NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL

OF THE NINTH CIRCUIT

In re:	BAP No. CC-08-1201-LPaD
MICHAEL GIONIS and ANASTASIA GIONIS,	Bk. No. LA 98-40895 ER
Debtors.	Adv. No. LA 06-01483 ER
JEANINE DOURBETAS,	
Appellant,	
v.	**MEMORANDUM**[1]
MICHAEL GIONIS; ANASTASIA GIONIS,	
Appellees.	

Argued and Submitted on March 18, 2009
at Pasadena, California

Filed - April 30, 2009

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

Hon. Ernest M. Robles, Bankruptcy Judge, Presiding.

Before: LEE[2], PAPPAS, and DUNN, Bankruptcy Judges.

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[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.

[2] The Honorable W. Richard Lee, Bankruptcy Judge for the Eastern District of California, sitting by designation.

In this proceeding, a creditor appeals from the bankruptcy court's determination, after a trial on the merits, that her claim is dischargeable. She also appeals from the bankruptcy court's decision denying a motion for summary judgment in which she sought to apply the doctrine of issue preclusion. The Appellant's claim is based on a consensual state court judgment stemming from the Debtor/Appellee's prepetition sale of a promissory note. The bankruptcy court declined to give preclusive effect to the state court judgment and subsequently found that the Appellant could not prove the elements of her fraud claim under 11 U.S.C. § 523(a)(2)(A).[3] We AFFIRM.

I. FACTS

A. Sale of the Promissory Note

Between 1991 and 1996, Debtor/Appellee Michael Gionis ("Gionis") and his wife, Anastasia Gionis, owned and operated a restaurant, Isaac's Burgers, in Compton, California.[4] In April 1996, they sold Isaac's Burgers, through an escrow, to Charles and Jung Brugger (the "Bruggers") for $170,000. The escrow agent told Gionis that Mrs. Brugger had experience in operating a

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[3] Unless otherwise indicated, all chapter, section and rule references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1330, and to the Federal Rules of Bankruptcy Procedure, Rules 1001-9036, as enacted and promulgated prior to October 17, 2005, the effective date of The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. 109-8, Apr. 20, 2005, 119 Stat. 23.

[4] Before trial of this adversary proceeding, the parties stipulated to most of the underlying facts in a joint pre-trial order.

restaurant. The Bruggers paid 50% of the purchase price, $85,000, in cash, and executed a promissory note to Gionis for the balance (the "Note"). The Note was secured by the furnishings, equipment, and fixtures at Isaac's Burgers (the "Collateral"). The Bruggers were to pay $1,723.49 per month for about five years. Gionis continued to work at the restaurant and helped with the transition for a short time.[5]

About six months after the sale, in October 1996, Gionis sold the Note and assigned his security interest in the Collateral to Plaintiff/Appellant Jeanine Dourbetas ("Dourbetas") acting through her agent and father, Alex Dourbetas ("Alex").[6] Alex paid Gionis $55,000 for the Note, which represented a $30,000 discount from the face value. Before deciding to purchase the Note, Alex did not ask Gionis for any financial statements or profit and loss statements relating to the restaurant, nor did he run a credit check on the Bruggers. Neither Alex nor Dourbetas inspected Isaac's Burgers or the Collateral, nor did they ever meet the Bruggers. Unfortunately, the Bruggers made no payments on the Note to anyone after Dourbetas acquired the Note.

Gionis made the following representations to Alex in

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[5] Gionis also operated a pizza restaurant at a different location.

[6] Jeanine Dourbetas is the real-party-in-interest; however all of the negotiations and actions relevant to the transaction were handled by her father, Alex. During the bankruptcy adversary proceeding the court noted that Jeanine had no knowledge of any material facts and she was excused from further participation.

connection with the sale of the Note:

1. The Bruggers had the ability to make payments on the Note;
2. The Note was not in default; and,
3. Isaac's Burgers was a successful, ongoing and viable business.

Gionis and Alex were not acquainted before the transaction in question; however they were from the same country and had a mutual acquaintance. Alex prepared the single document entitled "Note Assignment" to memorialize both the sale of the Note and assignment of the security interest. At some point during that process, Alex interlineated the words "with RECOURSE" at the end of the document.[7] Based thereon, Alex contends that Gionis personally guaranteed payment of the Note and that he would not have purchased the Note unless Gionis guaranteed it. Alex testified that he also relied on the recommendation of their mutual friend and the fact that he and Gionis were from the same country. English was Gionis' second language and he did not read it well. Gionis testified that he never intended to guarantee the Note and that he did not read the Note Assignment before he signed it. He also testified that he trusted Alex and relied on oral representations made by Alex during the negotiations.

Soon after Dourbetas acquired the Note, the Bruggers abandoned the restaurant. Gionis tried to operate the business

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[7] The interlineation was not initialed by Gionis and it is not clear from the face of the Note Assignment whether the interlineation was made before or after Gionis signed the document.

himself for about two months, but finally had to close it.[8] During this period of time Gionis sent some money to Dourbetas representing income from the restaurant. Gionis had the Collateral removed and placed in storage. There was conflicting testimony whether Gionis ever told Alex where he had stored the Collateral. However, Alex did not demand to inspect or take possession of the Collateral prior to the adversary proceeding. Alex testified that he was not concerned with the Collateral because he relied on Gionis' guarantee of the Note. Alex understood that Gionis intended to use the Collateral to start a new business.[9]

On July 31, 1998, Gionis filed a chapter 7 bankruptcy petition and subsequently received a discharge. Gionis did not list Dourbetas as a creditor nor did he list the Collateral in his schedules. He later explained that he did not consider Dourbetas to be a creditor. The Bruggers were the obligors on the Note and presumably still the owners of the Collateral.

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[8] The record is silent as to what arrangement, if any, Gionis negotiated with the Bruggers regarding repossession and operation of Isaac's Burgers. In December 1997, the Bruggers filed a petition for relief under chapter 7 in the District of Arizona. Presumably, they received a discharge. Dourbetas never received a notice of the Bruggers' bankruptcy.

[9] After closing Isaac's Burgers, Gionis tried to find another buyer who would reopen the restaurant and assume the Bruggers' Note. Gionis introduced Alex to prospective buyers, Mr. and Mrs. Banuelos; however Alex turned down their proposal. Gionis testified that Alex demanded a $20,000 down payment which the Banuelos were unable or unwilling to pay.

B. The State Court Litigation

In March 2001, long after entry of Gionis' discharge in the bankruptcy case, Dourbetas sued Gionis in the Los Angeles County Superior Court to enforce the Note (the "State Court Litigation"). Neither Alex nor Dourbetas knew about Gionis' bankruptcy case until sometime late in the State Court Litigation. The state court complaint was drafted on a Judicial Council Form and alleged two causes of action; breach of contract based on Gionis' purported guarantee of the Note and fraud based on intentional or negligent misrepresentations that the Note was current, that the Bruggers would honor the Note, and that Gionis intended to guarantee the Note.

At the mandatory settlement conference the parties agreed to settle the dispute pursuant to a stipulation (the "Stipulation") which was drafted by counsel for Dourbetas. The Stipulation memorialized an arrangement whereby Gionis agreed to make a series of monthly payments to Dourbetas totaling $50,000 over a period of about five years. The successful completion of the payment schedule would result in a dismissal of the State Court Litigation with prejudice. However, a default of the Stipulation would trigger the entry of a judgment in favor of Dourbetas in the amount of $70,000, less credit for payments made (the "Judgment"). The Stipulation states in pertinent part:

> It is hereby stipulated by and between Plaintiff, Jeanine Dourbetas, and Defendants, Mike Gionis, and Anastasia Gionis, (hereinafter Defendants), that judgment may be entered in the above entitled action in favor of Plaintiff, Jeanine Dourbetas, and against Defendants for the total sum of $70,000, from July 1, 2002 until paid in full, less any payments credited to said debt in accordance with this agreement, under the following terms and conditions: 1. Said Stipulation

> for Entry of Judgment shall not be entered as a judgment in court, provided the following payments are made: [thereafter follows a description of the payment terms.] 2. If Defendants pay the total sum of $50,000, plus court costs, and no default is entered by the time the final payment is made, this stipulation shall be considered paid in full, and no further payments shall be owed by Defendants. 3. Upon final payment, Plaintiff will then enter a dismissal with prejudice of the entire action in favor of Defendants. If Defendants default on a payment, Defendants agree that judgment shall be entered by the court for the sum of $70,000, plus interest accruing from the date of default, and all court costs in favor of Plaintiff, in addition to interest at 10% per annum from the date of default notice, less credits for payments received.

(Emphasis added.)

The terms of the proposed Stipulation were read into the record at the settlement conference. The transcript of that hearing suggests that each of the parties understood the terms of the Stipulation. There was no mention at the settlement conference of any admissions or findings of fact. The parties acknowledged Gionis' 1998 bankruptcy case and added the following language to the Stipulation at paragraph 11: "This stipulation is subject to United States Bankruptcy Court approval and Defendants hereby waive any time limitation for any filing of this stipulation or bringing any adversary action with the Bankruptcy Court which may have jurisdiction." Notwithstanding this provision, the parties did not seek approval of the Stipulation in the bankruptcy court.[10]

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[10] Gionis later argued, in this adversary proceeding in opposition to Dourbetas' motion for summary judgment, that the Stipulation and Judgment were entered in violation of the discharge injunction under § 524(a) and therefore void. The bankruptcy court concluded that the debt was not discharged (continued...)

Subsequently, Gionis defaulted on the payment provisions of the Stipulation. In March 2005, Dourbetas returned to state court and had the Judgment entered pursuant to the Stipulation in the amount of $73,601.89.

C. The Dischargeability Litigation

In February 2006, Gionis moved to reopen his bankruptcy case to seek a determination of the Judgment's dischargeability. Dourbetas responded by filing this adversary proceeding against both Michael and Anastasia Gionis.[11] In the third amended complaint, Dourbetas first pled for relief pursuant to § 523(a)(2)(A). Dourbetas alleged that Gionis misrepresented material facts about the Bruggers and the Note. She also alleged that Gionis misrepresented his intent to guarantee the Note. In her second claim, Dourbetas pled for relief pursuant to § 523(a)(4), for embezzlement or larceny. Specifically, Dourbetas alleged that Gionis took the Collateral from the restaurant with fraudulent or larcenous intent. Dourbetas' third claim pled for relief based on § 523(a)(6), for willful and malicious injury.

After Gionis filed his responsive pleading, Dourbetas moved for summary judgment based on the doctrine of issue preclusion

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[10](...continued)
during Gionis' bankruptcy by operation of § 523(a)(3)(B). Accordingly, the Judgment was not void because dischargeability of the debt had not yet been determined.

[11] Anastasia was a party to the Stipulation and the Judgment and was originally named as a defendant in the adversary proceeding. Although her name remained in the case caption, she was dismissed from the adversary proceeding on December 6, 2006.

(the "MSJ"). Dourbetas contended that the Judgment, entered in the State Court Litigation pursuant to the Stipulation, was binding under the doctrine of collateral estoppel as to each element of fraud under § 523(a)(2)(A). The bankruptcy court declined to grant the MSJ because the Judgment contained no findings on the fraud claim and there was no evidence that the parties intended the Judgment to have such preclusive effect. The court summarized its decision in a written ruling as follows:

> In the instant case, there is no evidence that the parties intended the Judgment to preclude further litigation of fraud issues. The Stipulation contains no admissions by [Gionis] regarding their liability for [Dourbetas'] fraud claim, and the Judgment contains no findings on this issue. In addition, [Dourbetas] has presented no extrinsic evidence that the parties intended the Judgment to have such a preclusive effect.
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> In sum, [Dourbetas] has failed to meet her burden of proving the applicability of collateral estoppel herein. While [Gionis was a party] in the prior action and [Dourbetas'] state court fraud claims closely mirror the elements of a § 523(a)(2)(a) claim, there is no evidence that the fraud issues were actually litigated or necessarily decided by the state court and/or that the Judgment was decided on the merits. Based on the foregoing, [Gionis is] not precluded from litigating the fraud issues with respect to [Dourbetas'] § 523(a)(2)(A) claim and the Motion for Summary Judgment is DENIED.

Tentative Ruling filed June 19, 2008, at docket entry no. 78, incorporated by reference into Order denying the MSJ entered June 20, 2008, at docket entry no. 79 (emphasis added.)

Thereafter, the adversary proceeding was tried on the merits and the bankruptcy court entered a judgment in favor of Gionis on all claims for relief. The court found, inter alia, that (1) Gionis did not intend to guarantee the Note, and (2) Gionis did not intentionally misrepresent any facts relating to sale and assignment of the Note. Dourbetas only appealed the court's ruling with regard to the § 523(a)(2)(A) fraud claim.

II. JURISDICTION

The bankruptcy court had jurisdiction over the adversary proceeding pursuant to 28 U.S.C. §§ 1334 and 157(b)(2)(1). The Panel has jurisdiction over this appeal under 28 U.S.C. § 158(b).

III. ISSUES

Dourbetas listed 21 issues in the statement of issues on appeal which she filed in the bankruptcy court. In her opening brief filed with this court, she only asks for review of (1) the bankruptcy court's denial of the MSJ, and (2) the bankruptcy court's ruling that the Judgment is not excepted from discharge pursuant to § 523(a)(2)(A). Issues not addressed in an appellant's brief are waived.[12]

The three issues which we address below are:

1. Is the bankruptcy court's denial of the MSJ properly before the court on appeal?
2. Did the bankruptcy court erroneously refuse to apply the doctrine of issue preclusion to the state court Stipulation and Judgment?
3. Were the bankruptcy court's findings of fact, in favor of Gionis on the § 523(a)(2)(A) fraud claim, clearly erroneous?

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[12] Jodoin v. Samayoa (In re Jodoin), 209 B.R. 132, 143 (9th Cir. BAP 1997); Law Offices of Neil Vincent Wake v. Sedona Inst. (In re Sedona Inst.), 220 B.R. 74, 76 (9th Cir. BAP 1998).

IV. STANDARDS OF REVIEW

Questions of law are reviewed de novo. Genel Co. v. Bowen (In re Bowen), 198 B.R. 551, 555 (9th Cir. BAP 1996). De novo review means this court views the case from the same position as the bankruptcy court. See Ka Makani 'O Kohala Ohana Inc. v. Water Supply, 295 F.3d 955, 959 (9th Cir. 2002). The bankruptcy court's findings of fact after trial are reviewed under the clearly erroneous standard. Rule 7052, incorporating Federal Rule of Civil Procedure 52(a)(6); Easley v. Cromartie, 532 U.S. 234, 242 (2001). Review under the clearly erroneous standard is significantly deferential, requiring a "definite and firm conviction that a mistake has been committed." See id. at 242; United States v. Syrax, 235 F.3d 422, 427 (9th Cir. 2000).

The bankruptcy court's decision to grant or deny a motion for summary judgment is reviewed de novo. See Padfield v. AIG Life Ins. Co., 290 F.3d 1121, 1124 (9th Cir. 2002). "The appellate court must determine, viewing the evidence in the light most favorable to the non-moving party, whether there are any genuine issues of material fact and whether the district court correctly applied the relevant substantive law." Far Out Productions, Inc. v. Oskar, 247 F.3d 986, 992 (9th Cir. 2001).

A mixed question of law and fact, with the legal issues predominating, is presented when this court reviews the bankruptcy court's determination that the doctrine of issue preclusion does not apply. Blasi v. Williams, 775 F.2d 1017, 1018 (9th Cir. 1985). "We review de novo a [bankruptcy] court's ruling on the availability of res judicata both as to claim preclusion and as to issue preclusion. [Blasi, 775 F.2d at 1018]

(claim preclusion); Davis & Cox v. Summa Corp., 751 F.2d 1507, 1519 (9th Cir. 1985) (issue preclusion)." Robi v. Five Platters, Inc., 838 F.2d 318, 321 (9th Cir. 1988).

This Panel reviews for clear error the bankruptcy court's decision, that Dourbetas did not meet her burden of proof on each element of fraud. "The clearly erroneous standard also applies to findings of intent to defraud, to findings that the fraud proximately caused the alleged damages, In re Rubin, 875 F.2d 755, 758 (9th Cir. 1989), and to materiality. In re Lansford, 822 F.2d 902, 904 (9th Cir. 1987) ('[w]hether the misrepresentations were material under the circumstances, whether there was reasonable reliance, and whether there was intent to deceive are issues of fact')." Candland v. Ins. Co. of N. Am. (In re Candland), 90 F.3d 1466, 1469 (9th Cir. 1996).

V. DISCUSSION

A. Appealability of the Motion for Summary Judgment

Dourbetas contends that the bankruptcy court erred in not granting her MSJ and declining to apply the doctrine of issue preclusion to extend the state court's Judgment to all of the elements of her fraud claim in this adversary proceeding. Gionis counters that denial of the MSJ was an interlocutory ruling, not now appealable. Alternatively, he argues that if the bankruptcy court's order denying the MSJ was a final order, then the appeal of the ruling was not timely. The appealability question turns on the reason for denial of the MSJ; was there a question of fact, or was the motion denied on an issue of law? As the court stated in Banuelos v. Const. Laborers' Trust Funds for S. Cal.,

382 F.3d 897, 902-03 (9th Cir. 2004),

> In Pavon, we first stated the general rule that "this court will often decline to engage in the 'pointless academic exercise' of reviewing a denial of summary judgment after a trial on the merits." Id. (citing Lum v. City and County of Honolulu, 963 F.2d 1167, 1169-70 (9th Cir. 1992)). We concluded that "such a case is not presented here, because the question of claim preclusion was not a disputed factual issue that went to the jury, but was a ruling by the district court on an issue of law." Id. This distinction is logical. If a district court denies a motion for summary judgment on the basis of a question of law that would have negated the need for a trial, this court should review that decision. If, however, a district court denied a motion for summary judgment based on a disputed issue of fact, and that issue of fact was decided in a subsequent trial, this court will not engage in the pointless academic exercise of deciding whether a factual issue was disputed after it has been decided.

Id. (emphasis added).

The MSJ was denied because the bankruptcy court decided, as a matter of law, based on the available record from the State Court Litigation, that issue preclusion was not available. There were no triable issues of material fact cited in the bankruptcy court's ruling.[13] The court ruled that the doctrine of issue preclusion did not bar Gionis from defending himself on the fraud claim. Had the bankruptcy court applied the doctrine of issue preclusion, that ruling would have negated the need for a trial. We therefore review the bankruptcy court's decision to deny the MSJ de novo.

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[13] Dourbetas did not renew her request for issue preclusion at trial. There was no further effort to show that the elements of issue preclusion had been satisfied in the State Court Litigation.

B. Applicability of the Doctrine of Issue Preclusion

The avoidance of relitigation serves several important purposes, however, "incantations such as res judicata, collateral estoppel, judicial estoppel, or equitable estoppel, often lead courts into summary resolution of actions without being precise about the niceties of the doctrines being invoked." Christopher Klein, Lawrence Ponoroff and Sarah Borrey, Principles of Preclusion and Estoppel in Bankruptcy Cases, 79 Am. Bankr. L.J. 839, 879-880 (Fall 2005). The bankruptcy code presumes the applicability of common law preclusion doctrines. However, as a statutory overlay on a common law foundation, "the bankruptcy world is a ripe setting for misleading summary or serpentine reasoning about the common law doctrines of preclusion and estoppel." Id. at 840. "When addressing a question of preclusion, the starting point in the matrix of analysis is to identify the common law rule and then to consider whether the bankruptcy code has altered that rule in a manner that makes a difference to the case at hand." Id. at 892.

Under proper circumstances, issue preclusion may apply in bankruptcy dischargeability proceedings. See Grogan v. Garner, 498 U.S. 279, 284 & n.11 (1991). The bankruptcy court has "an obligation to afford 'full faith and credit' to state acts and judicial proceedings. 28 U.S.C. § 1738 (West 2006). Accordingly, in deciding the preclusive effect of a state-court judgment, [the court] must look to the law of the state that rendered the judgment to determine whether the courts of that state would afford the judgment preclusive effect." Sartin v. Macik, 535 F.3d 284, 292 (4th Cir. 2008) (Williams, C.J.,

dissenting). See also Diamond v. Kolcum (In re Diamond), 285 F.3d 822, 826 (9th Cir. 2002), citing Gayden v. Nourbakhsh (In re Nourbakhsh), 67 F.3d 798, 800 (9th Cir. 1995). Because the Judgment originated in California, California's law of issue preclusion is applicable.

California courts will apply issue preclusion only if certain threshold requirements have been met, and then only if application of the doctrine furthers the underlying public policies. Harmon v. Kobrin (In re Harmon), 250 F.3d 1240, 1245 (9th Cir. 2001) (citing Lucido v. Super. Ct., 51 Cal. 3d 335, 341, 272 Cal. Rptr. 767 (1990)). The public policies that form the basis for the doctrine of issue preclusion are (1) the preservation of the integrity of the judicial system, (2) promotion of judicial economy, and (3) the protection of litigants from harassment by vexatious litigation. Lucido, 51 Cal. 3d at 343.

There are five threshold requirements which must be established before issue preclusion can apply:

> First, the issue sought to be precluded from relitigation must be identical to that decided in a former proceeding.
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> Second, this issue must have been actually litigated in the former proceeding.
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> Third, it must have been necessarily decided in the former proceeding.
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> Fourth, the decision in the former proceeding must be final and on the merits.
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> Finally, the party against whom preclusion is sought must be the same [party] as, or in privity with, the party to the former proceeding.

Id. at 341.

This Panel must scrutinize each of the five requirements for

issue preclusion, specifically the first, second, and third elements, to determine what issues, if any, have been decided pursuant to the Stipulation and Judgment.[14]

Dourbetas argues that issue preclusion can apply to a default judgment even though entry of the default precluded "actual litigation" of the underlying issues.[15] However, Dourbetas confuses the effect of a default judgment with the effect of what is merely the default of a settlement agreement. The former may, in appropriate cases, be a basis for issue preclusion. The latter is merely a breach of contract which is not actionable under § 523. The U.S. Supreme Court explained this distinction in the context of a consent judgment in Arizona v. California, 530 U.S. 392, 414 (2000):

> [S]ettlements ordinarily occasion no issue preclusion (sometimes called collateral estoppel), unless it is clear, as it is not here, that the parties intend their agreement to have such an effect. "In most circumstances, it is recognized that consent agreements ordinarily are intended to preclude any further

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[14] There is no dispute concerning the privity and finality requirements for issue preclusion. Gionis was the defendant in the State Court Litigation and Dourbetas was the plaintiff. The Judgment is now final.

[15] The second requirement, the "actually litigated" element, applies in the context of a default judgment, "only where the record shows an express finding upon the allegation" for which issue preclusion is sought. Cal-Micro, Inc. v. Cantrell (In re Cantrell), 329 F.3d 1119, 1124 (9th Cir. 2003), citing Williams v. Williams (In re Williams' Estate), 36 Cal.2d. 289, 297 (1950). However, the "express finding" requirement can be waived if the court in the prior proceeding necessarily decided the issue. Cantrell, 329 F.3d at 1124, citing In re Harmon, 250 F.3d at 1248. In such circumstances, an express finding is not required. "[I]f an issue was necessarily decided in a prior proceeding, it was actually litigated." Id.

> litigation on the claim presented but are not intended to preclude further litigation on any of the issues presented. Thus consent judgments ordinarily support claim preclusion but not issue preclusion." 18 Charles Alan Wright, Arthur R. Miller, & Edward H. Cooper, Federal Practice and Procedure § 4443, pp. 384-385 (1981). This differentiation is grounded in basic res judicata doctrine. It is the general rule that issue preclusion attaches only "[w]hen an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment." Restatement (Second) of Judgments § 27, p. 250 (1982). "In the case of a judgment entered by confession, consent, or default, none of the issues is actually litigated. Therefore, the rule of this Section [describing issue preclusion's domain] does not apply with respect to any issue in a subsequent action." Id., comment e, at 257.

Id. (emphasis added).

The same principles have been found to work in favor of the plaintiff/creditor when the defendant/debtor attempts to use issue preclusion as a defense to the creditor's dischargeabiity claim. When a debtor settles a fraud claim by entering into a stipulated money judgment, and then files a bankruptcy case, the debtor cannot argue that the settlement converted the fraud claim to a contract claim. The U.S. Supreme Court has ruled that such a settlement has no preclusive effect on the creditor's right to bring a dischargeability action on the underlying claim in the bankruptcy court. Klein et al., supra at 14, at 879-80, citing Archer v. Warner, 538 U.S. 314 (2003).

Resolution of this dispute, therefore, begins with an analysis of the Stipulation and the Judgment, and their effect, if any, on the issues that Dourbetas had to prove in order to invoke the doctrine of issue preclusion in this adversary proceeding. In other words, this Panel must decide, based on the record provided from the state court, whether the state court had

already conclusively decided any of the material facts relevant to the fraud claim presented in the adversary proceeding.

In the state court complaint, Dourbetas alleged both breach of contract and intentional or negligent fraud. In resolution of these claims the parties agreed, in the Stipulation, to an award of damages in an amount significantly less than prayed for in the state court complaint. The parties did not agree on an award of punitive damages and the Judgment does not include punitive damages.

Assuming, arguendo, that Dourbetas adequately alleged facts in the State Court Litigation that would satisfy the five elements under § 523(a)(2)(A), none of those fraud elements were "actually litigated" in the state court proceeding. Neither does it appear that a finding of fraud was "necessary" to support the Judgment. There is nothing substantive to be found in the Stipulation and Judgment. The mere facts that, (1) Dourbetas alleged fraud, and (2) the Judgment was entered pursuant to the Stipulation, do not establish that the fraud claim was "actually litigated" and "necessary" to support the Judgment. Indeed, the damages awarded in the Judgment could have been due to the alleged breach of contract, or they could have been the result of the alleged negligent misrepresentation, neither of which will support a § 523(a)(2)(A) claim.[16]

The transcript of the state court settlement conference

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[16] Dourbetas argues without authority that all of the facts necessary to support all claims pled in the state court complaint were somehow merged into the Stipulation and Judgment. We find that argument to be unpersuasive.

makes it clear that the Stipulation was a settlement. The bankruptcy court correctly characterized it as a contract with a liquidated damages provision. When Gionis did not pay according to the Stipulation, the Judgment was entered for the amount of damages as agreed. As the bankruptcy court correctly observed, the Stipulation and Judgment were devoid of any findings of fact as to the fraud claim pled in the State Court Litigation. Further, the parties mutually preserved the issue of dischargeability, agreeing that the Stipulation would be subject to bankruptcy court approval. Dourbetas makes no showing that the parties intended the Stipulation and the Judgment to preclude litigation of the fraud claim in the bankruptcy court.

Dourbetas relies on Avery v. Avery, 10 Cal. App. 3d 525, 89 Cal. Rptr. 195 (1970), for the proposition that, under California law, a judgment entered upon the parties' stipulation must be given the same effect as an action tried on its merits. Dourbetas' reliance on Avery is misplaced. In Avery, the plaintiff moved for entry, in California, of a Missouri judgment after trial. The judgment called for the defendant to make a series of payments to the plaintiff. In the California proceedings the defendant raised a new defense to payment of the judgment; however the defendant then stipulated to entry of the judgment. When the defendant defaulted on the judgment, he reasserted the same issue in defense of the plaintiff's enforcement action and prevailed. The appeal court ruled, based on the doctrine of res judicata, that the defendant could not raise the same defense in the subsequent proceedings. The stipulation in Avery was to the entry of a foreign judgment which

had been decided on the merits. Here, the Stipulation at issue was to a schedule of payments in lieu of a trial on the merits.

Dourbetas also cites John Siebel Associates v. Keele, 188 Cal. App. 3d 560, 233 Cal. Rptr. 231 (1986), for the same proposition. However, in that case the parties stipulated to an arbitration award for payments with interest. The defendant defaulted on the payments and a judgment was entered. The defendant then argued that the interest rate under the arbitration award should be the lower rate allowed on a judgment. On appeal, the court held that the stipulation determined the interest rate until judgment was entered. The holdings in Avery and Keele are not applicable in this case.

This court is persuaded that the essential elements of Dourbetas' fraud claim were not actually litigated in the state court, neither would such factual findings have been necessary to support the Stipulation or the subsequent Judgment. Accordingly, we agree with the bankruptcy court that the Stipulation and Judgment did not preclude Gionis from a trial on the merits with respect to Dourbetas' fraud claim.

C. The § 523(a)(2)(A) Fraud Claim

Once this adversary proceeding went to a trial, it was Dourbetas' burden to prove by a preponderance of the evidence each of the elements of fraud under § 523(a)(2)(A). Grogan, 498 U.S. at 287-88. "In order to establish that a debt is nondischargeable under § 523(a)(2)(A), a creditor must establish five elements by a preponderance of the evidence: (1) misrepresentation, fraudulent omission or deceptive conduct by the debtor; (2) knowledge of the falsity or deceptiveness of his

statement or conduct; (3) an intent to deceive; (4) justifiable reliance by the creditor on the debtor's statement or conduct; and (5) damage to the creditor proximately caused by its reliance on the debtor's statement or conduct. Turtle Rock Meadows Homeowners Ass'n v. Slyman (In re Slyman), 234 F.3d 1081, 1085 (9th Cir. 2000)." Harmon, 250 F.3d at 1246.

The bankruptcy court received and heard testimony and evidence on the fraud issues and based thereon, made findings of fact in favor of Gionis with regard to essentially every element of the fraud claim. With regard to the first element, misrepresentation, Dourbetas argued that since the Bruggers abandoned Isaac's Burgers 30 or 40 days after Dourbetas purchased the Note, the restaurant must have been failing for some time, and Gionis must have known that. Ergo, Dourbetas suggests that Gionis knowingly misrepresented the Note as a good investment, and Gionis never intended to perform on the guarantee upon which Dourbetas justifiably relied. The bankruptcy court disagreed and found that Gionis' statements to Dourbetas regarding the Note were not knowingly false, stating, "[T]he record indicates that [Gionis'] admitted statements are more likely true than not." Alex himself acknowledged at trial that Gionis' statements could have been true.

With regard to Gionis' purported guarantee of the Note, the bankruptcy court found, after considering the evidence, including oral testimony from Alex and Gionis, that Gionis did not intend to guarantee the Note; "The court believes that [Gionis] did not intend to guarantee the Note, even though [Gionis] signed the Note which specified that the assignment was 'with RECOURSE.'"

The bankruptcy court also found that Alex could not have justifiably relied on Gionis' purported guarantee of the Note: "Even if [Gionis] did represent that the assignment was with recourse, . . . [Gionis] likely did not intend to deceive Mr. Dourbetas. [Gionis] testified that he had no connection with Mr. Dourbetas prior to the transaction. In addition, [Alex] could not have justifiably relied on [Gionis'] alleged guarantee due to lack of a prior connection and lack of diligence by not investigating [Gionis'] credit history."

Dourbetas correctly points out in her opening brief, at 26, ¶ 3, that fraudulent intent can be inferred from the evidence based on the totality of the circumstances. Michalic v. Cleveland Tankers, Inc., 364 U.S. 325, 330-31 (1960). However, Dourbetas does not contend that the bankruptcy court's findings lack evidentiary support in the record; she merely argues that the court should have made different inferences. As Dourbetas also correctly recites: "Because of the fact-intensive nature of the inquiry, the bankruptcy court's determination of intent is reviewed under the clearly erroneous standard." Appellant's Br. at 26, ¶ 5. Where the evidence, direct or circumstantial, will support the reasonable inference of the fact-finder, we will not disturb that determination on appeal, even where a different inference could be drawn. See Talor v. Pub. Fin. Corp. of Redlands (In re Taylor), 514 F.2d 1370, 1374 (9th Cir. 1975). To support a judgment in favor of Gionis, the bankruptcy court only needed to find, by inference or otherwise, that one of the five fraud elements was not present. We are satisfied that the bankruptcy court's ruling as to each element of the fraud claim

was based on careful consideration of testimony and evidence in the record. Dourbetas has shown nothing to leave this court with a "definite and firm conviction that a mistake has been made."

VI. CONCLUSION

The bankruptcy court considered the possibility that the Stipulation and Judgment might have a preclusive effect in the adversary proceeding before it, and decided that the doctrine of issue preclusion did not apply as a matter of law. This court has reviewed that decision de novo and arrives at the same conclusion as the bankruptcy court, for the same reasons: the Stipulation and Judgment did not preclude Gionis from defending the fraud claim because none of the facts necessary to support a § 523(a)(2)(A) dischargeability claim were actually and/or necessarily litigated in the state court.

As to the merits of the fraud claim, the bankruptcy court found that Gionis did not intend to guarantee the Note purchased by Dourbetas, that Gionis did not intend to defraud Dourbetas, and that Alex did not reasonably rely on any representation made by Gionis. These findings were not clearly erroneous. We AFFIRM the decision of the bankruptcy court.