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,	**M E M O R A N D U M**[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.

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[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.

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

I. FACTS

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

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

[3] Unless otherwise indicated, all chapter, section and rule references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1330, and 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.

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

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

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

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

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[4] June 30th Order at 2:4 & 11.

[5] Standing is a jurisdictional issue that we may raise sua sponte and address de novo. See Menk v. LaPaglia (In re Menk), 241 B.R. 896, 903 (9th Cir. BAP 1999). Standing to appeal is limited to "persons aggrieved," i.e., "those persons who are directly and adversely affected pecuniarily by an order of the bankruptcy court. 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...)

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

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

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[5](...continued)
possibility of a surplus to give the chapter 7 debtor a pecuniary interest or when the claim involved will not be discharged. See Heath v. Am. Express Travel Related Servs. Co. (In re Heath), 331 B.R. 424, 429 (9th Cir. BAP 2005); Willard v. O'Neil (In re Willard), 240 B.R. 664, 668 (Bankr. D. Conn. 1999). In this case, 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.

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

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

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

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

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

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

II. JURISDICTION

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

III. ISSUES

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

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

[8] Id. at 2:1-3.

2. Whether it was error to grant Ziino's motion for summary judgment based upon a finding there was no genuine issue of material fact as to Wellman's defenses of lack of capacity and duress.

IV. STANDARDS OF REVIEW

We review a grant of summary judgment de novo. Patterson v. Int'l Bhd. Of Teamsters, Local 959, 121 F.3d 1345, 1349 (9th Cir. 1997). In viewing the evidence in the light most favorable to the nonmoving party, we must determine whether there are any genuine issues of material fact and whether the applicable substantive law was applied correctly by the bankruptcy court. City of Vernon v. S. Cal. Edison Co., 955 F.2d 1361, 1365 (9th Cir. 1992). If the record before the bankruptcy court, including all "pleadings, depositions, answers to interrogatories, and admissions on file, together with any affidavits" establish that there are no triable issues and that "the moving party is entitled to summary judgment as a matter of law, summary judgment will be upheld." Gertsch v. Johnson & Johnson Corp. (In re Gertsch), 237 B.R. 160, 165 (9th Cir. BAP 1999).

V. DISCUSSION

A. Standard on Motion for Summary Judgment.

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled

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

Under Rule 56(c), the moving party bears the initial burden to establish that there are no genuine issues of material fact[10] to be

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

> **(c) Motion and Proceedings Thereon** . . . The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together 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 . . . .
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> . . .
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> **(e) Form of Affidavits; Further Testimony; Defense Required** . . . When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's 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.

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

[10] "A 'material fact' is one that is relevant to an element of a claim or defense and whose existence might affect the outcome of the suit. The materiality of a fact is thus determined by the 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). Genuine issues of material fact are those "factual issues that make a difference to the potential outcome and 'that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party.'" Svob. v. Bryan (In re Bryan), 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 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.

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

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

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[11] In deciding whether a fact issue has been created, the court must view the facts and the inferences to be drawn therefrom in a light most favorable to the nonmoving party. See Jonas v. Resolution Trust Corp. (In re Comark), 971 F.2d 322, 324 (9th Cir. 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).

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

B. Ziino's Proof of Claim.

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

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

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

C. Ziino's Motion for Summary Judgment.

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

[12] Appellant's Brief, p.12.

affirmative defenses.

1. Lack of Capacity and Duress.

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

> Ziino's motion fails to present evidence sufficient to negate any factual issues. Mr. Ziino's declaration merely states that the parties had discussions and reached an agreement. He says nothing about Wellman's mental state or her ability to freely consent to the promissory notes.
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> Mr. Chandler's declaration does nothing to negate the factual issues. Mr. Chandler opines about the meaning of the documents and statements produced by Wellman but he is not a qualified expert in the mental health field. In particular, Mr. Chandler's statements in paragraphs 11 and 12 should be ignored since they are the opinion or interpretation of medical records by an attorney, not a competent expert in the mental health field. . . .
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> Since Ziino's moving papers do not eliminate the disputed factual issues as to what, if any, consideration there was for the promissory notes nor do they eliminate the disputed factual issues as to Wellman's mental state when she signed the promissory notes, his motion must be denied.[14]

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

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

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

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

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

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[15] Duress consists in:

1. Unlawful confinement of the person of the party, or of the husband or wife of such party, or of an ancestor, descendant, or adopted child of such party, husband, or wife;

2. Unlawful detention of the property of any such person; or,

3. Confinement of such person, lawful in form, but fraudulently obtained, or fraudulently made unjustly harassing or oppressive.

Cal. Civ. Code § 1569.

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

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

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

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

[16] Appellant's Brief, p.12.

477 U.S. at 323. Ziino's proof of claim constitutes prima facie evidence of the validity and amount of his claim. Wellman admits signing each of the notes forming the basis of the claim, but denies that she was mentally competent to do so on either May 31, 2001 or December 31, 2001. Wellman maintains that she was not mentally competent for a period of five years beginning in 1997 and ending just shortly before the filing of her bankruptcy petition in 2002.[17] However, the medical evidence provided in response to Ziino's discovery requests belies her contentions.

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

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

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

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

2. Lack of Consideration.

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

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

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

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

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[19] Id. at 2:12-14.

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

> Generally, the preclusive effect of a former adjudication is referred to as "res judicata." The doctrine of res judicata includes two distinct types of preclusion, claim preclusion and issue preclusion. Claim preclusion treats a judgment, once rendered, as the full measure of relief to be accorded between the same parties on the same claim or cause of action. Claim preclusion prevents litigation of all grounds for, or defenses to, recovery that were previously available to the parties, regardless of whether they were asserted or determined in the prior proceeding.
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> The doctrine of issue preclusion prevents relitigation of all issues of fact or law that were actually litigated and necessarily decided in a prior proceeding. In both the offensive and defensive use situations the party against whom 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).

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

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

[21] For cases filed prior to October 17, 2005, section 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...)

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

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

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

[22] Section 523(a)(15) further excepted from discharge a debt to a spouse, former spouse, or child of the debtor and "not of the 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).

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

[24] Appellant's Brief, p. 23:10-12.

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

VI. CONCLUSION

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