

No. A105815

In the Court of Appeal
Of the State of California
First Appellate District
Division 2

AMBREEN KHAWAJA and AHSAN KHAWAJA,

Plaintiffs and Appellants,

v.

RAFI KHAWAJA

Defendant and Respondent.

RESPONDENT S BRIEF

Appeal from
Contra Costa County Superior Court Case No. C0105357
The Honorable Barbara Zuniga

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STATEMENT OF THE CASE

On December 31, 2001, appellants Ambreen Ahsan Khawaja (Ambreen) and Khawaja Saleem Ahsan (Ahsan) filed a verified complaint against Ahsan s brother, respondent Rafi Khawaja (Rafi ¹), alleging causes of action for quiet title, declaratory relief, breach of contract, enforcement of oral trust and constructive trust, all in connection with real property owned by Rafi at 10 Manchester in Hercules, California (the Subject Property). (Clerk s Transcript on Appeal (CT) 1-8.) Rafi answered and filed a cross-complaint for breach of contract, which he later amended. (CT 24-39, 158-168.)

Following an eight day court trial and extensive post-trial briefing by all parties (CT 367-440), the trial court on October 24, 2003 issued a Tentative Decision in favor of Rafi on both the complaint and the cross-complaint. (CT 444-47.) Appellants requested a statement of decision (CT 449-52), and filed an Objection to Statement of Decision. (CT 463-67.)

¹ Due to the similarity of the parties names, this brief will refer to them by their first names. No disrespect is intended.

The trial court issued its Statement of Decision on December 12, 2003 (CT 469-89), and on January 8, 2004, entered a judgment in favor of Rafi on the complaint and cross-complaint, awarding him \$18,751.50 plus interest and costs on the cross-complaint. (CT 491-92.) The court further found in favor of Rafi on the unlawful detainer portion of the cross-complaint, entitling him to hold-over damages of \$1,700 per month. (CT 492.)

In the Statement of Decision, the trial court rejected appellants' claims that they had secretly provided Rafi with \$15,000 toward the purchase price of the Subject Property. (CT 471-72.) Turning to the cross-complaint, the court found overwhelming evidence of loans from Rafi to Ahsan, and rejected Ahsan's contention that he had discharged the debt to Rafi in bankruptcy. (CT 445, 473-74, 478-79, 485-86.)

Appellants filed their Appellants' Opening Brief (AOB) on February 25, 2005. According to the AOB, the appeal is limited to challenging the sufficiency of the evidence in support of the award of \$18,751.50 on the cross-complaint. (AOB 1, 5-6.)

STATEMENT OF FACTS

Rafi took out a home equity line of credit in 1997 in order to loan money to Ahsan and Ambreen, who had accumulated huge credit card debts and were paying high interest rates. (Reporter's Transcript on Appeal (RT) 595-97, 737-38 and Exhibit C, Respondent's Appendix (RA) 3.) In 1998, Ahsan signed a document acknowledging that he owed a total of \$72,000 to Rafi, including \$27,000 currently owed as a result of the equity line loan. (RT 599-608 and Exhibits 8, B, and N1, Supplemental Clerk's Transcript on Appeal (SCT) 24, 104, RA 1, 156.)

The initial amount loaned to Ahsan and Ambreen via the equity line of credit was \$26,500, but Rafi had made subsequent loans from the equity line of credit so that appellants could pay other expenses. (RT 598-99, 608-14 and Exhibits C-D, RA 3-15.) Ahsan made occasional

² As explained in the July 13, 2005 Motion and Declaration of Good Cause For Extension of Time to File Respondent's Brief Civil, the Contra Costa County Superior Court Clerk's Office could not locate most of the exhibits submitted by respondent Rafi at trial. Fortunately, Rafi's trial counsel, Ira James Harris, had retained copies of all exhibits submitted by him at trial, and copies of pertinent exhibits are included in the Respondent's Appendix.

payments, and Rafi treated all of the payments as part of an ongoing loan. (RT 613-19 and Exhibits D, E, F, Z and N1, SCT 104, RA 7-68, 156.) In June 2000, for example, when Ahsan owed \$29,711.49 to Rafi, he made a \$15,000 cash payment on the loan, reducing the balance owed to the lowest level since the loan's inception. (RT 619-28, 669, 872 and Exhibit N1, SCT 104, RA 156.)

In September of 2000, Ahsan filed a bankruptcy petition, supporting the petition with necessary schedules the next month. (RT 210 and Exhibit E1, RA 69-140.) In the bankruptcy documents, signed under penalty of perjury (RT 217, 243 and Exhibit E1, RA 128, 137), Ahsan used a false address (RT 210-15, 242-43 and Exhibit E1, RA 97, 133, 136, 139), did not claim any interest in the Subject Property or acknowledge any liens against it (RT 215-222, 241-42 and Exhibit E1, RA 106-107), listed credit card debts of over \$83,000 (RT 222-228 and Exhibit E1, RA 114-119), and stated falsely that he was paying a certain amount of rent. (RT 234-35 and Exhibit E1, 127.)³

³ When first questioned about the petition at trial, Ahsan refused to answer any of the questions based on his Fifth Amendment right against self-

Ahsan did not list any debt to Rafi in the bankruptcy documents, (Exhibit E1, RA 112-123), and did not acknowledge any of his pre-petition payments to Rafi. (RT 235-239 and Exhibit E1, RA 131.) He received a discharge on January 18, 2001. (Exhibit E1, RA 69.)

In March 2001, Ahsan solicited an additional loan of \$17,000 from Rafi so Ahsan could buy a taxi. (RT 792-93, 859-61 and Exhibit N1, SCT 104, RA 156.) That amount was added to the approximately \$15,000 that was already owed, and Ahsan made payments until August 2001, when a dispute arose over ownership of the Subject Property and appellants ceased making payments on the loan. (RT 663, 680 and Exhibits C, D, E, F, Z and N1, SCT 104, RA 3-68, 156.)

In September 2002, after the filing of Rafi s cross-complaint seeking recovery of the \$17,000 balance due on the June 1998 loan, (CT 24-26), Ahsan amended his bankruptcy petition, for the first time claiming an interest in the Subject Property and listing a debt to Rafi of \$17,000 from 1998. (RT 244-246 and Exhibit H1, RA 141, 144-149.)

incrimination. (RT 30, 191-96.)

Rafi, however, had characterized the money that Ahsan had paid after obtaining the taxi loan in March 2001 as payments on the 1998 loan, and had applied them to reduce the amount owed on that general loan, leaving \$17,000 still due to repay the taxi loan, as alleged in the First Amended Complaint. (CT 158-60; RT 859-61.)

The trial court rejected Ahsan's contention that he had discharged his debt to Rafi in bankruptcy and determined that Ahsan and Ambreen owed Rafi \$19,151.50 which, after crediting a \$400 payment that Ahsan appears to have made in March of 1998, resulted in a total amount due of \$18,751.50, plus interest from June 23, 2003. (CT 486 and 486 n.39; RT 627-628, 748-749, 792 and Exhibit N1, SCT 104, RA 156.)

ARGUMENT

A. APPELLANTS HAVE WAIVED THEIR ONLY ARGUMENT ON

**APPEAL BY FAILING TO SET FORTH ALL OF THE
FACTS ELICITED AT TRIAL, AND BY FAILING TO
SUPPORT THEIR CLAIMS WITH PROPER CITATIONS TO
THE RECORD**

Appellants' sole claim on this appeal is that there was no substantial evidence to support the trial court's award of \$18,751.50 to Rafi, because Ahsan had filed bankruptcy. (AOB 5-11.)

The trial court had found that Rafi was entitled to apply Ahsan's 2001 payments to the oldest debt from the existing indebtedness on the 1998 loan in order to reduce the amount of interest, and that there was no agreement to credit the \$17,000 separate and apart from the prior indebtedness which had yet to be discharged in bankruptcy. (CT 485-86.)

In addition to rejecting Ahsan's contention that he had discharged the debt to Rafi in bankruptcy (CT 485-86), the trial court noted that when questioned about the apparently fraudulent bankruptcy filing, Ahsan had initially and repeatedly raised his Fifth Amendment right against self-incrimination, before denying any knowledge of it. (CT 473, 478-79; see RT 191-96.)

The court determined that:

AHSAN can not be allowed to solicit further loans from his brother after filing bankruptcy only to reopen bankruptcy to discharge the earlier debt (after applying his post bankruptcy petition payments selectively to the later debt) once this lawsuit began. It is clear that **RAFI** used his own funds to purchase the SUBJECT PROPERTY and that there remains an outstanding debt due from **AHSAN** of \$19,151.50

(Statement of Decision, CT 486.)

Appellants Ahsan and Ambreen have provided this court with absolutely no reason to disturb this ruling on appeal.

It has long been clear that a reviewing court starts with the presumption that the record contains evidence to sustain every finding of fact, *Foreman & Clark Corporation v. Fallon* (1971) 3 Cal.3d 875, 881), and that when a judgment is challenged on grounds of insufficiency of the evidence, the power of an appellate court *begins and ends* with the determination as to whether there is any substantial evidence contradicted or uncontradicted which will support the finding of fact. *Foreman & Clark*, 3 Cal.3d at 881 (emphasis in original).)

Appellants have the burden of demonstrating the

lack of substantial evidence, and to do so they must set forth in their brief all of the material evidence on each issue of fact, not merely their own evidence.

(*Foreman & Clark*, 3 Cal.3d at 881.) If they cite only the evidence in support of their position, they have waived any error. (*Foreman & Clark*, 3 Cal.3d at 881.)

Attacks on the sufficiency of the evidence are entitled to no consideration when it is apparent that a substantial amount of evidence was received on behalf of respondent. (*Nwosu v. Uba* (2004) 122 Cal.App.4th 1229, 1246.) This court applied this doctrine in *Toigo v. Town of Ross* (1998) 70 Cal.App.4th 309, 317, concluding that the defective appellants' brief so flagrantly violates established rules of appellate procedure that this assignment of error is deemed waived. (*Toigo*, 70 Cal.App.4th at 317.)

In addition to setting forth all of the facts, appellants must also support any factual claims they make with appropriate citations to the record. (*Nwosu*, 122 Cal.App.4th at 1246; California Rules of Court, rules 14(a)(1)(C), 14(a)(2)(C).) When appellants fail to support an argument with proper citations to the

reporter's transcript, the court is not required to search the record on its own, and should deem the argument waived. (*Nwosu*, 122 Cal.App.4th at 1246-47.)

Although appellants Ahsan and Ambreen appear to be aware of their burden to demonstrate error,⁴ the AOB contains only one citation to the 898 page Reporter's Transcript on Appeal. (AOB 9-10.) The AOB makes no reference to any of the exhibits introduced during the course of the trial, citing exclusively to documents contained in the Clerk's Transcript that were not introduced at trial.

In light of Ahsan and Ambreen's flagrant violations of established appellate procedure, the court should consider their only issue on appeal waived. (*Toigo*, 70 Cal.App.4th at 317.)

Ahsan and Ambreen have not only failed to set forth all of the evidence or otherwise attempt a fair statement of the evidence, (*Nwosu*, 122 Cal.App.4th at 1246), but even when they appear to be quoting from the

⁴ The AOB at 6 cites *Winograd v. American Broadcasting Company* (1998) 68 Cal.App.4th 624, which states clearly that the burden of demonstrating error rests on the appellant. (*Wonograd*, 68 Cal.App.4th at 631.)

record they mislead the court by deleting testimony that is not helpful to them. Although the AOB at 9-10 purports to quote from the cross-examination of Rafi at RT 859:16 to 861:6, the AOB omits the portions set forth below in bold:

Q. And you loaned them \$17,000 out of your credit equity line for the purchase of the taxi; is that correct?

A. Yes... **They came to me.**

Q. **And you say the payment is listed below that**

A. **Yes.**

Q. **Were each of those payments made to you?**

A. **To the equity line.**

Q. **And did you consider those payments on the \$17,000 taxi loan?**

A. **I would consider those payments to the general loan.**

Q. Isn't it correct you considered those payments to the taxi loan until you found out that the \$17,000 other \$17,000 you were claiming had been listed in the bankruptcy court?

A. I could have assigned this amount to the taxi loan if he had not discharged the loan that he agreed to pay me back. [no ellipsis]

Q. **So it is your testimony that well at what point did you change the characterization of the payment from the taxi loan to a general obligation?**

A. **I never had a specific characterization. I never had a specific idea how to assign those, but after he discharged, I clearly assigned to all the loans.**

Q. So you believed that your brother well am I correct that your brother, when he filed his amended petition listed \$17,000 that you claimed he still owed you; is that correct?

A. Yes.

Q. And that was discharged?

A. Yes.

[colloquy]

Q. Is it your understanding that was discharged?

A. Yes.

Q. And it was at that point that you decided to take the \$17,000 that were being paid by Ahsan and Ambreen and characterize it as the old discharged loan rather than the taxi loan?

A. Yes.

(RT 859-61 and Exhibit N1, SCT 104, RA 156.)

Far from demonstrating a lack of evidence to support the judgment, this passage provides substantial evidence to support the trial court's conclusion that there was no agreement to segregate the 2001 payments, and that Rafi was therefore free to apply them to the earlier debt. (CT 485-86.) The trial court's conclusion was of course also supported by other evidence, (RT 613-19 and Exhibits D, E, F, Z and N1, SCT 104, RA 7-68, 156), which the appellants have ignored altogether.

B. APPELLANTS HAVE FURTHER WAIVED THEIR ONLY ARGUMENT ON APPEAL BY FAILING TO SUPPORT THAT ARGUMENT WITH PROPER CITATION TO AUTHORITIES, AND BY FAILING TO RAISE THE ISSUE IN THE TRIAL COURT

In addition to setting out a fair statement of all facts and supporting it with proper citations to the record, an appellant must also support each issue raised on appeal with reasoned argument and citation to legal authority. (*People v. Stanley* (1995) 10 Cal.4th 764, 793; California Rules of Court, rule 14(a)(1)(B).)

An appellate court is not required to consider points which are not argued or which are not supported by citation to authorities or the record. (*Kim v. Sumitomo Bank of California* (1993) 17 Cal.App.4th 974, 979.) As Division Three has explained:

When an appellant fails to raise a point, or asserts it but fails to support it with reasoned argument and citations to authority, we treat the point as waived.

(*Badie v. Bank of America* (1998) 67 Cal.App.4th 779, 784-85.)

Appellate courts also need not consider issues raised for the first time on appeal, (*Brown v. Boren* (1999) 74 Cal.App.4th 1303, 1316), and will imply all findings necessary to support the trial court's judgment

when the appellant did not raise the issue in the request for statement of decision, or did not bring any alleged deficiency in the statement of decision to the attention of the trial court. (*Marriage of Arceneaux* (1990) 51 Cal.3d 1130, 1132-38; Code of Civil Procedure sections 632 and 634; California Rules of Court, rule 232.)

The AOB in this case contains no citation to authorities except for: references to two cases pertaining to the standard of review (AOB 6); a brief quotation from 11 U.S.C.A. section 524, subdivision (a) (2) (AOB 6); a reference to 11 U.S.C.A. section 524, subdivision (c) (AOB 9); and a signal to see also a CEB book on bankruptcy practice. (AOB 9.) None of the citations supports appellants argument on appeal.

While appellants correctly cite *Winograd v. American Broadcasting Co.* (1998) 68 Cal.App.4th 624, 632, acknowledging that the substantial evidence rule applies in cases challenging the sufficiency of

the evidence,⁵ they never explain how that standard applies in this case, or why they believe that there was no substantial evidence to support the trial court's judgment in this case. (AOB 6, 8-9.) In the absence of any reasoned argument on the issue, the court should deem it waived. (*Badie*, 67 Cal.App.4th at 784-85.)

The quotation from section 524, subdivision (a)(2) refers to the effect of a bankruptcy discharge on the commencement or continuation of actions to recover debts. Appellants argue that this statute somehow precluded the trial court from concluding that Rafi could apply Ahsan's payments to the 1998 debt, (AOB 6-7), but cite no authority for that contention, and did not raise it either in their request for a statement of

⁵ Appellants also suggest that an appellate court can reweigh evidence, but cite only *Herbert v. Lankershim* (1937) 9 Cal.2d 409, 476, a case involving alleged undue influence by a fiduciary in which the court was required to view the transaction with the most scrutinizing jealousy and that the presumption of fraud attaches. (*Herbert*, 9 Cal.2d at 426-27.) No such standard is involved here, and later cases have made clear that *Herbert* does not change the general rule that if findings are supported by substantial evidence an appellate court cannot reassess the weight of conflicting evidence. (*Wheat v. Morse* (1961) 197 Cal.App.2d 203, 205.)

decision (CT 449-52), or in their objection to the statement of decision. (CT 463-67.) Once again, the court should deem the argument waived.

Finally, the reference to 11 U.S.C.A. section 524, subdivision (c) pertains to reaffirmation agreements, and appellants argue that since the 1998 debt had been discharged, Rafi would only be entitled to recover \$17,000 if Ahsan reaffirmed the debt in accordance with the statute. (AOB 8-9.) Once again, appellants cite no authority for the contention, and did not raise it below. (CT 449-52, 463-67.)

Appellants have not produced any authority to support their claims that the bankruptcy statutes somehow rendered the evidence submitted at trial insufficient to support the trial court's judgment. This court should consider the issue waived due to appellants' flagrant violations of established appellate procedure. (*Toigo*, 70 Cal.App.4th at 317.)

C. EVEN CONSIDERING APPELLANTS ARGUMENT ON THE MERITS, IT IS FRIVOLOUS BECAUSE SUBSTANTIAL EVIDENCE SUPPORTED THE TRIAL COURT S JUDGMENT

Although appellants failure to make a coherent argument on appeal makes it difficult to be certain, it appears that appellants agree that substantial evidence supported the trial court s findings that they owe Rafi \$18,751.50, (CT 485-86), and are now relying solely on their argument that the debt has somehow been discharged by bankruptcy. Even if the court overlooks appellants failure to raise this issue properly either in the trial court or on this appeal, the argument has no merit.

Ahsan cannot rely on the laws of bankruptcy to sanction the fraud that he was attempting to perpetrate on his brother and the courts. While a discharge may operate as an injunction against actions to recover a discharged debt (11 U.S.C. § 524, subd. (a)(2)), the trial court in this case determined that appellants owed Rafi for the taxi loan which they incurred in March 2001, after discharge. (CT 485-86; RT 663, 680, 792-93, 859-61 and Exhibits C, D, E, F, Z, E1, H1 and N1, SCT 104, RA 3-156.)

A bankruptcy discharge operates to discharge the

debtor from all debts that arose before the date of the order for relief. (11 U.S.C. § 727, subd.(b).)

Appellants post-discharge debt incurred to purchase the taxi was not affected by Ahsan's discharge, which also barred him from listing the debt in a new petition. (11 U.S.C. § 727, subd. (a)(8).)

The trial court's ruling also negates appellants' other argument based on 11 U.S.C. section 524, subdivision (c), governing reaffirmation agreements.

The trial court did not find that Rafi forced Ahsan to reaffirm his 1998 debt after discharge, but that Ahsan voluntarily entered into a new, post-discharge debt.

(CT 495-86.) Debtors are of course free to make voluntary payments on a discharged debt under 11 U.S.C. section 524, subdivision (f).

Even if appellants could point to some authority for this court to find that the January 2001 discharge somehow affected Ahsan's March 2001 debt, which they have yet to do, the trial court's findings of fact would support a decision that the debt was nondischargeable under 11 U.S.C. section 523, subdivision (2), which precludes the discharge of fraudulently incurred debts,

and 11 U.S.C. section 727, subdivision (a)(4), which denies a discharge to a debtor who has made false statements in connection with the bankruptcy case. (CT 478-79, 485-86.)

CONCLUSION

For all the above reasons, the court should affirm the judgment of the trial court, and should consider sanctioning appellants for this frivolous appeal. The trial court concluded that Ahsan and Ambreen were unworthy of belief (CT 445, 473-74), and their efforts on appeal simply reinforce the accuracy of that conclusion.

DATED: March 22, 2007 LAW OFFICES OF PAUL KLEVEN

By: _____
PAUL KLEVEN

CERTIFICATE OF COUNSEL

I certify that this Respondent s Brief contains 3455 words, as calculated by my WordPerfect 11 word processing program.

PAUL KLEVEN