

MAY 29 2012

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

ORDERED PUBLISHED

**UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT**

6	In re:)	BAP No. NC-11-1566-JuKiJo
)	
7	BILL MARTIN PARKER,)	Bk. No. 09-43245
)	
8	Debtor.)	Adv. No. 09-04301
)	
9	ALBERT P. WILCOX,)	
)	
10	Appellant,)	
)	
11	v.)	O P I N I O N
)	
12	BILL MARTIN PARKER,)	
)	
13	Appellee.)	
)	

Argued and Submitted on May 17, 2012
at San Francisco, California

Filed - May 29, 2012

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

Honorable Roger L. Efremsky, Bankruptcy Judge, Presiding

Appearances: Andrew Steinfeld, Esq. argued for appellant
Albert P. Wilcox; Richard C. Raines, Esq.,
argued for appellee Bill Martin Parker.

Before: JURY, KIRSCHER, and JOHNSON,¹ Bankruptcy Judges.

¹ Hon. Wayne E. Johnson, Bankruptcy Judge for the Central
District of California, sitting by designation.

1 JURY, Bankruptcy Judge:
2

3 Appellant-creditor, Albert P. Wilcox ("Wilcox"), appeals
4 the bankruptcy court's order denying his motion for summary
5 judgment on a § 523(a)(2)(A)² fraud claim against chapter 7
6 debtor, Bill Martin Parker ("Parker"). This appeal follows a
7 trial on the merits on the fraud claim with judgment entered in
8 favor of Parker and Wilcox's claim found dischargeable. We
9 AFFIRM.

10 **I. FACTS**

11 Parker is a real estate broker. He also was the owner and
12 principal officer of BT Investment & Loan, Inc. ("BT
13 Investments"), a company which facilitated hard money loans for
14 purchasers of real estate.

15 On November 13, 2006, BT Investments acted as the broker
16 for a \$290,000 loan made by Wilcox, a retiree, to Mark and
17 Kathleen Taylor (the "Taylors") in connection with the Taylors'
18 purchase of real property located on 65th Street, Sacramento,
19 California.³ The loan was secured by trust deeds encumbering
20 the property on 65th Street and the Taylors' family residence
21

22 ² Unless otherwise indicated, all chapter and section
23 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532,
24 "Rule" references are to the Federal Rules of Bankruptcy
25 Procedure and "Civil Rule" references are to the Federal Rules of
Civil Procedure.

26 ³ Mark Taylor owned a construction company and purchased
27 properties to rehabilitate them and sell for a profit. The
28 Taylors had worked with Parker and BT Investments for over four
years, obtaining up to fifteen loans during that time frame.

1 located on Grant Street in Brentwood, California.

2 On May 17, 2007, BT Investments acted as the broker for two
3 additional loans made by Wilcox to the Taylors for \$120,000 and
4 \$230,000. These loans were for the renovation of property
5 located on Beatrice Street in Brentwood, California. Both loans
6 were secured by trust deeds encumbering the Beatrice property.
7 The \$230,000 loan was also secured by a trust deed encumbering
8 the Taylors' family residence on Grant Street.

9 **The State Court Litigation**

10 The Taylors did not repay their loans to Wilcox. On
11 November 23, 2008, Wilcox filed a lawsuit against Parker, BT
12 Investments and Parker's wife (collectively, "Parker"), Wilcox
13 v. Parker, et al., in the Contra Costa Superior Court (Case No.
14 C08-00149) (the "State Court Action"). On March 12, 2008,
15 Parker filed a cross-complaint against the Taylors for equitable
16 indemnity and declaratory relief.³

17 **The Taylors' Bankruptcy**

18 About two months later, on May 15, 2008, the Taylors filed
19 their chapter 7 petition. On August 18, 2008, Parker filed an
20

21 ³ Cal. Code of Civ. Proc. § 428.10(b) states:

22 A party against whom a cause of action has been asserted in
23 a complaint or cross-complaint may file a cross-complaint
24 setting forth . . . [a]ny cause of action he has against a
25 person alleged to be liable thereon, whether or not such
person is already a party to the action

26 Under this section, a defendant may file a cross-complaint
27 against any person from whom he seeks indemnity. Daon Corp. v.
28 Place Homeowners Assn., 255 Cal. Rptr. 448, 451 (Cal Ct. App.
1989) .

1 adversary proceeding against the Taylors asserting claims for
2 relief under § 727(a)(2), (3), and (4) and § 523(a)(2).⁴ With
3 respect to the § 523(a)(2) fraud claim, Parker alleged that the
4 Taylors provided him with false information so that they could
5 obtain the loans from Wilcox. Parker further alleged that the
6 Taylors misrepresented the status of their other loans and
7 financial condition. In the prayer for relief on the fraud
8 claim, Parker sought equitable indemnification from the Taylors
9 for any damages arising out of their fraudulent actions in
10 obtaining the loans in the event Parker was found liable for the
11 Taylors' obligation in the State Court Action.

12 The Taylors did not answer the complaint. On September 29,
13 2008, the clerk of the court entered a default against them.
14 Parker then filed an application for entry of a default
15 judgment. On February 17, 2009, the bankruptcy court entered a
16 default judgment against the Taylors, denying them a discharge
17 under § 727. On the § 523 fraud claim, the judgment provided:

18 Defendants shall be obligated to indemnify and to
19 repay Plaintiffs for any monetary damage award entered
20 against Plaintiffs (if any) in accordance with a final
21 judgment in the State Court Action in Contra Costa
22 Superior court, Case Number C08-00149, Wilcox v.
23 Parker, et al. To the extent that Defendants do
24 not indemnify and repay Plaintiffs, as required by
25 this Judgment, Plaintiffs may pursue Defendants and
26 each of them for repayment of any sums that Plaintiffs
27 and each of them are obligated to pay in the State
28 Court Action, in accordance with this Judgment.

25 ⁴ We have taken judicial notice of the pleadings which were
26 docketed and imaged in In re Taylor, Bankruptcy Case No. 08-42427
27 and the related adversary proceeding, Parker v. Taylor, Adv. No.
28 08-4239. Atwood v. Chase Manhattan Mortg. Co. (In re Atwood),
293 B.R. 227, 233 n.9 (9th Cir. BAP 2003).

1 Shortly thereafter, the Taylors moved to set aside the
2 default judgment. On April 29, 2009, the bankruptcy court
3 entered a conditional order setting the default judgment aside
4 which required the Taylors to pay Parker’s attorneys’ fees.
5 After the Taylors provided proof of payment of the court-
6 approved fees, the court entered a final order setting aside the
7 default on March 8, 2010.

8 On June 2, 2011, Parker filed a motion for summary judgment
9 (“MSJ”) on the § 727 claims against the Taylors. On June 3,
10 2011, Parker voluntarily dismissed the § 523(a) (2) claim.⁵ The
11 bankruptcy court denied Parker’s MSJ.

12 After amending his complaint, Parker abandoned his pursuit
13 of the Taylors. On November 2, 2011, the bankruptcy court
14 dismissed the adversary proceeding for lack of prosecution. On
15 November 18, 2011, the adversary proceeding closed.

16 **Parker’s Bankruptcy**

17 Meanwhile, on April 20, 2009, just prior to the bankruptcy
18 court’s conditional set aside of Parker’s default judgment
19 against the Taylors, Parker filed his chapter 7 petition.
20 Parker’s Schedule F showed \$1,037,000 in unsecured debt with \$1
21 million of that amount attributed to his potential liability to
22 Wilcox in the State Court Action.

23 On July 20, 2009, Wilcox filed an adversary proceeding
24 against Parker alleging claims for relief under §§ 727 and
25

26 _____
27 ⁵ By this time, as further discussed below, the bankruptcy
28 court had found after a trial that Parker did not have the
requisite intent to defraud Wilcox.

1 523(a)(2). Wilcox filed an MSJ on all claims for relief. With
2 respect to the § 523(a)(2)(A) fraud claim, Wilcox sought summary
3 judgment on judicial estoppel grounds based on the default
4 judgment Parker had obtained in the Taylors' bankruptcy case.
5 According to Wilcox, Parker could only obtain a judgment for
6 equitable indemnity if he was jointly and severally liable with
7 the Taylors for fraud. Therefore, Wilcox reasoned that Parker's
8 application for entry of the default judgment and the judgment
9 itself constituted Parker's admission that he had committed
10 fraud against Wilcox.

11 On November 19, 2010, the bankruptcy court entered its
12 order denying Wilcox's MSJ. On the § 523(a)(2)(A) fraud claim,
13 the court found that there was a genuine dispute on the issue of
14 Parker's intent to defraud Wilcox.⁶

15 The bankruptcy court bifurcated the trial into two phases.
16 In the first phase, the bankruptcy court would decide the fraud
17 claim under § 523(a)(2)(A), and in the second phase the court
18 would decide the § 727 claims for relief. On December 3, 2010,
19 Wilcox filed a motion for leave to appeal the interlocutory
20 order denying his MSJ with the bankruptcy court. In that

22 ⁶ In support of his MSJ, Wilcox evidently included a letter
23 from the California Department of Real Estate (the "DRE") that
24 found Parker had an obligation to disclose the fact that his wife
25 had a senior trust deed on one of the properties that Wilcox
26 loaned money on. That letter is not part of the record on
27 appeal. However, from what we can tell, the DRE found Parker was
28 negligent or incompetent and that he was overly optimistic that
the transaction would be successful. Hr'g Tr. November 4, 2010
at 10:9-13. Although the bankruptcy court referred to that
factual issue in denying the § 523(a)(2) MSJ, it made no
reference whatsoever to the judicial estoppel argument.

1 motion, Wilcox stated that the issue for appeal was whether the
2 doctrine of judicial estoppel should apply to bar Parker from
3 denying his liability to Wilcox for fraud. Wilcox also moved to
4 stay the trial pending appeal.

5 On December 13, 2010, the bankruptcy court held a trial on
6 the § 523(a)(2)(A) claim. At that hearing, the court denied
7 Wilcox's motion for leave to appeal.⁷ Ultimately, the court
8 ruled in Parker's favor, finding that the alleged debts owed to
9 Wilcox were discharged. On April 4, 2011, the bankruptcy court
10 entered judgment for Parker on the § 523(a)(2)(A) fraud claim.

11 On September 28, 2011, the bankruptcy court entered the
12 order granting Wilcox's motion to dismiss the remaining claims
13 under § 727. At that point, the interlocutory order denying
14 Wilcox's MSJ on the § 523(a)(2) claim merged into the final
15 judgment disposing of Wilcox's claim under § 523(a)(2). United
16 States v. Real Prop. Located at 475 Martin Lane, Beverly Hills,
17 Cal., 545 F.3d 1134, 1141 (9th Cir. 2008) (under merger rule
18 interlocutory orders entered prior to the judgment merge into
19 the judgment and may be challenged on appeal).

20 On October 6, 2011, the adversary proceeding closed. On
21 the same day Parker was granted a discharge.

22 On October 11, 2011, Wilcox timely appealed the bankruptcy
23 court's order denying his MSJ.

24 II. JURISDICTION

25 The bankruptcy court had jurisdiction over this proceeding

27 ⁷ Wilcox was required to seek leave to appeal the
28 interlocutory order from this Panel under Rule 8003(b).

1 under 28 U.S.C. §§ 1334 and 157(b)(2)(I). We have jurisdiction
2 under 28 U.S.C. § 158.

3 **III. ISSUE**

4 Did the bankruptcy court err in denying Wilcox's MSJ on
5 judicial estoppel grounds?

6 **IV. STANDARD OF REVIEW**

7 We review de novo the bankruptcy court's denial of a motion
8 for summary judgment. Padfield v. AIG Life Ins. Co., 290 F.3d
9 1121, 1124 (9th Cir. 2002).

10 **V. DISCUSSION**

11 We first consider whether review of the order denying
12 Wilcox's MSJ is appropriate under these circumstances.
13 Generally, the denial of a motion for summary judgment is not
14 reviewable on appeal after a full trial and final judgment on
15 the merits of the case. Lum v. City and Cnty. of Honolulu, 963
16 F.2d 1167, 1170 (9th Cir. 1992); Locricchio v. Legal Servs.
17 Corp., 833 F.2d 1352, 1358 (9th Cir. 1987); see also Allahar v.
18 Zahora, 59 F.3d 693, 695 (7th Cir. 1995) ("Once a trial has been
19 completed and all the facts presented, it is almost always
20 immaterial whether or not summary judgment should have been
21 granted at an earlier point in the proceedings."). In
22 Locricchio, the Ninth Circuit explained the rationale for the
23 rule:

24 To be sure, the party moving for summary judgment
25 suffers an injustice if his motion is improperly
26 denied. This is true even if the jury decides in his
27 favor. The injustice arguably is greater when the
28 verdict goes against him. However, we believe it
would be even more unjust to deprive a party of a jury
verdict after the evidence was fully presented, on the
basis of an appellate court's review of whether the

1 pleadings and affidavits at the time of the summary
2 judgment motion demonstrated the need for a trial.

3 833 F.2d at 1359. However, the rule does not apply to denials
4 of summary judgment motions "where the [bankruptcy] court made
5 an error of law that, if not made, would have required the
6 [bankruptcy] court to grant the motion." Banelos v. Const.
7 Laborers' Trust Funds for S. Cal., 382 F.3d 897, 902 (9th Cir.
8 2004).

9 Here, the bankruptcy court did not make any findings on
10 Wilcox's judicial estoppel theory. However, the record shows
11 that the question of whether the doctrine of judicial estoppel
12 applied did not concern disputed factual issues that were later
13 addressed at trial. Indeed, the record reveals that the only
14 disputed issues of material fact for trial were whether Parker
15 had the requisite intent to defraud Wilcox and whether Wilcox
16 justifiably relied on material misrepresentations which resulted
17 in damage. Thus, the bankruptcy court implicitly decided the
18 question of whether judicial estoppel applied under these facts
19 as an issue of law. Accordingly, the court's denial of summary
20 judgment had the effect of ending any further consideration of
21 Wilcox's judicial estoppel theory.⁸

22 Moreover, had the bankruptcy court applied the doctrine of
23

24 ⁸ Parker also argues that Wilcox waived his claim of
25 judicial estoppel for purposes of appeal because he never
26 referred to it at trial, did not adduce any testimony relating to
27 detriment or unfair advantage, did not introduce any documentary
28 evidence on the issue and never sought a ruling by the trial
court on the issue at trial. For the same reasons noted above,
we conclude that Wilcox did not waive the issue for purposes of
this appeal.

1 judicial estoppel on the issue of Parker's fraud, that ruling
2 would have negated the need for a trial on the issue. Under
3 these circumstances, we find it appropriate to review the order
4 denying Wilcox's MSJ under our traditional de novo review.

5 **Judicial Estoppel**

6 We now consider whether the doctrine of judicial estoppel
7 applies to the undisputed facts as a matter of law. "Judicial
8 estoppel, sometimes also known as the doctrine of preclusion of
9 inconsistent positions, precludes a party from gaining an
10 advantage by taking one position, and then seeking a second
11 advantage by taking an incompatible position." Whaley v.
12 Belleque, 520 F.3d 997, 1002 (9th Cir. 2008). It is "an
13 equitable doctrine invoked by a court at its discretion," N.H.
14 v. Maine, 532 U.S. 742, 750 (2001), and "is intended to protect
15 the integrity of the judicial process by preventing a litigant
16 from playing fast and loose with the courts." Whaley, 520 F.3d
17 at 1002.

18 In deciding whether judicial estoppel should be applied, we
19 typically consider three elements: "(1) whether a party's later
20 position is 'clearly inconsistent' with its original position;
21 (2) whether the party has successfully persuaded the court of
22 the earlier position, and (3) whether allowing the inconsistent
23 position would allow the party to 'derive an unfair advantage or
24 impose an unfair detriment on the opposing party.'" United
25 States v. Ibrahim, 522 F.3d 1003, 1009 (9th Cir. 2008); see also
26 Cheng v. K&S Diversified Invs., Inc. (In re Cheng), 308 B.R.
27 448, 452-3 (9th Cir. BAP 2004).

28 Before moving on to the determination as to whether these

1 elements have been met, we briefly address Wilcox's reasoning to
2 support application of judicial estoppel under this set of
3 facts. His argument goes like this:

4 (1) A judgment based on equitable indemnity was not
5 available to Parker absent his joint and several
6 liability with the Taylors;

7 (2) The judgment Parker obtained against the Taylors
8 presupposes joint liability for fraud;

9 (3) Ergo, Parker's judgment against the Taylors based
10 on equitable indemnity constitutes a judicial
11 admission of Parker's liability for fraud.

12 Wilcox's major premise is correct: equitable indemnity is
13 only available among tortfeasors who are jointly and severally
14 liable for the plaintiff's injury. Leko v. Cornerstone Bldg.
15 Inspection Serv., 103 Cal. Rptr. 2d 858, 863 (Cal. Ct. App.
16 2001). The key here is that there can be no indemnity without
17 liability. Only when the indemnitee is found responsible for
18 the acts of the indemnitor does the obligation to indemnify
19 apply. Restatement (Second) of Torts § 886B(1) (1979) ("If two
20 persons are liable in tort to a third person for the same harm
21 and one of them discharges the liability of both, he is entitled
22 to indemnity from the other if the other would be unjustly
23 enriched at his expense by the discharge of the liability.").
24 However, as discussed below, the rest of Wilcox's analysis fails
25 because his minor premises are incorrect.

26 Our independent review of Parker's application for entry of
27 default in the Taylors' adversary and the default judgment
28 itself show that Parker asserted a conditional, or contingent

1 claim for common law indemnity against the Taylors. We
2 characterize Parker's equitable indemnity claim as conditional
3 because, on the one hand, Parker denied that he was liable for
4 any of the claims Wilcox may have asserted against him. Yet, on
5 the other hand, Parker asserted that he could incur liability
6 for the Taylors' debt and, if so, the Taylors should be required
7 to equitably indemnify him due to their fraud. The plain
8 language of the default judgment shows that the Taylors'
9 obligation to indemnify Parker and repay him was conditional⁹ on
10 Wilcox obtaining a monetary damage award against Parker in the
11 State Court Action. Accordingly, the conditional nature of the
12 judgment does not, as Wilcox puts it, "presuppose" Parker's
13 fraud.

14 It follows then that the judgment cannot constitute a
15 judicial admission by Parker that he committed fraud. "Judicial
16 admissions are formal admissions in the pleadings which have the
17 effect of withdrawing a fact from issue and dispensing wholly
18 with the need for proof of the fact." Am. Title Ins. v. Lacelaw
19 Corp., 861 F.2d 224, 226 (9th Cir. 1988). There are no formal
20 admissions in the record before us. At all times, Parker denied
21 he was liable for the claims Wilcox asserted against him.

22 Due to the conditional nature of Parker's claim for
23 equitable indemnity the doctrine of judicial estoppel has no
24 application under this set of facts. There is no "conflict"
25 between the default judgment that Parker obtained in the

26
27 ⁹ Generally, conditional judgments are not final under
28 Civil Rule 54(a), incorporated by Rule 7054, until the
contingency has been removed. Wright, Miller & Cooper, 15B
Federal Practice and Procedure § 3915.3 (2nd ed. 1998).

1 Taylors' bankruptcy and the judgment in favor of Parker at issue
2 in this appeal. Further, the record does not reveal any
3 inconsistencies in Parker's position.

4 Wilcox also failed to establish judicial estoppel based on
5 the success element. There is nothing in the record that shows
6 Parker was asserting a vested right to indemnification against
7 the Taylors based on his admission of fraud. Accordingly, by
8 entering the conditional judgment, the bankruptcy court could
9 not have "accepted" the position that Wilcox advocates.

10 Finally, we are hard pressed to conclude that Parker sought
11 an unfair advantage by seeking equitable indemnity from the
12 Taylors in their bankruptcy and then later defending himself in
13 this nondischargeability proceeding. Parker obtained no
14 advantage by obtaining the default judgment against the Taylors
15 which was later set aside. In the end, the bankruptcy court
16 held a trial on the issue of Parker's fraud where Wilcox had
17 ample opportunity to cross examine Parker and other witnesses.
18 A trial on the merits cannot be considered to impose an "unfair
19 detriment" on Wilcox when, at the time of his MSJ, the record
20 demonstrated the need for a trial.

21 Accordingly, we conclude that, as a matter of law, Wilcox
22 failed to establish the elements necessary to support the
23 application of the doctrine of judicial estoppel.

24 VI. CONCLUSION

25 For the reasons stated, we AFFIRM. Wilcox's motion to
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1 supplement the record is DENIED.¹⁰

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22 ¹⁰ On May 3, 2012, Wilcox filed a motion to supplement the
23 record with the state court cross-complaint filed by Parker
24 against the Taylors for indemnity and Parker's Schedule B listing
25 his contingent claim against the Taylors. On May 7, 2012, Parker
26 objected to the inclusion of these documents in the record. On
27 that same day, the Panel issued an order stating that the motion
28 would be considered along with the merits. The documents
included with the supplement were not presented to the bankruptcy
court and therefore were not properly considered as part of the
record on appeal. They are not necessary to our ruling.
Therefore, the motion is denied.