NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL

OF THE NINTH CIRCUIT

In re:	BAP Nos. CC-08-1047-MkSnPa
	CC-08-1054-MkSnPa
DR. MUNIR UWAYDAH,	(Consolidated)
Debtor.	Bk. No. 03-11086
DR. MUNIR UWAYDAH,	Adv. No. 03-01510
Appellant,	
v.	**MEMORANDUM**[1]
GENERAL ELECTRIC MEDICAL SYSTEMS EUROPE, INC.,	
Appellee.	

Argued and Submitted on June 19, 2008
at Pasadena, California

Filed – July 23, 2008

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

Honorable Thomas B. Donovan, Bankruptcy Judge, Presiding

Before: MARKELL, SNYDER[2] and PAPPAS, 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. Paul B. Snyder, U.S. Bankruptcy Judge for the Western District of Washington, sitting by designation.

SUMMARY

Stripped of its voluminous record and many claims and counterclaims, this controversy results from the fraudulent purchase in 2001 of a $1 million radiology scanner by the debtor/appellant, Dr. Munir M. Uwaydah ("Uwaydah"). Uwaydah never paid for the device, and federal courts in Ohio have held that at the time he ordered it, he did not intend to pay for it. This was fraud. But Uwaydah, who denies that he committed fraud, has spent several years attempting to have the debt for the scanner discharged in bankruptcy.

In this appeal, Uwaydah argues that the Ohio court findings should not have preclusive effect in bankruptcy court in California. His reasons include his assertion that the summary judgment that the Ohio federal court entered against him was the result of sanctions that the court had previously imposed on him. In this view, giving the summary judgment preclusive effect would deny him due process.

This panel finds Uwaydah's arguments without merit and AFFIRMS the judgment of the bankruptcy court.

FACTS

In the summer of 2001, Uwaydah ordered a CT radiology scanner, which cost $1,070,000, from the creditor/appellee, General Electric Medical Systems Europe, Inc. ("GEMS"). The purchase was made through his alter ego,[3] Prometheus Health

[3] The alter-ego status was confirmed by the district court in Ohio and upheld on appeal by the Sixth Circuit. One of GEMS's allegations in the Ohio litigation was that Uwaydah and Prometheus were alter egos and that Uwaydah "exercised complete

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Imaging Systems, Inc. ("Prometheus"). Uwaydah asked for the scanner to be delivered to a new radiology clinic operated by a business partner, Al-Banadar International Group ("ABIG") in Saudi Arabia, and he repeatedly assured GEMS that he would pay for it.

The payment terms spelled out in the purchase agreement were as follows: 10% of the price by September 27, 2001, an additional 50% when the scanner was shipped, an additional 30% when it was delivered, and the final 10% when the scanner was installed and accepted.[4]

In support of this purchase and these terms, Prometheus presented to GEMS a letter of credit for "at least $1,000,000" issued by a bank in Saudi Arabia. ABIG, the business partner, was the applicant for the letter of credit, and Prometheus was the beneficiary. Uwaydah told GEMS that the money from the letter of credit would be used to pay for the scanner.

Prometheus paid GEMS the first 10% installment ($107,000) as required on September 27, 2001. That was the last payment that GEMS received from Prometheus or Uwaydah, both of whom repeatedly assured GEMS that the remaining $963,000 would be paid.

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[3](...continued)
and total control over" Prometheus. GEMS also claimed that Prometheus "was simply a shell corporation which was never adequately capitalized." When the district court entered summary judgment in favor of GEMS, it specifically granted the alter ego claims.

[4] The terms were later amended because of delays in shipping the scanner overseas, caused in part by the terrorist attacks of September 11, 2001. Under the revised terms, Uwaydah was to make full payment on delivery, which he did not do.

However, the record from the Ohio litigation shows that at the same time that Uwaydah was telling GEMS that he had not yet received the money from the letter of credit, the money had already been released to Prometheus, and Uwaydah was transferring most of it to a bank account in Lebanon and $50,000 to his personal bank account.

On September 19, 2002, GEMS sued Uwaydah and Prometheus for the unpaid debt in the federal district court for the Northern District of Ohio ("the Ohio court"). (GEMS is a foreign company, based in Paris, so there was diversity jurisdiction.)

Four months later, on January 14, 2003, Uwaydah filed chapter 7 bankruptcy[5] in Los Angeles. He did not inform the Ohio court of his bankruptcy filing until May 16, 2003, four months after he had filed.

Meanwhile, on January 22, 2003, the Ohio court conducted a case management conference, at which the defendants' lawyer was unable to tell the court what had happened to the money released to Prometheus from the letter of credit. As a result, the court's case management plan directed that disclosures under Fed. R. Civ. P. 26 be filed by January 29, 2003, and ordered that they "include disclosure of documents showing transfer and/or location of money released under the letter of credit and disclose the names of all individuals with any knowledge of same."

[5] Unless otherwise indicated, all "Code," chapter and section references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1330, before it was amended by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA"), Pub. L. 109-8, 119 Stat. 23, as the case from which this appeal arises was filed before October 17, 2005, the effective date of most BAPCPA provisions.

A status conference was held on May 15, 2003, but neither Uwaydah nor Prometheus appeared. The court entered an order to show cause why judgment should not be entered against them.

Another case management conference was held on October 24, 2003, at which the court reaffirmed its prior order and warned that "any continued failure to comply with the Court's orders may result in sanctions, up to and including judgment against defendants in this case."[6]

On May 2, 2005, after more than two years of Uwaydah's failure to comply with discovery orders, and twenty months after it had specifically warned him, the Ohio court entered sanctions against Uwaydah, including an order that "Dr. Uwaydah is prohibited from introducing any testimony contrary to the facts set forth by GEMS." (Emphasis in original.) Gen. Elec. Med. Sys. Eur. v. Prometheus et al., ER App. 4, Tab 20 at 2271.

The sanctions order is worth quoting at length:

> Dr. Uwaydah repeatedly abused the discovery process and completely opposed the cooperative spirit intended by the Rules. He has repeatedly failed to adequately respond to GEMS' requests and this Court's orders, which, in itself, warrants sanctions. Most recently, Dr. Uwaydah has continued his delay tactics by avoiding his properly noticed deposition; and, thereafter, he failed to make a good faith effort to reschedule the deposition or otherwise make himself available. Dr. Uwaydah's counsel's arguments in response to GEMS' motion, especially in light of this case's history, and this Court's repeated willingness to allow counsel an opportunity to convince his client to cooperate, are unavailing. This Court has patiently accommodated Dr. Uwaydah's interchangeable excuses for his complete lack of cooperation. Dr. Uwaydah has shown

[6] Uwaydah's bankruptcy filing, of course, imposed an automatic stay on all further proceedings. But on July 17, 2003, the parties agreed to lift the automatic stay so that the Ohio litigation could go forward.

> this Court his lack of respect for the judicial process and has demonstrated he will not remedy his actions in the future.

Id. at 2276-77 (emphasis in original).

On August 5, 2005, three months after sanctioning Uwaydah, the Ohio court entered summary judgment against him personally for fraud and conversion. Docket no. 91. The Sixth Circuit affirmed on November 22, 2006, and the United States Supreme Court declined to review the case. Gen. Elec. Med. Sys. Eur. v. Prometheus Health Imaging et al. ("GEMS v. Prometheus"), 205 Fed. Appx. 418 (6th Cir. 2006), cert. denied,127 S.Ct. 2951 (2007). This was a final judgment.

In short, the federal courts in Ohio found and affirmed that at the time that Uwaydah bought the CT Scanner, promised to pay $1,070,000 for it, and ordered it shipped to Saudi Arabia, he had no present intention of paying for it. He had therefore committed fraud.

The Sixth Circuit reviewed the record and agreed with GEMS's account of what had occurred: "GEMS cites the fact that Uwaydah made repeated assurances that Prometheus would pay for the scanner if GEMS shipped it to Saudi Arabia, but then immediately diverted all funds away from Prometheus right after the funds posted to the account, thus rendering Prometheus insolvent." GEMS v. Prometheus, 205 Fed. Appx. at 420.

The Sixth Circuit dismissed Uwaydah's argument that he did not have to pay for the scanner because GEMS had breached the contract, and he was therefore free to use the money from the letter of credit for other purposes. The court found that the breach of contract that Uwaydah complained of was not material,

and, further, that his assertions of breach of contract were "belied by the facts." Id. at 421. The court concluded, "[A] valid inference can be drawn that Uwaydah had no intention of paying for the scanner at any point." Id.

GEMS, the creditor, then sought to apply the Ohio fraud determination to Uwaydah's bankruptcy in the Central District of California and to have Uwaydah's debt declared nondischargeable under § 523 (a)(2)(A).

On February 7, 2008, the bankruptcy court held that the Ohio court's finding of fraud had preclusive effect in Uwaydah's bankruptcy case. It upheld all of GEMS's claims and denied Uwaydah's motion for summary judgment. As a result, Uwaydah's debt to GEMS was fraudulent and therefore nondischargeable.

Uwaydah timely filed a notice of appeal on February 14, 2008.

ISSUE

Do findings made in a summary judgment following a sanctions order for discovery violations have preclusive effect in bankruptcy?[7]

[7] The Sixth Circuit's affirmance was based on the record before the district court prior to the imposition of sanctions. In a puzzling footnote in its opinion, the appellate court said, "While normally we would address the sanctions question first, because our decision rests on the summary judgment record before the district court which was submitted prior to imposition of the sanctions, the sanctions question is moot." GEMS v. Prometheus, 205 Fed. Appx. at 420.

As a result, none of the debtor's due process contentions appear to have any merit, as the Sixth Circuit seemed to have ruled on the basis of the record that existed before Uwaydah was barred from presenting a defense. But the parties have not

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STANDARD OF REVIEW

The bankruptcy court's findings of fact are subject to a clearly erroneous standard of review. Fed. R. Bank. P. 8013. Its conclusions of law are reviewed de novo. Mendez v. Salven (In re Mendez), 367 B.R. 109, 113 (9th Cir. BAP 2007).

DISCUSSION

The central question here is whether court-ordered sanctions for Uwaydah's repeated failures to comply with discovery orders in the fraud case, along with summary judgment against him, have preclusive effect in his bankruptcy case.

The Ohio court entered summary judgment against Uwaydah after it had sanctioned him for his repeated failure to comply with discovery orders. In particular, the court barred Uwaydah from introducing evidence or testimony contrary to the facts stated by GEMS, which effectively prevented him from presenting a defense.

In its opinion affirming the district court, the Sixth Circuit recited the elements of fraud in Ohio as follows:

> (a) a representation . . . (b) which is material to the transaction at hand, (c) made falsely, with knowledge of its falsity, or with such utter disregard and recklessness as to whether it is true or false that knowledge may be inferred, (d) with the intent of misleading another into relying upon it, (e) justifiable reliance upon the representation or concealment, and (f) a resulting injury proximately caused by the reliance.

[7](...continued)
chosen to argue this point. Because there is no difference in outcome, our disposition deals with the issues as framed by the parties, although a much shorter memorandum would result if the Sixth Circuit's perspective is correct.

GEMS v. Prometheus, 205 Fed. Appx. at 420 (quotation and citations omitted).

The Sixth Circuit then found that Uwaydah's conduct had met all of the elements of fraud. Id. at 421. This panel confirms the bankruptcy court's conclusion that the fraud finding under Ohio law satisfies the requirements of nondischargeability under § 523(a)(2).

Because the sanctions order essentially led to the summary judgment, we will consider the summary judgment as if it had been a default judgment. This raises the question of issue preclusion.

The principles of collateral estoppel, or issue preclusion, apply in discharge proceedings in bankruptcy court. See Grogan v. Garner, 498 U.S. 279, 284-85 n.11 (1991); In re McNallen, 62 F.3d 619, 624 (4th Cir. 1995).

Because the prior judgment was rendered by a federal court, federal principles of collateral estoppel apply. See Heiser v. Woodruff, 327 U.S. 726, 732 (1945); see also Grogan v. Garner, 498 U.S. at 284 (citing Restatement (Second) Judgments § 27 (1982) as establishing elements of federal collateral estoppel). For a party to be estopped from relitigating an issue, the following elements must be present: (1) the issue sought to be precluded must be the same as the one involved in the prior action; (2) the issue must have been actually litigated; (3) the issue must have been determined by a valid and final judgment; and (4) the determination must have been essential to the prior judgment. In re Ross, 602 F.2d 604, 608 (3d Cir. 1979); accord Restatement (Second) Judgments § 27 (1982); see also Pena v.

Gardner, 976 F.2d 469, 472 (9th Cir. 1992).

Uwaydah claims, among other things, that because of the discovery sanctions, the Ohio court's summary judgment did not meet the "actually litigated" requirement for estoppel or preclusive effect. In this view, to deny Uwaydah his day in court is to deny him due process.

Most default judgments occur under different circumstances than are present in this case. A party has simply failed to appear, or the venue is inconvenient, or there is another acceptable explanation. In those cases, the default judgment generally does not meet the "actually litigated" requirement. See Arizona v. California, 560 U.S. 392, 414 (2000) (citing Restatement (Second) of Judgments § 27 (1982) (stating in illustration (e): "[i]n the case of a judgment entered by confession, consent, or default, none of the issues is actually litigated. Therefore the rule of this Section does not apply to any issue in a subsequent action.")); In re Daley, 776 F.2d 834, 837-39 (9th Cir. 1985); see also 18A CHARLES ALAN WRIGHT, ARTHUR R. MILLER, EDWARD H. COOPER, FEDERAL PRACTICE & PROCEDURE: JURISDICTION. § 4442 (2d ed. 2007); 18 Moore's Federal Practice § 132.03[2][k][i] (3d ed. 2007).

But the default judgment in this case results from sanctions that were ordered for overt and knowing behavior by the defendant over an extended period of time. From 2003 to 2005, Uwaydah ignored, delayed, and otherwise attempted to thwart the Ohio court's discovery orders. In May 2005, after repeated warnings about Uwaydah's failure to comply, the Ohio court entered the sanctions order, and three months after that, it issued the

summary judgment in favor of GEMS. Those two orders taken together are the linchpin of this case.

Before the discovery sanctions and summary judgment were entered against Uwaydah in the fraud case in Ohio, he had extensive notice and an opportunity to reply. In fact, the Ohio court noted, in response to one discovery request by GEMS, Uwaydah had produced some documents, but they were insufficient. At another point, Prometheus gave some documents to GEMS, but they only partially complied with the discover order. In other words, Uwaydah knew about the orders, and he participated to some extent in the discovery process. Though his original counsel withdrew during the controversy, a lawyer from that office appeared at a later hearing in the case and told the court that Uwaydah had been kept informed of what was going on.

As noted, the Ohio court gave Uwaydah every opportunity to comply with its orders or to contest them and make his case, and the court specifically warned him that he risked sanctions including a judgment against him if he continued to fail to comply with the discovery orders. He still did not comply.

Uwaydah had his day in court. To be sure, he did not show up, but holding that the judgments made by the Ohio federal courts do not have preclusive effect in bankruptcy court would allow Uwaydah and others similarly situated to profit from flouting discovery orders. If the fraud finding by the Ohio court is not preclusive in his bankruptcy case, Uwaydah would be in a better position than if he had litigated to adjudication and lost.

The Ninth Circuit dealt with a similar set of facts in FDIC v. Daily (In re Daily), 47 F.3d 365 (9th Cir. 1995). In that case, a default judgment had been entered following the defendant's failure to provide discovery in a fraud case. The creditor then sought to have the determination applied to the debtor's bankruptcy case, preventing him from denying the fraud in bankruptcy court. As in the current case, the debtor objected that the fraud issue had not been "actually litigated."

The Ninth Circuit held that Daily was not an "ordinary default judgment" and that when a party has participated in the process but consistently tried to thwart discovery, the requirements of "actually litigated" had been met. The court said:

> 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.

Id. at 368 (footnote omitted).

That description applies to the current appeal. As a result, the Ohio court's finding of fraud has preclusive effect in the California bankruptcy case.

In short, the sanctions in this case were imposed on Uwaydah only after he had spent more than two years delaying, obfuscating, and attempting to frustrate the adjudication of the case, which the Ohio court spelled out in detail. The requirements of due process were met.

The Daily court further held:

> Due process is not violated by a court's entry of a default judgment or other sanction against a party for refusal to cooperate with discovery. The court's action presumes, in essence, that defendant's conduct is but an admission of the want of merit in the asserted defense. Nor is due process violated if the defendant is later held to the consequences of such a judgment in a bankruptcy discharge proceeding. It is implicit in the doctrine of collateral estoppel that, where a party has been accorded a full and fair opportunity to litigate an issue in a prior proceeding, due process is not violated by denying the party a further opportunity to litigate the same issue in a subsequent proceeding.

Id. at 369 (internal quotations and citations omitted).

Daily is consistent with the Restatement (Second) of Judgments, which explains, "[E]ven if [an issue] was not litigated, the party's reasons for not litigating in the prior action may be such that preclusion would be appropriate." Restatement (Second) of Judgments § 27 cmt. e (1982).

Other circuits have reached the same conclusion. For example, in a similar bankruptcy case in Florida, where a debtor refused to comply with discovery orders and then had a default judgment of fraud entered against him, the fraud finding had preclusive effect in bankruptcy court, and the debt was deemed nondischargeable. The Eleventh Circuit upheld the bankruptcy court and said, "Where a party has substantially participated in an action in which he had a full and fair opportunity to defend on the merits, but subsequently chooses not to do so, and even attempts to frustrate the effort to bring the action to judgment," collateral estoppel is proper. Bush v. Balfour Beatty Bahamas, Ltd. (In re Bush), 62 F.3d 1319, 1325 (11th Cir.1995).

In another similar case involving a default judgment of fraud as sanctions for discovery violations, the Third Circuit held that the default judgment had preclusive effect in bankruptcy and that the debtor's fraudulent debt was nondischargeable. Wolstein v. Docteroff (In re Docteroff), 133 F.3d 210 (3d Cir.1997). The court said:

> This is not a typical default judgment where a defendant neglects or elects not to participate in any manner because of the inconvenience of the forum selected by the plaintiffs, the expense associated with defending the lawsuit, or some other reason. To the contrary, for several months, Docteroff participated extensively in the lawsuit. He filed an answer, noticed Wolstein's deposition, engaged several lawyers, including local counsel, filed papers with the court, and corresponded with opposing counsel. Apparently, Docteroff realized the meritlessness of his position and decided to frustrate orderly litigation by willfully obstructing discovery.
>
> We do not hesitate in holding that a party such as Docteroff, who deliberately prevents resolution of a lawsuit, should be deemed to have actually litigated an issue for purposes of collateral estoppel application . . . . [U]nder these circumstances, the actual litigation requirement is met. To hold otherwise would encourage behavior similar to Docteroff's and give litigants who abuse the processes and dignity of the court an undeserved second bite at the apple. We reject such a result.

Id. at 215 (citations omitted).

In his current appeal, Uwaydah claims that his fraud was not his promises to pay GEMS for the scanner but rather "a statement respecting the debtor's or an insider's financial condition," which is exempt from nondischargeability under § 523(a)(2)(A). In support of this assertion, he says that his fraud dealt only with what he represented about the letter of credit and Prometheus's financial circumstances. As he argued in his opening brief in this appeal:

> Debtor's fraud as determined by the Fraud Judgment was . . . his misrepresentation that PHI's

> [Prometheus's] financial condition was such that a specific amount of funds ($1M) to be obtained from a specific source (. . . under the LOC)would be set aside by PHI and earmarked such that upon delivery of the Scanner, GEMS would be legally entitled to those specific funds.

Appellant's opening brief at 12.

But this claim is false. The Ohio federal courts made clear that the fraud consisted of Uwaydah's promise to pay for the scanner when he had no intention of doing so. The fraud had nothing to do with any statements about Uwaydah's or Prometheus's financial condition.

Uwaydah also argues in his opening brief that "the fraud judgment was not entitled to preclusive effect because it was rooted in determinations that violated the automatic stay."

This argument also has no merit. The automatic stay was lifted by stipulation of the parties in July, 2003, well before the district court's sanctions order (February, 2005) and its summary judgment (May, 2005). The sanctions order covered Uwaydah's conduct after the stay was lifted. If there was any sanctionable conduct before July, 2003, Uwaydah could have cured it.

Uwaydah further argues that the bankruptcy court erred by not permitting him to conduct "meaningful discovery" in GEMS's adversary proceeding against him. But the adversary proceeding in bankruptcy court was identical to the litigation in Ohio, in which the record was complete and closed and a final and conclusive judgment had been entered. No further discovery would have changed that.

Uwaydah's argument that the bankruptcy court erred in granting GEMS's motion to strike his answer, affirmative defenses, and counterclaims also fails. Uwaydah filed his answer and counterclaims on December 5, 2007, more than four years after the court had set a deadline of June 20, 2003, for such a filing. His response was not timely, Uwaydah did not seek leave to file after the deadline, and he offered no explanation or excuse. Moreover, he offered no legitimate counterclaims.

CONCLUSION

Collateral estoppel, or issue preclusion, prohibits the relitigation of issues that have been adjudicated in a prior lawsuit.

Two federal courts in Ohio found that Uwaydah had committed fraud when he ordered the scanner from GEMS and promised to pay for it, and the bankruptcy court in the Central District of California properly found that the findings had preclusive effect in Uwaydah's bankruptcy.

Because of the fraud, Uwaydah's debt to GEMS of $963,000 (plus interest) was nondischargeable. His arguments have no merit, the bankruptcy court's decision to apply issue preclusion was correct, and we AFFIRM.