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

NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT

In re:)	BAP No.	AZ-08-1143-EMoMk
)		
CHARLES KIRKLAND AND)	Bk. Nos.	03-11884
CAROLINA M. LOPEZ,)		03-02493
)		(Substantively Consolidated)
Debtors.)		
)	Adv. No.	03-01086
_____)		
CHARLES KIRKLAND AND)		
CAROLINA M. LOPEZ,)		
)		
Appellants,)		
)		
v.)	MEMORANDUM 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.

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

11 For the reasons set forth below, we AFFIRM.

13 I. FACTS

14 A. The Bankruptcy Case

15 In February 2003, Debtors filed their bankruptcy cases. On
16 December 15, 2003, Barnes filed a complaint under § 523(a)(6).⁴
17 The factual allegations in this complaint are substantially
18 identical to those in the state court complaint described below.
19 Barnes then obtained relief from stay to continue her litigation
20 against Debtors and Valley-Wide Productions L.L.C. ("Valley-
21

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

26 ⁴ Section 523(a)(6) excepts from discharge debts for
27 willful and malicious injury by the debtor to another entity or
28 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).

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

3 **B. The State Court Litigation**

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

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

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

20 ⁷ Arizona's RICO statute is patterned after federal mail
21 fraud law. "It contemplates swindles, Ponzi schemes, confidence
22 games, and similar frauds in which the perpetrator takes
23 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)
24 (distinguishing theft and fraud under A.R.S. § 13-2310(A)).
A.R.S. § 13-2310(A) provides: "Any person who, pursuant to a
25 scheme or artifice to defraud, knowingly obtains any benefit by
26 means of false or fraudulent pretenses, representations, promises
or material omissions is guilty of a class 2 felony." Reliance on
27 the part of any person is not a necessary element of this
offense. A.R.S. § 13-2310(B). A person who sustains reasonably
28 foreseeable injury to his person, business or property by a

(continued...)

1 of approximately \$19,000, plus interest, attorneys' fees and
2 treble damages under A.R.S. § 13-2314.04.⁸

3 1. The Allegations of the Complaint

4 Paragraphs 8 through 42 of the State Court complaint
5 contained the main allegations against Kirkland. The complaint
6 alleged that Barnes had owned a single family residence in
7 Chandler, Arizona (the "Property") subject to a deed of trust in
8 favor of Quality Loan Service (the "Trustee"). In February 2000,
9 the Trustee conducted a foreclosure sale of the Property. The
10 foreclosure sale generated excess proceeds of approximately
11 \$21,000 (the "Excess Proceeds"). In April 2000, Barnes vacated
12 the Property and filed a forwarding address with the U.S. Postal
13 Service. Later in April 2000, the Trustee sent a notice of
14 deposit to all parties who might have an interest in the Excess
15 Proceeds, informing them that the Excess Proceeds had been
16 deposited with the Maricopa County Treasurer. Kirkland obtained
17 an assignment of the Excess Proceeds from the parties Barnes had
18 purchased the Property from seven years earlier (who no longer

19 _____
20 ⁷(...continued)

21 pattern of racketeering activity, may file an action in superior
22 court for the recovery of up to treble damages and the costs of
23 the suit, including reasonable attorney fees. A.R.S. § 23-
24 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).

25 ⁸ Under A.R.S. § 13-2314.04(A), an award of up to treble
26 damages is mandatory upon a finding of injury by racketeering
27 under A.R.S. § 13-2301, et seq. Sullivan v. Metro Prods., Inc.,
724 P.2d 1242 (Ariz. Ct. App. 1986). The treble damages
28 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).

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

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

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

18 The essential allegations of the RICO cause of action were
19 that through the same intentionally deceptive noticing procedure
20 Kirkland had used as to Barnes, Kirkland (or Valley-Wide) had
21 filed claims for excess foreclosure sale proceeds of more than
22 \$1.45 million relating to more than 150 foreclosure sales.¹⁰
23 This pattern constituted engaging in fraudulent schemes and
24 practices as defined in Arizona's RICO statute.

25
26 ⁹ The complaint alleges the required elements of a fraud
27 cause of action under Arizona law. Echols v. Beauty Built Homes,
Inc., 647 P.2d 629, 631 (Ariz. 1982) (listing elements).

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

1 2. Discovery Disputes and Appointment of Special
2 Master

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

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

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

23 ¹¹ The report indicates that the defendants had initially
24 failed to produce documents for the special master's review, then
25 partially produced documents, then claimed not to have kept
26 copies of documents produced to the Arizona attorney general's
27 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.

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

1 3. Evidentiary Hearings in State Court

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

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

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

24 4. The State Court's Decisions

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

28 ¹³ These documents are not part of the record.

1 \$4,000 sanction against Kirkland. The order also states that
2 after an evidentiary hearing, and after consideration of the
3 evidence, witness credibility, legal memoranda, the State Court's
4 file and relevant law, the State Court determined that Kirkland
5 had attempted to deceive both Barnes and the court by sending the
6 above-described pleadings to Barnes with the intention that she
7 file them with the court. The State Court rejected Kirkland's
8 claim that he was simply trying to settle the litigation and
9 rejected Kirkland's claim that these were settlement documents.
10 The State Court found Kirkland in contempt and, based on the
11 seriousness of his actions, sanctioned him by striking his answer
12 and entering his default.

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

26
27 ¹⁴ The record does not include the full transcript of this
28 hearing. Nevertheless, it is apparent that even though liability
was not an issue, there was testimony and argument regarding the
facts supporting liability.

1 § 33-812(D).¹⁵ The order awards treble damages and reasonable
2 attorneys' fees.

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

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

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

16 The Judgment awarded Barnes compensatory damages of
17 \$19,201.45, treble damages of \$38,402.90, \$3,000 in sanctions for
18 discovery abuses, and \$35,000 in attorneys' fees for a total of
19 \$95,604.35.

20 5. The Judgment is Affirmed on Appeal

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

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.

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

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

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

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

21 **C. Rulings by the Bankruptcy Court**

22 1. The First Summary Judgment Motion

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

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

5 On May 25, 2007, the bankruptcy court heard argument and
6 then granted summary judgment. The bankruptcy court articulated
7 the legal and factual basis for its decision on the record.
8 First, the court analyzed the issue preclusion argument and,
9 citing Kelly v. Okoye (In re Kelly), 182 B.R. 255 (9th Cir. BAP
10 1995), stated that the party seeking to assert issue-preclusion
11 has the burden of proving all requisite elements by introducing a
12 sufficient record to reveal the controlling facts and the exact
13 issues litigated in the prior action. In re Kelly, 182 B.R. at
14 258. Further, the court articulated the requirements for issue-
15 preclusion under controlling Arizona law: (1) the issue is
16 actually litigated; (2) there is a full and fair opportunity to
17 litigate; (3) resolution of the issue is essential to the
18 decision; (4) there is a valid and final judgment on the merits;
19 and (5) there is a common identity of the parties. Aldabbagh v.
20

21 _____
22 ¹⁶ Kirkland also repeated his arguments on the merits:
23 Valley-Wide, not Kirkland, had made the representations, Barnes
24 had not relied on any statements of Kirkland, there could be no
25 reliance in any event because any statements were privileged
26 because they had been made in the context of litigation, and any
27 statements were expressions of opinion, not fact. He also
28 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.

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

3 Second, the court acknowledged the Arizona authority
4 indicating that a judgment entered by default is not given issue-
5 preclusive effect because none of the issues are "actually
6 litigated." Circle K Corp. v. Indus. Comm'n of Arizona, 880 P.2d
7 642, 645 (Ariz. Ct. App. 1994) (citing Chaney Bldg. Co. v. City
8 of Tucson, 716 P.2d 28 (Ariz. 1986) (en banc)).¹⁷ However, the
9 court reasoned that there is a distinction between a "pure"
10 default entered after a failure to respond or appear, and the
11 default judgment in this case where Kirkland had a full and fair
12 opportunity to litigate, had actively participated in the
13 litigation for years, and had his answer stricken as a sanction
14 for his contemptuous behavior and discovery violations.

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

23 ¹⁷ Because there was no controlling Arizona precedent
24 dealing with whether a default judgment entered as a discovery
25 sanction might satisfy the actually litigated element of issue
26 preclusion, the bankruptcy court could have certified that
27 question to the Arizona Supreme Court under A.R.S. § 12-1861.
28 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.

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

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

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

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

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

1 § 523(a)(6) had been established. First, Kirkland had willfully
2 failed to give adequate notice for the express purpose of
3 obtaining the Excess Proceeds. Thus, Kirkland's conduct
4 satisfied the test for a willful injury stated in Geiger.
5 Second, the act of diverting the Excess Proceeds was a wrongful
6 act, it was done intentionally, it necessarily caused injury, and
7 it was done without just cause or excuse. Thus, Kirkland's
8 conduct also satisfied the test for a malicious injury stated in
9 Jercich.

10 2. The Second Summary Judgment Motion

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

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

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

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

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

7 3. The Bankruptcy Court Judgment

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

15 Kirkland filed a timely notice of appeal.

16
17 **II. JURISDICTION**

18 The bankruptcy court had jurisdiction under 28 U.S.C.
19 §§ 1334(a) and 28 U.S.C. § 157(b)(2)(I). We have jurisdiction
20 under 28 U.S.C. § 158.

21
22 **III. ISSUES**

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

26
27
28

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

1 **V. DISCUSSION**

2 **A. Standard for Summary Judgment**

3 Summary judgment is proper when the pleadings, the discovery
4 and disclosure materials on file, and any affidavits show that
5 there is no genuine issue as to any material facts and that the
6 movant is entitled to judgment as a matter of law. Fed. R. Civ.
7 P. 56(c), applicable in bankruptcy court by Fed. R. Bankr. P.
8 7056. An issue is "genuine" only if there is an evidentiary
9 basis on which a reasonable fact finder could find for the
10 nonmoving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242,
11 248 (1986). A dispute is "material" only if it could affect the
12 outcome of the suit under governing law. Id. At the summary
13 judgment stage, the court does not weigh the evidence and
14 determine the truth of the matter, but determines whether there
15 is a genuine issue for trial. Id. at 249.

16 **B. Standard for Issue Preclusion**

17 The doctrine of issue preclusion prohibits relitigation of
18 issues that have been adjudicated in a prior action. Lopez v
19 Emergency Serv. Restoration, Inc. (In re Lopez), 367 B.R. 99, 104
20 (9th Cir. BAP 2007). The party asserting issue preclusion bears
21 the burden of proof as to all elements and must introduce a
22 sufficient record to reveal the controlling facts and the exact
23 issues litigated. Kelly v. Okoye (In re Kelly), 182 B.R. 255,
24 258 (9th Cir. BAP 1995).

25 The purpose of issue preclusion is to protect parties from
26 multiple lawsuits, to prevent the possibility of inconsistent
27 decisions, and to conserve judicial resources. Montana v. U.S.,
28 440 U.S. 147, 153 (1979).

1 Issue preclusion applies in nondischargeability litigation.
2 Grogan v. Garner, 498 U.S. 279, 284-285 (1991).¹⁹ Under the
3 federal full faith and credit statute, a federal court must give
4 a state court judgment the same preclusive effect that another
5 court of that state would give the judgment. 28 U.S.C. § 1738;
6 Far Out Prods., Inc. v. Oskar, 247 F.3d 986, 993 (9th Cir. 2001).
7 Accordingly, Arizona law on issue preclusion applies here.
8 Gayden v. Nourbakhsh (In re Nourbakhsh), 67 F.3d 798, 800 (9th
9 Cir. 1995) (citing Marrese v. Am. Acad. of Orthopaedic Surgeons,
10 470 U.S. 373, 380 (1985)).

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

14 The Restatement (Second) of Judgments § 27 provides:

15 When an issue of fact or law is actually litigated and
16 determined by a valid and final judgment, and the
17 determination is essential to the judgment, the
18 determination is conclusive in a subsequent action between
19 the parties, whether on the same or a different claim.

18 Id.

19 Chaney stated "issue preclusion is applicable when the issue
20 or fact to be litigated was actually litigated in a previous
21 suit, a final judgment was entered, and the party against whom
22 the doctrine is to be invoked had a full opportunity to litigate
23 the matter and actually did litigate it, provided such issue or
24 fact was essential to the prior judgment." Chaney, 716 P.2d at
25 30.

26
27 ¹⁹ The preferred terminology is "issue preclusion" rather
28 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).

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

5 These situations are quite limited and their applicability
6 can only be determined on the facts and circumstances of the
7 individual case. The inability to appeal the first judgment,
8 changes in legal context, inequity, differences in the
9 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.

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

12 **C. Issue Preclusion is Appropriate**

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

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

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

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

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

10 1. The Test for "Actually Litigated"

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

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

17 Id.

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

25
26
27 ²⁰ The § 523(a)(6) action was pending at the time the State
28 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.

1 2. The Issues Were "Actually Litigated"

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

7 First, there is little practical difference between state
8 law and federal law on the analysis of whether an issue has been
9 actually litigated. See Nortman v. Smith (In re Smith), 362 B.R.
10 438, 442, fn. 1 (Bankr. D. Ariz. 2007) (acknowledging there is no
11 real difference between Oregon law and federal law on this aspect
12 of issue preclusion, giving preclusive effect to default
13 judgment); Ludtke v. Hodges (In re Hodges), 271 B.R. 347, 351-352
14 (Bankr. N.D. Iowa 2000) (under Iowa law, default judgment entered
15 as discovery sanction given issue-preclusive effect even though
16 Iowa law would ordinarily not give such effect to default
17 judgment).

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

21 ²¹ The parties and the bankruptcy court accepted the
22 proposition that a default judgment is not generally entitled to
23 preclusive effect. There appears to be at least some contrary
24 authority in Arizona. In Collister v. Inter-State Fid. Bldg. &
25 Loan Ass'n, 38 P.2d 626 (1934), the Arizona Supreme Court held
26 that a default judgment in favor of a lender against its borrower
27 was entitled to preclusive effect on the issue of usury in the
28 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).

1 generally turn on the degree of participation in the prior
2 litigation. In re Smith, 362 B.R. at 442. Kirkland's active
3 participation in every step of the litigation in the State Court
4 clearly puts him at one end of this spectrum. His participation
5 was such that the issues appear to have been "actually litigated"
6 in every sense of that phrase. The State Court held evidentiary
7 hearings in which Kirkland participated, and it concluded in the
8 Judgment "that evidence has been presented and received in
9 support of the allegations of the plaintiff's complaint. The
10 evidence substantiates this [J]udgment. The allegations of
11 plaintiff's complaint are true and are sustained by the
12 evidence." This language comports with Restatement (Second)
13 § 27: it shows that the relevant issues of fact were "actually
14 litigated and determined" by the State Court.

15 Second, on facts substantially similar to the facts of this
16 case, employing federal common law, the Ninth Circuit has held
17 that the actual litigation requirement may be satisfied by
18 certain conduct. F.D.I.C. v. Daily (In re Daily), 47 F.3d 365
19 (9th Cir. 1995).

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

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

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

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

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

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

1 because it satisfied the actually litigated requirement). The
2 Third, Fourth and Fifth Circuits have also followed this
3 approach. See Wolstein v. Docteroff (In re Docteroff), 133 F.3d
4 210 (3rd Cir. 1997) (applying federal law, giving preclusive
5 effect to judgment entered as sanction for bad faith conduct in
6 discovery); Pahlavi v. Ansari (In re Ansari), 113 F.3d 17 (4th
7 Cir. 1997), cert. denied, 522 U.S. 914 (1997) (applying Virginia
8 law, default judgment entered as discovery sanction given
9 preclusive effect in § 523(a)(4) action, award of punitive
10 damages indicated factual issues were necessary part of
11 judgment); Gober v. Terra + Corp. (In re Gober), 100 F.3d 1195
12 (5th Cir. 1996) (applying Texas law, default judgment entered as
13 sanction given preclusive effect, state court's award of punitive
14 damages and explicit findings indicated determination of
15 appropriate mental state). See also McCart v. Jordana (In re
16 Jordana), 232 B.R. 469 (10th Cir. BAP 1999) (applying federal
17 common law, finding judgment entered as sanction for abuse of
18 discovery process entitled to preclusive effect); Herbstein v.
19 Bruetman, 266 B.R. 676 (N.D. Ill. 2001) (applying federal common
20 law, finding judgment entered as sanction for failure to comply
21 with court order entitled to preclusive effect). But see, Sartin
22 v. Macik, 535 F.3d 284 (4th Cir. 2008) (applying test it believed
23 North Carolina Supreme Court would, court refused to give
24 preclusive effect to judgment entered as discovery sanction;
25 dissent argued that policy of Restatement (Second) § 27 supported
26 a contrary result).

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

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

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

18 3. The Test for "Necessarily Decided"

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

27 In Harmon v. Kobrin (In re Harmon), 250 F.3d 1240 (9th Cir.
28 2001), the Ninth Circuit discussed the separate requirements that

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

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

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

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

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

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

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

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

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

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

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

17 **D. Marital Property Issue**

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

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

1 322 B.R. 879, 882 (Bankr. D. Ariz. 2005) (citations omitted). In
2 Arizona, "the community is not liable for one spouse's malicious
3 acts unless it is specifically shown that the other spouse
4 consented to the act or that the community benefitted from it."
5 Selby v. Savard, 655 P.2d 342, 349 (Ariz. 1982) (citation
6 omitted); Taylor Freezer Sales of Arizona, Inc. v. Oliphant (In
7 re Oliphant), 221 B.R. 506, 509 (Bankr. D. Ariz. 1998). In
8 Arizona, a direct benefit can be established where funds obtained
9 by the bad acts of one spouse were used to pay family expenses.
10 See In re Rollinson, 322 B.R. at 882 (court found "direct
11 community purpose or benefit," resulting in a "community
12 obligation" where funds embezzled by one spouse were used to pay
13 family expenses).

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

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

1 month and that the rest of the money to pay the expenses came
2 from Kirkland's income. Id. at 212:20-213:25; 214:17-21; 215:1-
3 216:15; 217:1-4. Barnes also provided copies of checks to show
4 that the Excess Proceeds received by Valley-Wide were, in part,
5 distributed directly to Kirkland. Id. at 225-264. The record
6 before this panel is devoid of any evidence offered by Kirkland
7 to refute the evidence presented by Barnes.

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

18 19 **VI. CONCLUSION**

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

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

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