

NOT FOR PUBLICATION

NOV 09 2007

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

UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT

In re)	BAP No.	NC-07-1154-CaKD
)		
LAURA JEAN WELLMAN,)	BK. No.	02-12586
)		
Debtor.)		
_____)		
)		
LAURA JEAN WELLMAN,)		
)		
Appellant,)	<u>MEMORANDUM</u> ¹	
)		
v.)		
)		
ROBERT ZIINO,)		
)		
Appellee.)		
_____)		

Argued and Submitted on October 26, 2007
at Sacramento, California

Filed - November 9, 2007

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

Honorable Alan Jaroslovsky, Bankruptcy Judge, Presiding

Before: CARROLL,² KLEIN and DUNN, Bankruptcy Judges.

¹ This disposition is not appropriate for publication. Although it may be cited for whatever persuasive value it may have (see Fed. R. App. P. 32.1), it has no precedential value. See 9th Cir. BAP Rule 8013-1.

² Hon. Peter H. Carroll, United States Bankruptcy Judge for the Central District of California, sitting by designation.

1 Debtor, Laura Jean Wellman ("Wellman"), objected to a proof of
2 claim filed by Robert Ziino ("Ziino") in the amount of \$800,000.
3 The bankruptcy court granted Ziino's motion for summary judgment,
4 overruled Wellman's objection, and allowed Ziino's claim in its
5 entirety. Wellman timely appealed. We AFFIRM.

6 I. FACTS

7 On October 25, 2002, Wellman filed a voluntary petition under
8 chapter 7 of the Bankruptcy Code.³ Wellman and Ziino had lived
9 together for a period of approximately eight years before
10 separating in April 2002. They never married, but did have a child
11 two years before their separation. Prior to separation, Wellman
12 represented to Ziino that she would be receiving \$1.6 million
13 through her family trust and inheritance. In conjunction with
14 their separation, Ziino retained custody of their child and Wellman
15 gave two promissory notes to Ziino: A promissory note in the
16 original principal sum of \$300,000 dated May 31, 2001, and a
17 promissory note in the original principal sum of \$500,000 dated
18 December 12, 2001. Neither note bore interest, and each was
19 payable on demand. According to Ziino, the notes were negotiated
20 over a period of two years and executed for the purpose of
21 equalizing a division of property between the parties and providing
22 "for the child's needs throughout his lifetime."

23 On February 5, 2003, Ziino filed a complaint in Adversary No.
24 03-1025, styled Robert Ziino v. Laura Jean Wellman, objecting to

25
26 ³ Unless otherwise indicated, all chapter, section and rule
27 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1330, and
28 to the Federal Rules of Bankruptcy Procedure, Rules 1001-9036, as
enacted and promulgated prior to the effective date (October 17,
2005) of most of the provisions of the Bankruptcy Abuse Prevention
and Consumer Protection Act of 2005, Pub. L. 109-8, April 20, 2005,
119 Stat. 23.

1 Wellman's discharge under § 727(a)(4) and seeking to have his debt
2 declared nondischargeable under § 523(a)(5) or, in the alternative,
3 § 523(a)(15). On June 4, 2003, Wellman executed a Stipulation for
4 Judgment in which she agreed to a denial of discharge. Pursuant to
5 the stipulation, a judgment was signed on June 29, 2003, denying
6 Wellman's discharge under § 727(a)(4).

7 On June 30, 2003, the bankruptcy court signed an Order on
8 Defendant's Motion for Summary Judgment and Plaintiff's Cross-
9 Motion for Summary Judgment ("June 30th Order") granting summary
10 judgment in favor of Wellman on the remaining claims in the
11 adversary proceeding. In its June 30th Order, the bankruptcy court
12 found that the notes were "not debts described in 11 U.S.C.
13 § 523(a)(5)" nor "debts described in 11 U.S.C. § 523(a)(15)."⁴

14 While Adversary No. 03-1025 was pending between the parties,
15 Ziino timely filed a proof of claim in the amount of \$800,000, plus
16 interest, for "support" and "property division." Ziino's proof of
17 claim was filed on June 12, 2003, and docketed as Claim # 1. A
18 copy of each of the notes was attached to the proof of claim.

19 On August 4, 2005, Wellman filed an objection to Ziino's claim
20 alleging there was no consideration for the notes.⁵ Wellman
21

22 ⁴ June 30th Order at 2:4 & 11.

23 ⁵ Standing is a jurisdictional issue that we may raise sua
24 sponte and address de novo. See Menk v. LaPaglia (In re Menk), 241
25 B.R. 896, 903 (9th Cir. BAP 1999). Standing to appeal is limited
26 to "persons aggrieved," i.e., "those persons who are directly and
27 adversely affected pecuniarily by an order of the bankruptcy court.
28 Fondiller v. Robertson (In re Fondiller), 707 F.2d 441, 442 (9th
Cir. 1983). If the estate is insolvent, a chapter 7 debtor
ordinarily lacks standing to object to proofs of claim. See Id.
(stating that "a hopelessly insolvent debtor does not have standing
to appeal orders affecting the size of the estate"). Standing to
object to claims exists, however, when there is a sufficient

(continued...)

1 reasoned that the June 30th Order constituted a final determination
2 that the notes were not valid debts for support or property
3 division, and therefore, Ziino was barred from further litigating
4 his claim based on the notes by the doctrines of res judicata and
5 collateral estoppel. Alternatively, Wellman alleged that the notes
6 were unenforceable because she lacked the mental capacity to make a
7 contract at the time they were executed, and each of the notes was
8 signed under duress. Ziino filed a response in opposition to the
9 objection on August 22, 2005, stating that Wellman was competent at
10 the time she executed the notes and that the sufficiency of the
11 consideration for the notes was not an issue determined by the June
12 30th Order.

13 At a preliminary hearing on September 7, 2005, Wellman
14 requested the opportunity to file a motion for summary judgment on
15 the issue of consideration before permitting Ziino to engage in
16 extensive discovery concerning her alternative defenses. On
17 September 16, 2005, Wellman filed a motion for summary judgment
18 claiming that the notes forming the basis of Ziino's claim lacked
19 consideration. Wellman argued that the notes were unenforceable to
20 the extent they represented child support because they were not
21

22 ⁵(...continued)
23 possibility of a surplus to give the chapter 7 debtor a pecuniary
24 interest or when the claim involved will not be discharged. See
25 Heath v. Am. Express Travel Related Servs. Co. (In re Heath), 331
26 B.R. 424, 429 (9th Cir. BAP 2005); Willard v. O'Neil (In re
27 Willard), 240 B.R. 664, 668 (Bankr. D. Conn. 1999). In this case,
28 Wellman had standing to object to Ziino's claim because the debt
was not discharged as a result of the judgment denying her
discharge under § 727(a)(4). Furthermore, Wellman has an economic
interest that would be harmed because there appears to be property
of the estate under § 726(a)(6) that may be in excess of the amount
necessary to pay allowed claims and administrative expenses in the
case.

1 executed in conjunction with a child support agreement approved by
2 the state court. Alternatively, Wellman argued that the
3 consideration failed as a property settlement because she and Ziino
4 were never married, and there was no community property to divide
5 as a matter of law. Ziino did not oppose the motion.

6 On September 21, 2005, the bankruptcy court issued a
7 memorandum decision denying Wellman's motion for summary judgment.
8 The court held that the notes were not unenforceable as a matter of
9 law, stating that under California law "a private agreement which
10 does provide for sufficient support is binding and enforceable"
11 citing Schumm v. Berg, 37 Cal.2d 174 (Cal. 1951).⁶

12 On February 28, 2007, Ziino filed a motion for summary
13 judgment alleging there was no genuine issue of material fact
14 concerning Wellman's remaining defenses of duress and lack of
15 mental capacity. Ziino's motion was supported by his declaration,
16 together with the following summary judgment evidence: (1)
17 Wellman's verified Response to Interrogatories - Set One; (2)
18 Wellman's verified Response to Request for Admission - Set One; (3)
19 Wellman's verified Response to Request for Documents - Set One, and
20 (4) the Declaration of David N. Chandler. On March 19, 2007,
21 Wellman filed her Opposition to Motion for Summary Judgment. In
22 her opposition, Wellman asked the court to take judicial notice of
23 the June 30th Order and the memorandum of points and authorities
24 which she filed in support of her motion for summary judgment on
25 September 16, 2005. Wellman did not file a declaration nor submit
26 any other evidence in opposition to Ziino's motion.

27
28 ⁶ Memorandum on Motion for Summary Judgment (entered Sept.
21, 2005) at 2:1-3.

1 After a hearing on April 2, 2007, the bankruptcy court issued
2 a memorandum decision granting Ziino's motion for summary judgment.
3 The bankruptcy court determined there was sufficient consideration
4 for the notes as a matter of law, and that Wellman had failed to
5 respond with "declarations or other evidence creating a triable
6 issue of fact" on her defenses of duress and lack of mental
7 capacity.⁷ The court reiterated its prior ruling on September 21,
8 2005, that the notes forming the basis of Ziino's claim were
9 supported by sufficient consideration and that the June 30th Order
10 had no preclusive effect, explaining that it "only ruled in the
11 prior adversary proceeding that the obligations represented by the
12 notes were dischargeable because they did not meet all the
13 requirements of § 523(a)(5) and § 523(a)(15) of the Bankruptcy Code
14 for exception from discharge."⁸

15 On April 11, 2007, an Order Overruling Objection to Claim No.
16 1 was entered in the case. Wellman timely filed a notice of appeal
17 on April 18, 2007.

18 II. JURISDICTION

19 The bankruptcy court had jurisdiction under 28 U.S.C. § 1334
20 and 28 U.S.C. § 157(b)(1) and (b)(2)(B). We have jurisdiction
21 under 28 U.S.C. § 158.

22 III. ISSUES

23 1. Whether it was error to deny Wellman's motion for summary
24 judgment based upon a finding there was consideration for
25 the notes.

26 ⁷ Memorandum on Motion for Summary Judgment (entered April
27 19, 2007) at 2-3.

28 ⁸ Id. at 2:1-3.

1 to a judgment as a matter of law." Fed. R. Civ. P. 56(c).⁹ "The
2 purpose of summary judgment is to avoid unnecessary trials when
3 there is no dispute as to the [material] facts before the court."
4 Nw. Motorcycle Ass'n v. U.S. Dep't of Agric., 18 F.3d 1468, 1471
5 (9th Cir. 1994).

6 Under Rule 56(c), the moving party bears the initial burden to
7 establish that there are no genuine issues of material fact¹⁰ to be
8

9 ⁹ Rule 56 of the Federal Rules of Civil Procedure, applicable
10 to adversary proceedings by virtue of Rule 7056, provides for the
summary adjudication of issues:

11 **(c) Motion and Proceedings Thereon . . .** The judgment sought
12 shall be rendered forthwith if the pleadings, depositions,
13 answers to interrogatories, and admissions on file, together
14 with the affidavits, if any, show that there is no genuine
issue as to any material fact and that the moving party is
entitled to a judgment as a matter of law

15 . . .

16 **(e) Form of Affidavits; Further Testimony; Defense Required .**
17 . . . When a motion for summary judgment is made and supported
18 as provided in this rule, an adverse party may not rest upon
19 the mere allegations or denials of the adverse party's
20 pleading, but the adverse party's response, by affidavits or
as otherwise provided in this rule, must set forth specific
facts showing that there is a genuine issue for trial. If the
adverse party does not so respond, summary judgment, if
appropriate, shall be entered against the adverse party.

21 Fed. R. Civ. P. 56(c) & (e).

22 ¹⁰ "A 'material fact' is one that is relevant to an element of
23 a claim or defense and whose existence might affect the outcome of
the suit. The materiality of a fact is thus determined by the
24 substantive law governing the claim or defense." T.W. Elec. Serv.
v. Pac. Elec. Contractors Ass'n, 809 F.2d 626, 630 (9th Cir. 1987).
25 Genuine issues of material fact are those "factual issues that make
a difference to the potential outcome and 'that properly can be
26 resolved only by a finder of fact because they may reasonably be
resolved in favor of either party.'" Svob. v. Bryan (In re Bryan),
27 261 B.R. 240, 243 (9th Cir. BAP 2001) (quoting Anderson v. Liberty
Lobby, Inc., 477 U.S. 242, 250 (1986)). In other words, an issue
28 of material fact is "genuine" if "the evidence is such that a
reasonable jury could return a verdict for the nonmoving party."
Anderson, 477 U.S. at 248.

1 decided at trial. Celotex Corp. v. Catrett, 477 U.S. 317, 322-23
2 (1986); Anderson, 477 U.S. at 248-50. Where the nonmoving party
3 will bear the burden of proof on a specific claim or defense at
4 trial, the moving party may move for summary judgment based solely
5 on the "pleadings, depositions, answers to interrogatories, and
6 admissions on file." Celotex Corp., 477 U.S. at 324. There is no
7 requirement "that the moving party support its motion with
8 affidavits or other similar materials negating the opponent's
9 claim." Id. at 323 (emphasis in original). The burden then shifts
10 to the nonmoving party to produce "significantly probative
11 evidence" of specific facts showing that there is a genuine issue
12 of material fact requiring a trial.¹¹ T.W. Elec. Serv., 809 F.2d at
13 630 (citing Fed. R. Civ. P. 56(e)).

14 The nonmoving party cannot "withstand a motion for summary
15 judgment merely by making allegations; rather, the party opposing
16 the motion must go beyond its pleadings and designate specific
17 facts by use of affidavits, depositions, admissions, or answers to
18 interrogatories showing there is a genuine issue for trial." In re
19 Ikon Office Solutions, Inc., Sec. Lit., 277 F.3d 658, 666 (3d Cir.
20 2002). If the nonmoving party fails to establish a triable issue
21 on an essential element of its case and upon which it will bear the
22 burden of proof at trial, the moving party is entitled to judgment

23
24 ¹¹ In deciding whether a fact issue has been created, the
25 court must view the facts and the inferences to be drawn therefrom
26 in a light most favorable to the nonmoving party. See Jonas v.
27 Resolution Trust Corp. (In re Comark), 971 F.2d 322, 324 (9th Cir.
28 1992). All reasonable doubt as to the existence of genuine issues
of material fact must be resolved against the moving party. See
Anderson, 477 U.S. at 248. "Inferences may [also] be drawn from
underlying facts that are not in dispute." T.W. Elec. Serv., 809
F.2d at 631. "Where the record taken as a whole could not lead a
rational trier of fact to find for the non-moving party, there is
no 'genuine issue for trial.'" Matsushita Elec. Indus. Co. v.
Zenith Radio Corp., 475 U.S. 574, 587 (1986).

1 as a matter of law. Celotex Corp., 477 U.S. at 322-23.

2 B. Ziino's Proof of Claim.

3 A duly executed proof of claim is prima facie evidence of the
4 validity and amount of a claim. Fed. R. Bankr. P. 3001(f). See
5 Diamant v. Kasparian (In re S. Cal. Plastics, Inc.), 165 F.3d 1243,
6 1247-48 (9th Cir. 1999); Ankeny v. Meyer (In re Ankeny), 184 B.R.
7 64, 69 (9th Cir. BAP 1995). The claim is deemed allowed, absent
8 objection by a party in interest. 11 U.S.C. § 502(a); see also
9 Irvine-Pac. Commercial Ins. Brokers, Inc. v. Adams (In re Irvine-
10 Pac. Commercial Ins. Brokers, Inc.), 228 B.R. 245, 246 (9th Cir.
11 BAP 1998). The burden of tendering sufficient evidence to overcome
12 the prima facie validity of a properly filed claim is on the
13 objecting party. See Lundell v. Anchor Constr. Specialists, Inc.
14 (In re Lundell), 223 F.3d 1035, 1039 (9th Cir. 2000); In re Global
15 W. Dev. Corp., 759 F.2d 724, 727 (9th Cir. 1985). "If the objector
16 produces sufficient evidence to negate one or more of the sworn
17 facts in the proof of claim, the burden reverts to the claimant to
18 prove the validity of the claim by a preponderance of the
19 evidence." Ashford v. Consol. Pioneer Mortgage (In re Consol.
20 Pioneer Mortgage), 178 B.R. 222, 226 (9th Cir. BAP 1995) (quoting In
21 re Allegheny Int'l, Inc., 954 F.2d 167, 173-74 (3d Cir. 1992)).
22 The ultimate burden of persuasion still rests on the claimant to
23 prove its claim by a preponderance of the evidence. Lundell, 223
24 F.3d at 1039; Franchise Tax Bd. v. McFarlane (In re MacFarlane), 83
25 F.3d 1041, 1044 (9th Cir. 1996); In re Holm, 931 F.2d 620, 623 (9th
26 Cir. 1991).

27 Ziino's timely-filed proof of claim was prima facie evidence
28 of the validity and amount of his claim against Wellman's

1 bankruptcy estate. Fed. R. Bankr. P. 3001(f). Ziino's claim was
2 "strong enough to prevail over a mere formal objection without
3 more." Garner v. Shier (In re Garner), 246 B.R. 617, 623 (9th Cir.
4 BAP 2000). Because Wellman bore the burden of proof on her
5 affirmative defenses of lack of consideration, lack of capacity and
6 duress, it was Wellman's burden in response to Ziino's motion for
7 summary judgment to identify specific facts, supported by
8 declarations, depositions, answers to interrogatories, or other
9 evidence contemplated by Rule 56(e), to negate the prima facie
10 validity of Ziino's filed claim and establish a genuine issue of
11 material fact requiring trial. See, e.g., Metcalf v. Golden (In re
12 Adbox, Inc.), 488 F.3d 836, 843 (9th Cir. 2007) (granting summary
13 judgment in preference action after defendant who had burden of
14 proof on an earmarking defense failed to identify triable issues of
15 fact); Daubert v. Merrell Dow Pharm., Inc., 43 F.3d 1311, 1315 (9th
16 Cir. 1995), cert. denied, 516 U.S. 869 (1995) (where nonmovant has
17 burden of persuasion, movant at summary judgment need only specify
18 to court absence of material fact and need not provide additional
19 evidence).

20 C. Ziino's Motion for Summary Judgment.

21 Wellman claims that the bankruptcy court erred in placing the
22 burden on her, as the nonmoving party, to establish a triable issue
23 of fact. According to Wellman, Ziino had the burden, as the moving
24 party, to establish "an absence of essential evidence" to support
25 her objection to his proof of claim.¹² Wellman is mistaken. It was
26 Wellman's burden, not Ziino's, to produce "significantly probative
27 evidence of specific facts" establishing a triable issue on her

28 ¹² Appellant's Brief, p.12.

1 affirmative defenses.

2 1. Lack of Capacity and Duress.

3 In response to Ziino's motion for summary judgment, Wellman
4 did not identify a single disputed factual issue requiring a trial
5 of her alleged affirmative defenses nor offer any direct evidence
6 of lack of capacity or duress.¹³ Wellman's confusion concerning the
7 burden of proof under Rule 56(e) is reflected in her opposition,
8 which states:

9 Ziino's motion fails to present evidence sufficient to negate
10 any factual issues. Mr. Ziino's declaration merely states
11 that the parties had discussions and reached an agreement. He
12 says nothing about Wellman's mental state or her ability to
13 freely consent to the promissory notes.

14 Mr. Chandler's declaration does nothing to negate the factual
15 issues. Mr. Chandler opines about the meaning of the
16 documents and statements produced by Wellman but he is not a
17 qualified expert in the mental health field. In particular,
18 Mr. Chandler's statements in paragraphs 11 and 12 should be
19 ignored since they are the opinion or interpretation of
20 medical records by an attorney, not a competent expert in the
21 mental health field. . . .

22 Since Ziino's moving papers do not eliminate the disputed
23 factual issues as to what, if any, consideration there was for
24 the promissory notes nor do they eliminate the disputed
25 factual issues as to Wellman's mental state when she signed
26 the promissory notes, his motion must be denied.¹⁴

27 In California, "[a]ll persons are capable of contracting
28 except minors, persons of unsound mind, and persons deprived of
29 civil rights." Cal. Civ. Code § 1556. "A person entirely without
30 understanding has no power to make a contract of any kind. . . ."
31 Cal. Civ. Code § 38; see also § 1557. Lack of capacity exists when
32 a person entering into a contract is not mentally competent to deal

33 ¹³ Wellman simply asked the court to take judicial notice of
34 the June 30th Order and the memorandum of points and authorities
35 which she filed in support of her motion for summary judgment on
36 September 16, 2005.

37 ¹⁴ Opposition to Motion for Summary Judgment at 3:11-25.

1 with the subject of the contract with a full understanding of his
2 rights. Rains v. Flinn (In re Rains), 428 F.3d 893, 901 (9th Cir.
3 2005). The test in each instance is whether the person entering
4 into the contract understood the nature, purpose and effect of that
5 action. Id.; Drum v. Bummer, 77 Cal. App.2d 453, 460 (Cal. Dist.
6 Ct. App. 1946) ("the test to be applied is whether the party was
7 mentally competent to deal with the subject before him with a full
8 understanding of his rights - whether he actually understood the
9 nature, purpose and effect of what he did").

10 California law recognizes statutory duress and economic duress
11 as defenses to contract enforcement. See, e.g., Tarpv v. County of
12 San Diego, 110 Cal. App.4th 267, 277 (Cal. Ct. App. 2003)
13 (California law recognizes both statutory duress and economic
14 duress "as a basis for vitiating a coerced party's consent to an
15 agreement"); Rich & Whitlock, Inc. v. Ashton Dev., Inc., 157 Cal.
16 App.3d 1154, 1158 (Cal. Ct. App. 1984) ("California courts have
17 recognized the economic duress doctrine in private sector cases for
18 at least 50 years"). Statutory duress requires unlawful
19 confinement or detention.¹⁵ Economic duress does not require an
20 unlawful act, but occurs "when a person subject to a wrongful act,

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22 ¹⁵ Duress consists in:

- 23 1. Unlawful confinement of the person of the party, or
24 of the husband or wife of such party, or of an
25 ancestor, descendant, or adopted child of such
26 party, husband, or wife;
- 27 2. Unlawful detention of the property of any such
28 person; or,
3. Confinement of such person, lawful in form, but
fraudulently obtained, or fraudulently made unjustly
harassing or oppressive.

Cal. Civ. Code § 1569.

1 such as a threat to withhold payment of an acknowledged debt, must
2 succumb to the demands of the wrongdoer or else suffer financial
3 ruin." Sheehan v. Atlanta Int'l Ins. Co., 812 F.2d 465, 469 (9th
4 Cir. 1987).

5 To establish economic duress, Wellman had the burden of
6 establishing by a preponderance of the evidence that (a) Ziino
7 engaged in a coercive wrongful act; (b) Ziino's wrongful act was
8 sufficiently coercive that a reasonably prudent person in Wellman's
9 position would have had no reasonable alternative but to succumb to
10 Ziino's coercion; (c) Ziino knew of Wellman's economic
11 vulnerability, and (d) Ziino's coercive wrongful act actually
12 caused or induced Wellman to sign each of the notes. See Johnson
13 v. Int'l Bus. Mach. Corp., 891 F.Supp. 522, 529 (N.D. Cal. 1995).

14 In his motion for summary judgment, Ziino relied on Wellman's
15 factually barren discovery responses to shift the burden to Wellman
16 to identify specific facts establishing the existence of a triable
17 issue of fact. Having failed to identify any triable issues of
18 fact at the trial level, Wellman now argues on appeal that there
19 were genuine issues of material fact apparent from the discovery
20 evidence submitted by Ziino which, if considered by the bankruptcy
21 court, would have precluded a summary judgment on her affirmative
22 defenses.¹⁶

23 We review summary judgments de novo. Even considering
24 Wellman's own discovery responses in a light most favorable to her,
25 summary judgment was proper "since a complete failure of proof
26 concerning an essential element of the nonmoving party's case
27 necessarily renders all other facts immaterial." Celotex Corp.,

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¹⁶ Appellant's Brief, p.12.

1 477 U.S. at 323. Ziino's proof of claim constitutes prima facie
2 evidence of the validity and amount of his claim. Wellman admits
3 signing each of the notes forming the basis of the claim, but
4 denies that she was mentally competent to do so on either May 31,
5 2001 or December 31, 2001. Wellman maintains that she was not
6 mentally competent for a period of five years beginning in 1997 and
7 ending just shortly before the filing of her bankruptcy petition in
8 2002.¹⁷ However, the medical evidence provided in response to
9 Ziino's discovery requests belies her contentions.

10 Between 1996 and 2002, Wellman consulted five mental health
11 professionals, including one psychiatrist. None of these mental
12 health professionals was a psychologist. Wellman's medical records
13 and discovery responses reveal only that she was treated for
14 chronic anxiety and depression. Wellman identified seven
15 physicians who could testify concerning her alleged incompetency at
16 the time the notes were executed. However, Wellman did not offer
17 the declaration of any of these physicians in response to Ziino's
18 motion for summary judgment. Indeed, Wellman admits that no mental
19 health professional has ever opined that she was not mentally
20 competent. There is no evidence that Wellman was unlawfully
21 confined or detained, nor do the medical records referenced in her
22 discovery responses support her claim that she was mistreated by
23 Ziino. Finally, there is nothing in the record to indicate that
24 she raised lack of capacity or duress as affirmative defenses to
25 Ziino's nondischargeability claim in Adversary No. 03-1025. In

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27 ¹⁷ Wellman states that she "came back to herself" 10 days
28 after separation from Ziino. Wellman admits that she was competent
on October 23, 2002, when her bankruptcy petition was filed with
the court.

1 sum, we cannot find that any issue of fact which may be gleaned
2 from Wellman's discovery responses rises to the level of a genuine
3 issue of material fact requiring a trial of her affirmative
4 defenses.

5 The bankruptcy court correctly concluded that there was no
6 genuine issue of material fact with respect to Wellman's lack of
7 capacity defense because the record viewed in a light most
8 favorable to Wellman could not lead a rational trier of fact to
9 conclude that Wellman did not know the nature, purpose and effect
10 of executing the notes. Furthermore, the bankruptcy court
11 correctly concluded that there was no triable issue of fact
12 concerning Wellman's affirmative defense of duress because there
13 was no evidence that Ziino engaged in an unlawful act or that his
14 alleged conduct was so coercive that Wellman, who was to receive
15 \$1.6 million through her family trust and inheritance, was in such
16 dire financial straits that she had no reasonable alternative but
17 to succumb to signing the notes.

18 2. Lack of Consideration.

19 Wellman does not dispute the fact that the consideration for
20 the notes was support and property division. Nor does she dispute
21 the bankruptcy court's determination that a private agreement for
22 child support is enforceable.¹⁸ Wellman's lack of consideration
23 defense stems from a misinterpretation of the bankruptcy court's
24 June 30th Order and its preclusive effect. Wellman reasons that
25 "since the court determined that neither note was for the

26 _____
27 ¹⁸ Wellman admits that "[s]he did not intend to argue that a
28 parent's promise to support his or her child is not valid
consideration." Opposition to Motion for Summary Judgment at 2:18-
20.

1 consideration of child support and property division, as alleged by
2 Ziino, there was no consideration for the notes."¹⁹

3 Collateral estoppel, or issue preclusion,²⁰ prevents a party
4 from relitigating an issue that the party has actually litigated
5 and lost in a prior proceeding. See Resolution Trust Corp. v.
6 Keating, 186 F.3d 1110, 1114 (9th Cir. 1999); Roussos v.
7 Michaelides (In re Roussos), 251 B.R. 86, 92 (9th Cir. BAP 2000).
8 Issue preclusion protects litigants from multiple lawsuits,
9 conserves judicial resources, and encourages reliance on
10 adjudication by reducing the likelihood of inconsistent decisions.
11 Allen v. McCurry, 449 U.S. 90, 94 (1980); Montana v. United States,
12 440 U.S. 147, 153-54 (1979); see generally, C. Klein, et. al.,
13 Principles of Preclusion and Estoppel in Bankruptcy Cases, 79 Am.
14 Bankr. L.J. 839, 852-58 (2005).

15
16 ¹⁹ Id. at 2:12-14.

17 ²⁰ In Robi v. Five Platters, Inc., the Ninth Circuit explained
18 the concepts of issue preclusion and claim preclusion, stating:

19 Generally, the preclusive effect of a former adjudication is
20 referred to as "res judicata." The doctrine of res judicata
21 includes two distinct types of preclusion, claim preclusion
22 and issue preclusion. Claim preclusion treats a judgment,
23 once rendered, as the full measure of relief to be accorded
24 between the same parties on the same claim or cause of action.
25 Claim preclusion prevents litigation of all grounds for, or
26 defenses to, recovery that were previously available to the
27 parties, regardless of whether they were asserted or
28 determined in the prior proceeding.

24 The doctrine of issue preclusion prevents relitigation of all
25 issues of fact or law that were actually litigated and
26 necessarily decided in a prior proceeding. In both the
27 offensive and defensive use situations the party against whom
28 estoppel [issue preclusion] is asserted has litigated and lost
in an earlier action. The issue must have been actually
decided after a full and fair opportunity for litigation.

838 F.2d 318, 321-22 (9th Cir. 1988) (citations and quotations
omitted).

1 The preclusive effect of a prior bankruptcy court judgment is
2 determined by federal law. See, e.g., FDIC v. Daily (In re Daily),
3 47 F.3d 365, 368 (9th Cir. 1995) (applying federal law to determine
4 the preclusive effect of a prior federal judgment in an action
5 under the Racketeer Influenced and Corrupt Organizations Act);
6 Robi, 838 F.2d at 322 (“we apply California law of res judicata to
7 the California judgment, New York law to the New York judgment, and
8 federal law to the federal judgments”); Genel Co. v. Bowen (In re
9 Bowen), 198 B.R. 551, 555 (9th Cir. BAP 1996) (“we apply federal
10 law to determine the preclusive effect of a prior federal diversity
11 judgment”). Under federal law, issue preclusion may be raised when
12 “(1) there was a full and fair opportunity to litigate the issue in
13 the previous action; (2) the issue was actually litigated in that
14 action; (3) the issue was lost as a result of a final judgment in
15 that action; and (4) the person against whom collateral estoppel is
16 asserted in the present action was a party or in privity with a
17 party in the previous action.” IRS v. Palmer (In re Palmer), 207
18 F.3d 566, 568 (9th Cir. 2000); Pena v. Gardner, 976 F.2d 469, 472
19 (9th Cir. 1992). The burden is on the party asserting preclusion
20 to establish the necessary elements. Alonso v. Summerville (In re
21 Summerville), 361 B.R. 133, 141 (9th Cir. BAP 2007); Khaligh v.
22 Hadaegh (In re Khaligh), 338 B.R. 817, 825 (9th Cir. BAP 2006).

23 In the June 30th Order, the bankruptcy court held that the
24 debts represented by the notes were not excepted from discharge
25 under either § 523(a)(5)²¹ or § 523(a)(15)²² because “Ziino [was] not
26

27 ²¹ For cases filed prior to October 17, 2005, section
28 523(a)(5) excepted from discharge a debt “to a spouse, former
spouse, or child of the debtor, for alimony to, maintenance for, or
support of such spouse or child, in connection with a separation
(continued...)

1 a spouse or former spouse and the notes were not made pursuant to a
2 court order."²³ The bankruptcy court did not make a specific
3 finding that either note lacked sufficient consideration to be
4 enforceable nor was it necessary for the court to do so given the
5 disqualifying language of §§ 523(a)(5) and 523(a)(15).
6 Furthermore, there is nothing in the record to indicate that
7 Wellman raised lack of consideration as an affirmative defense to
8 Ziino's nondischargeability claim based on the notes in Adversary
9 No. 03-1025 or that Ziino was given a full and fair opportunity to
10 litigate the issue prior to entry of the June 30th Order.
11 Therefore, we conclude that the bankruptcy court did not err in
12 denying Wellman's motion for summary judgment based upon a finding
13 that there was consideration for the notes.

14 Finally, Wellman now claims that the consideration received in
15 exchange for the notes was not adequate, arguing that "[t]he two
16 promissory notes extracted from [her] appear to be grossly unfair
17 and the product of duress, incapacity or other unjust pressures."²⁴

19 ²¹(...continued)
20 agreement, divorce decree or other order of a court of record,
21 determination made in accordance with State or territorial law by a
22 governmental unit, or property settlement agreement" 11
23 U.S.C. § 523(a)(5) (emphasis added).

24 ²² Section 523(a)(15) further excepted from discharge a debt
25 to a spouse, former spouse, or child of the debtor and "not of the
26 kind described in [§ 523(a)(5)] that is incurred by the debtor in
the course of a divorce or separation or in connection with a
separation agreement, divorce decree or other order of a court of
record, a determination made in accordance with State or
territorial law by a governmental unit" 11 U.S.C.
§ 523(a)(15).

27 ²³ Memorandum on Motion for Summary Judgment (entered Sept.
28 21, 2005) at 2:1-4.

²⁴ Appellant's Brief, p. 23:10-12.

1 Having raised the issue of the adequacy of consideration for the
2 first time on appeal, the issue will not be considered by the
3 court.

4 VI. CONCLUSION

5 We hold that the bankruptcy court correctly resolved the
6 issues by summary judgment. Ziino's proof of claim was prima facie
7 evidence of the validity and amount of his claim based on the
8 notes. Wellman did not produce significantly probative evidence of
9 specific facts establishing a triable issue of material fact with
10 respect to any of her affirmative defenses. Accordingly, the order
11 of the bankruptcy court is AFFIRMED.

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