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

NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT

5	In re:)	BAP No. NC-11-1631-DJuKi
6	SAMAN HASNAIN,)	Bk. No. 10-58064-SLJ
7	Debtor.)	Adv. No. 10-05380-SLJ
8	_____)	
9	SAMAN HASNAIN,)	
10	Appellant,)	
11	v.)	M E M O R A N D U M ¹
12	MICHAEL CHADD,)	
13	Appellee.)	
	_____)	

Submitted Without Oral Argument
on October 19, 2012

Filed - November 9, 2012

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

Honorable Stephen L. Johnson, Bankruptcy Judge, Presiding

Appearances: Appellant Saman Hasnain and appellee Michael Chadd
pro se on briefs.

Before: DUNN, JURY and KIRSCHER, Bankruptcy Judges.

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

1 Appellee Michael Chadd moved for summary judgment on his
2 complaint against the debtor, Saman Hasnain,² to except a debt
3 from discharge under § 523(a)(4) and (a)(19) ("exception to
4 discharge complaint").³ The debt arose from a confirmed
5 arbitration award against the debtor for violations of California
6 securities laws, fraud and conversion. The bankruptcy court
7 granted summary judgment in Chadd's favor ("summary judgment
8 order"), giving issue preclusive effect to the arbitration
9 judgment. The debtor appeals the bankruptcy court's summary
10 judgment order. We AFFIRM.

11
12 **FACTS**

13 A. Chadd's state court action

14 Approximately four years before the debtor filed for
15 bankruptcy protection, Chadd entered into an operating agreement
16 with the debtor's husband, Jawad Hasnain, and others to form
17 Westland Homes, LLC ("Westland Homes"), a real estate development
18 company. Westland Homes was formed to develop several town homes
19 on a tract of land in Fremont, California ("Fremont property").

20 Under the operating agreement, the signatories were required
21

22 ² Unless otherwise indicated, all chapter, section and rule
23 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532, and
24 to the Federal Rules of Bankruptcy Procedure, Rules 1001-9037.
25 The Federal Rules of Civil Procedure are referred to as "Civil
26 Rules."

27 ³ Chadd sought to except the debt from discharge under
28 § 523(a)(2)(A), (a)(4), (a)(6) and (a)(19). The bankruptcy court
granted summary judgment based on the judgment confirming the
final arbitration award which it determined to have set forth
findings sufficient under § 523(a)(4) and 523(a)(19).

1 to purchase securities in the form of member interests in
2 Westland Homes. The proceeds from the sale of the securities
3 ("investment proceeds") were to be invested in the development of
4 the Fremont property. The operating agreement also required the
5 signatories to participate in arbitration in the event of a
6 dispute concerning Westland Homes ("arbitration clause").

7 Chadd was a member of Westland Homes, having signed the
8 operating agreement and purchased securities. The debtor's
9 husband was a member, as well as the manager, of Westland Homes.
10 The debtor was neither a signatory to the operating agreement nor
11 a member of Westland Homes.

12 On September 11, 2008, Chadd filed a complaint in state
13 court⁴ against the debtor, her husband and Westland Homes⁵ for
14 violations of California securities laws, fraud, conversion and
15 joint venture ("state court action" or "state court complaint").⁶

17 ⁴ Neither Chadd nor the debtor provided a copy of the state
18 court complaint in the record before us. Chadd attached a copy
19 of the state court complaint as an exhibit to his exception to
20 discharge complaint. We reviewed the state court complaint from
21 the bankruptcy court's electronic adversary proceeding docket.
22 See O'Rourke v. Seaboard Surety Co. (In re E.R. Fegert, Inc.),
23 887 F.2d 955, 958 (9th Cir. 1989)(court may take judicial notice
24 of underlying bankruptcy records).

25 ⁵ Chadd also named Westland Homes' two other members,
26 Vidyasager Vaman Despande and Paul Duggan, as defendants in the
27 state court action.

28 ⁶ Chadd asserted the following causes of action against the
debtor and her husband in his state court complaint:

(1) securities violations under Cal. Corp. Code §§ 25401 and
253001; (2) fraud; (3) conversion; (4) "money had and received"
(i.e., investment funds intended for use by Westland Homes but

(continued...)

1 Chadd alleged that the debtor and her husband engaged in a
2 joint venture as to Westland Homes' operations. Chadd claimed
3 that the debtor, her husband and/or Westland Homes (1) made
4 numerous misrepresentations about the rate of return on his
5 investment, the amounts invested by the debtor's husband in
6 Westland Homes and his experience in real estate development,
7 among other things; (2) represented that the debtor was the real
8 estate agent responsible for selling the town homes on the
9 Fremont property; (3) failed to disclose that the debtor's
10 husband previously had filed for bankruptcy and had lawsuits
11 pending against him; (4) converted the investment proceeds for
12 the debtor and her husband's personal use; and (5) failed to
13 return the investment proceeds to Chadd. He also alleged that
14 the debtor knew about her husband's wrongful actions and/or
15 "ratified and approved" his conduct and "accepted the benefits of
16 his wrongful actions."

17 B. The state court arbitration

18 The debtor, her husband and Westland Homes moved to compel
19 arbitration ("arbitration motion") in the state court action.
20 They argued that, under the terms of the operating agreement, any
21 dispute relating to Westland Homes must be addressed through
22 mediation first. If no resolution was reached through mediation,
23

24 ⁶(...continued)
25 instead used by the debtor and her husband for their personal use
26 and not returned by either the debtor or her husband); (5)
27 "aiding and abetting" in wrongfully obtaining and/or misusing
28 Chadd's investment funds; (6) violation of Cal. Bus. & Prof. Code
§ 17200; and (7) joint venture. Chadd also asserted causes of
action against the debtor's husband only.

1 the dispute was to be addressed through arbitration. According
2 to the debtor, her husband and Westland Homes, the parties tried
3 to resolve the matter through mediation, but were unsuccessful.
4 They also pointed out that the debtor did not sign the operating
5 agreement and had no involvement with Westland Homes. The state
6 court granted the arbitration motion.

7 The arbitration took place over two hearings ("arbitration
8 hearings"). The debtor, her husband, Westland Homes and Chadd
9 were represented by counsel in the arbitration. A retired judge
10 acted as arbitrator. After considering the briefs and evidence
11 submitted by the parties, the arbitrator issued an interim
12 arbitration award in Chadd's favor ("interim arbitration award").

13 The arbitrator found that the liability of the debtor and
14 her husband was "direct and personal." Although the debtor had
15 not signed the operating agreement with the arbitration clause,
16 the arbitrator determined that she nonetheless became a party to
17 the arbitration by participating in it. The arbitrator concluded
18 that the debtor, her husband and Westland Homes were jointly and
19 severally liable for violating California securities laws by
20 (1) selling unqualified and nonexempt member interests in
21 Westland Homes to Chadd and (2) making misleading statements and
22 omitting material facts in selling member interests in Westland
23 Homes to Chadd. He also concluded that the debtor, her husband
24 and Westland Homes were jointly and severally liable to Chadd for
25 breach of fiduciary duty.

26 Shortly after the arbitrator issued the interim arbitration
27 award, the debtor submitted a brief contesting it ("arbitration
28 participation brief"). Despite her having joined in the

1 arbitration motion, she contended that she was not bound by the
2 interim arbitration award because she was not a proper party to
3 the arbitration. The debtor argued that only signatories to the
4 operating agreement had to submit to arbitration under the
5 arbitration clause. Because she had not signed the operating
6 agreement, the debtor was not subject to the arbitration. She
7 further contended that she was not subject to the arbitration
8 because she did not receive any benefits from the operating
9 agreement. The debtor also claimed that she had no involvement
10 with Westland Homes.

11 The debtor further maintained that she was not bound by the
12 interim arbitration award because she did not actively
13 participate in the arbitration. She argued that simply raising
14 minimal defenses in response to the state court action and
15 providing direct testimony at the arbitration hearings did not
16 make her a party to the arbitration. The debtor claimed that she
17 only appeared at the arbitration hearings because she believed
18 that she was required to do so under a notice to appear issued by
19 Chadd ("arbitration appearance notice") and an order issued by
20 the arbitrator ("arbitration appearance order").

21 She also contended that the interim arbitration award set
22 forth findings as to her liability beyond those alleged by Chadd
23 in the state court complaint. The debtor was found to be liable
24 on the same grounds as those asserted against her husband, even
25 though they had not been asserted against her in the state court
26 complaint. Moreover, she argued, Chadd did not offer any
27 evidence demonstrating that she was liable for violations of
28 California securities laws.

1 Two months after the debtor filed her arbitration
2 participation brief, on July 6, 2010, the arbitrator issued the
3 final arbitration award which "incorporated the contents of the
4 [interim arbitration award], except as amended." He found that,
5 although the debtor did not sign the operating agreement, she
6 still was subject to arbitration because she had "voluntarily
7 participated in the arbitration and by so doing, became a party
8 to it." The arbitrator further determined that, although the
9 debtor did not sign the operating agreement, she nonetheless
10 participated in the "fraudulent misappropriation committed
11 against [Chadd]" by using the investment proceeds for her
12 personal needs.

13 The arbitrator found that the debtor's husband had offered
14 and sold unqualified securities in Westland Homes in violation of
15 Cal. Corp. Code § 25110. He also found that the debtor, her
16 husband and Westland Homes violated Cal. Corp. Code § 25401 by
17 (1) misrepresenting her husband's experience and success as a
18 real estate developer and (2) failing to advise Chadd of her
19 husband's bankruptcy filing and of the lawsuits filed against
20 him, among other things.

21 The arbitrator also determined that the debtor and her
22 husband drew on the investment proceeds for their own personal
23 needs, "contrary to [the] oral and written representations made
24 by [the debtor's husband] to the investors."

25 Based on these findings, the arbitrator determined that the
26 debtor, her husband and Westland Homes were jointly and severally
27 liable to Chadd. He awarded Chadd a total of \$606,402, which
28

1 included attorney's fees and costs.⁷

2 C. The debtor's chapter 7 bankruptcy

3 Before Chadd could obtain confirmation of the final
4 arbitration award,⁸ on August 4, 2010, the debtor filed her
5 chapter 7 bankruptcy petition. She scheduled Chadd as an
6 unsecured creditor with a \$600,000 claim arising from "an
7 arbitration judgment." The deadline to file complaints objecting
8 to discharge was November 8, 2010.

9 Chadd initiated an adversary proceeding against the debtor,
10 filing the exception to discharge complaint on November 5, 2010.
11 He repeated in the exception to discharge complaint most of the
12 allegations he made in the state court complaint. He also
13 asserted that the debtor had transferred into her own bank
14 account the investment proceeds from Westland Homes' bank account
15 and used them for her personal needs. Chadd pointed out that he
16 obtained the final arbitration award against the debtor
17 prepetition.

18 He argued that the final arbitration award was excepted from
19 discharge under § 523(a)(4). Chadd asserted that the debtor was
20 a fiduciary because, under the operating agreement, she was to
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22
23 ⁷ The arbitrator awarded Chadd a total of \$431,402 in
24 damages and \$175,000 in attorney's fees.

25 ⁸ Under California law, a party to an arbitration, in which
26 an award has been issued, may petition the state court to
27 confirm, correct or vacate the arbitration award. Cal. Civ.
28 Proc. Code §§ 1285-1287.6. A conforming judgment is entered if
the arbitration award is confirmed. The judgment then has the
same force and effect as any other civil judgment. Id. at
§ 1287.4.

1 ensure that the investment proceeds that had been "placed in
2 trust" were to be used in the development of the Fremont
3 property. He moreover claimed that the debtor was a fiduciary
4 because she was the real estate agent for Westland Homes. The
5 debtor fraudulently and wrongfully obtained the securities
6 proceeds, however, by making various misrepresentations to and
7 omitting material facts from Chadd. She then converted the
8 investment proceeds for her own personal benefit.

9 He also contended that the final arbitration award was
10 excepted from discharge under § 523(a)(19). He alleged that the
11 debtor violated Cal. Corp. Code § 25110 in obtaining the
12 investment proceeds from him.⁹ Alternatively, the debtor engaged
13 in fraud, deceit and/or manipulation in obtaining from Chadd the
14 investment proceeds by making false and/or misleading statements
15

16 ⁹ Cal. Corp. Code § 25110 provides:

17
18 It is unlawful for any person to offer or sell in this
19 state any security in an issuer transaction (other than
20 in a transaction subject to Section 25120), whether or
21 not by or through underwriters, unless such sale has
22 been qualified under Section 25111, 25112 or 25113 (and
23 no order under Section 25140 or subdivision (a) of
24 Section 25143 is in effect with respect to such
25 qualification) or unless such security or transaction
26 is exempted or not subject to qualification under
27 Chapter 1 (commencing with Section 25100) of this part.
28 The offer or sale of such a security in a manner that
varies or differs from, exceeds the scope of, or fails
to conform with either a material term or material
condition of qualification of the offering as set forth
in the permit or qualification order, or a material
representation as to the manner of offering which is
set forth in the application for qualification, shall
be an unqualified offer or sale.

1 and concealing material facts in violation of Cal. Corp. Code
2 § 25401.¹⁰

3 The debtor answered the exception to discharge complaint.
4 While the adversary proceeding was pending, she received her
5 chapter 7 discharge on January 27, 2011. Two months later, Chadd
6 filed a motion for relief from stay ("chapter 7 relief from stay
7 motion") seeking termination of the automatic stay so that he
8 could obtain confirmation of the final arbitration award and have
9 it entered as a judgment. The debtor opposed the chapter 7
10 relief from stay motion.

11 At the March 29, 2011 hearing on the chapter 7 relief from
12 stay motion, the bankruptcy court determined that there was no
13 automatic stay in effect because the debtor had received her
14 discharge. The bankruptcy court concluded that the final
15 arbitration award was not discharged, however, because Chadd's
16 exception to discharge complaint was pending before the discharge
17 was entered.¹¹

18
19 ¹⁰ Cal. Corp. Code § 25401 provides:

20 It is unlawful for any person to offer or sell a
21 security in this state or buy or offer to buy a
22 security in this state by means of any written or oral
23 communication which includes an untrue statement of a
24 material fact or omits to state a material fact
25 necessary in order to make the statements made, in the
light of the circumstances under which they were made,
not misleading.

26 ¹¹ The bankruptcy court further reasoned that Chadd should
be allowed to obtain confirmation of the final arbitration award
27 as a matter of judicial economy. It acknowledged that the matter
"[had] already been litigated somewhere else." The question
28 (continued...)

1 The bankruptcy court granted relief from stay under § 362,
2 to the extent that it applied, and § 524(a)(2), to allow Chadd to
3 obtain confirmation of the final arbitration award and have it
4 entered as a judgment. However, it prohibited Chadd from taking
5 any actions to enforce any such judgment he obtained. On
6 April 5, 2011, the bankruptcy court entered an order consistent
7 with its ruling ("chapter 7 relief from stay order").¹²

8 D. The debtor's chapter 11 bankruptcy¹³

9 The state court scheduled a hearing for May 10, 2011, to
10 confirm the arbitration award ("arbitration confirmation
11 hearing"). One day before the arbitration confirmation hearing,
12 the debtor filed her chapter 11 bankruptcy petition (case
13 no. 11-54431).¹⁴ She also sent a letter to Chadd, advising him
14 that her chapter 11 bankruptcy case automatically stayed the

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16 ¹¹(...continued)
17 remained, however, as to whether the matter had been "litigated
18 in a way that [could] be used as collateral estoppel"
19 The bankruptcy court wanted "an answer to that question, rather
20 than setting up a trial for something [that had] already been
21 tried." It believed that once Chadd obtained confirmation of the
22 final arbitration award and had judgment entered on it, he could
23 return to the bankruptcy court and move for summary judgment on
24 his exception to discharge complaint.

22 ¹² The debtor appealed the chapter 7 relief from stay order
23 to this Panel (BAP no. NC-11-1174). The Panel dismissed the
24 debtor's appeal as moot because Chadd later obtained confirmation
25 of the arbitration award and had judgment entered on it.

25 ¹³ The debtor's chapter 11 case was dismissed on September
26 13, 2011, on motion filed by the United States Trustee.

27 ¹⁴ Judge Stephen L. Johnson presided over the debtor's
28 chapter 7 bankruptcy case while Judge Arthur S. Weissbrodt
presided over her chapter 11 bankruptcy case.

1 arbitration confirmation hearing.

2 Chadd filed a motion for relief from stay in the debtor's
3 chapter 11 bankruptcy case ("chapter 11 relief from stay
4 motion"). He notified the bankruptcy court of the debtor's
5 chapter 7 bankruptcy case, the exception to discharge complaint
6 and the chapter 7 relief from stay order. He asked that the
7 bankruptcy court lift the automatic stay imposed by the debtor's
8 chapter 11 bankruptcy case so that he could proceed with the
9 arbitration confirmation hearing "to facilitate" the summary
10 judgment motion he intended to file against the debtor in the
11 adversary proceeding. The bankruptcy court granted the
12 chapter 11 relief from stay motion, entering an order on July 19,
13 2011 ("chapter 11 relief from stay order"). The debtor did not
14 appeal the chapter 11 relief from stay order.

15 E. The cross-motions for summary judgment

16 The arbitration confirmation hearing took place on
17 August 23, 2011. At the arbitration confirmation hearing, the
18 state court noted that the matter had been arbitrated and
19 adjudicated and an arbitration award had been entered. Based on
20 these circumstances, the state court confirmed the final
21 arbitration award. It issued an order confirming the final
22 arbitration award on August 25, 2011 ("arbitration confirmation
23 order"). It also issued a judgment against the debtor in the
24 total amount of \$751,250.11 ("arbitration judgment").¹⁵ The

25
26 ¹⁵ The state court judge signed the arbitration confirmation
27 order on August 23, 2011. The arbitration confirmation order was
28 endorsed on August 25, 2011, and filed on August 29, 2011. The
(continued...)

1 debtor did not appeal the arbitration judgment.¹⁶

2 Prior to the arbitration confirmation hearing, on July 21,
3 2011, the debtor filed a motion for summary judgment ("debtor's
4 summary judgment motion") in the adversary proceeding. Chadd
5 filed his own motion for summary judgment on September 13, 2011
6 ("Chadd's summary judgment motion").

7 The debtor argued in her summary judgment motion that the
8 bankruptcy court should not give issue preclusive effect to the
9 arbitration award because it did not establish the elements under
10 § 523(a)(4) and (a)(19).¹⁷ She contended that the bankruptcy
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12 ¹⁵(...continued)
13 state court judge signed the judgment on August 25, 2011. The
14 judgment was endorsed on the same day.

15 ¹⁶ The debtor included in her summary judgment motion her
16 responses to Chadd's interrogatory requests. In response to the
17 statement that she had "not objected to the arbitration award
18 with any court," the debtor explained that she did not do so
19 because she "could not afford to go through [a] lengthy appeal
20 process in State Court, therefore [she] immediately filed [her]
21 bankruptcy petition after [the] arbitration award was given."

22 ¹⁷ Section 523 provides, in relevant part:

23 (a) A discharge under section 727 . . . of this title
24 does not discharge an individual debtor from any debt -

25 (4) for fraud or defalcation while acting in a
26 fiduciary capacity, embezzlement, or larceny;

27 . . . [or]

28 (19) that -

(A) is for -

(i) the violation of any of the Federal
securities laws (as that term is defined
in section 3(a)(47) of the Securities
Exchange Act of 1934), any of the State
securities laws, or any regulation or

(continued...)

1 court instead should discharge the final arbitration award and
2 the arbitration judgment.

3 With respect to the § 523(a)(4) claim, the debtor asserted
4 that she was not a fiduciary because she was not the real estate
5 agent for Westland Homes or a signatory to the operating
6 agreement. She also did not take any investment proceeds from
7 Westland Homes' bank account because she lacked authority to
8 access it; only her husband had authority to access Westland
9 Homes' bank account. She contended that her husband was entitled
10 to make withdrawals from Westland Homes' bank account to pay part
11 of his salary per the operating agreement. The debtor also
12 claimed that she had no knowledge of her husband's withdrawals
13 from Westland Homes' bank account or how he used them.

14 As for the § 523(a)(19) claim, the debtor argued that she
15

16 ¹⁷(...continued)

17 order issued under such Federal or State
18 securities laws; or
19 (ii) common law fraud, deceit, or
20 manipulation in connection with the
21 purchase or sale of any security; and
22 (B) results, before, on, or after the date on
23 which the petition was filed, from -
24 (i) any judgment, order, consent order,
25 or decree entered in any Federal or
26 State judicial or administrative
27 proceeding;
28 (ii) any settlement agreement entered
into by the debtor; or
(iii) any court or administrative order
for any damages, fine, penalty,
citation, restitutionary payment,
disgorgement payment, attorney fee,
cost, or other payment owed by the
debtor.

1 could not have sold securities in Westland Homes to Chadd because
2 she was not involved in Westland Homes in any way; she was not a
3 member or the real estate agent for Westland Homes. The debtor
4 moreover did not sign the operating agreement.

5 Chadd contended in his summary judgment motion that the
6 arbitration award should be given issue preclusive effect under
7 California law. He claimed that the arbitrator set forth
8 findings sufficient to establish fraud, embezzlement and/or
9 larceny under § 523(a)(4) and securities law violations under
10 § 523(a)(19), thereby rendering relitigation of these claims
11 unnecessary.

12 The bankruptcy court initially set a hearing for October 4,
13 2011, on the cross-motions for summary judgment. It later
14 vacated the hearing, determining that oral argument was
15 unnecessary. It advised the parties that it would take the
16 cross-motions for summary judgment under advisement and issue a
17 written decision.

18 The bankruptcy court entered the summary judgment order,
19 denying the debtor's summary judgment motion and granting Chadd's
20 summary judgment motion, on October 27, 2011. It entered
21 judgment against the debtor, excepting the state court judgment
22 from the debtor's discharge, on October 28, 2011.

23 The bankruptcy court set forth its factual findings and
24 legal conclusions in the summary judgment order. It concluded
25 that the final arbitration award and arbitration judgment were
26 entitled to preclusive effect under California law. In
27 particular, the bankruptcy court determined that: (1) both Chadd
28 and the debtor had been parties to the arbitration and the

1 arbitration confirmation hearing; (2) the issues of fraud and
2 embezzlement had been actually litigated, as the arbitrator
3 received and reviewed the parties' evidence and briefs and heard
4 oral argument during the arbitration hearings; and (3) the
5 arbitrator necessarily decided that the debtor was liable for
6 violating California securities laws and fraudulently
7 misappropriating the investment proceeds for her own use, which
8 would be part of a bankruptcy court's exception to discharge
9 determinations under § 523(a)(4) and (a)(19).

10 The debtor filed her notice of appeal of the summary
11 judgment order and judgment ("appeal notice") on November 4,
12 2011. Three days later, she filed a motion for reconsideration
13 of the summary judgment order and judgment ("motion to
14 reconsider"). The bankruptcy court denied the debtor's motion to
15 reconsider, entering an order on November 14, 2011
16 ("reconsideration order"). The debtor did not appeal the
17 reconsideration order.¹⁸

18
19 ¹⁸ The Civil Rules do not recognize motions for
20 reconsideration. Captain Blythers, Inc. v. Thompson (In re
21 Captain Blythers, Inc.), 311 B.R. 530, 539 (9th Cir. BAP 2004).
22 The Civil Rules do provide, however, two avenues through which a
23 party may obtain post-judgment relief: (1) a motion to alter or
24 amend judgment under Civil Rule 59(e) and (2) a motion for relief
25 from judgment under Civil Rule 60. Civil Rule 59(e) applies to
26 bankruptcy proceedings under Rule 9023, and Civil Rule 60 applies
27 to bankruptcy proceedings under Rule 9024. "When taken together,
28 [Civil] Rule 59 and [Civil] Rule 60 encompass all possible
post-judgment relief: [Civil] Rule 59 incorporates common law
principles of equity for granting new trials, and [Civil] Rule 60
preserves the relief afforded by ancient remedies for relief from
settlement judgments while abolishing the separate and
independent use of those remedies." In re Walker, 332 B.R. 820,
(continued...)

1 arbitration confirmation order and the arbitration judgment,
2 satisfy the elements for an exception to discharge judgment?

3
4 **STANDARD OF REVIEW**

5 We review de novo a bankruptcy court's ruling on
6 cross-motions for summary judgment. See CRM Collateral II, Inc.
7 v. TriCounty Metro. Transp., 669 F.3d 963, 968 (9th Cir. 2012)
8 (citation omitted). "When the bankruptcy court disposes of a
9 case on cross-motions for summary judgment, we may review both
10 the grant of the prevailing party's motion and the corresponding
11 denial of the opponent's motion." Id. (citation omitted).

12 Viewing the evidence in the light most favorable to the
13 nonmoving party, we must determine whether any genuine issues of
14 material fact exist and whether the bankruptcy court correctly
15 applied the relevant substantive law. Id. (quoting Trunk v. City
16 of San Diego, 629 F.3d 1099, 1105 (9th Cir. 2011)).

17 We review de novo the bankruptcy court's determination that
18 issue preclusion is available. See Miller v. County of Santa
19 Cruz, 39 F.3d 1030, 1032 (9th Cir. 1994). If we conclude that
20 issue preclusion is available, we review for abuse of discretion
21 the bankruptcy court's decision giving issue preclusive effect to
22 the state court ruling. Id.

23
24 **DISCUSSION**

25 On appeal, the debtor contends that the bankruptcy court
26 erred in granting summary judgment in Chadd's favor, setting
27 forth four main arguments: (1) the bankruptcy court failed to
28 provide her an opportunity to present her case by canceling the

1 hearing on the cross-motions for summary judgment; (2) she was
2 not a party to the prior suit, i.e., the arbitration; (3) the
3 issues of fraud and securities law violations were not actually
4 litigated in the arbitration; and (4) the issues of fraud and
5 securities law violations were not necessarily decided in the
6 arbitration.

7 Before we begin our analysis, we must outline the general
8 principles of issue preclusion within the context of § 523(a)
9 cases. Issue preclusion may be applied in exception to discharge
10 proceedings. Grogan v. Garner, 498 U.S. 279, 284 (1991). Issue
11 preclusion "bars successive litigation of an issue of fact or law
12 actually litigated and resolved in a valid court determination
13 essential to the prior judgment, even if the issue recurs in the
14 context of a different claim." Taylor v. Sturgell, 553 U.S. 880,
15 892 (2008)(quoting New Hampshire v. Maine, 532 U.S. 742, 748
16 (2001)(internal quotation marks omitted)).

17 We refer to the preclusion law of the state in which the
18 judgment was rendered to determine the preclusive effect of a
19 state court judgment. Diruzza v. County of Tehama, 323 F.3d
20 1147, 1152 (9th Cir. 2003)(quoting Marrese v. Am. Acad. of
21 Orthopaedic Surgeons, 470 U.S. 373, 380 (1985)). Here,
22 California law applies. Under California law, issue preclusion
23 can be applied when: (1) the issue decided in the prior
24 proceeding is identical to the issue sought to be relitigated in
25 the subsequent proceeding; (2) the issue was actually litigated
26 in the prior proceeding; (3) the issue was necessarily decided in
27 the prior proceeding; (4) a final judgment on the merits was
28 issued in the prior proceeding; and (5) the party against whom

1 issue preclusion is sought was a party to the prior proceeding.
2 Lucido v. Superior Court, 51 Cal. 3d 335, 337 (1990). Even if
3 all of these five elements are met, issue preclusion only may be
4 applied when the public policies underlying it would be advanced.
5 Id. at 354.

6 A state court's confirmation of an arbitration award
7 constitutes a judicial proceeding entitled to the full faith and
8 credit it would receive under state law. Caldeira v. County of
9 Kauai, 866 F.2d 1175, 1178 (9th Cir. 1989). In California, a
10 judgment confirming an arbitration award has the same force and
11 effect as a judgment in a civil action. Cal. Civ. Proc. Code
12 § 1287.4.

13 A. Hearing on the debtor's summary judgment motion

14 The debtor first claims that the bankruptcy court erred in
15 failing to afford her an opportunity to present her case by
16 deciding to issue a ruling without holding a hearing on the
17 cross-motions for summary judgment.

18 The bankruptcy court was not required to hold a hearing on
19 the debtor's summary judgment motion, however, unless required to
20 do so under the local bankruptcy rules. See Fernhoff v. Tahoe
21 Regional Planning Agency, 803 F.2d 979, 983 (9th Cir. 1986) ("a
22 district court may not, by rule or otherwise, preclude a party
23 from requesting oral argument . . . [though] district courts are
24 authorized 'to provide by rule that a party desiring oral
25 argument on a motion for summary judgment must apply therefor, in
26 the absence of which oral argument will be deemed to have been
27 waived.'") (quoting Dredge Corp. v. Penny, 338 F.2d 456 (9th Cir.
28

1 1964)).¹⁹ There is nothing in the local bankruptcy rules for the
2 Northern District of California requiring the bankruptcy court to
3 hold hearings on motions for summary judgment. See Bankruptcy
4 Local Rules 7003-1(f), 9013-1, 9013-2 and 9013-3. Moreover, the
5 debtor did not request a hearing on her summary judgment motion.
6 The bankruptcy court therefore did not err in declining to hold a
7 hearing on the cross-motions for summary judgment.

8 B. Participation in arbitration

9 The debtor next argues that she was not a party to the
10 arbitration because she did not sign the operating agreement that
11 required arbitration of disputes concerning Westland Homes. She
12 further argued that she only appeared in the arbitration as a
13 witness, being compelled to do so by the arbitration appearance
14 notice and arbitration appearance order. Because she was not a
15 party to the arbitration, the debtor continues, the element
16 requiring identical parties for issue preclusion was not met.

17 The arbitrator expressly determined that the debtor was a
18 party to the arbitration. He found that though she did not sign
19

20
21 ¹⁹ The Ninth Circuit in Fernhoff relied on Dredge Corp.;
22 both cases dealt with motions for summary judgment decided in
23 district court. Dredge Corp. looked to Civil Rules 56(c), 78 and
24 83 in formulating the proposition relied on by Fernhoff. The
25 Federal Rules of Bankruptcy Procedure did not adopt Civil
26 Rule 78, which authorizes district courts to provide for
27 submissions and determinations on motions on the briefs without
28 oral argument. Civil Rule 78 therefore does not apply in
bankruptcy cases. The Federal Rules of Bankruptcy Procedure also
did not adopt Civil Rule 83, which authorizes district courts to
make rules for their districts. Instead, Rule 9029 allows
district courts to authorize bankruptcy courts within their
districts to adopt local rules.

1 the operating agreement containing the arbitration clause, the
2 debtor "voluntarily participated" in the arbitration. As noted
3 above, she joined in the arbitration motion.

4 The debtor contends that a greater level of participation
5 than she provided is required to become a party to arbitration.
6 She insists that appearing and testifying at the arbitration
7 hearings do not qualify as "active participation." Rather, her
8 participation in the arbitration "was no more than that of any
9 witness who could have been subpoenaed by counsel." Appellant's
10 Opening Brief at 8.

11 Participation in arbitration does not require a particular
12 level of activity. "Participation" simply means "to take part"
13 or "to share in something." The American Heritage Dictionary of
14 the English Language, 4th ed. p. 1281 (2000). To participate in
15 any activity, one simply joins in. By appearing and testifying
16 at the arbitration hearings and by being represented by counsel
17 in the arbitration, the debtor took part in the arbitration. The
18 arbitrator clearly so found when he made his determination.

19 Additionally, as the state court pointed out at the
20 arbitration confirmation hearing, the debtor and her husband have
21 been active parties in all the proceedings connected to the state
22 court action, having been named as defendants. The debtor and
23 her husband also specifically requested that the matter go to
24 arbitration. In making such a request, the debtor voluntarily -
25 nay, willingly - subjected herself to arbitration. She cannot
26 now say that she was not subject to the arbitration when the
27 arbitrator issued a decision against her. The bankruptcy court
28 therefore did not err in determining that this element of issue

1 preclusion was met.

2 C. Actually litigated

3 The debtor next contends that she did not have the
4 opportunity to present evidence to the arbitrator, as she only
5 appeared as a witness at the arbitration. Because she had no
6 chance to litigate her case before the arbitrator, she contends
7 that the issues of fraud and securities law violations as they
8 related to her were not actually litigated.

9 We disagree. As we mentioned earlier, the debtor and her
10 husband were named as defendants in the state court action. They
11 were represented by the same counsel. The debtor and her husband
12 answered Chadd's state court complaint. They also sought and
13 obtained arbitration of the state court action. Over the course
14 of two hearings, the arbitrator received briefs, testimony and
15 oral arguments from the parties' counsel. As a party to both the
16 state court action and the arbitration, the debtor had ample
17 opportunity to present evidence to make her case. Indeed, she
18 did present evidence by providing testimony at the arbitration
19 hearings. Her testimony constituted evidence that the arbitrator
20 was free to evaluate and consider. See, e.g., In re Checkmate
21 Stereo & Electronics, Ltd., 21 B.R. 402, 413 (E.D.N.Y. 1982).

22 Moreover, as the debtor and her husband were represented by the
23 same attorney in the state court action and the arbitration, any
24 evidence submitted by their attorney relating to her husband was
25 submitted on the debtor's behalf as well.

26 Based on these circumstances, the debtor's argument that the
27 issues of fraud and securities law violations were not actually
28 litigated at the arbitration hearings has no merit. The

1 bankruptcy court therefore did not err in determining that these
2 issues were actually litigated in the arbitration.

3 D. Necessarily decided

4 The debtor further contends that the issues of fraud under
5 § 523(a)(4) and securities law violations under § 523(a)(19) were
6 not necessarily decided in the arbitration. She claims that
7 Chadd failed to provide evidence showing that she had committed
8 fraud or misappropriated the investment proceeds while acting in
9 a fiduciary capacity. Specifically, she argues that he did not
10 provide evidence showing that she was a fiduciary to Chadd, as
11 she neither was a member of Westland Homes nor the real estate
12 agent for Westland Homes. She again stressed that she was not a
13 member of Westland Homes because she did not sign the operating
14 agreement. The debtor further contends that Chadd failed to
15 provide evidence showing that she misappropriated the investment
16 proceeds for her personal use, given that she was not a member of
17 Westland Homes and had no access to Westland Homes' bank account.

18 Again, we disagree with the debtor. "Necessarily decided"
19 means that the issues at hand were not "entirely unnecessary" to
20 the judgement in the prior proceeding. Lucido, 51 Cal. 3d at 342
21 (citations omitted). Here, the arbitration award ultimately was
22 based on findings of the debtor and her husband's securities law
23 violations and fraud, both carried out through numerous
24 misrepresentations and omissions made at the time Chadd purchased
25 the securities in Westland Homes.

26 Although the debtor does not contest the fourth element of
27 issue preclusion, we emphasize that the final arbitration award
28 is final. The state court confirmed the final arbitration award,

1 and judgment was entered on it, but the debtor failed to appeal.
2 Regardless of whether the appeal process would have been costly,
3 if the debtor disagreed with the final arbitration award and
4 arbitration judgment, she should have appealed them. The debtor
5 cannot dispute them now at this late stage.

6 E. The elements of § 523(a)(19) were met

7 As noted earlier, the bankruptcy court granted summary
8 judgment on Chadd's § 523(a)(4) and (19) claims. Although the
9 debtor appeals the bankruptcy court's determinations on both
10 claims, we address its determination concerning § 523(a)(19)
11 first.

12 Section 523(a)(19) provides that a debt arising from
13 violations of state securities laws or common law fraud, deceit
14 or manipulation in connection with the purchase or sale of any
15 security is excepted from discharge. As set forth in the interim
16 arbitration award, which was incorporated in the final
17 arbitration award, the debtor and her husband were found to be
18 "jointly and severally liable to [Chadd] for violating California
19 Securities Laws by selling unqualified and non-exempt memberships
20 in [Westland Homes] . . . [and by making] misleading statements
21 and omissions of material facts by [the debtor's husband] in
22 selling a membership in [Westland Homes] to [Chadd]" and that
23 "[their] liability [was] direct and personal."

24 These findings made by the arbitrator are all that are
25 required to except the final arbitration award and arbitration
26 judgment from discharge under § 523(a)(19). The final
27 arbitration award was confirmed and the arbitration judgment was
28 entered. Because the debtor did not appeal the confirmed

1 arbitration judgment, it is final. Chadd therefore is entitled
2 to have the final arbitration award accorded issue preclusive
3 effect, as determined in the bankruptcy court's summary judgment
4 order and judgment. In light of that conclusion, we do not need
5 to consider the debtor's arguments with respect to the
6 application of § 523(a)(4).

7
8 **CONCLUSION**

9 Based on our review, the bankruptcy court did not err in
10 granting summary judgment in Chadd's favor by giving issue
11 preclusive effect to the final arbitration award and the
12 arbitration judgment. We AFFIRM.