In re: RYAN A. NASSBRIDGES, Debtor. RYAN A. NASSBRIDGES, Appellant, v. LOUIS A. DIMICHELE, WILLIAM MURRAY; ARLA MURRAY, Appellees.

BAP No. CC-10-1451-KiDMk

UNITED STATES BANKRUPTCY APPELLATE PANEL FOR THE NINTH CIRCUIT

2011 Bankr. LEXIS 3163

June 17, 2011, Argued at Pasadena, California
July 15, 2011, Filed

NOTICE: 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.

PRIOR HISTORY: [*1]

Appeal from the United States Bankruptcy Court for the Central District of California. Bk. No. SA 08-12510-TA, Adv. No. SA 08-1326-TA. Honorable Theodor C. Albert, Bankruptcy Judge, Presiding.

COUNSEL: Jeremiah T. Morgan argued for appellant, Ryan A. Nassbridges.

Steven L. Krongold argued for appellees, William and Arla Murray.

JUDGES: Before: KIRSCHER, DUNN, and MARKELL, Bankruptcy Judges.

OPINION

MEMORANDUM

Appellant, chapter 7 [2] debtor Ryan A. Nassbridges ("Nassbridges"), appeals a bankruptcy court judgment excepting from discharge his $1,546,523.00 debt to appellees, William and Arla Murray ("Murrays"), under sections 523(a)(2)(A) and (a)(4). Nassbridges also appeals the court's order denying his motion to alter/amend the judgment. We AFFIRM. [3]

2 Unless specified otherwise, all chapter, code, and rule references are to the Bankruptcy Code, *11 U.S.C. §§ 101-1532*, and the *Federal Rules of Bankruptcy Procedure*, *Rules 1001-9037*. The Federal Rules of Civil Procedure are referred to as "FRCP."

3 Although Nassbridges was pro se when he filed his appellant's opening brief, he was represented by counsel at oral argument and that counsel filed appellant's reply brief. After oral argument, on July 20, 2011, Mr. Nassbridges, [*2] pro se, attempted to supplement the record by filing what he called "Appellant's Topics of His Oral Argument."

We are not required to consider Nassbridges's filing. Issues that counseled parties attempt to raise pro se need not be considered except on a direct appeal in which counsel has filed an Anders brief, which is not applicable here. See *United States v. Vampire Nation, 451 F.3d 189, 206 n.17 (3d Cir. 2006)*. Even if we did consider it, Nassbridges's arguments center on what he contends are erroneous findings of fact by the bankruptcy court, which he has already asserted.

He then instructs the Panel to review various "exhibits" where we can confirm the alleged errors. As we explain below, Nassbridges failed to include in the record any trial exhibits, including the ones to which he now refers.

I. FACTUAL AND PROCEDURAL BACKGROUND

A. Prepetition Facts.

Nassbridges was an investment broker specializing in trading precious metals. Murrays are cattle ranchers from Miles City, Montana and former clients of Nassbridges and his California company, American Bullion Exchange Corporation ("ABEX"), which Nassbridges founded in April 2007. ABEX, which filed bankruptcy on April 23, 2008, was an [*3] investment brokerage firm dealing exclusively in precious metals comprised of bullion and coins made of gold, silver, platinum and palladium, to be held for investment purposes.

After losing money investing in precious metals futures trading with two other brokerages, Murrays were still interested in investing in gold. In August 2007, an employee of ABEX, Curtis Lund ("Lund"), contacted Ms. Murray by telephone inquiring about her interest in purchasing gold. Ms. Murray responded favorably, so Lund caused ABEX brochures to be sent to her. Ms. Murray also reviewed ABEX's website and was impressed. Murrays soon thereafter received the ABEX brochures. Nowhere in the brochures does it mention the word "futures" or "futures contracts."

In October 2007, Murrays received from ABEX various forms and a booklet entitled the "ABEX Storage Account and Precious Metals Buy/Sell Disclaimer & Disclosure" ("Account Agreement") for their review and signature. That same month, Murrays agreed to open an account with ABEX, and they signed and returned each form as requested. On or around October 18, 2007, Nassbridges on behalf of ABEX opened two accounts at MF Global (f/k/a Man Financial) specifically to [*4] accommodate Murrays's purchases of gold. One account was opened under the name of Bita Nassbridges, Nassbridges's wife, as a speculation account; the other was opened in the name of ABEX as a hedge account. ABEX also utilized a margin account at MF Global. MF Global describes itself as a "futures commission merchant, holding commodity futures trading accounts for its customers."

Starting in October 2007, Murrays began a series of trades by wiring money to ABEX and/or sending to ABEX gold coins for sale. To place orders, Murrays would call and speak to an account representative. Each of these calls was recorded. In each call, the representative would read from a script drafted by Nassbridges, and remind Murrays of the disclosures and disclaimer contained in the Account Agreement and affirm their understanding of those terms. On October 23, 2007, Murrays wired $975,000 to ABEX for the purchase of gold bars. That same day, Murrays placed an order for the purchase of 1200 ounces of gold bars at a spot [4] price of $761.70 per ounce. On November 8, 2007, ABEX sent Murrays confirmations showing the $975,000 paid to purchase gold bars. On November 2, 2007, Murrays wired another $399,600 to ABEX. [*5] On that same date, Ms. Murray wired $15,000 to ABEX. On November 6, 2007, Murrays placed an order for the purchase of 1400 ounces of gold bars at a spot price of $810.00 per ounce on credit. On that same date, ABEX sent Murrays a confirmation showing the $399,600 for the purchase of gold bars. On November 20, 2007, Murrays sold 169 American Eagle gold coins for $134,693 and authorized ABEX to purchase 500 ounces of gold at a spot price of $805.00 per ounce on credit with the funds. ABEX then sent Murrays confirmation showing the $134,693 applied to purchase gold bars on credit. On November 28, 2007, Murrays sold 28 Canadian Maple Leaf gold coins for $21,436 and, together with the $15,000 deposit, authorized ABEX to purchase 160 gold bars at spot price of $806.00 per ounce on credit. In total, Murrays paid ABEX $1,389,600 through wire transfers, and another $156,129 through the sale of gold coins.

4 As explained by the bankruptcy court, a "spot" price is "[t]he current price at which a particular commodity can be bought or sold at a specified time and place . . . ." See http://www.investopedia.com/terms/s/spotprice.asp.

In addition to the confirmations for purchases, Murrays also received [*6] from ABEX month-end statements showing the amount and value of their account. Murrays' account as of November 30, 2007, and December 31, 2007, showed that it contained 4300 ounces in gold bullion bars valued at $3,380,058 and $3,571,623, respectively. Each ABEX statement described the holdings as varying quantities of "gold bar .999."

All was fine as the price of gold steadily rose from around $761.00 per ounce in October 2007 to over $1,000 per ounce in March 2008. The ABEX statement from February 2008 showed that Murrays enjoyed $1,555,177.32 in "equity" in their joint account, and that Ms. Murray had $57,317.54 "equity" in her separate account.

Things then took a turn for the worse. On March 18, 2008, the price of gold was $1,003 per ounce. By March 20, it had fallen to $910. MF Global made margin calls upon ABEX's account which were not met and, as the price continued to fall, MF Global sold out the entire account on March 20, 2008, leaving a deficiency of -$290,428.16. Murrays's entire investment was wiped out in moments. Nassbridges attempted to mitigate Murrays's losses by a series of stop loss orders but, for reasons unexplained, the stop orders were rejected, or were ineffective. [*7] Nonetheless, despite the complete wipe out of their investment, Murrays still received statements from ABEX for the months of March 2008 and April 2008 showing they enjoyed "equity" of $1,361,782.90 and $1,219,210.63, respectively, in their joint account, and that Ms. Murray enjoyed $50,694,58 and $43,032.93 "equity," respectively, in her separate account. Nassbridges also met with Ms. Murray for dinner in Washington D.C. in late March 2008, but he said nothing about MF Global or that Murrays's investments had been wiped out.

Several days after the wipe out, ABEX sent Murrays a letter notifying them of the problem. The letter also disclosed to Murrays, for the first time, the name MF Global. Included with ABEX's letter was a "Letter of Acknowledgment" under which ABEX attempted to obtain a "hold harmless" agreement from Murrays. ABEX sent additional letters to Murrays on April 23 and April 29, 2008. Murrays declined to sign the "hold harmless" agreement. After ABEX filed a chapter 7 petition for relief in April 2008, it was determined to be a "no asset" case and did not have on account, hold, or own the volume of gold described in the statements sent to Murrays.

On April 30, 2008, Murrays [*8] (along with two other plaintiffs not subject to this appeal) filed a complaint against Nassbridges in the United States District Court for the Central District of California for damages and injunctive relief for commodities fraud and related claims. Specifically, Murrays sued Nassbridges for, inter alia, commodities fraud, actual and constructive fraud, breach of fiduciary duty, unfair business practices, conversion, and fraudulent transfer. The district court action was stayed once Nassbridges filed a chapter 11 petition for relief on May 9, 2008. His case was converted to one under chapter 7 on October 10, 2008.

B. Postpetition Events.

1. District Court Action.

In May 2009, Murrays obtained relief from stay to prosecute their district court action against Nassbridges. On July 31, 2009, the parties filed in the district court a Stipulation to File First Amended Complaint ("Stipulation"). The Stipulation stated that after initial discovery Murrays had determined that their damages were caused by Nassbridges's negligent acts or omissions, and not by any fraudulent or unlawful business activity; therefore, Murrays wished to file an amended complaint. The district court granted the Stipulation. [*9] Murrays then filed their First Amended Complaint, which removed all allegations of fraud and now pled claims for negligence and breach of fiduciary duty. Shortly thereafter, Murrays moved for summary judgment against Nassbridges. The district court held a hearing on the motion on December 14, 2009. Although Nassbridges was given six weeks to prepare for the hearing, he failed to appear. Accordingly, the district court deemed his non-appearance as consent to granting the motion, and it entered a judgment in favor of Murrays for $1,546,523 plus costs of suit.

2. Nondischargeability Action.

On August 18, 2008, Murrays filed a complaint against Nassbridges seeking to except from discharge their debt under sections 523(a)(2)(A) [actual fraud], (a)(4) [fraud as fiduciary and embezzlement], and (a)(6) [willful and malicious injury]. [5] Murrays alleged that Nassbridges had solicited them to invest substantial sums of money to purchase gold bullion and gold coins. Specifically, Nassbridges, as investment advisor and fiduciary, provided Murrays with prices, solicited and confirmed their orders, executed orders, and decided how and when to place stop loss orders on their behalf. In reality and unbeknownst [*10] to Murrays, rather than purchasing gold, as represented, Nassbridges had purchased highly leveraged gold futures contracts. Murrays asserted that at no time was Nassbridges or any of his affiliated entities authorized to engage in these

leveraged transactions.

> 5 The bankruptcy court found in favor of Nassbridges on Murrays's claim under section 523(a)(4) for embezzlement and their willful and malicious injury claim under section 523(a)(6). Murrays have not cross appealed the court's decisions with respect to those claims. Therefore, those issues are not before the Panel and we need not discuss them any further.

According to Murrays, in a September 2007 telephone conversation, Nassbridges knowingly made numerous false representations upon which they relied before investing with ABEX:

o he was a registered commodities broker;

o he was experienced in commodities having worked as a trader for Monex Precious Metals;

o he would use investors money to buy, sell, and store gold coins and bullion;

o he would use investors money to purchase gold futures contracts and/or leverage contracts at prevailing market prices and at commission rates standard for the industry;

o the gold investments were insured [*11] by Lloyd's of London;

o the investor's funds would be held in a segregated account; and

o the principal was safe since if margin requirements could not be met, then the positions would be closed when appropriate stop losses were triggered.

Murrays alleged that they later discovered Nassbridges was not a registered broker, he had never worked as a trader for Monex, none of their investments were insured or held in a segregated account, and he charged exorbitant commissions and finance charges. Murrays further alleged that Nassbridges also failed to disclose that on October 24, 2007 he withdrew his principal license with the Commodities Futures Trading Commission ("CFTC") and the National Futures Association and was therefore unlicensed to perform any activity as a commodities trader or advisor. Finally, Murrays alleged that Nassbridges recruited salespeople, many of whom had no prior commodities trading experience, and urged them to solicit the general public through cold calls or leads purchased from third parties. [6]

> 6 Murrays later moved for summary judgment or partial summary adjudication, which the bankruptcy court denied on February 23, 2010.

Nassbridges filed his trial pleadings on [*12] July 12, 2010. [7] He asserted that he had little recollection of the September 2007 telephone conversation with Murrays, but suspects that he informed Murrays of the services ABEX could provide and the terms that would apply to the buying and selling of gold. Nassbridges denied that he invested Murrays's money into gold futures contracts; rather, he purchased gold bullion on credit/margin as Murrays requested. Nassbridges provided an entirely different story regarding the transactions with Murrays. He explained that ABEX had accounts with MF Global for MF Global to act as the intermediary for ABEX into the commodities market. That way, ABEX could obtain wholesale prices for gold and give its customers access to the gold market which they would otherwise not be able to access. ABEX's accounts were not "futures trading accounts" as Murrays alleged, but rather were what Nassbridges called "due contracts." Nassbridges asserted that "due contracts" were different from "futures contracts" in that a due contract is a purchase at spot prices but where delivery is expected within 90 days. Nassbridges claimed that Murrays's funds were used to purchase gold through MF Global on credit. As such, [*13] MF Global stored the gold until ABEX was able to pay its debt in full to MF Global on each contract, but ABEX would not be able to do so until Murrays paid their debt in full to ABEX. Until then, MF Global held title to the gold purchased by ABEX, and not until Murrays's paid their account in full would the gold be shipped to them. According to Nassbridges, in a letter dated November 9, 2007, Murrays agreed to allow ABEX to purchase "Gold Contracts within 90 Days delivery time period and further sell the contract prior to its delivery due date."

> 7 Review of Nassbridges's declaration and trial brief was necessary to determine what he asserted at trial. These documents can be found on the bankruptcy court docket (08-1326) at entries 107 and 117. The BAP can take judicial notice of items from the bankruptcy court record. *Atwood v. Chase Manhattan Mortgage Co. (In re Atwood), 293 B.R. 227, 233 n.9 (9th Cir. BAP 2003).*

Nassbridges alleged that on March 18, 2008, he realized the price of gold was decreasing, so he placed a sell order with MF Global as was his regular practice. For reasons unexplained, MF Global did not honor the sell order. As a result, ABEX suffered a margin call. [8] Consequently, [*14] ABEX was unable to pay off its debt with MF Global and had no choice but to liquidate Murrays's position as permitted under the Account Agreement. According to Nassbridges, Murrays purchased over $4 million of gold on credit/margin from ABEX, and they still owed ABEX approximately $3.6 million in unpaid credit advances made by ABEX to MF Global on their behalf.

8 Nassbridges alleged that after MF Global made a margin call on ABEX, ABEX in turn made a demand on Murrays to pay their balance, but they did not do so. The bankruptcy court ultimately concluded that no written evidence existed that ABEX made the alleged margin call on Murrays.

Nassbridges contended that judicial estoppel precluded Murrays's nondischargeability suit because they had admitted in the Stipulation that no facts sufficient to prove fraud existed. He further argued that Murrays's assertion in the district court action that Nassbridges told them that ABEX would purchase futures contracts was inconsistent with their current position that Nassbridges told them that ABEX would purchase gold bullion. [9]

9 At summary judgment, Nassbridges had claimed that he relied on Murrays's counsel's promise to dismiss the adversary proceeding [*15] if he agreed to sign the Stipulation. Murrays's counsel denied this allegation. He testified that the parties had agreed to amend the district court fraud action to one for negligence in hopes that Nassbridges's D&O liability insurance policy would satisfy Murrays's claim. If it did, then Murrays agreed to dismiss the adversary proceeding. If not, Murrays would continue to pursue the nondischargeability claims. Counsel testified that at no time did he ever agree to dismiss the adversary proceeding just because Nassbridges stipulated that Murrays could file the First Amended Complaint. The Stipulation merely avoided a noticed motion and hearing.

Nassbridges also asserted that Murrays's suit was precluded by the doctrine of claim preclusion. In summary, Nassbridges argued that the facts Murrays asserted in the district court action were almost identical to the facts they asserted here, and thus the claim at issue here is clearly from the same transaction, which was already litigated to judgment in the district court.

Alternatively, Nassbridges alleged that Murrays failed to prove the necessary elements of sections 523(a)(2)(A) or (a)(4). As for the actual fraud claim, Nassbridges argued [*16] that Murrays could not even remember what he told them about what was being purchased, futures contracts or gold, as reflected by their inconsistent statements in the two actions. However, even if he made the September 2007 statements as alleged, Nassbridges argued that the statements were not false and/or Murrays could not have justifiably relied on them due to the disclosures in the Account Agreement and monthly statements. Accordingly, argued Nassbridges, he could not have had any intent to deceive Murrays. Finally, Nassbridges argued that Murrays's loss was not due to his action but rather the actions of Murrays and MF Global.

Nassbridges argued that Murrays's claim under section 523(a)(4) also failed because he was not a fiduciary to Murrays as disclosed on page 36 of the signed Account Agreement: "ABEX and its account representative are not agents for Customer and owe no fiduciary duty to Customer." Further, contended Nassbridges, Murrays account was entirely "self-directed" and it was their responsibility to monitor their accounts and to make their own decisions for buying and selling. In any event, argued Nassbridges, he did not engage in any fraudulent activity.

A four-day trial [*17] on the nondischargeability action commenced on July 19, 2010. In addition to what Murrays had already alleged regarding the September 2007 telephone conversation with Nassbridges, they testified that Nassbridges represented:

o he was President of ABEX and an experienced gold bullion dealer;

o he was a member of various precious metal trade groups;

o ABEX would use their money to purchase gold bullion at spot prices;

o their money would not be commingled with any

other person or account;

o they could pay in full and take immediate physical delivery of the gold bullion or store it with HSBC bank or an independent depository; and

o Murrays could finance their purchase through ABEX with a down payment and any balance was subject to monthly charges.

Murrays also testified that at no time from October 2007 until their last transaction did ABEX have in storage actual gold bullion ready to be delivered to them upon payment of the balance due in their joint account. Finally, Murrays testified that they never authorized Nassbridges to purchase futures contracts, were never made aware that he had done so, and would never have permitted their money to be used for that purpose.

James J. Bibbings ("Bibbings"), [*18] expert witness for Murrays, also testified. Bibbings was retained to opine on whether or not trades made by Nassbridges/ABEX through MF Global for Murrays were futures contracts or the actual purchase of gold bullion. Bibbings testified that, based on the documents he reviewed, in his opinion the statements reflected the purchase and sale of futures contracts in precious metals. None of the documents provided showed proof that Nassbridges/ABEX purchased actual gold bullion, coins, or any other type of physical precious metals asset. Specifically, Bibbings stated that:

> According to Exhibit 60, ABEX represented to the Murrays that it was to act as a principal to client trades, in other words they were to be the counter-party or facilitator for client transactions in precious metals. ABEX was also to deal in gold coins and offer prices that were not required to align with futures exchanges. This is consistent with spot precious metals trading, not futures trading. . . . Despite this representation, however, I did not see any evidence of the actual purchase of gold bullion for or on behalf of Murrays or any other ABEX customer.

Bibbings further explained that a "futures contract" is a standardized, [*19] transferable, exchange-traded contract that requires delivery of a given commodity, like gold, at a specified price on a specified future date. One futures contract for gold controls 100 troy ounces, or one brick, of gold. Thus, if the market is trading at $1,200 per ounce, the value of the contract is $120,000 ($1,200 x 100 oz.). Bibbings testified that the MF Global statements he reviewed consisted of futures contracts of gold and silver. Specifically, the contract "DEC 07 CMX SILVER or FEB 08 CMX GOLD," was for the delivery of 5000 troy ounces of silver at contract expiration December 2007 or 100 ounces of gold at contract expiration in February 2008. According to Bibbings, for approximately $5,700, one can control $120,000 worth of gold, a ratio of roughly 1 to 21. Based on exchange margin rules, the margin required to control one contract is a fraction of the market value. A futures contract, explained Bibbings, has margin requirements that must be settled and monitored daily, or even more often in volatile markets. If the futures contract does not have enough margin on deposit, the owner will receive a "margin call" to increase the amount of funds on deposit to secure the trade. [*20] In this instance, opined Bibbings, if Nassbridges/ABEX had purchased gold bullion as represented, as opposed to futures contracts, the trading discrepancy with MF Global in the ABEX account should not have exposed clients to any future losses. Likewise, had clients purchased spot precious metals for delivery, these assets should not have been affected by a margin call in the futures market.

Finally, Lund, former employee of ABEX, testified that although he spoke with Murrays and sent them information on ABEX, Nassbridges called in the actual trades. Lund was never allowed to and did not make any trades, nor was he allowed to listen in on Nassbridges's trade calls. Lund testified that he believed for each trade ABEX was purchasing gold bullion per the client's request. Lund further testified that after the wipe out on March 20, 2008, Nassbridges "panicked" and sent Murrays the hold harmless agreement, which Lund told Murrays not to sign. Just days later, Lund resigned from ABEX. Lund testified that he became aware of Nassbridges's fraud in the summer of 2008.

After taking the matter under advisement, the bankruptcy court issued its Statement of Decision After Trial on August 17, 2010 [*21] ("Statement of Decision"), determining that Nassbridges's debt to Murrays was nondischargeable under sections 523(a)(2)(A) [actual fraud] and (a)(4) [fraud or defalcation while acting in a fiduciary capacity]. On

September 1, 2010, the bankruptcy court entered a judgment in favor of Murrays for $1,546,523 plus costs of suit ("Judgment").

Nassbridges timely moved to alter/amend the Judgment on September 15, 2010, thus tolling the time for appeal of the Judgment. See Rule 8002(b). Murrays opposed. A hearing on the motion was held on October 13, 2010. The bankruptcy court entered an order denying the motion on November 8, 2010 ("Reconsideration Order"). Nassbridges filed this timely appeal.

II. JURISDICTION

The bankruptcy court had jurisdiction under *28 U.S.C. §§ 157(b)(2)(I)* and *1334*. We have jurisdiction under *28 U.S.C. § 158*.

III. ISSUES

1. Did the bankruptcy court err in determining that judicial estoppel did not apply?

2. Did the bankruptcy court err in determining that claim and/or issue preclusion did not apply?

3. Did the bankruptcy court err when it entered the Judgment against Nassbridges under section 523(a)(2)(A)?

4. Did the bankruptcy court err when it entered the Judgment against [*22] Nassbridges under section 523(a)(4)?

IV. STANDARDS OF REVIEW

We review rulings regarding claim and issue preclusion de novo as mixed questions of law and fact in which legal questions predominate. *Robi v. Five Platters, Inc., 383 F.2d 318, 321 (9th Cir. 1988)*; *Alary Corp. v. Sims (In re Associated Vintage Grp., Inc.), 283 B.R. 549, 554 (9th Cir. BAP 2002)*. Once it is determined that preclusion doctrines are available to be applied, the actual decision to apply them is left to the trial court's discretion. Robi, 838 F.2d at 321.

In claims for nondischargeability, the Panel reviews the bankruptcy court's findings of fact for clear error and conclusions of law de novo, and applies de novo review to "mixed questions" of law and fact that require consideration of legal concepts and the exercise of judgment about the values that animate the legal principles. *Oney v. Weinberg (In re Weinberg), 410 B.R. 19, 28 (9th Cir. BAP 2009)*.

The determination of justifiable reliance is a question of fact reviewed for clear error. *Eugene Parks Law Corp. Defined Benefit Pension Plan v. Kirsh (In re Kirsh), 973 F.2d 1454, 1456 (9th Cir. 1992)*. The bankruptcy court's witness credibility findings are entitled [*23] to special deference, and are also reviewed for clear error. *Weinberg, 410 B.R. at 28*; Rule 8013. If two views of the evidence are possible, the trial judge's choice between them cannot be clearly erroneous. *Hansen v. Moore (In re Hansen), 368 B.R. 868, 875 (9th Cir. BAP 2007)*. A finding is clearly erroneous if it is illogical, implausible, or without support in the record. *United States v. Hinkson, 585 F.3d 1247, 1261 (9th Cir. 2009)*.

Whether a person is a "fiduciary" for purposes of section 523(a)(4) is a question of law reviewed de novo. *Lovell v. Stanifer (In re Stanifer), 236 B.R. 709, 713 (9th Cir. BAP 1999)*.

Decisions whether to invoke judicial estoppel are reviewed for abuse of discretion. *Hamilton v. State Farm Fire & Cas. Co., 270 F.3d 778, 782 (9th Cir. 2001)*. We also review the bankruptcy court's denial of a motion to alter/amend a judgment for abuse of discretion. *Nunez v. Nunez (In re Nunez), 196 B.R. 150, 155 (9th Cir. BAP 1996)*. To determine whether the bankruptcy court abused its discretion, we conduct a two-step inquiry: (1) we review de novo whether the bankruptcy court "identified the correct legal rule to apply to the relief requested" and (2) if it did, whether [*24] the bankruptcy court's application of the legal standard was illogical, implausible or "without support in inferences that may be drawn from the facts in the record." *Hinkson, 585 F.3d at 1261-62*.

V. DISCUSSION

Our review of this appeal is impeded because Nassbridges failed to provide many of the documents necessary for an adequate review. Because Nassbridges contests many of the bankruptcy court's factual findings, he has the burden to demonstrate that its findings of fact are clearly erroneous. *Gionis v. Wayne (In re Gionis), 170 B.R. 675, 681 (9th Cir. BAP 1994)*; Rule 8009(b). To show clear error, Nassbridges has to show how the findings were not supported by the record (i.e., the testimony and evidence upon which the court relied in issuing its ruling).

Most importantly, Nassbridges failed to include the trial transcript. The random six pages of transcript he did submit falls short of meeting his burden. *Kritt v. Kritt (In re Kritt), 190 B.R. 382, 386-87 (9th Cir. BAP 1995)*; see also *FRAP 10(b)(2)* ("If the appellant intends to urge on appeal that a finding or conclusion is unsupported by the evidence or is contrary to the evidence, the appellant must include in the record a transcript [*25] of all evidence relevant to that finding or conclusion."). Although the 640-page transcript is available on the bankruptcy court docket, we are not obligated to scour the record to uncover where the bankruptcy court may have erred. *Kritt, 190 B.R. at 386-87*.

Nassbridges also failed to include many other relevant documents considered by the bankruptcy court such as his trial pleadings, copies of all trial exhibits (including the ABEX brochures, the Account Agreement, the script ABEX employees read to Murrays, and the monthly ABEX statements sent to Murrays), his motion to alter/amend the Judgment and supporting declaration, the transcript from that hearing, and the Reconsideration Order. "'Appellants should know that an attempt to reverse the trial court's findings of fact will require the entire record relied upon by the trial court be supplied for review.'" *Kritt, 190 B.R. at 387* (quoting *Burkhart v. Fed. Dep. Ins. Corp. (In re Burkhart), 84 B.R. 658, 661 (9th Cir. BAP 1988)*.

Because Nassbridges's record is severely inadequate, we are entitled to presume that any missing portions are not helpful to his position. *Gionis, 170 B.R. at 680-81*. We are also entitled to affirm or dismiss his [*26] appeal summarily. *Cmty. Commerce Bank v. O'Brien (In re O'Brien), 312 F.3d 1135, 1137 (9th Cir. 2002)*. Nonetheless, we take into consideration his initial appellant pro se status, and, although the record is limited, it does not preclude us from deciding this appeal. *Gionis, 170 B.R. at 681*. Therefore, we will proceed to review the matter from the record before us.

A. Judicial Estoppel Did Not Apply.

"The doctrine of judicial estoppel, sometimes referred to as the doctrine of preclusion of inconsistent positions, is invoked to prevent a party from changing its position over the course of judicial proceedings when such positional changes have an adverse impact on the judicial process." *In re Avalon Hotel Partners, LLC, 302 B.R. 377, 383 (Bankr. D. Or. 2003)*. The purpose of judicial estoppel is "'to protect the integrity of the judicial process.'" *New Hampshire v. Maine, 532 U.S. 742, 749 (2001)* (quoting *Edwards v. Aetna Life Ins. Co., 690 F.2d 595, 598 (6th Cir. 1982))*.

In considering whether the doctrine applies, the trial court should consider: (1) whether the party's later position is "clearly inconsistent" with its earlier position; and (2) whether the party to be estopped succeeded [*27] in convincing a court to accept the earlier position such that judicial acceptance of the inconsistent position in a later proceeding would create the perception that either the first or the second court was misled. *New Hampshire, 532 U.S. at 749-51*.

Here, the bankruptcy court concluded nothing in the record indicated that the district court was misled; when the district court reached its decision to permit the parties to file an amended complaint, it did not do so based on the existence of, or absence of, fraud. *Murray v. Nassbridges (In re Nassbridges), 434 B.R. 573, 582 (Bankr. C.D. Cal. 2010)*. The bankruptcy court further found that the Stipulation's language ("Upon review of the initial disclosure documents, Plaintiffs believe their damages were caused by certain negligent acts or omission of Defendant as an officer of ABEX CORP. and not by any fraudulent or unlawful business activity") was not "clearly inconsistent" because it allowed for the possibility that fraud might still be alleged upon further discovery. *Id. at 582-83*. Therefore, judicial estoppel did not apply.

Nassbridges contends that the bankruptcy court erred by allowing Murrays to allege negligence in the district [*28] court action and fraud in the nondischargeability action. Specifically, Nassbridges argues that the bankruptcy court erred in reasoning that the nondischargeability action was not "clearly inconsistent" with what Murrays alleged in the Stipulation. He further argues that the district court was, contrary to the bankruptcy court's determination, misled as to why the fraud complaint was being amended to a claim for negligence.

We reject Nassbridges's judicial estoppel argument for the same reasons articulated by the bankruptcy court. Moreover, there is nothing necessarily inconsistent about asserting negligence in prebankruptcy litigation and fraud in a bankruptcy nondischargeability action. As we explain further below, bankruptcy nondischargeable fraud is a different legal question than state law fraud (*Brown v. Felsen, 442 U.S. 127, 138-39 (1979))*, even though a

determination of fraud by a non-bankruptcy court may become issue preclusive in bankruptcy nondischargeability litigation.

B. Claim And/Or Issue Preclusion Did Not Apply.

Although Nassbridges appeared to raise only the doctrine of claim preclusion at trial, the bankruptcy court considered both claim and issue preclusion in its [*29] Statement of Decision. Thus, we address both doctrines.

1. Claim Preclusion.

Nassbridges argues that the bankruptcy court erred by not applying claim preclusion because Murrays had a full and fair opportunity to litigate the fraud claim in district court but chose not to. In its Statement of Decision, the bankruptcy court rejected Nassbridges's argument that Murrays were obligated to litigate the fraud claim in district court. It further distinguished the cases cited by Nassbridges, which are the same cases he cites on appeal, as cases where a fraud claim was fully litigated before another court or where nondischargeability was not at issue. *Nassbridges, 434 B.R. at 583-84*.

Preclusion principles, such as claim preclusion, apply in bankruptcy. *Grogan v. Garner, 498 U.S. 279, 284-85 n.11*; Paine, 283 B.R. at 37. In order for claim preclusion to apply in bankruptcy, four elements must be satisfied: (1) a final judgment on the merits; (2) judgment rendered by a court of competent jurisdiction; (3) a second action involving the same parties; and (4) the same cause of action involved in both cases. *Rein v. Providian Fin. Corp., 270 F.3d 895, 898-99 (9th Cir. 2001)*.

The question of nondischargeability [*30] is separate and distinct from non-bankruptcy court proceedings. *Brown, 442 U.S. at 138-39*. Claim preclusion does not bar litigation in bankruptcy court for dischargeability purposes where the underlying issue, such as fraud, could have been but was not actually litigated in another court. Id. Thus, here, whether or not fraud was before the district court does not matter. Claim preclusion did not prevent the bankruptcy court from looking beyond the record of the district court action in order to decide whether Nassbridges's debt to Murrays was a debt for money obtained by fraud. *Archer v. Warner, 538 U.S. 314, 320 (2003)*. "The mere fact that a conscientious creditor has previously reduced his claim to judgment should not bar further inquiry into the true nature of the debt." Id. Furthermore, as the bankruptcy court noted, no claim based on fraud was prosecuted to final judgment in the district court action. Accordingly, we see no error here.

2. Issue Preclusion.

The doctrine of issue preclusion applies in dischargeability proceedings to preclude the re-litigation of non-bankruptcy court findings relevant to dischargeability. *Grogan, 498 U.S. at 284 n.11*. Here, the First Amended Complaint [*31] removed all allegations of fraud and pled claims for negligence and breach of fiduciary duty. As such, the fraud claim was not actually litigated in the district court. Fraud was also not necessarily decided in, or necessary to, the district court's judgment. The district court made no findings regarding fraud, but granted summary judgment on a complaint that alleged only negligence and breach of fiduciary duty. Its judgment could have been entered on either claim; it is unclear as to which finding the court used. However, it is clear that the district court's judgment was not based on fraud.

Accordingly, we reject Nassbridges's argument to the extent he contends that the bankruptcy court erred by not applying issue preclusion. We see no error on this record.

C. The Bankruptcy Court Did Not Err In Determining That The Debt To Murrays Was Nondischargeable Under Section 523(a)(2)(A).

1. Section 523(a)(2)(A).

Section 523(a)(2)(A) provides, in relevant part: "A discharge under . . . this title does not discharge an individual debtor from any debt (2) for money . . . to the extent obtained by (A) false pretenses, a false representation, or actual fraud . . . ."

To prevail on a claim under section 523(a)(2)(A), [*32] a creditor must demonstrate five elements: (1) misrepresentation, fraudulent omission or deceptive conduct by the debtor; (2) knowledge of the falsity or deceptiveness of his statement or conduct; (3) an intent to deceive; (4) justifiable reliance by the creditor on the debtor's statement or conduct; and (5) damage to the creditor proximately caused by its reliance on the debtor's statement or conduct. *Weinberg, 410 B.R. at 35* (citing *Turtle Rock Meadows Homeowners Ass'n v. Slyman (In*

re Slyman), 234 F.3d 1081, 1085 (9th Cir. 2000)). "The creditor bears the burden of proof to establish all five of these elements by a preponderance of the evidence." Id. (citing *Slyman, 234 F.3d at 1085*).

2. Analysis.

Here, the bankruptcy court found that Murrays thought they were buying gold bullion, and that they were entirely ignorant of the extreme jeopardy in which their investment had been placed by Nassbridges and ABEX. Murrays had not bargained for the danger of being subject to a complete wipe out in only two days over an 8% movement in the price of gold, and, reasoned the court, even if some margin payment would have been necessary to bring them back into margin limits with ABEX, there should [*33] have been enough value there to do so had gold bullion been purchased on spot or been on hand. *Nassbridges, 434 B.R. at 585*. The bankruptcy court rejected what Nassbridges contended were disclosures showing that Murrays were buying futures, stating that "by no stretch of the imagination do these references amount to disclosure that actually the Murrays['s] monies were being used to buy futures (or even forward contracts) on a highly leveraged account at MF Global." *Id. at 586*. Plus, the alleged disclosures did not explain away the monthly statements' references to "gold bar .999," or the script which was scrupulously read to Murrays just after each trade referencing "gold bullion." Id. The bankruptcy court characterized the acts of ABEX sending Murrays statements in March and April of 2008, which still made no reference to the wipe out, and Nassbridges's failure to mention the wipe out or MF Global to Ms. Murray at dinner in late March 2008, as a "cover up until some kind of alternative remedy could be found . . . . It does not look to the court like the behavior of a reputable gold dealer with nothing to apologize for because its client had been suitably informed of the risks undertaken. [*34] These look like the acts of someone quite reluctant to face up to the reality of a situation with a client that had not been informed." *Id. at 587*.

In summary, the bankruptcy court found that: (1) Nassbridges either stated falsely to Murrays that their money would be used to buy gold bullion, or failed to disclose that their monies were actually being sent to MF Global to invest in highly leveraged and risky futures or a forward contracts margin account, which was all material information concerning the degree of risk inherent in the transaction; (2) Nassbridges knew at the time he made the statement that it was false or deceptive and/or the information not disclosed was highly material and that the ABEX materials given to Murrays were therefore very deceptive; (3) Nassbridges made these statements, or failed to inform Murrays, with intent that Murrays be deceived since they would never have agreed to this level of risk as Nassbridges well knew; (4) Murrays reasonably relied upon these statements or reasonably relied upon the ABEX brochures and sales scripts, etc., in believing they were buying gold bullion; and (5) Murrays were proximately damaged by these misstatements or failures [*35] to disclose in the amount of $1,546,523. Id.

All of what Nassbridges challenges on appeal consists of the bankruptcy court's findings of fact and, notably, not all of them. Nassbridges argues that Mr. Murray was, contrary to the bankruptcy court's finding, a "sophisticated investor," and thus apparently incapable of being defrauded by Nassbridges. To support his argument, Nassbridges cites to a few sentences from Mr. Murray's trial testimony where he admitted his rather extensive experience in purchasing gold futures.

In this circumstance, Mr. Murray's level of sophistication matters little. The bankruptcy court found that Murrays, based on their conversations with Nassbridges, the ABEX brochures, the monthly ABEX statements, and the script read by ABEX employees after each trade, all of which made reference to gold bullion, thought they were buying gold bullion; Murrays had no idea Nassbridges/ABEX was investing their monies in risky futures contracts because he failed to disclose that material fact. A debtor's nondisclosure of a material fact in the face of a duty to disclose can establish the requisite reliance and causation for actual fraud under the Bankruptcy Code. *Apte v. Romesh Japra, M.D., F.A.C.C. Inc. (In re Apte), 96 F.3d 1319, 1323 (9th Cir. 1996)*. [*36] A party to a business transaction is under a duty to disclose to the other party facts basic to the transaction before the transaction is consummated, if he or she knows that the other is about to enter into the transaction under a mistake as to them and that the other party, because of the relationship between them, would reasonably expect disclosure of such facts. *Id. at 1324* (citing the *Restatement (Second) of Torts § 551* (1976)).

Nassbridges also contends that the "evidence" of the contradictory allegations Murrays made in their original district court complaint and the adversary complaint shows that Murrays "knew exactly what they were

doing," i.e., buying futures, and it negates "the whole idea of fraud in this matter." Paragraph 15(d) of the original district court complaint and ¶ 12(d) of the adversary complaint state:

> Nassbridges represented that: (d) he would use investor's money to purchase gold futures contracts and/or leverage contracts at prevailing market prices and at commission rates standard for the industry.

We reject Nassbridges's argument. First, allegations in a complaint do not constitute evidence. Second, as the bankruptcy court correctly concluded, the original [*37] district court complaint was superseded by the First Amended Complaint, which had deleted this paragraph. Why this admittedly contradictory paragraph was in the adversary complaint is unknown and was not addressed by the bankruptcy court. In any event, FRCP 15(b), incorporated by Rule 7015, permits pleadings to be amended to conform to the evidence, and the evidence before the bankruptcy court established that Murrays thought Nassbridges/ABEX was investing their money in gold bullion. [10]

> 10 Without the trial transcript, we cannot determine whether Nassbridges objected to any of Murrays's evidence.

In summary, we see nothing in the record to suggest that the bankruptcy court's findings of fact with respect to Murrays's claim under section 523(a)(2)(A) are illogical, implausible, or without support in the record. *Hinkson, 585 F.3d at 1261*. As such, the bankruptcy court did not err in determining that the debt Nassbridges owed Murrays was excepted from discharge under section 523(a)(2)(A).

D. The Bankruptcy Court Did Not Err In Determining That The Debt To Murrays Was Nondischargeable Under Section 523(a)(4).

1. Section 523(a)(4).

Section 523(a)(4) provides that an individual debtor is not [*38] discharged from any debt "for fraud or defalcation while acting in a fiduciary capacity . . . ." To establish fraud or defalcation by someone acting in a fiduciary capacity, the plaintiff must demonstrate: (1) an express or technical trust existed; (2) the debt was caused by fraud or defalcation; and (3) the debtor acted as a fiduciary to the creditor at the time the debt was created. *Banks v. Gill Distrib. Ctrs., Inc. (In re Banks), 263 F.3d 862, 870 (9th Cir. 2001)*.

Under section 523(a)(4), the term "fiduciary capacity" is construed very narrowly. The fiduciary relationship must be one arising from an express or technical trust that was imposed before, and without reference to, the wrongdoing that caused the debt, as opposed to a trust ex maleficio, constructively imposed because of the act of wrongdoing from which the debt arose. *Weinberg, 410 B.R. at 28* (citing *Ragsdale v. Haller, 780 F.2d 794, 795 (9th Cir. 1986))*.

While the scope of the term "fiduciary capacity" is a question of federal law, we look to state law to ascertain whether the requisite trust relationship exists. Id. (citing *Ragsdale, 780 F.2d at 796*). Under California law, a broker or securities salesperson is a fiduciary [*39] to his or her client. *Duffy v. Cavalier, 264 Cal. Rptr. 740, 753 n.11 (Cal. Ct. App. 1989)*(the relationship between a broker and a client is fiduciary in nature and imposes on the broker the duty of acting in the highest good faith toward the client)(citing *Twomey v. Mitchum, Jones & Templeton, Inc., 69 Cal. Rptr. 222, 236 (Cal. Ct. App. 1968))*; *Hobbs v. Bateman Eichler, Hill Richards, Inc., 210 Cal. Rptr. 387, 404 (Cal. Ct. App. 1985)*. Securities brokers are also fiduciaries for purposes of section 523(a)(4). *Lock v. Scheuer (In re Scheuer), 125 B.R. 584, 592 (Bankr. C.D. Cal. 1991)*.

Judge Ryan, in Scheuer, further concluded that the statutory duty of loyalty imposed on a securities broker as an agent for the investor not only establishes a fiduciary relationship but also establishes a trust relationship especially given the licensing requirements with which a broker must comply. *125 B.R. at 592*. The Scheuer analysis favorably considered the analysis from *Prudential-Bache Sec., Inc. v. Sawyer (In re Sawyer), 112 B.R. 386, 390 (D. Colo. 1990)*, that when statutory provisions through licensing and regulations place specific limits on the actions of brokers with respect to customer funds, [*40] a trust relationship is created.

2. Analysis.

The bankruptcy court found that Nassbridges was acting in a fiduciary capacity with respect to Murrays despite the disclaimers in the ABEX documents that

ABEX was not a fiduciary and that Murrays's accounts were to be self-directed, citing *Nat'l Gold Exch. v. Stern (In re Stern), 403 B.R. 58, 67 (Bankr. C.D. Cal. 2009)*(the "substance and character of the debt relationship and not its form" will determine whether a fiduciary relationship exists). To reach this conclusion, the court relied upon the following facts: (1) Nassbridges "watched out" for Murrays by following gold prices carefully and by placing orders overnight on their behalf for which he sought confirmation from Murrays the next day; (2) Nassbridges acted on Murrays's behalf by attempting to place the ineffective stop orders; (3) Murrays reposed great confidence in Nassbridges to protect their interests and they relied upon his expertise by entrusting over $1.5 million to him through ABEX; and (4) there were at least oral promises that Murrays's property would be segregated and safely invested. *Nassbridges, 434 B.R. at 587-88*. The court concluded that Nassbridges violated that [*41] fiduciary relationship by taking Murrays's money and gambling with it. *Id. at 588*.

Nassbridges contends that the court's finding of a fiduciary relationship is not supported by the record. We disagree. The record amply supports the bankruptcy court's findings that Nassbridges was a fiduciary and that his debt to Murrays was nondischargeable under section 523(a)(4): a technical trust relationship, at minimum, existed between Nassbridges and Murrays for Nassbridges/ABEX to invest and safeguard their $1,546,523 (as determined by the district and bankruptcy courts) as Murrays directed in gold bullion; the judgment and resulting debt was the result of Nassbridges's fraud; and, under California law, Nassbridges was a fiduciary to Murrays at the time the debt was created. Although Nassbridges, as alleged by Murrays, was unlicensed to perform any activity as a commodities broker or advisor after October 24, 2007, at the time he made his false representations to Murrays, when he opened accounts at MF Global to accommodate their transactions, and when Murrays did their first transaction with ABEX on October 23, 2007, Nassbridges was still, as near as we can determine from the record before us, [*42] a licensed broker.

Accordingly, the bankruptcy court did not err in determining that the debt Nassbridges owed Murrays was excepted from discharge under section 523(a)(4).

VI. CONCLUSION

Based on the foregoing reasons, we AFFIRM the Judgment that Nassbridges's debt to Murrays for $1,546,523 was nondischargeable under sections 523(a)(2)(A) and (a)(4). [11]

> 11 Although Nassbridges attached the Reconsideration Order to his notice of appeal, he did not provide any argument whatsoever that the bankruptcy court abused its discretion in denying his motion to alter/amend the Judgment. As such, this issue has been waived. See *Smith v. Marsh, 194 F.3d 1045, 1052 (9th Cir. 1999)* ("[O]n appeal, arguments not raised by a party in its opening brief are deemed waived.").