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NOT FOR PUBLICATION

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

UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT

In re:)	BAP No.	CC-08-1201-LPaD
)		
MICHAEL GIONIS and ANASTASIA)	Bk. No.	LA 98-40895 ER
GIONIS,)		
)	Adv. No.	LA 06-01483 ER
Debtors.)		
<hr/>			
JEANINE DOURBETAS,)		
)		
Appellant,)		
)		
v.)	MEMORANDUM¹	
)		
MICHAEL GIONIS; ANASTASIA)		
GIONIS,)		
)		
Appellees.)		
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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: LEE², PAPPAS, and DUNN, 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.

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

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

12 13 I. FACTS

14 A. Sale of the Promissory Note

15 Between 1991 and 1996, Debtor/Appellee Michael Gionis
16 ("Gionis") and his wife, Anastasia Gionis, owned and operated a
17 restaurant, Isaac's Burgers, in Compton, California.⁴ In April
18 1996, they sold Isaac's Burgers, through an escrow, to Charles
19 and Jung Brugger (the "Bruggers") for \$170,000. The escrow agent
20 told Gionis that Mrs. Brugger had experience in operating a
21

22
23 ³ Unless otherwise indicated, all chapter, section and rule
24 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1330, and
25 to the Federal Rules of Bankruptcy Procedure, Rules 1001-9036, as
26 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.

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

1 restaurant. The Bruggers paid 50% of the purchase price,
2 \$85,000, in cash, and executed a promissory note to Gionis for
3 the balance (the "Note"). The Note was secured by the
4 furnishings, equipment, and fixtures at Isaac's Burgers (the
5 "Collateral"). The Bruggers were to pay \$1,723.49 per month for
6 about five years. Gionis continued to work at the restaurant and
7 helped with the transition for a short time.⁵

8 About six months after the sale, in October 1996, Gionis
9 sold the Note and assigned his security interest in the
10 Collateral to Plaintiff/Appellant Jeanine Dourbetas ("Dourbetas")
11 acting through her agent and father, Alex Dourbetas ("Alex").⁶
12 Alex paid Gionis \$55,000 for the Note, which represented a
13 \$30,000 discount from the face value. Before deciding to
14 purchase the Note, Alex did not ask Gionis for any financial
15 statements or profit and loss statements relating to the
16 restaurant, nor did he run a credit check on the Bruggers.
17 Neither Alex nor Dourbetas inspected Isaac's Burgers or the
18 Collateral, nor did they ever meet the Bruggers. Unfortunately,
19 the Bruggers made no payments on the Note to anyone after
20 Dourbetas acquired the Note.

21 Gionis made the following representations to Alex in
22

23 ⁵ Gionis also operated a pizza restaurant at a different
24 location.

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

1 connection with the sale of the Note:

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

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

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

25
26 ⁷ The interlineation was not initialed by Gionis and it is
27 not clear from the face of the Note Assignment whether the
28 interlineation was made before or after Gionis signed the
document.

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

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

18 / / / /

19 / / / /

20
21 ⁸ The record is silent as to what arrangement, if any,
22 Gionis negotiated with the Bruggers regarding repossession and
23 operation of Isaac's Burgers. In December 1997, the Bruggers
24 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.

25 ⁹ After closing Isaac's Burgers, Gionis tried to find
26 another buyer who would reopen the restaurant and assume the
27 Bruggers' Note. Gionis introduced Alex to prospective buyers,
28 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.

1 **B. The State Court Litigation**

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

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

24 It is hereby stipulated by and between Plaintiff,
25 Jeanine Dourbetas, and Defendants, Mike Gionis, and
26 Anastasia Gionis, (hereinafter Defendants), that
27 judgment may be entered in the above entitled action in
28 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

1 for Entry of Judgment shall not be entered as a
2 judgment in court, provided the following payments are
3 made: [thereafter follows a description of the payment
4 terms.] 2. If Defendants pay the total sum of
5 \$50,000, plus court costs, and no default is entered by
6 the time the final payment is made, this stipulation
7 shall be considered paid in full, and no further
8 payments shall be owed by Defendants. 3. Upon final
9 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.

10 (Emphasis added.)

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

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

(continued...)

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

5 **C. The Dischargeability Litigation**

6 In February 2006, Gionis moved to reopen his bankruptcy case
7 to seek a determination of the Judgment's dischargeability.
8 Dourbetas responded by filing this adversary proceeding against
9 both Michael and Anastasia Gionis.¹¹ In the third amended
10 complaint, Dourbetas first pled for relief pursuant to
11 § 523(a)(2)(A). Dourbetas alleged that Gionis misrepresented
12 material facts about the Bruggers and the Note. She also alleged
13 that Gionis misrepresented his intent to guarantee the Note. In
14 her second claim, Dourbetas pled for relief pursuant to
15 § 523(a)(4), for embezzlement or larceny. Specifically,
16 Dourbetas alleged that Gionis took the Collateral from the
17 restaurant with fraudulent or larcenous intent. Dourbetas' third
18 claim pled for relief based on § 523(a)(6), for willful and
19 malicious injury.

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

22
23 ¹⁰ (...continued)
24 during Gionis' bankruptcy by operation of § 523(a)(3)(B).
25 Accordingly, the Judgment was not void because dischargeability
of the debt had not yet been determined.

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

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

8 The court summarized its decision in a written ruling as follows:

9 In the instant case, there is no evidence that the parties
10 intended the Judgment to preclude further litigation of
11 fraud issues. The Stipulation contains no admissions by
12 [Gionis] regarding their liability for [Dourbetas'] fraud
13 claim, and the Judgment contains no findings on this issue.
14 In addition, [Dourbetas] has presented no extrinsic evidence
15 that the parties intended the Judgment to have such a
16 preclusive effect.

17 In sum, [Dourbetas] has failed to meet her
18 burden of proving the applicability of collateral estoppel
19 herein. While [Gionis was a party] in the prior action and
20 [Dourbetas'] state court fraud claims closely mirror the
21 elements of a § 523(a)(2)(a) claim, there is no evidence
22 that the fraud issues were actually litigated or necessarily
23 decided by the state court and/or that the Judgment was
24 decided on the merits. Based on the foregoing, [Gionis is]
25 not precluded from litigating the fraud issues with respect
26 to [Dourbetas'] § 523(a)(2)(A) claim and the Motion for
27 Summary Judgment is DENIED.

28 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.

1 **II. JURISDICTION**

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

5
6 **III. ISSUES**

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

14 The three issues which we address below are:

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

23 / / / /
24 / / / /
25 / / / /

26
27 ¹² Jodoin v. Samayoa (In re Jodoin), 209 B.R. 132, 143 (9th
28 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).

1 **IV. STANDARDS OF REVIEW**

2 Questions of law are reviewed de novo. Genel Co. v. Bowen
3 (In re Bowen), 198 B.R. 551, 555 (9th Cir. BAP 1996). De novo
4 review means this court views the case from the same position as
5 the bankruptcy court. See Ka Makani 'O Kohala Ohana Inc. v.
6 Water Supply, 295 F.3d 955, 959 (9th Cir. 2002). The bankruptcy
7 court's findings of fact after trial are reviewed under the
8 clearly erroneous standard. Rule 7052, incorporating Federal
9 Rule of Civil Procedure 52(a)(6); Easley v. Cromartie, 532 U.S.
10 234, 242 (2001). Review under the clearly erroneous standard is
11 significantly deferential, requiring a "definite and firm
12 conviction that a mistake has been committed." See id. at 242;
13 United States v. Syrax, 235 F.3d 422, 427 (9th Cir. 2000).

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

22 A mixed question of law and fact, with the legal issues
23 predominating, is presented when this court reviews the
24 bankruptcy court's determination that the doctrine of issue
25 preclusion does not apply. Blasi v. Williams, 775 F.2d 1017,
26 1018 (9th Cir. 1985). "We review de novo a [bankruptcy] court's
27 ruling on the availability of res judicata both as to claim
28 preclusion and as to issue preclusion. [Blasi, 775 F.2d at 1018]

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

4 This Panel reviews for clear error the bankruptcy court’s
5 decision, that Dourbetas did not meet her burden of proof on each
6 element of fraud. “The clearly erroneous standard also applies
7 to findings of intent to defraud, to findings that the fraud
8 proximately caused the alleged damages, In re Rubin, 875 F.2d
9 755, 758 (9th Cir. 1989), and to materiality. In re Lansford,
10 822 F.2d 902, 904 (9th Cir. 1987) (‘[w]hether the
11 misrepresentations were material under the circumstances, whether
12 there was reasonable reliance, and whether there was intent to
13 deceive are issues of fact’).” Candland v. Ins. Co. of N. Am.
14 (In re Candland), 90 F.3d 1466, 1469 (9th Cir. 1996).

15 16 V. DISCUSSION

17 A. Appealability of the Motion for Summary Judgment

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

1 382 F.3d 897, 902-03 (9th Cir. 2004),

2 In Pavon, we first stated the general rule that "this
3 court will often decline to engage in the 'pointless
4 academic exercise' of reviewing a denial of summary
5 judgment after a trial on the merits." Id. (citing Lum
6 v. City and County of Honolulu, 963 F.2d 1167, 1169-70
7 (9th Cir. 1992)). We concluded that "such a case is
8 not presented here, because the question of claim
9 preclusion was not a disputed factual issue that went
10 to the jury, but was a ruling by the district court on
11 an issue of law." Id. This distinction is logical.
12 If a district court denies a motion for summary
13 judgment on the basis of a question of law that would
14 have negated the need for a trial, this court should
15 review that decision. If, however, a district court
16 denied a motion for summary judgment based on a
17 disputed issue of fact, and that issue of fact was
18 decided in a subsequent trial, this court will not
19 engage in the pointless academic exercise of deciding
20 whether a factual issue was disputed after it has been
21 decided.

22 Id. (emphasis added).

23 The MSJ was denied because the bankruptcy court decided, as
24 a matter of law, based on the available record from the State
25 Court Litigation, that issue preclusion was not available. There
26 were no triable issues of material fact cited in the bankruptcy
27 court's ruling.¹³ The court ruled that the doctrine of issue
28 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.

/ / / /

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.

1 **B. Applicability of the Doctrine of Issue Preclusion**

2 The avoidance of relitigation serves several important
3 purposes, however, “incantations such as res judicata, collateral
4 estoppel, judicial estoppel, or equitable estoppel, often lead
5 courts into summary resolution of actions without being precise
6 about the niceties of the doctrines being invoked.” Christopher
7 Klein, Lawrence Ponoroff and Sarah Borrey, Principles of
8 Preclusion and Estoppel in Bankruptcy Cases, 79 Am. Bankr. L.J.
9 839, 879-880 (Fall 2005). The bankruptcy code presumes the
10 applicability of common law preclusion doctrines. However, as a
11 statutory overlay on a common law foundation, “the bankruptcy
12 world is a ripe setting for misleading summary or serpentine
13 reasoning about the common law doctrines of preclusion and
14 estoppel.” Id. at 840. “When addressing a question of
15 preclusion, the starting point in the matrix of analysis is to
16 identify the common law rule and then to consider whether the
17 bankruptcy code has altered that rule in a manner that makes a
18 difference to the case at hand.” Id. at 892.

19 Under proper circumstances, issue preclusion may apply in
20 bankruptcy dischargeability proceedings. See Grogan v. Garner,
21 498 U.S. 279, 284 & n.11 (1991). The bankruptcy court has “an
22 obligation to afford ‘full faith and credit’ to state acts and
23 judicial proceedings. 28 U.S.C. § 1738 (West 2006).
24 Accordingly, in deciding the preclusive effect of a state-court
25 judgment, [the court] must look to the law of the state that
26 rendered the judgment to determine whether the courts of that
27 state would afford the judgment preclusive effect.” Sartin v.
28 Macik, 535 F.3d 284, 292 (4th Cir. 2008) (Williams, C.J.,

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

6 California courts will apply issue preclusion only if
7 certain threshold requirements have been met, and then only if
8 application of the doctrine furthers the underlying public
9 policies. Harmon v. Kobrin (In re Harmon), 250 F.3d 1240, 1245
10 (9th Cir. 2001) (citing Lucido v. Super. Ct., 51 Cal. 3d 335,
11 341, 272 Cal. Rptr. 767 (1990)). The public policies that form
12 the basis for the doctrine of issue preclusion are (1) the
13 preservation of the integrity of the judicial system, (2)
14 promotion of judicial economy, and (3) the protection of
15 litigants from harassment by vexatious litigation. Lucido, 51
16 Cal. 3d at 343.

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

19 First, the issue sought to be precluded from relitigation
20 must be identical to that decided in a former proceeding.

21 Second, this issue must have been actually litigated in the
22 former proceeding.

23 Third, it must have been necessarily decided in the former
24 proceeding.

25 Fourth, the decision in the former proceeding must be
26 final and on the merits.

27 Finally, the party against whom preclusion is sought must be
28 the same [party] as, or in privity with, the party to the
former proceeding.

29 Id. at 341.

30 This Panel must scrutinize each of the five requirements for

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

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

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

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

22 ¹⁵ The second requirement, the "actually litigated"
23 element, applies in the context of a default judgment, "only
24 where the record shows an express finding upon the allegation"
25 for which issue preclusion is sought. Cal-Micro, Inc. v.
26 Cantrell (In re Cantrell), 329 F.3d 1119, 1124 (9th Cir. 2003),
27 citing Williams v. Williams (In re Williams' Estate), 36 Cal.2d.
28 289, 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.

1 litigation on the claim presented but are not intended
2 to preclude further litigation on any of the issues
3 presented. Thus consent judgments ordinarily support
4 claim preclusion but not issue preclusion.” 18 Charles
5 Alan Wright, Arthur R. Miller, & Edward H. Cooper,
6 Federal Practice and Procedure § 4443, pp. 384-385
7 (1981). This differentiation is grounded in basic res
8 judicata doctrine. It is the general rule that issue
9 preclusion attaches only “[w]hen an issue of fact or
10 law is actually litigated and determined by a valid and
11 final judgment, and the determination is essential to
12 the judgment.” Restatement (Second) of Judgments § 27,
13 p. 250 (1982). “In the case of a judgment entered by
14 confession, consent, or default, none of the issues is
15 actually litigated. Therefore, the rule of this
16 Section [describing issue preclusion’s domain] does not
17 apply with respect to any issue in a subsequent
18 action.” Id., comment e, at 257.

19 Id. (emphasis added).

20 The same principles have been found to work in favor of the
21 plaintiff/creditor when the defendant/debtor attempts to use
22 issue preclusion as a defense to the creditor’s dischargeability
23 claim. When a debtor settles a fraud claim by entering into a
24 stipulated money judgment, and then files a bankruptcy case, the
25 debtor cannot argue that the settlement converted the fraud claim
26 to a contract claim. The U.S. Supreme Court has ruled that such
27 a settlement has no preclusive effect on the creditor’s right to
28 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

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

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

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

24 The transcript of the state court settlement conference
25

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

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

13 Dourbetas relies on Avery v. Avery, 10 Cal. App. 3d 525, 89
14 Cal. Rptr. 195 (1970), for the proposition that, under California
15 law, a judgment entered upon the parties' stipulation must be
16 given the same effect as an action tried on its merits.

17 Dourbetas' reliance on Avery is misplaced. In Avery, the
18 plaintiff moved for entry, in California, of a Missouri judgment
19 after trial. The judgment called for the defendant to make a
20 series of payments to the plaintiff. In the California
21 proceedings the defendant raised a new defense to payment of the
22 judgment; however the defendant then stipulated to entry of the
23 judgment. When the defendant defaulted on the judgment, he
24 reasserted the same issue in defense of the plaintiff's
25 enforcement action and prevailed. The appeal court ruled, based
26 on the doctrine of res judicata, that the defendant could not
27 raise the same defense in the subsequent proceedings. The
28 stipulation in Avery was to the entry of a foreign judgment which

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

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

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

20 **C. The § 523(a)(2)(A) Fraud Claim**

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

1 statement or conduct; (3) an intent to deceive; (4) justifiable
2 reliance by the creditor on the debtor's statement or conduct;
3 and (5) damage to the creditor proximately caused by its reliance
4 on the debtor's statement or conduct. Turtle Rock Meadows
5 Homeowners Ass'n v. Slyman (In re Slyman), 234 F.3d 1081, 1085
6 (9th Cir. 2000).” Harmon, 250 F.3d at 1246.

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

23 With regard to Gionis' purported guarantee of the Note, the
24 bankruptcy court found, after considering the evidence, including
25 oral testimony from Alex and Gionis, that Gionis did not intend
26 to guarantee the Note; “The court believes that [Gionis] did not
27 intend to guarantee the Note, even though [Gionis] signed the
28 Note which specified that the assignment was ‘with RECOURSE.’”

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

10 Dourbetas correctly points out in her opening brief, at 26,
11 ¶ 3, that fraudulent intent can be inferred from the evidence
12 based on the totality of the circumstances. Michalic v.
13 Cleveland Tankers, Inc., 364 U.S. 325, 330-31 (1960). However,
14 Dourbetas does not contend that the bankruptcy court's findings
15 lack evidentiary support in the record; she merely argues that
16 the court should have made different inferences. As Dourbetas
17 also correctly recites: "Because of the fact-intensive nature of
18 the inquiry, the bankruptcy court's determination of intent is
19 reviewed under the clearly erroneous standard." Appellant's Br.
20 at 26, ¶ 5. Where the evidence, direct or circumstantial, will
21 support the reasonable inference of the fact-finder, we will not
22 disturb that determination on appeal, even where a different
23 inference could be drawn. See Talor v. Pub. Fin. Corp. of
24 Redlands (In re Taylor), 514 F.2d 1370, 1374 (9th Cir. 1975). To
25 support a judgment in favor of Gionis, the bankruptcy court only
26 needed to find, by inference or otherwise, that one of the five
27 fraud elements was not present. We are satisfied that the
28 bankruptcy court's ruling as to each element of the fraud claim

1 was based on careful consideration of testimony and evidence in
2 the record. Dourbetas has shown nothing to leave this court with
3 a "definite and firm conviction that a mistake has been made."
4

5 **VI. CONCLUSION**

6 The bankruptcy court considered the possibility that the
7 Stipulation and Judgment might have a preclusive effect in the
8 adversary proceeding before it, and decided that the doctrine of
9 issue preclusion did not apply as a matter of law. This court
10 has reviewed that decision de novo and arrives at the same
11 conclusion as the bankruptcy court, for the same reasons: the
12 Stipulation and Judgment did not preclude Gionis from defending
13 the fraud claim because none of the facts necessary to support a
14 § 523(a)(2)(A) dischargeability claim were actually and/or
15 necessarily litigated in the state court.

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