

MAR 11 2008

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

NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL  
OF THE NINTH CIRCUIT

In re:	)	BAP Nos.	NC-07-1352-MkMcPa
	)		NC-07-1434-MkMcPa
Astarte Davis-Rice,	)		(Consolidated)
	)		
Debtor.	)	Bk. No.	05-40818
	)		
	)	Adv. No.	06-04113
Astarte Davis-Rice,	)		
	)		
Appellant,	)		
	)		
v.	)	<b>MEMORANDUM*</b>	
	)		
Kathleen Clements,	)		
	)		
Appellee.	)		

Submitted Without Oral Argument  
on February 22, 2008

Filed - March 11, 2008

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

Honorable Leslie Tchaikovsky, Bankruptcy Judge, Presiding

Before: MARKELL, McMANUS,\*\* and PAPPAS Bankruptcy Judges.

\*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.

\*\*Hon. Michael S. McManus, Chief Judge of the United States Bankruptcy Court for the Eastern District of California, sitting by designation.

1 **I. Introduction**

2 This is an appeal in a section 523<sup>1</sup> nondischargeability  
3 proceeding by an incarcerated pro se debtor from an order  
4 granting summary judgment to the creditor/plaintiff. Creditor  
5 based her motion on the issue preclusive effect of prior criminal  
6 and civil judgments entered against the debtor for forgery,  
7 fraud, and conversion. The bankruptcy court also denied debtor's  
8 summary judgment motion, heard at the same time, as it was based  
9 upon unsubstantiated (and, it appears, untrue) allegations that  
10 the prior judgments were invalid. The bankruptcy court patiently  
11 and competently dealt with all material issues raised. We  
12 affirm.

13 **II. Facts**

14 *A. Activity Before the Adversary Proceeding was Filed*

15 The facts leading to this appeal began in the mid-1980s.  
16 During that time, the debtor, Astarte Davis-Rice ("Debtor") took  
17 up with (she claims married) a man of means named James M. Rice  
18 ("Rice"). They moved to the Virgin Islands. Sometime in July  
19 1986, Rice disappeared. His daughter, appellee Kathleen Clements  
20 ("Clements") became worried, and began to investigate her  
21 father's disappearance. This investigation came to naught; Rice  
22 has never been found. Clements ultimately obtained a judicial  
23 decree that her father was dead, and became the administrator of

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24  
25 <sup>1</sup>Unless otherwise indicated, all chapter, section, and rule  
26 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532 as  
27 enacted and promulgated prior to the effective date (October 17,  
28 2005) of the relevant provisions of the Bankruptcy Abuse  
Prevention and Consumer Protection Act of 2005 ("BAPCPA"), Pub.  
L. 109-8, 119 Stat. 23 (2005), and to the Federal Rules of  
Bankruptcy Procedure, Rules 1001-9037.

1 his estate. It is in that capacity that she appears in this  
2 appeal.

3 Clements' investigations also led to discoveries that Debtor  
4 had forged documents which purported to transfer Rice's property  
5 to Debtor and her family, and that she had also initiated a quiet  
6 title action seeking to declare all Rice's property as her own.  
7 Ultimately, Debtor was indicted for numerous criminal offenses in  
8 the Virgin Islands. Before trial, she jumped bail. She was  
9 later discovered living under another name in Santa Barbara; this  
10 discovery came to light after she was caught embezzling from her  
11 California employer. After conviction in California for that  
12 embezzlement, she was sent back to the Virgin Islands in 1992.

13 There, in 1993, Debtor entered into a plea bargain which  
14 included a plea of guilty with respect to various crimes  
15 involving Rice and his property. Judgments of conviction were  
16 entered upon that plea ("Virgin Islands Criminal Convictions"),  
17 and the district court sentenced Debtor to fifteen years in  
18 prison for her crimes.<sup>2</sup> She appealed the sentence given, and  
19

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20 <sup>2</sup>Debtor's signed plea agreement is in the record. It shows  
21 that Debtor pled guilty to a variety of federal and territorial  
22 offenses, spread over four separate criminal indictments and  
23 informations. In particular, Debtor pled guilty to: conspiracy  
24 to defraud, forgery on real property deed, offering false  
25 evidence in a civil case, perjury, selling property obtained  
26 unlawfully, mail fraud, making false statements, and failure to  
27 appear. Government of Virgin Islands v. Davis, 43 F.3d 41, 43 (3d  
28 Cir. 1994), cert. denied, 515 U.S. 1123 (1995).

The district court consolidated sentencing in all four  
26 matters, and made its findings as to sentencing in its Memorandum  
27 of April 2, 1993, a copy of which is also in the record. When  
28 this memorandum refers to the Virgin Islands Criminal  
Convictions, that reference includes reference to the sentencing  
memorandum.

1 lost. Government of Virgin Islands v. Davis, 43 F.3d 41, 43 (3d  
2 Cir. 1994), cert. denied, 515 U.S. 1123 (1995). She has since  
3 filed several habeas corpus petitions regarding her convictions;  
4 none have been successful.<sup>3</sup> It is with respect to these  
5 convictions that Debtor is presently incarcerated.

6 In affirming the sentence given, the Third Circuit  
7 summarized the acts and intentions Debtor's guilty pleas had  
8 admitted:

9 Both the V.I. Case and the U.S. Case involved  
10 Davis' efforts to defraud the estate of James Merrills  
11 Rice (Rice Estate) of more than one million dollars  
12 worth of real and personal property. Specifically,  
13 Davis prepared a false and fictitious last will and  
14 testament of James Rice purporting to bequeath to her  
15 the bulk of the Rice Estate; altered Rice's power of  
16 attorney, giving herself full and complete control over  
17 his property, assets and affairs; and prepared a false  
18 warranty deed for the purpose of facilitating the  
19 transfer of valuable realty owned by Rice to herself.  
20 Using the forged documents, Davis transferred title for  
21 or otherwise unlawfully appropriated or conveyed  
22 personal property belonging to Rice which was valued at  
23 more than \$120,000. Davis also forged Rice's signature  
24 on a series of checks which totalled \$10,985 and  
25 entered into contractual agreements concerning Rice's  
26 boat, the Fish Eagle, assigning to herself a percentage  
27 of the profits earned by the venture.  
28

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21 <sup>3</sup>See, e.g., Davis-Rice v. United States, 224 Fed. Appx. 702,  
22 2007 WL 786782 (9th Cir. March 16, 2007); Davis-Rice v. Clark,  
23 2007 WL 1840180 (N.D. Cal., June 26, 2007); Davis-Rice v. Clark,  
24 2007 WL 1558570 (N.D. Cal., May 29, 2007); Davis-Rice v. Clark,  
25 2006 WL 3797890 (N.D. Cal., Dec. 22, 2006); Davis-Rice v. Clark,  
26 2006 WL 1646143 (N.D. Cal., June 14, 2006); Davis-Rice v. Clark,  
27 2005 WL 3310039 (N.D. Cal., Dec. 7, 2005). There were several  
28 habeas petitions filed in the Virgin Islands, but they are not  
reported in Westlaw, and only can be inferred by the unreported  
Third Circuit decisions affirming their dismissal. E.g.,  
Government of the Virgin Islands v. Davis, 107 F.3d 7 (3d Cir.  
1997) (unpublished table decision); Government of the Virgin  
Islands v. Davis, 107 F.3d 6 (3d Cir. 1997) (unpublished table  
decision).

1           In addition to the other illegal activities Davis  
2 stood convicted of by virtue of her plea in the V.I.  
3 Case, she filed a lawsuit against a number of entities  
4 and individuals, including Rice, to quiet title to  
5 property she had fraudulently obtained. In preparation  
6 for that lawsuit, Davis forged letters, deeds and other  
7 documents to make it appear as though James Rice was  
8 alive and that he had given all of his worldly  
9 possessions to her and her sons. Davis presented the  
10 false documents at a deposition during which she also  
11 gave false testimony.

12           With respect to the U.S. Case, Davis prepared  
13 forged documents instructing the Guardian Savings Bank  
14 in Houston, Texas, to transfer two one hundred thousand  
15 (100,000) dollar certificates of deposit into an  
16 account held by the Icon Corporation, which was  
17 wholly-owned by Davis and her sons.

18 Government of Virgin Islands v. Davis, 43 F.3d 41, 43 (3d Cir.  
19 1994), cert. denied, 515 U.S. 1123 (1995) (footnotes omitted).

20           In the meantime, on July 31, 1989, Clements sued Debtor in  
21 California state court. Those proceedings were stayed during the  
22 pendency of the Virgin Islands criminal proceedings. After entry  
23 of the Virgin Islands Criminal Convictions, the California case  
24 went to trial. As a sanction for her refusal to cooperate in  
25 pretrial discovery, the California court barred Debtor from  
26 presenting any defense, and then found against her on all  
27 liability issues.<sup>4</sup> Trial was then had on the issue of damages.  
28 In November 1993, Clements received a judgment against the Debtor  
in the amount of \$2,538,630.01 for "Fraud, Conversion and

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<sup>4</sup>Debtor refused to testify at her deposition, invoking the Fifth Amendment privilege against self-incrimination. By then, however, she had been convicted of the acts that were the subject of the civil lawsuit, so that there was nothing left upon which she could incriminate herself.

1 Conspiracy." ("California Civil Judgment").<sup>5</sup> Punitive damages  
2 constituted \$1 million of the award.

3 The California Court of Appeal affirmed the California Civil  
4 Judgment in 1995 in an unreported decision. Clements has since  
5 renewed the California Civil Judgment, although Debtor contends  
6 that Clements has done so in a flawed manner.<sup>6</sup>

7 While imprisoned, Debtor filed a conspiracy case against  
8 Clements in United States District Court for the Northern  
9 District of California.<sup>7</sup> Many of the allegations in that case  
10 track the allegations presented here on appeal. After Clements'  
11 summary judgment motion in 1997, the district court ruled for  
12 Clements and against Debtor. The appeal to the Ninth Circuit  
13 from this decision was voluntarily dismissed.

14 In 2005, Debtor began a new round of litigation, this time  
15 involving the bankruptcy courts. On February 24, 2005, she filed

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16  
17 <sup>5</sup>Clements originally sued as the conservator of the estate  
18 of her father, "a missing person." In 1991, Clements' father was  
19 declared dead, and Clements' capacity changed. The California  
20 Civil Judgment reflects that it is in favor of Clements in her  
21 capacity as "administrator of the estate of James M. Rice." *Id.*,  
22 p. 31.

23 <sup>6</sup>In papers filed in response to pre-hearing matters, Debtor  
24 indicates that the renewal of the California Civil Judgment in  
25 1993 was procedurally improper in that she did not receive the  
26 required notice. We express no view on that issue, as it does  
27 not affect the appeal before us, since all Clements sought was a  
28 declaration of nondischargeability of her claim, not a  
liquidation or validation of it. Any defense Debtor may have on  
this point is best reserved for any enforcement action by  
Clements on the California Civil Judgment itself.

29 <sup>7</sup>This tracked a lawsuit she filed in the Virgin Islands on  
30 basically the same theories, which was resolved in Clements'  
31 favor. Davis-Rice v. Estate of Rice, 151 F.3d 1024 (3d Cir.  
32 1998) (unpublished table decision).

1 the bankruptcy case in which this appeal arises.<sup>8</sup> She has since  
2 received her chapter 7 discharge; Clements' action is the sole  
3 adversary proceeding pending that seeks an exception from that  
4 discharge.

5 On August 16, 2005, Debtor filed a civil action in the  
6 United States District Court for the Territory of the Virgin  
7 Islands "to vacate void judgments" and for a writ of mandamus  
8 expunging her convictions. Case. No. 1:05-cv-00118-RLF-GWC  
9 (D.V.I.) ("2005 Action"). The 2005 Action alleges (as had  
10 Debtor's previous habeas petitions and her civil conspiracy case  
11 against Clements) that Debtor's 1993 plea bargain had been  
12 improperly obtained, and should be set aside. The docket sheet  
13 indicates that on September 26, 2005, the district court  
14 recharacterized her civil action as a motion under 28 U.S.C.  
15 § 2255; that is, a request to pursue post-conviction relief after  
16 being previously denied similar relief.<sup>9</sup> Under appropriate  
17 procedures, the district court then transferred Debtor's petition  
18 to the Third Circuit Court of Appeals. That court denied relief  
19 on April 17, 2007. In re Davis-Rice, 222 Fed. Appx. 135, 2007 WL  
20 1113355, \*1 (April 16, 2007). Debtor sought certiorari from this  
21 decision, and the Supreme Court denied that request on October 1,  
22 2007. Davis-Rice v. U.S. Dist. Ct. for Dist. of Virgin Islands,  
23 128 S. Ct. 194 (2007).

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25 <sup>8</sup>Debtor initially filed the case as one under chapter 11.  
26 It was converted to one under chapter 7 on January 10, 2006.

27 <sup>9</sup>Section 2255 provides that "[a] second or successive motion  
28 must be certified as provided in section 2244 by a panel of the  
appropriate court of appeals . . . "

1           In the meantime, however, the docket in the 2005 Action  
2 indicates that the district court dismissed Debtor's complaint on  
3 October 27, 2005, and closed the case. Undeterred, on October  
4 16, 2007, Debtor sought a default in the 2005 Action against all  
5 parties. The Virgin Islands docket reflects no action on this  
6 request as of the date of submission of this case.

7           *B. Activity After Clements' Filing of the Adversary*  
8                           *Proceeding*

9           Clements filed her adversary proceeding on April 17, 2006,  
10 the last day upon which such a complaint would be timely. For  
11 reasons unexplained, the docket indicates that although the  
12 complaint was filed on April 17, the receipt for the filing fee  
13 was not issued until the next day.

14           Due to Debtor's incarcerated status, and some initial  
15 confusion on how to serve her, much confusion surrounded the  
16 initial proceedings; the propriety of service upon Debtor, and  
17 the entry of default against the Debtor, were in doubt. The  
18 bankruptcy court clarified the situation in a memorandum dated  
19 February 10, 2007. In that memorandum, the court noted various  
20 errors in service, and set aside the default. It then found,  
21 however, that Debtor had appeared in the proceeding, thereby  
22 waiving any service defects. The memorandum thus declared the  
23 adversary proceeding to be 'at issue,' and set a continued status  
24 conference for case management purposes.

25           Five months later, in July 2007, Debtor contended that she  
26 was entitled to a jury trial on the issues raised in Clements'  
27 nondischargeability complaint. The court denied Debtor's motion  
28 as untimely in an order entered on July 25, 2007. It based its

1 denial on Debtor's failure to request a jury trial within 10 days  
2 of her first appearance, and upon her delay of over five months  
3 in making a jury trial request after the adversary proceeding had  
4 been declared 'at issue.'

5 Following this ruling, and without answering the complaint,  
6 on July 2, 2007 Debtor filed a summary judgment motion based upon  
7 the 2005 Action and its effect on the California Civil Judgment.  
8 She did not, however, submit any documents to support her claim.

9 Clements responded on July 25 with a cross-motion for  
10 summary judgment, claiming that the doctrine of issue preclusion  
11 entitled her to judgment as a matter of law. In support of this  
12 claim, she placed in the record all of the judgments and  
13 proceedings upon which she relied. There was no objection to the  
14 authenticity of these documents.

15 The motions were heard on August 23, with Debtor  
16 participating by telephone. On August 31, the court entered its  
17 "Memorandum of Decision" denying Debtor's motion and granting  
18 Clements'.

19 Debtor appealed.

### 20 **III. Jurisdiction**

21 The bankruptcy court had jurisdiction pursuant to 28 U.S.C.  
22 §§ 157(b)(1) and (b)(2)(I). We initially remanded Debtor's  
23 appeal because it appeared the bankruptcy court had not entered a  
24 final judgment; upon remand, the bankruptcy court entered a final  
25 judgment, a new appeal from that judgment was taken, and a  
26 motions panel consolidated the two appeals. As a consequence, we

1 have jurisdiction pursuant to 28 U.S.C. §§ 158(a)(1) and  
2 (c)(1).<sup>10</sup>

#### 3 **IV. Issues Presented**

4 Debtor lists sixteen grounds for reversal. Many are  
5 duplicative; others are conclusory. They boil down, however, to  
6 five general allegations of error:

7 (A) Was Clements' complaint filed on time?

8 (B) Did the bankruptcy court correctly rule that Debtor  
9 waived her jury trial rights?

10 (C) Did the court properly apply issue preclusion concepts  
11 in ruling for Clements

12 (D) Did the court properly rule against Debtor on her  
13 motion for summary judgment because of Debtor's failure  
14 to substantiate her claims

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15  
16  
17 <sup>10</sup>We do not believe that a letter sent by Debtor to the  
18 bankruptcy court and docketed after remand affects this analysis.  
19 As indicated in text, the bankruptcy court entered a memorandum  
20 disposition on August 31, 2007. Debtor filed a notice of appeal  
21 with respect to that memorandum on September 8, 2007. Later, a  
22 motions panel of this court remanded that appeal for entry of a  
23 final order on a separate document. A new separate order  
24 responsive to the BAP's remand was entered on November 5, 2007.  
25 Debtor filed a new notice of appeal dated November 14, 2007. As  
26 indicated in text, we consolidated these two appeals.

27 In between, however, Debtor filed, on October 9, 2007, a  
28 motion to reconsider the August 31 memorandum. The bankruptcy  
court denied that motion on October 22, 2007. Debtor then sent a  
letter dated November 6 (but not docketed until November 13) to  
counsel for Clements (with a copy to the bankruptcy court)  
complaining about the form of order that had been submitted with  
respect to the denial of the motion to reconsider. Neither party  
nor the court construed the November 6 letter as a motion to  
reconsider the November 5 judgment, and we think that conclusion  
to be sound.

1 (E) Did Debtor's filing of the 2005 Action have any effect  
2 on Clements' case?

### 3 V. Standard of Review

4 A grant or denial of summary judgment is reviewed de novo.  
5 Henry v. Lehman Commercial Paper, Inc. (In re First Alliance  
6 Mort. Co.), 471 F.3d 977, 995 (9th Cir. 2006); S.E.C. v. Colello,  
7 139 F.3d 674, 675 (9th Cir. 1998). The evidence must be reviewed  
8 in the light most favorable to the non-moving party to determine  
9 if there are any genuine issues of material fact and whether the  
10 bankruptcy court correctly applied the substantive law. Fichman  
11 v. Media Center, 512 F.3d 1157, 1159 (9th Cir. 2008); Olsen v.  
12 Idaho State Bd. of Med., 363 F.3d 916, 922 (9th Cir. 2004). The  
13 bankruptcy court may be affirmed on any ground supported by the  
14 record. Id.

15 With respect to the other issues raised by Debtor, the  
16 interpretation of whether the complaint was timely is an issue  
17 under Rule 4007(c), and is a question of law to be reviewed de  
18 novo. Wilzig v. Lopez (In re Lopez), 192 B.R. 539, 543 (9th Cir.  
19 BAP 1996). The right to jury trial is a question of law that we  
20 also review de novo. Schieber v. Hooper (In re Hooper), 112 B.R.  
21 1009, 1011 (9th Cir. BAP 1990).

### 22 VI. Analysis

#### 23 A. *Timeliness of Complaint*

24 Debtor's initial argument, that the nondischargeability  
25 complaint was not timely filed, proceeds from a false premise.  
26 Debtor contends that "the adversary proceeding complaint **cover**  
27 **sheet** was the **only** part of Appellee's complaint that was filed on  
28

1 4/17/06 . . . ." Appellant's Brief, page 4, ¶ 27 (emphasis in  
2 original).

3 This is clearly wrong. The cover sheet is item 2 on docket.  
4 Item 1 is the complaint itself. The clerk's notations on the  
5 complaint and the accompanying cover sheet indicate that both  
6 documents were filed on the same date. As Debtor admits that the  
7 cover sheet was filed before the deadline lapsed, it follows that  
8 the complaint, filed at the same time, was also timely filed.

9 *B. Jury Trial Waiver*

10 Debtor also contends that she is entitled to a jury trial on  
11 all issues. She is incorrect. There is no right to a jury trial  
12 when, as here, only nondischargeability of a claim, and not its  
13 validity or liquidation, is at issue. Hooper, 112 B.R. at 1011.

14 In addition, FED. R. CIV. P. 38(b), made applicable by Rule  
15 9015, requires that a "demand [for] a trial by jury of any issue  
16 triable of right by a jury" be made "not later than 10 days after  
17 the service of the last pleading directed to such issue . . . ."  
18 As specified by FED. R. CIV. P. 38(d), "[t]he failure of a party  
19 to serve and file a demand as required by this rule constitutes a  
20 waiver by the party of trial by jury." As found by the  
21 bankruptcy court in its July 25, 2007, order, Debtor waited over  
22 five months after being notified that the adversary proceeding  
23 was 'at issue' - the latest date upon which she knew of "the last  
24 pleading directed to [the] issue [of nondischargeability]." As  
25 such, even if she had a right to trial by jury, she waived that  
26 right by delaying her request.

1 C. Issue Preclusion and Clements' Summary Judgment Motion

2 Clements grounded her summary judgment request on the  
3 preclusive effect of her California Civil Judgment and the Virgin  
4 Islands Criminal Convictions. Issue preclusion based upon prior  
5 state court litigation applies to nondischargeability  
6 proceedings. Grogan v. Garner, 498 U.S. 279, 284 n.11 (1991);  
7 Cal-Micro, Inc. v. Cantrell (In re Cantrell), 329 F.3d 1119, 1123  
8 (9th Cir. 2003); Khaligh v. Hadaegh (In re Khaligh), 338 B.R.  
9 817, 824 (9th Cir. BAP 2006).<sup>11</sup> The preclusive effect of a prior  
10 state court judgment in a subsequent federal action is determined  
11 by the law of the state or territory<sup>12</sup> in which the judgment was  
12 entered. See 28 U.S.C. § 1738; Gayden v. Nourbakhsh (In re  
13 Nourbakhsh), 67 F.3d 798, 800 (9th Cir. 1995).

14 Given the Full Faith and Credit statute, “[i]f a state court  
15 would give preclusive effect to a judgment rendered by courts of  
16 that state, then the Full Faith and Credit Statute (28 U.S.C.  
17 § 1738) imports the same consequence to an action in federal  
18 court based on the same award.” In re Khaligh, 338 B.R. at 824  
19 (citing McDonald v. City of W. Branch, 466 U.S. 284, 287 (1984));  
20

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21 <sup>11</sup>As a policy matter, issue preclusion shields parties from  
22 multiple lawsuits, conserves judicial resources, and encourages  
23 reliance on adjudication by reducing the likelihood of  
24 inconsistent decisions. Allen v. McCurry, 449 U.S. 90, 94 (1980);  
25 Montana v. United States, 440 U.S. 147, 153-54 (1979). See  
26 generally Christopher Klein, Lawrence Ponoroff & Sarah Borrey,  
27 *Principles of Preclusion and Estoppel in Bankruptcy Cases*, 79 AM.  
28 BANKR. L.J. 839, 852-58 (2005) (footnotes omitted).

26 <sup>12</sup>The Virgin Islands is a “territory” within the meaning of  
27 Section 1738, and thus the judgments of the courts of that  
28 territory are to be given full faith and credit. Bergen v.  
Bergen, 439 F.2d 1008, 1013 (3d Cir. 1971).

1 Harmon v. Kobrin (In re Harmon), 250 F.3d 1240, 1245 (9th Cir.  
2 2001).

3 1. Preclusive Effect of California State Court  
4 Judgment and Virgin Islands Judgments of  
5 Conviction

6 Under California preclusion law, collateral estoppel effect  
7 is given to a judgment that "actually and necessarily" decides  
8 the issue in question. People v. Howie, 41 Cal. App. 4th 729,  
9 736, 48 Cal. Rptr. 2d 505 (Cal. Ct. App. 1995).<sup>13</sup> This Panel has  
10 interpreted this standard in fraud cases to mean:

11 In order for a prior judgment to be entitled to  
12 collateral estoppel effect under California law, the  
following five elements must be met:

13 (1) The issue sought to be precluded  
from relitigation must be identical to that  
14 decided in a former proceeding;

15 (2) The issue must have been actually  
litigated in the former proceeding;

16 (3) It must have been necessarily  
decided in the former proceeding;

17 (4) The decision in the former  
proceeding must be final and on the merits;  
and

18  
19  
20 <sup>13</sup>Generally,

21 Issue preclusion bars relitigation of an issue of fact  
22 or law that: (1) was actually decided by a court in an  
earlier action, (2) in which the issue was necessary to  
23 the judgment in such action, and (3) there was a valid  
and final judgment. Issue preclusion entails a  
24 determination of identity of issues, which may include  
25 consideration of factual identity, applicable legal  
standards, and burden of proof imposed on the parties  
26 in the respective cases.

27 Klein, Ponoroff & Borrey, supra at 853. See also R.T.C. v.  
Keating, 186 F.3d 1110, 1114 (9th Cir. 1999); Roussos v.  
28 Michaelides (In re Roussos), 251 B.R. 86, 92 (9th Cir. BAP 2000).

1 (5) The party against whom preclusion is  
2 sought must be the same as, or in privity  
with, the party to the former proceeding.

3 Baldwin v. Kirkpatrick (In re Baldwin), 245 B.R. 131, 134 (9th  
4 Cir. BAP 2000) (citing Younie v. Gonya (In re Younie), 211 B.R.  
5 367, 373 (9th Cir. BAP 1997) (citation omitted), aff'd, 163 F.3d  
6 609 (9th Cir.1998) (unpublished table decision)). See also Tobin  
7 v. Sans Souci Ltd. P'ship (In re Tobin), 258 B.R. 199, 203 (9th  
8 Cir. BAP 2001).<sup>14</sup>

9 All requirements for issue preclusion would appear to be  
10 easily met, except possibly the "actually litigated" element, as  
11 Debtor was barred from presenting a defense by the California  
12 trial court's ruling on her improper assertion of the Fifth  
13 Amendment privilege. In the Ninth Circuit, however,

14 A party who deliberately precludes resolution of  
15 factual issues through normal adjudicative procedures  
may be bound, in subsequent, related proceedings

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16  
17 <sup>14</sup>To the extent that recourse to the original criminal  
18 judgments is appropriate, the Virgin Islands law of issue  
19 preclusion is less plentiful, but that jurisdiction appears to  
have adopted a standard similar to California. As stated by the  
Third Circuit when reviewing Virgin Islands law:

20 Traditionally, four factors must be present before the  
21 application of collateral estoppel is appropriate: (1)  
22 the previous determination was necessary to the  
23 decision; (2) the identical issue was previously  
24 litigated; (3) the issue was actually decided in a  
25 decision that was final, valid, and on the merits; and  
(4) the party being precluded from relitigating the  
issue was adequately represented in the previous  
action.

26 Hawksbill Sea Turtle v. Fed. Emerg. Mgmt. Agency, 126 F.3d 461,  
27 475 (3d Cir. 1997). Moreover, it also appears that the Virgin  
28 Islands looks to the RESTATEMENT to fill any gaps left by this  
test. Government of Virgin Islands v. Lansdale, 172 F. Supp. 2d  
636 (D. V.I. 2001).

1 involving the same parties and issues, by a prior  
2 judicial determination reached without completion of  
3 the usual process of adjudication. In such a case, the  
4 'actual litigation' requirement may be satisfied by  
substantial participation in the adversary contest in  
which the party is afforded a reasonable opportunity to  
defend himself on the merits but chooses not to do so.

5 FDIC v. Daily (In re Daily), 47 F.3d 365, 368 (9th Cir. 1995)

6 (court gives issue preclusive effect to judgment entered as a  
7 result of sanctions awarded under Rule 37). See also Muegler v.

8 Bening, 413 F.3d 980, 985 (9th Cir. 2005) (same, but sanctions

9 imposed by Missouri state court). Here, Debtor participated in

10 the California proceedings, and it was her own refusal to testify

11 that lead to the sanctions.

12 2. Fraud

13 The California Civil Judgment recites that it is for fraud.

14 As the Bankruptcy Appellate Panel stated in Tobin:

15 The elements of § 523(a)(2)(A) "mirror the elements of  
16 common law fraud" and match those for actual fraud  
17 under California law, which requires that the plaintiff  
18 show: (1) misrepresentation; (2) knowledge of the  
falsity of the representation; (3) intent to induce  
reliance; (4) justifiable reliance; and (5) damages.

19 258 B.R. at 203 (citing Younie v. Gonya, 211 B.R. at 373-74).

20 All of these elements were, or could easily have been,

21 established by recourse to the allegations of the California

22 complaint as supplemented and established by the findings of the

23 Virgin Islands Criminal Convictions. As the bankruptcy court

24 found, Debtor engaged in a series of misrepresentations as to the

25 ownership and control of Rice's assets. These misrepresentations

26 include numerous forgeries and lies, all designed to consolidate

27 in her and her sons the property that rightfully belonged to

28 Rice's estate. Her criminal conviction establishes that she made

1 these misrepresentations with criminal intent, and made them with  
2 the intent to induce others to take actions such that Rice's  
3 assets would vest in her. Finally, the California court took  
4 evidence on the extent of the damages. All elements of common  
5 law fraud, and fraud under § 523(a)(2), were met.

### 6 3. Conversion

7 Clements' California Civil Judgment also found Debtor had  
8 committed conversion. Debts arising from conversion may be  
9 nondischargeable under Section 523(a)(6). That section declares  
10 nondischargeable any debt "for willful and malicious injury by  
11 the debtor to another entity or to the property of another  
12 entity."

13 The Ninth Circuit requires separate findings on the issues  
14 of "willful" and "malicious". The "willful" injury requirement  
15 of § 523(a)(6) is met "when it is shown either that the debtor  
16 had a subjective motive to inflict injury or that the debtor  
17 believed that injury was substantially certain to occur as a  
18 result of his conduct." Carrillo v. Su (In re Su), 290 F.3d  
19 1140, 1142 (9th Cir. 2002) (quoting Petralia v. Jercich (In re  
20 Jercich), 238 F.3d 1202, 1208 (9th Cir. 2001)).

21 A "malicious injury" involves "(1) a wrongful act, (2) done  
22 intentionally, (3) which necessarily causes injury, and (4) is  
23 done without just cause or excuse." Id. at 1146-47 (quoting  
24 Petralia v. Jercich, 238 F.3d at 1209). See, e.g., Diamond v.  
25 Kolcum (In re Diamond), 285 F.3d 822, 829 (9th Cir. 2002)  
26 (holding that a state court jury finding that the debtors  
27 "intentionally caused injury" to the creditor "without just  
28 cause" was entitled to preclusive effect for purposes of

1 § 523(a)(6)); Murray v. Bammer (In re Bammer), 131 F.3d 788, 791  
2 (9th Cir. 1997) (en banc) (stating that malice under § 523(a)(6)  
3 “does not require a showing of biblical malice, i.e., personal  
4 hatred, spite or ill-will”).

5 A simple California judgment of conversion, however, is  
6 insufficient to establish nondischargeability under Section  
7 523(a)(6). As stated in Peklar v. Ikerd (In re Peklar):

8 A judgment for conversion under California substantive  
9 law decides only that the defendant has engaged in the  
10 “wrongful exercise or dominion” over the personal  
11 property of the plaintiff. It does not necessarily  
12 decide that the defendant has caused “willful and  
13 malicious injury” within the meaning of § 523(a)(6). A  
14 judgment for conversion under California law therefore  
15 does not, without more, establish that a debt arising  
16 out of that judgment is non-dischargeable under  
17 § 523(a)(6).

18 260 F.3d 1035, 1039 (9th Cir. 2001).

19 Here, however, Virgin Island Criminal Convictions supply the  
20 necessary findings of a “willful and malicious” state of mind.  
21 Her forgeries and fraudulent activity were wrongful as shown by  
22 these convictions. The convictions also establish that the acts  
23 were done intentionally and without just cause or excuse.  
24 Finally, the California Civil Judgment establishes the element of  
25 damage. Essentially, every dollar Debtor stole or swindled from  
26 the Rice estate (of which Clements is the administrator) was a  
27 dollar of damage to that estate. As such, summary judgment on  
28 the conversion claim was also appropriate.

4. Larceny and § 523(a)(4)

Clements’ complaint also sought the debt to be declared  
nondischargeable under Section 524(a)(4). That paragraph excepts

1 from discharge any debt "for fraud or defalcation while acting in  
2 a fiduciary capacity, embezzlement, or larceny."

3 There is no issue of a fiduciary relationship between  
4 Clements and the Debtor, nor is there any issue regarding  
5 embezzlement. Clements' claim must thus stand on whether there  
6 was "larceny." While Debtor was not convicted of the crime of  
7 larceny, that is not dispositive. As noted by COLLIER ON

8 BANKRUPTCY:

9 Larceny is the fraudulent and wrongful taking and  
10 carrying away of the property of another with intent to  
11 convert the property to the taker's use without the  
12 consent of the owner. As distinguished from  
13 embezzlement, the original taking of the property must  
14 be unlawful. For purposes of section 523(a)(4), a  
bankruptcy court is not bound by the state law  
definition of larceny but, rather, may follow federal  
common law, which defines larceny as a "felonious  
taking of another's personal property with intent to  
convert it or deprive the owner of same."

15 4 COLLIER ON BANKRUPTCY ¶ 523.10[2] (15th rev. ed., Henry Sommer and  
16 Alan Resnick, eds. 2007) (citing Clarendon Nat'l Ins. Co. v.  
17 Barrett (In re Barrett), 156 B.R. 529 (Bankr. N.D. Tex. 1993)).  
18 As a result, "[l]arceny is proven for § 523(a)(4) purposes if the  
19 debtor has wrongfully and with fraudulent intent taken property  
20 from its owner." Kaye v. Rose (In re Rose), 934 F.2d 901, 903  
21 (7th Cir. 1991). See also Dynamic Food Serv. Equip., Inc. v.  
22 Stern (In re Stern), 231 B.R. 25, 26 (S.D.N.Y. 1999).

23 Here, Debtor's criminal convictions for appropriating the  
24 Rice estate's property supply the necessary elements. The  
25 convictions establish that Debtor took the property wrongfully  
26 and with fraudulent intent; and the California conservatorship  
27 proceedings establish that the Rice estate was the rightful  
28 owner. As a consequence, the bankruptcy court's entering of

1 summary judgment excepting the California Civil Judgment from  
2 Debtor's discharge was appropriate.

3 *D. Debtor's Unsubstantiated Summary Judgment Motion*

4 Debtor also moved for summary judgment, and the bankruptcy  
5 court denied that motion. Central to Debtor's argument is her  
6 claim that the Virgin Islands Criminal Convictions are void  
7 pursuant to the 2005 Action. She claims that the 2005 Action  
8 resulted in a nihil dicit judgment; that is, a judgment obtained  
9 by failure to answer.<sup>15</sup> But as the bankruptcy court noted,  
10 "[t]here is nothing attached [to Debtor's motion or response]  
11 that is identifiable as a 2005 Virgin island [sic] nihil dicit  
12 judgment. Similarly, there is no evidence of a default judgment  
13 against [Clements]."

14 Our review of the record confirms the bankruptcy court's  
15 findings. Without any competent evidence of her claim of a void  
16 judgment, the bankruptcy court thus properly denied Debtor's  
17 motion for summary judgment.

18 *E. Effect of 2005 Action on Clements*

19 Debtor contends that the 2005 Action wipes her slate clean.  
20 The 2005 Action is an attempt, under FED. R. CIV. P. 60(b)(4), to  
21 have the Virgin Islands Criminal Convictions avoided. Were those  
22 to be avoided, however, the California Civil Judgment would still  
23  
24  
25

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26  
27 <sup>15</sup>Translated, nihil dicit means "he says nothing," and a  
28 nihil dicit judgment would appear to be nothing more than a  
judgment by default following a defendant's failure to answer a  
complaint. BLACK'S LAW DICTIONARY 1071 (8th ed. 2004).

1 be in place, and would bar relitigation of Debtor's actions and  
2 intents.<sup>16</sup>

3 Debtor, however, has an incorrect view of the 2005 Action.  
4 She apparently believes that simply filing a civil action voids  
5 the criminal convictions so long as it is not timely answered.  
6 This belief is reflected in her pleadings, which are replete with  
7 exhortations that failure to respond means that she automatically  
8 prevails. She apparently believes these statements.

9 They are, of course, incorrect. The docket of the 2005  
10 Action indicates that on September 26, 2005, the district court  
11 ordered that Debtor's "independent action" was improperly  
12 characterized as such, and further ordered that:

13 [P]etitioner's Motion to Vacate Void Judgments Pursuant  
14 to Title 28 Rule 60(b)(4) Independent Action is  
15 recharacterized as a motion under 28 USC § 2255, and  
16 further ordered that petitioner's motion is transferred  
17 to the court of appeals for the third circuit for  
18 authorization to file a successive motion under 28 USC  
19 2255 and 2244; . . . and further ordered that  
20 petitioner's motion for writ of mandamus is DENIED; and  
21 further ordered that petitioner's request for entry of  
22 default titled Notice of Default and Entry of Default  
23 is DENIED.

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24 <sup>16</sup>Debtor has also challenged the validity of the California  
25 Civil Judgment. In response to pre-hearing motions, Debtor  
26 submitted documents that indicate that in January 2007 she filed  
27 a motion to set aside the California Civil Judgment on similar  
28 grounds as stated in the 2005 Action. She filed this motion in  
the case in which the California Civil Judgment was obtained.  
See Clements v. Davis-Rice, Case No. MSC89-02907, Contra Costa  
County Superior Court (Jan. 18, 2007) ("Motion To/for Relief from  
Judgment Due to Fraud Filed by Astarte Davis").

On June 26, 2007, however, not only was Debtor's motion  
denied, she was declared to be a vexatious litigant, and was  
ordered to not file anything more in the state court action  
without prior court approval.

The denial of Debtor's motion is currently on appeal.  
Clements v. Davis-Rice, Case No. A118606 (Cal. Ct. App., 1st  
Dist., appeal filed July 27, 2007).

1 Docket Entry #11, Davis-Rice v. United States, Case No. 1:05-cv-  
2 00118-RLF-GWC (D.V.I. Sept. 26, 2005).

3 Further, on October 27, the district court amended docket  
4 entry 11 "to include the order entered on September 26, 2005 and  
5 that this matter is DISMISSED and that this file is CLOSE [sic]"  
6 Docket Entry #8, Davis-Rice v. United States, Case No. 1:05-cv-  
7 00118-RLF-GWC (D.V.I. Oct. 27, 2005). It is from this order that  
8 Debtor appealed to the Third Circuit, and from the Third  
9 Circuit's adverse ruling sought certiorari. In re Davis-Rice,  
10 222 Fed. Appx. 135, 2007 WL 1113355 (April 16, 2007), cert.  
11 denied sub. nom., Davis-Rice v. U.S. Dist. Ct. for Dist. of  
12 Virgin Islands, 128 S. Ct. 194 (Oct. 1, 2007).

13 As a result, Debtor's contentions that her 2005 Action has  
14 removed the foundations of Clements' case against her are simply  
15 wrong. The California Civil Judgment and the Virgin Islands  
16 Criminal Convictions still stand, and each independently bars  
17 relitigation of the central and dispositive issues in Clements'  
18 adversary proceeding under established principles of issue  
19 preclusion.

## 20 **VII. Conclusion**

21 Debtor presented nothing in the bankruptcy court that would  
22 preclude summary judgment based upon the issue preclusive effects  
23 of the California Civil Judgment and the Virgin Islands Criminal  
24 Convictions. Her appeal adds nothing new, and thus we AFFIRM the  
25 bankruptcy court.