NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL

OF THE NINTH CIRCUIT

In re:	BAP No. AZ-08-1143-EMoMk
CHARLES KIRKLAND AND CAROLINA M. LOPEZ,	Bk. Nos. 03-11884 03-02493 (Substantively Consolidated)
Debtors.	
	Adv. No. 03-01086
CHARLES KIRKLAND AND CAROLINA M. LOPEZ,	
Appellants,	
v.	**M E M O R A N D U M**[1]
LAURA K. BARNES,	
Appellee.	

Argued and submitted on October 17, 2008
at Phoenix, Arizona

Filed - November 26, 2008

Appeal from the United States Bankruptcy Court
for the District of Arizona

Honorable George B. Nielsen, Jr., Presiding

Before: EFREMSKY,[2] MONTALI AND MARKELL, 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] Hon. Roger L. Efremsky, U.S. Bankruptcy Judge for the Northern District of California, sitting by designation.

Husband and wife Charles Kirkland ("Kirkland") and Carolina M. Lopez ("Lopez" and collectively with Kirkland, "Debtors") appeal the bankruptcy court's final judgment entered after it granted summary judgment in favor of Laura K. Barnes ("Barnes") on two grounds. First, the bankruptcy court held that a state court judgment in favor of Barnes in an action based on fraud was entitled to issue-preclusive effect in Barnes's adversary proceeding brought pursuant to Bankruptcy Code § 523(a)(6).[3] Second, the bankruptcy court held that Kirkland's non-dischargeable debt was a community claim.

For the reasons set forth below, we AFFIRM.

I. FACTS

A. The Bankruptcy Case

In February 2003, Debtors filed their bankruptcy cases. On December 15, 2003, Barnes filed a complaint under § 523(a)(6).[4] The factual allegations in this complaint are substantially identical to those in the state court complaint described below. Barnes then obtained relief from stay to continue her litigation against Debtors and Valley-Wide Productions L.L.C. ("Valley-

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[3] Unless otherwise indicated, all chapter and section references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1330, as enacted prior to the effective date (October 17, 2005) of the relevant provisions of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. 109-8, April 20, 2005, 119 Stat. 23.

[4] Section 523(a)(6) excepts from discharge debts for willful and malicious injury by the debtor to another entity or to the property of another entity. Barboza v. New Form, Inc. (In re Barboza), 2008 WL 4307451 (9th Cir., Sept. 23, 2008); Lockerby v. Sierra, 535 F.3d 1038 (9th Cir. 2008).

Wide"[5]) then pending in state court and agreed to return to bankruptcy court after the litigation had been completed.

B. The State Court Litigation

In August 2001, Barnes sued Debtors and Valley-Wide in the Superior Court of Maricopa County, Arizona (the "State Court"). The complaint stated multiple causes of action but both Barnes and Kirkland state that, following a motion to dismiss, the action proceeded to judgment against Kirkland only on causes of action for "misrepresentation and fraud" and a "pattern of unlawful activity" that constituted engaging in "fraudulent schemes and practices" under Arizona's racketeering statute (A.R.S. § 13-2301, et seq. ("RICO")).[6],[7] Barnes sought damages

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[5] Valley-Wide is apparently a debtor in its own bankruptcy case. The record is unclear as to the exact relationship between Kirkland and Valley-Wide.

[6] There is nothing in the record regarding this motion to dismiss. The State Court's February 10, 2005 Minute Entry Order conflicts with this assertion. It indicates that the complaint also stated claims for conversion, constructive trust, unjust enrichment, and negligence.

[7] Arizona's RICO statute is patterned after federal mail fraud law. "It contemplates swindles, Ponzi schemes, confidence games, and similar frauds in which the perpetrator takes advantage of the victim by inducing the latter to turn over property or money based on a false picture painted by the perpetrator." State v. Johnson, 880 P.2d 132, 136 (Ariz. 1994) (distinguishing theft and fraud under A.R.S. § 13-2310(A)). A.R.S. § 13-2310(A) provides: "Any person who, pursuant to a scheme or artifice to defraud, knowingly obtains any benefit by means of false or fraudulent pretenses, representations, promises or material omissions is guilty of a class 2 felony." Reliance on the part of any person is not a necessary element of this offense. A.R.S. § 13-2310(B). A person who sustains reasonably foreseeable injury to his person, business or property by a

(continued...)

of approximately $19,000, plus interest, attorneys' fees and treble damages under A.R.S. § 13-2314.04.[8]

1. The Allegations of the Complaint

Paragraphs 8 through 42 of the State Court complaint contained the main allegations against Kirkland. The complaint alleged that Barnes had owned a single family residence in Chandler, Arizona (the "Property") subject to a deed of trust in favor of Quality Loan Service (the "Trustee"). In February 2000, the Trustee conducted a foreclosure sale of the Property. The foreclosure sale generated excess proceeds of approximately $21,000 (the "Excess Proceeds"). In April 2000, Barnes vacated the Property and filed a forwarding address with the U.S. Postal Service. Later in April 2000, the Trustee sent a notice of deposit to all parties who might have an interest in the Excess Proceeds, informing them that the Excess Proceeds had been deposited with the Maricopa County Treasurer. Kirkland obtained an assignment of the Excess Proceeds from the parties Barnes had purchased the Property from seven years earlier (who no longer

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[7](...continued)
pattern of racketeering activity, may file an action in superior court for the recovery of up to treble damages and the costs of the suit, including reasonable attorney fees. A.R.S. § 23-2314.04. The standard of proof in an action under this section is a preponderance of the evidence. A.R.S. § 13-2314.04(G). See Holeman v. Neils, 803 F. Supp. 237 (D. Ariz. 1992) (describing elements of cause of action).

[8] Under A.R.S. § 13-2314.04(A), an award of up to treble damages is mandatory upon a finding of injury by racketeering under A.R.S. § 13-2301, et seq. Sullivan v. Metro Prods., Inc., 724 P.2d 1242 (Ariz. Ct. App. 1986). The treble damages provision is to compensate for losses, to deter misconduct, and to encourage private litigants to act. Rhue v. Dawson, 841 P.2d 215, 233 (Ariz. Ct. App. 1992).

had an interest to assign), and, through his entity Valley-Wide, filed an application to recover the Excess Proceeds (the "Application").

As required by A.R.S. § 33-812(D), the Application stated under penalty of perjury that the Application had been mailed to all interested parties. Despite the fact that Barnes's name appeared on the list of those to whom notice of the Application had been given, Barnes never received the Application because Kirkland did not send it to her. Through this series of steps, Kirkland ultimately obtained an order from the state court allowing the Excess Proceeds to be disbursed to Valley-Wide and, in part, to him.

Barnes alleged that as a proximate result of this deception, she had been damaged by Kirkland's "wanton, reckless, dishonest acts" which were done with "spite, ill-will or an evil mind" and with knowledge that such "malicious and outrageous conduct" caused her harm.[9]

The essential allegations of the RICO cause of action were that through the same intentionally deceptive noticing procedure Kirkland had used as to Barnes, Kirkland (or Valley-Wide) had filed claims for excess foreclosure sale proceeds of more than $1.45 million relating to more than 150 foreclosure sales.[10] This pattern constituted engaging in fraudulent schemes and practices as defined in Arizona's RICO statute.

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[9] The complaint alleges the required elements of a fraud cause of action under Arizona law. Echols v. Beauty Built Homes, Inc., 647 P.2d 629, 631 (Ariz. 1982) (listing elements).

[10] The Application itself refers to several other foreclosed properties and excess proceeds of more than $35,000.

2. Discovery Disputes and Appointment of Special Master

Kirkland answered the complaint, and the parties engaged in discovery. Kirkland did not cooperate in the discovery process. As a result, in July 2002, the State Court appointed a special master to resolve the discovery disputes.

In October 2002, the special master reported to the State Court that Kirkland (and Valley-Wide) were not acting in good faith in the discovery process as they had had an ample opportunity to produce documents to the special master but had failed to do so.[11] The special master recommended that the State Court issue an order to show cause and set a hearing regarding why Kirkland should not be held in contempt and sanctioned, including the sanction of having his answer stricken. Kirkland's bankruptcy filing prevented the State Court from immediately holding a hearing. After Barnes obtained relief from the automatic stay, the litigation resumed in State Court.

In August 2004, the special master issued a second report again recommending that Kirkland be held in contempt of court and sanctioned.[12]

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[11] The report indicates that the defendants had initially failed to produce documents for the special master's review, then partially produced documents, then claimed not to have kept copies of documents produced to the Arizona attorney general's office. The special master stated that this lack of cooperation by the defendants had made it impossible for him to perform the document review that had been requested by the State Court.

[12] Neither the second report nor the State Court's orders to show cause are part of the record.

3. Evidentiary Hearings in State Court

On October 21, 2004 and November 5, 2004, the State Court held evidentiary hearings regarding the special master's recommendations. Both Barnes and Kirkland testified at these hearings on the issue of whether Kirkland should be held in contempt for his behavior during the litigation.

Barnes testified that in July 2004, Kirkland had called her and offered her $1,000 to terminate the services of her attorney. To accomplish this, he sent her a letter and instructed her to sign it and send it to her attorney discharging him without explanation. Kirkland also proposed that the litigation be resolved in his favor. To achieve this, Kirkland sent Barnes two pleadings. The first was entitled "Response to Motion for Summary Judgment" in which Barnes (in pro se) asks the State Court to rule in Kirkland's favor on a summary judgment motion he apparently planned to file. The second pleading was entitled "Withdrawal of Request for Discovery and Sanctions" by which Barnes (again appearing in pro se) would have resolved the pending discovery abuse and contempt issues in Kirkland's favor.[13]

Kirkland testified that he was simply trying to settle the litigation and, as a party, it was not improper for him to speak directly to Barnes to try to negotiate a settlement.

4. The State Court's Decisions

On November 8, 2004, the State Court issued its Minute Entry Order. The State Court agreed with the special master that Kirkland had not complied with the discovery rules and assessed a

[13] These documents are not part of the record.

$4,000 sanction against Kirkland. The order also states that after an evidentiary hearing, and after consideration of the evidence, witness credibility, legal memoranda, the State Court's file and relevant law, the State Court determined that Kirkland had attempted to deceive both Barnes and the court by sending the above-described pleadings to Barnes with the intention that she file them with the court. The State Court rejected Kirkland's claim that he was simply trying to settle the litigation and rejected Kirkland's claim that these were settlement documents. The State Court found Kirkland in contempt and, based on the seriousness of his actions, sanctioned him by striking his answer and entering his default.

In January 2005, the State Court held an evidentiary hearing on the issue of damages at which Kirkland and Barnes again testified.[14] On February 10, 2005, the State Court issued its Minute Entry Order on damages. The order states that the allegations in paragraphs 8 through 42 of the complaint are "unrefuted by the striking of the answer" and these unrefuted facts are "taken to be proven." The order also states that the State Court "credits and adopts" Kirkland's admissions to the Arizona State Bar as to three separate instances in which Kirkland filed claims with the Maricopa County Treasurer for disbursement of excess proceeds as an assignee of, or on behalf of, persons who did not have a legal interest in the surplus funds and in which he did not give notice as required by A.R.S.

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[14] The record does not include the full transcript of this hearing. Nevertheless, it is apparent that even though liability was not an issue, there was testimony and argument regarding the facts supporting liability.

§ 33-812(D).[15] The order awards treble damages and reasonable attorneys' fees.

On May 26, 2005, the State Court entered judgment (the "Judgment") which states in pertinent part:

> Plaintiff having presented proof in support of her claim and the record having been reviewed and the proof having been considered, and the defendant having presented evidence, argument and cross-examining witnesses [sic], the court finds . . . that evidence has been presented and received in support of the allegations of plaintiff's complaint. The evidence substantiates this judgment. The allegations of plaintiff's complaint are true and are sustained by the evidence. All issues of law and fact material to this judgment are resolved in favor of plaintiff.

Appellee's Appendix, at 14-16 (emphasis added).

The Judgment awarded Barnes compensatory damages of $19,201.45, treble damages of $38,402.90, $3,000 in sanctions for discovery abuses, and $35,000 in attorneys' fees for a total of $95,604.35.

5. The Judgment is Affirmed on Appeal

Kirkland appealed the Judgment. On September 7, 2006, the appellate court issued its unpublished memorandum decision affirming the Judgment. The appellate court's memorandum decision states that the State Court had made factual findings and applied the law correctly in imposing an appropriate sanction. The appellate court noted that the Judgment was based on an express factual finding that Kirkland had attempted to deceive both Barnes and the State Court and agreed that this was appropriately defined as "contempt" under applicable Arizona law.

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[15] These State Bar documents are not part of the record. The November 2004 Minute Entry Order states that Kirkland, a former licensed attorney, had been suspended by the Arizona State Bar.

The appellate court also found that striking Kirkland's answer was an appropriate sanction for his conduct and rejected Kirkland's argument that Barnes had no viable claim as a matter of law. The appellate court stated:

> [A]n ultimate sanction like this one is appropriate where an express finding has been made, after an evidentiary hearing, that a party has intentionally obstructed the litigation. . . . The sanction in this case was imposed after a hearing and was based upon findings of Kirkland's personal fault.

Appellee's Appendix, at 142-143 (internal citations omitted).

The appellate court noted that because it affirmed the sanction of default, it did not need to consider Kirkland's arguments disputing the merits of Barnes's case. In support, it cited Postal Benefit Ins. Co. v. Johnson, 165 P.2d 173, 178 (Ariz. 1946) (default constitutes judicial admission of well-pleaded facts) and Lloyd v. State Farm Mut. Auto Ins. Co., 860 P.2d 1300, 1304 (Ariz. Ct. App. 1992) (effective default admits liability and precludes defense). The appellate court awarded Barnes her attorneys' fees on appeal as permitted under Arizona's RICO statute.

C. Rulings by the Bankruptcy Court

1. The First Summary Judgment Motion

When the State Court litigation was completed, Barnes filed her first motion for summary judgment in her § 523 action in the bankruptcy court. She argued that summary judgment was appropriate because the Judgment was entitled to issue-preclusive effect in the § 523 action. Kirkland opposed the motion, arguing that the Judgment was not entitled to preclusive effect under applicable Arizona law because, in a default judgment context,

the fraud issues had not been "actually litigated."[16] Kirkland pointed out that there was no Arizona precedent for the proposition that, under certain circumstances, a default judgment was entitled to issue-preclusive effect.

On May 25, 2007, the bankruptcy court heard argument and then granted summary judgment. The bankruptcy court articulated the legal and factual basis for its decision on the record. First, the court analyzed the issue preclusion argument and, citing Kelly v. Okoye (In re Kelly), 182 B.R. 255 (9th Cir. BAP 1995), stated that the party seeking to assert issue-preclusion has the burden of proving all requisite elements by introducing a sufficient record to reveal the controlling facts and the exact issues litigated in the prior action. In re Kelly, 182 B.R. at 258. Further, the court articulated the requirements for issue-preclusion under controlling Arizona law: (1) the issue is actually litigated; (2) there is a full and fair opportunity to litigate; (3) resolution of the issue is essential to the decision; (4) there is a valid and final judgment on the merits; and (5) there is a common identity of the parties. Aldabbagh v.

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[16] Kirkland also repeated his arguments on the merits: Valley-Wide, not Kirkland, had made the representations, Barnes had not relied on any statements of Kirkland, there could be no reliance in any event because any statements were privileged because they had been made in the context of litigation, and any statements were expressions of opinion, not fact. He also contended that the RICO cause of action could not be proven because of the same litigation privilege, Barnes had not sought relief from the state court order distributing the Excess Proceeds and Kirkland had not personally benefitted from the distribution of the Excess Proceeds because they went to Valley-Wide.

Arizona Dept. of Liquor Licenses and Control, 783 P.2d 1207 (Ariz. Ct. App. 1989).

Second, the court acknowledged the Arizona authority indicating that a judgment entered by default is not given issue-preclusive effect because none of the issues are "actually litigated." Circle K Corp. v. Indus. Comm'n of Arizona, 880 P.2d 642, 645 (Ariz. Ct. App. 1994) (citing Chaney Bldg. Co. v. City of Tucson, 716 P.2d 28 (Ariz. 1986) (en banc)).[17] However, the court reasoned that there is a distinction between a "pure" default entered after a failure to respond or appear, and the default judgment in this case where Kirkland had a full and fair opportunity to litigate, had actively participated in the litigation for years, and had his answer stricken as a sanction for his contemptuous behavior and discovery violations.

Citing dicta in Stephens v. Bigelow (In re Bigelow), 271 B.R. 178 (9th Cir. BAP 2001), the court also concluded that use of issue preclusion in a default judgment context was not necessarily foreclosed because there is room in state law for including certain federal common law principles. Specifically, the Washington law applied in Bigelow, like the Arizona law, generally does not give preclusive effect to default judgments.

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[17] Because there was no controlling Arizona precedent dealing with whether a default judgment entered as a discovery sanction might satisfy the actually litigated element of issue preclusion, the bankruptcy court could have certified that question to the Arizona Supreme Court under A.R.S. § 12-1861. See Krohn v. Sweetheart Properties, Ltd., 52 P.3d 774 (Ariz. 2002) (en banc). Nevertheless, certification is not necessary when, as here, the proper interpretation under state law is not really in doubt and when no material policy considerations are implicated.

Nonetheless, Bigelow noted that federal courts have allowed preclusion where there is full and fair opportunity to participate, there is active participation, and a default is entered when defendant willfully abuses the dignity of the court and causes the court to strike his answer and enter default. Id., at 185, fn. 9.

The bankruptcy court also relied extensively on F.D.I.C. v. Daily (In re Daily), 47 F.3d 365 (9th Cir. 1995) which found that actual litigation was deemed to have occurred and gave preclusive effect to a default judgment entered as a sanction for discovery abuses on facts similar to those in this case.

Third, the court analyzed the requirements of § 523(a)(6). For the relevant definitions of "willful and malicious" the court referred to Kawaauhau v. Geiger, 523 U.S. 57 (1998); Carrillo v. Su (In re Su), 290 F.3d 1140 (9th Cir. 2002); and Petralia v. Jercich (In re Jercich), 238 F.3d 1202 (9th Cir. 2001).

The bankruptcy court noted that the State Court had held evidentiary hearings, after which it found that Kirkland had intentionally obstructed the progress of the litigation. This finding had been affirmed by the appellate court. The bankruptcy court also noted that the State Court had specifically stated that the facts alleged in paragraphs 8 through 42 of the complaint were found to be established, and the merits of the RICO cause of action had been addressed by the State Court because it had reviewed, credited and adopted Kirkland's admissions to the Arizona State Bar.

Based on these factors, the bankruptcy court concluded that willful and malicious conduct required for liability under

§ 523(a)(6) had been established. First, Kirkland had willfully failed to give adequate notice for the express purpose of obtaining the Excess Proceeds. Thus, Kirkland's conduct satisfied the test for a willful injury stated in Geiger. Second, the act of diverting the Excess Proceeds was a wrongful act, it was done intentionally, it necessarily caused injury, and it was done without just cause or excuse. Thus, Kirkland's conduct also satisfied the test for a malicious injury stated in Jercich.

2. The Second Summary Judgment Motion

In March 2008, Barnes filed a second motion for summary judgment to establish that Kirkland's nondischargeable debt was a community claim because there had been a community benefit from Kirkland's tortious activities. Kirkland opposed this motion, arguing, inter alia, that because the Excess Proceeds had gone to Valley-Wide (which he claimed not to own), there was no support for a finding of a community benefit.

Barnes argued that under Arizona law, a marital community may be liable for the intentional torts of one spouse if the tort was done for the benefit of the community regardless of whether the community in fact received any benefit. Barnes cited Taylor Freezer Sales of Arizona, Inc. v. Oliphant (In re Oliphant), 221 B.R. 506, 509 (Bankr. D. Ariz. 1998) (citing In re LeSueur, 53 B.R. 414, 416 (Bankr. D. Ariz. 1985) and Selby v. Savard, 655 P.2d 342 (Ariz. 1982)).

To establish a community benefit, Barnes presented deposition testimony of Lopez stating that the community earnings were primarily generated by Kirkland's law practice. Barnes also

offered copies of checks ostensibly showing Valley-Wide's disbursements to Kirkland from the Excess Proceeds and other foreclosure sale proceeds Kirkland had obtained through Valley-Wide.

The bankruptcy court granted summary judgment in Barnes's favor on this issue.[18]

3. The Bankruptcy Court Judgment

In May 2008, the bankruptcy court entered its judgment. The judgment states that the Judgment is a nondischargeable marital community obligation of Kirkland and Lopez which may be satisfied from any property and/or assets of their marital community as well as any separate property of Kirkland. The judgment also states that the Judgment is dischargeable as to Lopez individually.

Kirkland filed a timely notice of appeal.

II. JURISDICTION

The bankruptcy court had jurisdiction under 28 U.S.C. §§ 1334(a) and 28 U.S.C. § 157(b)(2)(I). We have jurisdiction under 28 U.S.C. § 158.

III. ISSUES

1. In granting summary judgment, did the bankruptcy court err in finding that the Judgment was entitled to issue-preclusive effect?

[18] Neither the transcript nor the court's order on this motion is part of the record.

2. In granting summary judgment, did the bankruptcy court err in ruling that Kirkland and Lopez's marital community property was liable for Kirkland's nondischargeable debt?

IV. STANDARD OF REVIEW

The bankruptcy court's grant or denial of a motion for summary judgment is reviewed de novo. Margulis v. Ryan, 140 F.3d 850, 852 (9th Cir. 1998). Its findings of fact are reviewed for clear error and its conclusions of law are reviewed de novo. Einstein/Noah Bagel Corp. v. Smith (In re BCE West, L.P.), 319 F.3d 1166, 1170 (9th Cir. 2003). Mixed questions of law and fact are reviewed de novo. Carrillo v. Su (In re Su), 290 F.3d 1140, 1142 (9th Cir. 2002). Whether issue preclusion is available is a mixed question of law and fact. Stephens v. Bigelow (In re Bigelow), 271 B.R. 178, 183 (9th Cir. BAP 2001). If issue preclusion is available, the decision to apply it is reviewed for abuse of discretion. Parklane Hosiery Co., Inc. v. Shore, 439 U.S. 322, 331 (1979).

A bankruptcy court abuses its discretion if its decision is based on an erroneous view of the law or on clearly erroneous factual findings. Highland Fed. Bank v. Maynard (In re Maynard), 264 B.R. 209, 213 (9th Cir. BAP 2001) (citation omitted). The panel will not reverse for abuse of discretion unless it has a definite and firm conviction that the bankruptcy court committed a clear error of judgment in the conclusion it reached. S.E.C. v. Coldicutt, 258 F.3d 939, 941 (9th Cir. 2001) (citation omitted).

V. DISCUSSION

A. Standard for Summary Judgment

Summary judgment is proper when the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material facts and that the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c), applicable in bankruptcy court by Fed. R. Bankr. P. 7056. An issue is "genuine" only if there is an evidentiary basis on which a reasonable fact finder could find for the nonmoving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). A dispute is "material" only if it could affect the outcome of the suit under governing law. Id. At the summary judgment stage, the court does not weigh the evidence and determine the truth of the matter, but determines whether there is a genuine issue for trial. Id. at 249.

B. Standard for Issue Preclusion

The doctrine of issue preclusion prohibits relitigation of issues that have been adjudicated in a prior action. Lopez v Emergency Serv. Restoration, Inc. (In re Lopez), 367 B.R. 99, 104 (9th Cir. BAP 2007). The party asserting issue preclusion bears the burden of proof as to all elements and must introduce a sufficient record to reveal the controlling facts and the exact issues litigated. Kelly v. Okoye (In re Kelly), 182 B.R. 255, 258 (9th Cir. BAP 1995).

The purpose of issue preclusion is to protect parties from multiple lawsuits, to prevent the possibility of inconsistent decisions, and to conserve judicial resources. Montana v. U.S., 440 U.S. 147, 153 (1979).

Issue preclusion applies in nondischargeability litigation. Grogan v. Garner, 498 U.S. 279, 284-285 (1991).[19] Under the federal full faith and credit statute, a federal court must give a state court judgment the same preclusive effect that another court of that state would give the judgment. 28 U.S.C. § 1738; Far Out Prods., Inc. v. Oskar, 247 F.3d 986, 993 (9th Cir. 2001). Accordingly, Arizona law on issue preclusion applies here. Gayden v. Nourbakhsh (In re Nourbakhsh), 67 F.3d 798, 800 (9th Cir. 1995) (citing Marrese v. Am. Acad. of Orthopaedic Surgeons, 470 U.S. 373, 380 (1985)).

Arizona's approach follows the approach taken in the Restatement (Second) of Judgments § 27. Chaney Bldg Co. v. City of Tucson, 716 P.2d 28, 30 (Ariz. 1986) (en banc).

The Restatement (Second) of Judgments § 27 provides:

> When 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, the determination is conclusive in a subsequent action between the parties, whether on the same or a different claim.

Id.

Chaney stated "issue preclusion is applicable when the issue or fact to be litigated was actually litigated in a previous suit, a final judgment was entered, and the party against whom the doctrine is to be invoked had a full opportunity to litigate the matter and actually did litigate it, provided such issue or fact was essential to the prior judgment." Chaney, 716 P.2d at 30.

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[19] The preferred terminology is "issue preclusion" rather than "collateral estoppel" and "claim preclusion" rather than "res judicata." Syverson v. Int'l Bus. Machs. Corp., 472 F.3d 1072, 1078 n. 8 (9th Cir. 2007) (citations omitted).

Even when the threshold requirements for issue preclusion are met, its application may not be appropriate when the policies of judicial economy and avoidance of inconsistent results are outweighed by other substantive policies:

> These situations are quite limited and their applicability can only be determined on the facts and circumstances of the individual case. The inability to appeal the first judgment, changes in legal context, inequity, differences in the quality or extensiveness of procedures followed in (or in the jurisdiction of) the respective courts, differences in burdens of proof, and lack of an opportunity or incentive to have obtained a full and fair adjudication in the initial action may militate against issue preclusion.

Klein, et al, Principles of Preclusion and Estoppel in Bankruptcy Cases, 79 Am. Bankr. L. J. 839, 855 (2005).

C. Issue Preclusion is Appropriate

There is no question that the same parties (Kirkland and Barnes) are involved here as were involved in the State Court litigation. There is also no question that the Judgment is final.

It is also apparent from the record that Kirkland had a full and fair opportunity to litigate in the State Court. Over the course of several years, he answered the complaint, he filed various substantive motions, and he engaged in the discovery process (albeit not cooperatively or productively). He apparently took the deposition of Barnes, and eventually (at least partially) produced documents. He also testified at evidentiary hearings, and he appealed the Judgment.

The State Court struck his answer after making specific findings as to his bad faith conduct in attempting to deceive the court and Barnes. The State Court also reviewed evidence regarding the merits of the action and specifically noted that

the elements of the RICO cause of action had been established by Kirkland's admissions to the Arizona State Bar.[20]

Because none of the policy reasons that might weigh against preclusion are present, the only real questions are whether the Judgment satisfies the actually litigated requirement of the Arizona formulation of issue preclusion, and if it does, whether the issues deemed litigated or necessarily decided in the State Court are the same as those required to establish that the debt to Barnes is nondischargeable under § 523(a)(6).

1. The Test for "Actually Litigated"

Comment d to § 27 of the Restatement (Second) of Judgments provides that:

> When an issue is properly raised, by the pleadings or otherwise, and is submitted for determination, and is determined, the issue is actually litigated within the meaning of this section. . . . A determination may be based on a failure of pleading or proof as well as on the sustaining of the burden of proof.

Id.

Comment e to § 27 states that none of the issues are actually litigated in a default judgment but acknowledges that even if an issue is not litigated, the party's reasons for not litigating in the prior action may be such that preclusion would be appropriate. Thus, because Arizona follows the Restatement (Second), inquiry into a party's reasons for not litigating is appropriate.

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[20] The § 523(a)(6) action was pending at the time the State Court made its rulings. Kirkland cannot claim to be surprised that the Judgment might be used to establish Barnes's case in the bankruptcy court.

2. The Issues Were "Actually Litigated"

While Chaney and the Restatement (Second) of Judgments § 27 generally state that a default judgment does not constitute actual litigation of any issues, there is ample authority for reaching the conclusion that a default judgment may meet the actual litigation requirement on certain facts.[21]

First, there is little practical difference between state law and federal law on the analysis of whether an issue has been actually litigated. See Nortman v. Smith (In re Smith), 362 B.R. 438, 442, fn. 1 (Bankr. D. Ariz. 2007) (acknowledging there is no real difference between Oregon law and federal law on this aspect of issue preclusion, giving preclusive effect to default judgment); Ludtke v. Hodges (In re Hodges), 271 B.R. 347, 351-352 (Bankr. N.D. Iowa 2000) (under Iowa law, default judgment entered as discovery sanction given issue-preclusive effect even though Iowa law would ordinarily not give such effect to default judgment).

As the court pointed out in Smith, the cases addressing whether an issue was actually litigated are on a continuum and

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[21] The parties and the bankruptcy court accepted the proposition that a default judgment is not generally entitled to preclusive effect. There appears to be at least some contrary authority in Arizona. In Collister v. Inter-State Fid. Bldg. & Loan Ass'n, 38 P.2d 626 (1934), the Arizona Supreme Court held that a default judgment in favor of a lender against its borrower was entitled to preclusive effect on the issue of usury in the borrower's later action against the lender. It reasoned that the usury issue arose out of the same transaction and the default judgment necessarily required a consideration of the applicable interest rate in determining how much was owed. The Restatement approach may differ. See Restatement (Second) 27, cmt e (issue not actually litigated if might have been affirmative defense but not raised).

generally turn on the degree of participation in the prior litigation. In re Smith, 362 B.R. at 442. Kirkland's active participation in every step of the litigation in the State Court clearly puts him at one end of this spectrum. His participation was such that the issues appear to have been "actually litigated" in every sense of that phrase. The State Court held evidentiary hearings in which Kirkland participated, and it concluded in the Judgment "that evidence has been presented and received in support of the allegations of the plaintiff's complaint. The evidence substantiates this [J]udgment. The allegations of plaintiff's complaint are true and are sustained by the evidence." This language comports with Restatement (Second) § 27: it shows that the relevant issues of fact were "actually litigated and determined" by the State Court.

Second, on facts substantially similar to the facts of this case, employing federal common law, the Ninth Circuit has held that the actual litigation requirement may be satisfied by certain conduct. F.D.I.C. v. Daily (In re Daily), 47 F.3d 365 (9th Cir. 1995).

In Daily, the F.D.I.C. filed a nondischargeability action against debtor and then proceeded to litigate its RICO action in district court. Id. at 367. Debtor's answer was stricken for discovery abuses and the court entered a default judgment in favor of the F.D.I.C. for treble damages. Id. at 367. The F.D.I.C. then returned to bankruptcy court and sought summary judgment on the basis of issue preclusion. In affirming the bankruptcy court, the Ninth Circuit noted that as an initial matter, the debtor had actively participated and had not simply

decided not to appear after determining that the burden of litigating outweighed any benefits. On these facts, the Ninth Circuit concluded:

> A party who deliberately precludes resolution of factual issues through normal adjudicative procedures may be bound, in subsequent, related proceedings involving the same parties and issues, by a prior judicial determination reached without completion of the usual process of adjudication. In such a case the 'actual litigation' requirement may be satisfied by substantial participation in an adversary contest in which the party is afforded a reasonable opportunity to defend himself on the merits but chooses not to do so.

In re Daily, 47 F.3d at 368 (emphasis added).

In Daily, the Ninth Circuit pointed out that none of the reasons that might weigh in favor of a court exercising its discretion to deny the use of issue preclusion were present - the RICO action did not involve a small amount of money, and it was not brought in a forum where the cost of litigating outweighed the burden of a default judgment. In fact, the debtor had had his day in court and application of the preclusion doctrine served its central purposes of protecting the prevailing party from the expense and vexation of multiple lawsuits, of conserving judicial resources, and of fostering reliance on judicial action by minimizing the possibility of inconsistent decisions. By contrast, denying preclusive effect would permit debtor to further delay and perhaps avoid entirely payment of a debt by deliberate abuse of the judicial process. Id. at 368.

The Eleventh Circuit followed this same approach in Bush v. Balfour Beatty Bahamas, Ltd. (In re Bush), 62 F.3d 1319 (11th Cir. 1995) (applying federal law in a nondischargeability action, judgment entered as a discovery sanction given preclusive effect

because it satisfied the actually litigated requirement). The Third, Fourth and Fifth Circuits have also followed this approach. See Wolstein v. Docteroff (In re Docteroff), 133 F.3d 210 (3rd Cir. 1997) (applying federal law, giving preclusive effect to judgment entered as sanction for bad faith conduct in discovery); Pahlavi v. Ansari (In re Ansari), 113 F.3d 17 (4th Cir. 1997), cert. denied, 522 U.S. 914 (1997) (applying Virginia law, default judgment entered as discovery sanction given preclusive effect in § 523(a)(4) action, award of punitive damages indicated factual issues were necessary part of judgment); Gober v. Terra + Corp. (In re Gober), 100 F.3d 1195 (5th Cir. 1996)(applying Texas law, default judgment entered as sanction given preclusive effect, state court's award of punitive damages and explicit findings indicated determination of appropriate mental state). See also McCart v. Jordana (In re Jordana), 232 B.R. 469 (10th Cir. BAP 1999) (applying federal common law, finding judgment entered as sanction for abuse of discovery process entitled to preclusive effect); Herbstein v. Bruetman, 266 B.R. 676 (N.D. Ill. 2001) (applying federal common law, finding judgment entered as sanction for failure to comply with court order entitled to preclusive effect). But see, Sartin v. Macik, 535 F.3d 284 (4th Cir. 2008) (applying test it believed North Carolina Supreme Court would, court refused to give preclusive effect to judgment entered as discovery sanction; dissent argued that policy of Restatement (Second) § 27 supported a contrary result).

Third, the Restatement (Second) § 27, acknowledges that the reasons for not litigating may be such that preclusion would be

appropriate. Restatement (Second) § 27, cmt e. Certainly, conduct that is dilatory, obstructive, evasive or contemptuous of the court and the judicial process supports use of preclusion - and Kirkland's conduct clearly falls within this description.

In light of the above authority, under the Arizona law of issue preclusion (or the federal common law of issue preclusion), the Judgment satisfied the actual litigation requirement for issue preclusion. On this record, Kirkland had a full and fair opportunity to litigate, and actually did litigate. It was only after evidentiary hearings at which he testified that the State Court found that his deliberate, contemptuous conduct - a blatant attempt to deceive both his adversary and the court - was grounds to strike his answer and enter his default. The State Court also reviewed evidence, heard testimony and argument on the merits of the overlapping fraud and RICO causes of action. The factual and legal issues raised by the complaint were thus actually litigated for purposes of application of issue preclusion.

3. The Test for "Necessarily Decided"

To be entitled to preclusive effect, an issue or fact must also be "necessarily decided." Chaney, 716 P.2d at 30 (preclusion for issue or fact "essential to prior judgment"); Collister v. Inter-State Fid. Bldg. & Loan Ass'n, 38 P.2d 626 (Ariz. 1934) (usury issue "necessarily decided" in context of calculating default judgment on promissory note). As phrased in the Restatement (Second) § 27, an issue of fact or law must be "essential to the judgment." Restatement (Second) § 27.

In Harmon v. Kobrin (In re Harmon), 250 F.3d 1240 (9th Cir. 2001), the Ninth Circuit discussed the separate requirements that

a fact or issue be actually litigated and necessarily decided. Applying California law regarding the preclusive effect to be accorded a default judgment in the nondischargeability context, the court stated that an express finding - as opposed to silence - was required to support a finding of actual litigation unless the issue or fact was necessarily decided. Id. at 1248; see also Lopez v. Emergency Serv. Restoration, Inc. (In re Lopez), 367 B.R. 99 (9th Cir. BAP 2007) (applying California law, finding of willful and malicious conduct was necessary prerequisite to state court's award of attorneys' fees); Cal-Micro, Inc. v. Cantrell (In re Cantrell), 329 F.3d 1119 (9th Cir. 2003) (award of punitive damages in default judgment established state court had found fraud).

4. Key Issues of Fact and Law were "Necessarily Decided"

The State Court complaint was based on common law fraud and a pattern of unlawful activity constituting a scheme to defraud under A.R.S. § 13-2310. To prevail under Arizona law, Barnes had to establish the requisite RICO conduct by a preponderance of the evidence. A.R.S. § 13-2314.04(G). The fraudulent conduct had to be established by "sufficient evidence." Echols v. Beauty Built Homes, Inc., 647 P.2d 629, 631 (Ariz. 1982) (listing elements of fraud cause of action, stating elements to be supported by sufficient, not vague, evidence).

In its February 2005 Minute Order, the State Court made express findings that the RICO cause of action had been established by Kirkland's admissions to the Arizona State Bar. As a result, the State Court awarded damages and fees under

A.R.S. § 13-2314(A). Under the plain language of § 13-2314(A), the State Court could only have awarded these damages if it found Barnes was a person "injured by a pattern of racketeering activity" (i.e., fraud). See Sullivan v. Metro Prods., Inc., 724 P.2d 1242, 1247 (1986) (a successful plaintiff is entitled to an award of treble damages, costs of suit and reasonable attorney's fees).

In further support of its conclusion, the State Court made express findings that Barnes had "presented proof in support of her claim," that Kirkland had also presented evidence and had had an opportunity to cross-examine witnesses. The Judgment also states that the allegations of the complaint "are sustained by the evidence" and the "evidence substantiates this [J]udgment." Finally, the Judgment concludes that "all issues of law and fact material to this [J]udgment are resolved in favor of plaintiff." Accordingly, the State Court expressly found that the elements of the RICO cause of action had been established. In doing so, it also necessarily decided that the fraud cause of action premised on the same conduct had been established.

5. Application of Issue Preclusion to § 523(a)(6) Action

The complaint in this adversary proceeding stated a claim for relief under § 523(a)(6). To prevail in a § 523(a)(6) action, a plaintiff must prove, by a preponderance of the evidence, both a willful and a malicious injury. A willful injury is defined as a deliberate or intentional injury, not merely a deliberate or intentional act that leads to injury. Geiger, 523 U.S. at 61. A malicious injury is defined as a

wrongful act, done intentionally, which necessarily causes injury and is done without just cause or excuse. In re Jercich, 238 F.3d at 1209.

The Judgment established that Kirkland had willfully failed to give adequate notice for the express purpose of obtaining the Excess Proceeds. Thus, Kirkland's conduct satisfies the willful injury test as stated in Geiger. Second, the Judgment established that Kirkland's act of diverting the Excess Proceeds was a wrongful act, that it was done intentionally, that it necessarily caused injury, and that it was done without just cause or excuse. As such, Kirkland's conduct also satisfied the malicious injury test as stated in Jercich.

Because there was no genuine issue as to any material fact, summary judgment was appropriate. As a result, we cannot find that the bankruptcy court erred in granting summary judgment and entering the final judgment finding the debt nondischargeable.

D. Marital Property Issue

Kirkland also appeals the bankruptcy court's grant of summary judgment and entry of the final judgment which held that the Judgment was a nondischargeable marital community obligation of Kirkland and Lopez. On the record before us, we cannot find that the bankruptcy court erred.

Community property is not liable for a debt of one spouse or another unless it is shown to be a "community claim." In re Maready, 122 B.R. 378, 381 (9th Cir. BAP 1991). Whether a claim is a "community claim" is purely a question of state law. F.D.I.C. v. Soderling (In re Soderling), 998 F.2d 730, 733 (9th Cir. 1993); Arcadia Farms Ltd. v. Rollinson (In re Rollinson),

322 B.R. 879, 882 (Bankr. D. Ariz. 2005) (citations omitted). In Arizona, "the community is not liable for one spouse's malicious acts unless it is specifically shown that the other spouse consented to the act or that the community benefitted from it." Selby v. Savard, 655 P.2d 342, 349 (Ariz. 1982) (citation omitted); Taylor Freezer Sales of Arizona, Inc. v. Oliphant (In re Oliphant), 221 B.R. 506, 509 (Bankr. D. Ariz. 1998). In Arizona, a direct benefit can be established where funds obtained by the bad acts of one spouse were used to pay family expenses. See In re Rollinson, 322 B.R. at 882 (court found "direct community purpose or benefit," resulting in a "community obligation" where funds embezzled by one spouse were used to pay family expenses).

In her motion for summary judgment, Barnes admitted that she did not have sufficient evidence to prove that Lopez consented to Kirkland's willful and malicious conduct. Thus, the claim cannot be a community claim under the theory that Lopez consented to Kirkland's bad acts.

Barnes did, however, provide evidence that Kirkland's willful and malicious conduct provided an actual benefit to the community. Specifically, Barnes provided copies of Lopez's deposition testimony, wherein she acknowledged that the household expenses of Lopez and Kirkland during the time period in question were paid, in large part, from Kirkland's earnings. Appellee's Appendix at pp. 212-217. Lopez testified that during this period, the most she made from her own employment was "around $800." Id. at 212:15-18. She further testified that their monthly expenses during this period were more than $800 each

month and that the rest of the money to pay the expenses came from Kirkland's income. Id. at 212:20-213:25; 214:17-21; 215:1-216:15; 217:1-4. Barnes also provided copies of checks to show that the Excess Proceeds received by Valley-Wide were, in part, distributed directly to Kirkland. Id. at 225-264. The record before this panel is devoid of any evidence offered by Kirkland to refute the evidence presented by Barnes.

Barnes provided unrefuted evidence that Kirkland received at least a portion of the Excess Proceeds and that those funds were used to pay the household expenses of Kirkland and Lopez. Thus, under Arizona law, Kirkland's willful and malicious acts actually benefitted the community. Because there was no genuine issue as to any material fact, summary judgment was appropriate. As a result, we cannot find that the bankruptcy court erred in granting summary judgment and entering the final judgment finding that there was no genuine issue of material fact that the debt was a community obligation.

VI. CONCLUSION

The bankruptcy court was correct in concluding that Kirkland had not presented facts or documentation showing a genuine dispute of material fact in opposition to either of the motions for summary judgment. The bankruptcy court was correct in concluding that issue preclusion was available and acted within its discretion in ruling that under Arizona law, the Judgment was entitled to issue-preclusive effect in the § 523(a)(6) action. The issues supporting the Judgment were actually litigated and there is no basis upon which to compel relitigation on this

record. Kirkland does not deserve a second bite at the apple when he has been found to have engaged in dilatory and deliberately obstructive conduct. The bankruptcy court also correctly ruled that the marital community of Kirkland and Lopez was liable for the nondischargeable debt of Kirkland. Accordingly, the bankruptcy court's judgment is AFFIRMED.