner was imputed to a debtor  
9 where the fraud was in the ordinary course of business of the  
10 partnership and the profits created were shared by the debtor  
11 partner).

12 The Tsurukawa analysis is thus specific to fraud and to  
13 apply it to willful and malicious conduct is a quantum leap we  
14 are not prepared to make. The plain language of § 523(a)(6)  
15 excepts from discharge a willful and malicious injury by the  
16 debtor to another entity (emphasis added). Further, the  
17 standards set forth in Geiger and Su compel a more measured  
18 approach. We harken back to Geiger where the Supreme Court, in  
19 the simplest possible terms, said a debtor must intend to injure  
20 the creditor before a claim is excepted from discharge based on  
21 malice. Geiger, 523 U.S. at 61-62. The Ninth Circuit in Su has  
22 refined the willful prong to require the debtor to subjectively  
23 intend to inflict injury or to believe that injury is  
24 substantially certain to occur as a result of his conduct. Su,  
25 290 F.3d at 1144 (emphasis added).

26  
27  
28



1 Even if Debtor was Chiu's partner,<sup>14</sup> agency principles do  
2 not project a state of mind on Chien. Behaviors and outcomes  
3 might be imputed, maybe even misrepresentations, but subjective  
4 thoughts cannot be. Under no accepted legal principles can  
5 Chiu's subjective willfulness be rested upon Debtor.<sup>15</sup>

6 Regarding Luc's conspiracy theory, the recent case of  
7 Kalmanson v. Adams (In re Nofziger), 361 B.R. 236 (Bankr. M.D.  
8 Fla. 2006), while not binding, is instructive. In Nofziger, the  
9 court held that a conspiracy claim would not substitute for the  
10 intentional tort typically required to make a debt  
11 nondischargeable under § 523(a)(6). Id. at 243. The court's  
12 decision was based on the rationale that a co-conspirator's acts  
13 are not the debtor's acts which must be taken directly against  
14 the objecting creditor as required by § 523(a)(6). Id. The  
15 court observed that "action taken by someone other than the  
16 debtor" does not qualify. Id. We agree with Nofziger,  
17 consistent with the standards set forth in Geiger and Su, that

18  
19  
20 <sup>14</sup> Maybe even assuming Chien was Chiu's partner is an  
21 unwarranted stretch when case law requires that a partner  
22 participate in the profits. The record makes it very clear that  
Chiu, not Chien, got all the money.

23 <sup>15</sup> Luc also relies on Flowers & Sons Dev. Corp. v. Mun.  
24 Court, 86 Cal.App.3d 818, 150 Cal.Rptr. 555 (1978). However,  
25 that case simply stands for the proposition that if the defendant  
26 no longer has a possessory interest in the fraudulently-conveyed  
27 property, the plaintiff creditor cannot obtain the set-aside  
28 remedy provided under Cal. Civ. Code § 3439.07, subdivision  
(a)(1) and may obtain an award for damages if the transferee had  
knowledge of the fraudulent scheme. Here, the award of damages  
against Chien by the state court was based on constructive trust,  
not his knowledge of fraud.

1 Luc's conspiracy theory is inapplicable in the context of  
2 § 523(a)(6).

3 While Luc argues that Su should not apply to this case, her  
4 argument seems to be based more on the factual distinction of Su  
5 than on any analysis that the subjective standards established by  
6 Su are wrong. These standards are controlling. Accordingly, a  
7 partner's willful conduct, which requires subjective intent to  
8 harm or subjective knowledge that harm would occur, may not be  
9 imputed to a debtor for purposes of nondischargeability under  
10 § 523(a)(6).

#### 11 VII. CONCLUSION

12 We hold that the bankruptcy court properly applied the  
13 standards under Su to the facts of this case. We emphasize that  
14 under Su, the debtor must have the subjective knowledge that harm  
15 to the complaining creditor, and not some other group of persons  
16 or entities, would occur. We also hold that the requisite  
17 standards for a finding of willfulness, which requires subjective  
18 intent to harm or subjective knowledge that harm will occur,  
19 cannot be imputed to a debtor through the conduct of another  
20 wrongdoer. Accordingly, for the reasons noted above, we AFFIRM.

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