

OCT 31 2006

NOT FOR PUBLICATION

**HAROLD S. MARENUS, CLERK
U.S. BKCY. APP. PANEL
OF THE NINTH CIRCUIT**

**UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT**

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In re:)
RAY G. DUNN,)
Debtor.)
_____)
RICHARD BRESNAHAN,)
Appellant,)
v.)
RAY G. DUNN,)
Appellee.)
_____)
RAY G. DUNN,)
Appellant,)
v.)
RICHARD BRESNAHAN,)
Appellee.)
_____)

BAP Nos. CC-05-1406-MoSnK
CC-06-1046-MoSnK
Bk. No. SV-04-13314-KT
Adv. No. SV-04-01343-KT

M E M O R A N D U M¹

Argued and Submitted on September 22, 2006
at Pasadena, California

Filed - October 31, 2006

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

Honorable Kathleen Thompson, Bankruptcy Judge, Presiding

¹This disposition is not appropriate for publication and may not be cited except when relevant under the doctrines of law of the case, issue preclusion or claim preclusion. See 9th Cir. BAP Rule 8013-1.

1 Before: MONTALI, SNYDER² and KLEIN, Bankruptcy Judges.

2 A creditor and debtor were equal shareholders in a health
3 care consulting corporation. The creditor filed an adversary
4 proceeding alleging that debts owed by the debtor to him were
5 nondischargeable under 11 U.S.C. § 523(a)(6).³ The creditor,
6 purportedly acting on behalf of the corporation, also alleged that
7 debtor's obligations to the corporation were nondischargeable
8 under section 523(a)(4) and (a)(6). In response, the debtor (also
9 purportedly acting on behalf of the corporation) filed a
10 counterclaim asserting that the creditor had been the beneficiary
11 of fraudulent transfers from the corporation.

12 The bankruptcy court granted summary judgment in favor of the
13 debtor on the nondischargeability claims. The court additionally
14 dismissed the debtor's counterclaims pursuant to Rule 7012 and
15 Federal Rule of Civil Procedure ("F. R. Civ. P.") 12(b)(6). We
16 AFFIRM, on issue preclusion grounds, the court's summary judgment
17 on the section 523(a)(4) and (a)(6) claims asserted on behalf of
18 the corporation. We REVERSE the court's summary judgment against
19 the creditor on his individual section 523(a)(6) claims. We
20 further AFFIRM the bankruptcy court's dismissal of the debtor's
21 counterclaim, but for different reasons than those cited by the
22 bankruptcy court.

23

24 ²Hon. Paul B. Snyder, United States Bankruptcy Judge for the
25 Western District of Washington, sitting by designation.

26 ³Unless 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 of The
Bankruptcy Abuse Prevention and Consumer Protection Act of 2005,
Pub. L. 109-8, Apr. 20, 2005, 119 Stat. 23.

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I. FACTS

Ray G. Dunn ("Debtor") owns 50% of the shares of Monterey Bay Group ("Monterey"); he is a director and the president of Monterey. Richard Bresnahan ("Creditor") also holds 50% of the shares in Monterey and is the only other director of that company. He is also its vice president and chief financial officer.

Monterey opened an office in Maryland (the "Maryland Operations"). Because the Maryland Operations were losing money, Creditor wanted to shut them down. Debtor, however, felt that they could be successful, so he formed a new corporation, eHealthFirst ("Buyer"), to purchase the Maryland Operations. Debtor and Creditor accordingly entered into an Asset Purchase Agreement and Buyer executed a promissory note (the "Note") in the amount of \$400,000 to the order of Monterey. Debtor personally guaranteed repayment of Note.

Debtor and Creditor, sole directors of Monterey, also executed a corporate resolution in which Monterey's rights and interests in the guaranty (the "Guaranty") executed by Debtor were assigned to Creditor. The corporate resolution (the "Resolution") further provided that the "proceeds of the Note [would] be used to fund agreed to bonus payments to [Creditor] and his permitted successors in return for considerations previously given." Debtor and Creditor also entered into a letter agreement ("Letter Agreement") dated January 31, 2001, providing (among other things) that Debtor would reduce his salary from Monterey to an amount "equal to 50% of [Creditor's] salary from [Monterey]."

Debtor contends, and Creditor vigorously disputes, that the Letter Agreement was later amended by another letter agreement

1 providing that Debtor's salary would equal 50% of Creditor's
2 salary plus bonuses and commissions. Creditor contends that this
3 purported second letter agreement is a forgery (the "Purported
4 Forgery"). Under the Purported Forgery, Debtor's salary would
5 have equaled half of Creditor's salary plus at least half of the
6 Note payments from Buyer to Monterey, since the initial Letter
7 Agreement allowed Creditor to receive any Note payments as a
8 "bonus."⁴ Creditor also contends that Debtor altered e-mails in
9 order to change terms of their agreements.

10 After Creditor accused Debtor of improperly using Monterey's
11 funds to pay himself excessive salary, Creditor filed a state
12 court lawsuit against Debtor and Monterey (as a nominal defendant)
13 in 2002 (the "State Court Action"). Among other things, Creditor
14 alleged that Debtor breached the Letter Agreement by taking
15 excessive salary and breached the Guaranty. Creditor also
16 asserted certain derivative claims against Debtor on behalf of
17 Monterey, including, inter alia, breach of fiduciary duty and
18 conversion.

19 A jury trial lasting several days commenced in the State
20 Court Action. At the conclusion of Creditor's case, Debtor moved
21 pursuant to California Code of Civil Procedure section 630 ("CCP
22 § 630") for a directed verdict as to all of the derivative claims
23 asserted by Creditor on behalf of Monterey. Debtor alleged that
24 "there's been a total failure of proof" as to those claims. The
25 state court granted the motion and did not indicate that its
26 ruling was anything other than on the merits. Creditor moved for
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28 ⁴Creditor received \$250,000 from Monterey as "bonus payments"
in addition to his regular salary.

1 reconsideration. The court initially granted the motion for
2 reconsideration, but later sustained its prior directed verdict
3 after Debtor argued that Monterey had not been properly joined as
4 a party. The state court did not specify the grounds for its
5 ruling.

6 In light of the directed verdict, only Creditor's individual
7 breach of contract claims were submitted to the state court jury.
8 The jury thereafter returned a verdict in favor of Creditor on his
9 claims that Debtor had breached the Guaranty and the Letter
10 Agreement and judgment was entered in favor of Creditor.

11 Debtor thereafter filed Chapter 7 and Creditor filed an
12 adversary proceeding under section 523(a)(4) and (a)(6) to have
13 Debtor's obligations to him declared nondischargeable. After
14 Debtor moved several times for dismissal of the section 523(a)(4)
15 claims because they belonged to the corporation and not Creditor,
16 Creditor amended his complaint to assert a derivative claim on
17 behalf of Monterey for embezzlement under section 523(a)(4) and to
18 assert individual and derivative claims under section 523(a)(6)
19 for willful and malicious injury.

20 Debtor in turn, acting derivatively on behalf of Monterey,
21 asserted a counterclaim against Creditor. Debtor alleged
22 fraudulent transfer⁵ claims against Creditor under California
23 Civil Code section 3439.04(a) and (b). Creditor moved for
24 dismissal of the counterclaim, arguing that Debtor lacked standing
25 to assert the claims and that the claims were barred by the

27 ⁵Throughout his papers Debtor used the term "fraudulent
28 conveyance" but we chose to use the more modern term "fraudulent
transfer." California has adopted the Uniform Fraudulent Transfer
Act as California Civil Code § 3439 et seq.

1 statute of limitations. The bankruptcy court dismissed the
2 counterclaim, but did so on the grounds that Debtor was equitably
3 estopped by his own wrongful conduct from asserting derivative
4 claims on behalf of Monterey.

5 Debtor filed a motion for summary judgment as to Creditor's
6 derivative section 523(a)(4) and 523(a)(6) claims and individual
7 section 523(a)(6) claims. Debtor argued, inter alia, that the
8 state court's directed verdict on Creditor's derivative claims
9 precluded Creditor from pursuing his section 523(a)(4) and (a)(6)
10 derivative claims in the nondischargeability action. Debtor
11 additionally argued that, at most, Debtor intentionally breached
12 his contracts with Creditor and intentional breach of contract
13 does not in and of itself constitute a willful and malicious
14 injury under section 523(a)(6). The bankruptcy court agreed and
15 entered summary judgment in favor of Debtor on both counts on
16 September 26, 2005. Creditor filed a timely notice of appeal.
17 That appeal is BAP No. CC-05-1406.

18 Upon reviewing the record in CC-05-1406, the clerk of this
19 Panel entered an order noting that the summary judgment did not
20 appear to be final because it did not dispose of Debtor's
21 counterclaim. Creditor was granted a limited remand to obtain a
22 final separate judgment resolving the counterclaim. On January
23 25, 2006, the bankruptcy court entered a separate order dismissing
24 the counterclaim. Debtor filed a timely notice of appeal. That
25 appeal is pending as BAP No. CC-06-1046. Because the appeals are
26 so related, we are issuing a joint memorandum decision disposing
27 of both appeals.

28

1 **II. ISSUES**

2 1. Did the bankruptcy court err in dismissing Creditor's
3 section 523(a)(4) and (a)(6) claims asserted derivatively on
4 behalf of Monterey?

5 2. Did the bankruptcy court err in dismissing Creditor's
6 individual section 523(a)(6) claims?

7 3. Did the bankruptcy court err in dismissing Debtor's
8 fraudulent transfer counterclaims?

9 **III. STANDARD OF REVIEW**

10 We review de novo the bankruptcy court's grant of summary
11 judgment. Marshack v. Orange Comm'l Credit (In re Nat'l Lumber
12 and Supply, Inc.), 184 B.R. 74, 77 (9th Cir. BAP 1995); Mordy v.
13 Chemcarb, Inc. (In re Food Catering & Housing, Inc.), 971 F.2d
14 396, 397 (9th Cir. 1992). In reviewing a summary judgment, the
15 task of an appellate court is the same as a trial court under F.
16 R. Civ. P. 56.⁶ Hifai v. Shell Oil Co., 704 F.2d 1425, 1428 (9th
17 Cir. 1983). Viewing the evidence in the light most favorable to
18 the non-moving party, the appellate court must determine whether
19 the bankruptcy court correctly found that there was no genuine
20 issue of material fact and that the moving party is entitled to
21 judgment as a matter of law. Id.; see F. R. Civ. P. 56(c).

22 We similarly review a bankruptcy court's dismissal for
23 failure to state a claim under Bankruptcy Rule 7012 and Federal
24 Rule of Civil Procedure 12(b)(6) de novo. N. Slope Borough v.
25 Rogstad (In re Rogstad), 126 F.3d 1224, 1228 (9th Cir. 1997). We
26 accept as true the allegations of the complaint and construe them
27 in the light most favorable to the plaintiff. Id. at 1228.

28 _____
⁶F. R. Civ. P. 56(c) is made applicable by Rule 7056.

1 Dismissal is improper unless it appears beyond doubt that the
2 plaintiff cannot prove any set of facts to support his claim that
3 would entitle him to relief. Id.

4 **IV. DISCUSSION**

5 A. Creditor's Derivative Claims

6 In the state court action, (described as the "Embezzlement
7 Lawsuit" by Creditor in paragraph 13 of his third amended
8 nondischargeability complaint), Creditor alleged the same facts
9 against Debtor as he later did in his nondischargeability
10 complaint. Both complaints focused on Debtor's purported
11 "unauthorized," "fraudulent" "misappropriation" of Monterey's
12 funds to pay himself "excessive" salary. The same facts underlie
13 both lawsuits, although the nondischargeability complaint does add
14 allegations regarding the Purported Forgery. Creditor, asserting
15 derivative claims against Debtor on behalf of Monterey, alleged
16 causes of action in state court for breach of fiduciary duty,
17 conversion, restitution, constructive trust and declaratory
18 judgment. In his nondischargeability action, Creditor asserted
19 derivative claims for willful and malicious injury and for
20 embezzlement.

21 The state court granted Debtor's motion for a directed
22 verdict on the derivative claims, but indicated the next day
23 (after Creditor moved for reconsideration) that it would vacate
24 that ruling. After Debtor argued that Creditor had not properly
25 joined Monterey as a party, the court stated "I'm going to stay
26 with my original ruling . . . I've got to stay with my ruling
27 yesterday granting the motion [for directed verdict]."
28 Significantly, the court never specified that the directed verdict

1 would operate as anything other than an adjudication of the
2 merits.⁷ The state court did not state on the record the reasons
3 for its ruling.

4 Because Creditor's derivative claim for willful and malicious
5 injury is based on the same facts and tortious claims (i.e.,
6 conversion) asserted in the state court lawsuit, the directed
7 verdict bars his derivative section 523(a)(6) claims here under
8 the doctrine of issue preclusion. Similarly, while Creditor did
9 not specify that he was suing Debtor derivatively for embezzlement
10 in the state court action (notwithstanding the "Embezzlement
11 Lawsuit" label), the state court's directed verdict dismissing his
12 derivative claims prevents him from pursuing his derivative
13 section 523(a)(4) claims for embezzlement.

14 Issue preclusion, often called "collateral estoppel,"
15 forecloses relitigation of matters that have already been decided
16 in prior proceedings. Paine v. Griffin (In re Paine), 283 B.R.
17 33, 39 (9th Cir. BAP 2002); see also Harmon v. Kobrin (In re
18 Harmon), 250 F.3d 1240, 1245 (9th Cir. 2001) (applying California
19 law), quoting Lucido v. California, 51 Cal.3d 335, 272 Cal.Rptr.
20 767, 795 P.2d 1223, 1225 (1990); Christopher Klein, et al,
21 Principles of Preclusion & Estoppel in Bankruptcy Cases, 79 Am.
22 Bankr. L.J. 839, 852 (2005).

23 Since the question involves the issue-preclusive effect of a
24 California state court's judgment, we apply California preclusion
25 law. 28 U.S.C. § 1738; Marrese v. Am. Acad. of Orthopaedic
26 Surgeons, 470 U.S. 373, 380 (1985). Under California law, the

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28 ⁷As discussed later, because the state court did not specify
otherwise, the directed verdict -- as a matter of express
statutory California law -- constitutes an adjudication on the
merits. Cal. Code Civ. Pro. § 630(c).

1 party asserting issue preclusion has the burden of establishing
2 the following requirements:

3 First, the issue sought to be precluded from
4 relitigation must be identical to that decided in a
5 former proceeding. Second, this issue must have been
6 actually litigated in the former proceeding. Third, it
7 must have been necessarily decided in the former
8 proceeding. Fourth, the decision in the former
9 proceeding must be final and on the merits. Finally,
10 the party against whom preclusion is sought must be the
11 same as, or in privity with, the party to the former
12 proceeding.

13 Harmon, 250 F.3d at 1225. All of these elements are present here.

14 1. Identical Issues

15 Both the derivative claims in the state court action and in
16 the nondischargeability adversary proceeding involve the identical
17 facts. They involve the same alleged harm: that Debtor
18 misappropriated Monterey's funds to pay himself unauthorized and
19 excessive salary. While the state court complaint did not assert
20 embezzlement as a specific cause of action, both actions present
21 identical factual issues and substantially identical legal issues.
22 The section 523(a)(6) derivative claim is likewise substantially
23 similar to Creditor's derivative state court claims for
24 conversion. The substantial similarity between the claims and
25 facts alleged in both lawsuits is sufficient for the purposes of
26 issue preclusion. Durkin v. Shea & Gould, 92 F.3d 1510, 1515-16
27 (9th Cir. 1996) ("Issue preclusion applies in 'subsequent suits
28 based on a different cause of action involving a party to the
prior litigation'" and the issue "decided in the prior
adjudication is [to be] substantially identical to the issue in
the subsequent litigation.") (Emphasis added and citations
omitted).

1 The state court complaint alleged that Debtor converted
2 property of Monterey. The elements of conversion under California
3 law include (1) the plaintiff's ownership or right to possession
4 of property; (2) the defendant's wrongful use or conversion of
5 the property in a manner inconsistent with the plaintiff's
6 property rights and (3) damages. Kasdan, Simonds, McIntyre,
7 Epstein & Martin v. World Sav. & Loan Ass'n (In re Emery), 317
8 F.3d 1064, 1069 (9th Cir. 2003). In contrast, embezzlement in the
9 context of nondischargeability requires three elements: (1)
10 property rightfully in the possession of a nonowner; (2)
11 nonowner's appropriation of the property to a use other than that
12 to which it was entrusted; and (3) circumstances indicating fraud.
13 Transam. Comm'l Fin. Corp. v. Littleton (In re Littleton), 942
14 F.2d 551, 555 (9th Cir. 1991). The primary difference between a
15 conversion claim and an embezzlement claim is that embezzlement
16 requires the plaintiff to demonstrate fraudulent intent by the
17 defendant. Because embezzlement is essentially conversion with
18 the additional element of fraudulent intent, some courts and
19 commentators simply characterize embezzlement as "fraudulent
20 conversion."⁸ Therefore, if a court finds that a plaintiff has
21 not established a case for conversion, the plaintiff likewise
22 would be unable to prove that all of the elements of embezzlement
23 are present.

24 Because the state court entered a directed verdict
25 dismissing Creditor's derivative claims that Debtor had wrongfully
26 used or misappropriated property belonging to Monterey, Creditor
27

28 ⁸See 26 Am. Jur. 2d Embezzlement § 3 (2006 Westlaw Update)
(embezzlement "requires a fraudulent conversion of property").

1 cannot establish the second prong of the embezzlement inquiry.
2 The issue was previously litigated and decided against Creditor.⁹

3 2. Actually Litigated

4 Creditor's derivative claims and the facts supporting them
5 were actually litigated before a jury. The court entered a
6 directed verdict following Creditor's presentation of evidence of
7 these claims.

8 3. Necessarily Decided

9 The state court decided the issues relating to the derivative
10 claims when it entered its directed verdict dismissing them. In
11 addition, following entry of its directed verdict in favor of
12 Debtor on Creditor's derivative claims, the state court allowed
13 the jury to consider Creditor's individual claims. In other
14 words, the directed verdict was reflected in the final verdict in
15 that the derivative claims were not submitted to or decided by the
16 jury even though it heard all evidence offered in support of the
17 derivative claims. After the jury returned a verdict in favor of
18 Creditor on his individual claims, the state court entered its
19 judgment which did not award Creditor damages on any derivative
20 claim. Therefore, the derivative claims were necessarily decided.

21 4. Identical Parties

22 The parties are identical in both actions; with respect to
23 the derivative claims, Creditor sued Debtor derivatively on behalf

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25 ⁹Even if the issues on the derivative claims were not
26 substantially similar in both actions, Debtor has not argued on
27 appeal that the issues are dissimilar. To the contrary, he
28 labeled the state court action as the "Embezzlement Action" in his
bankruptcy court pleadings and in his briefs before this panel.
Generally, we will not consider issues not raised on appeal. See
Branam v. Crowder (In re Branam), 226 B.R. 45, 55 (9th Cir. BAP
1998), aff'd mem., 205 F.3d 1350 (9th Cir. 1999) (issues not
argued in the opening brief are deemed abandoned).

1 of Monterey in both state court and in bankruptcy court.

2 5. Final Judgment on the Merits

3 Neither party disputes that the state court judgment is
4 final. The parties, however, dispute whether the directed verdict
5 was on the merits. Creditor argues that because the state
6 court's "reasons for granting the directed verdict motion was not
7 at all clear in the record" (see Appellant's Opening Brief in BAP
8 No. CC-05-1406 at page 20),¹⁰ the directed verdict cannot be "on
9 the merits." We disagree. Section 630(c) of the California Code
10 of Civil Procedure provides that if a motion for directed verdict
11 is granted, "unless the court in its order directing entry of the
12 verdict specifies otherwise, it shall operate as an adjudication
13 on the merits." When interpreting statutes, the "plain meaning of
14 legislation should be conclusive, except in the rare cases in
15 which the literal application will produce a result demonstrably
16 at odds with the intentions of its drafters." United States v.
17 Ron Pair Enters., Inc., 489 U.S. 235, 242 (1989). Here, the
18 meaning of CCP § 630(c) is both plain and apparent: a directed
19 verdict is on the merits unless the court provides otherwise.
20 This literal result is not demonstrably at odds with the
21 intentions of the statute's drafters, particularly given that the
22 California Legislature used identical language in its provisions
23 governing nonsuits. See CCP § 581c(c). We will apply CCP
24 § 630(c) as written and we will not read between the lines of the
25 state court judgment to find words that save Creditor here.

26
27 ¹⁰Creditor acknowledges on pages 25 and 26 of his brief that
28 the state court's directed verdict could have been based on
misjoinder grounds or could have been based on a finding that
Creditor had not presented evidence to support his derivative
claims.

1 Nothing in the record indicates that the court based its
2 ruling solely on procedural grounds; in fact, as Creditor
3 concedes, the record is ambiguous as to the grounds for the state
4 court's decision. But whatever the state court's reasoning was,
5 California law clearly mandates that the directed verdict operates
6 as an adjudication on the merits in light of the court's failure
7 to specify otherwise. Creditor has cited no case law interpreting
8 CCP § 630(c) any differently. Accordingly, the directed verdict
9 was an adjudication on the merits.

10 Because all of the grounds for issue preclusion under
11 California law are present here, Creditor's derivative section
12 523(a)(4) and (a)(6) claims are barred as a matter of law and
13 undisputed fact. We therefore AFFIRM the bankruptcy court's
14 summary judgment in favor of Debtor on the derivative section
15 523(a)(4) embezzlement claim and the derivative section 523(a)(6)
16 willful and malicious injury claim.¹¹

18 ¹¹Because we conclude that issue preclusion applies, we do not
19 address certain other arguments raised by the Debtor in support of
20 the summary judgment. Nonetheless, we do observe that such
21 arguments are not persuasive. First, Debtor contends that
22 Creditor cannot establish the "fraudulent intent" element of
23 embezzlement. Creditor, however, raises disputed and triable
24 issues of fact as to this element, such as whether Debtor
25 attempted to conceal his receipt of the higher salary. Summary
26 judgment would thus be inappropriate based on this theory.

27 Debtor also argues that Creditor's derivative claims were
28 time-barred. In his initial complaint, Creditor asserted the
section 523(a)(4) claims on his own behalf. After the deadline
for objecting to dischargeability passed, he amended the complaint
to assert the section 523(a)(4) claims derivatively on behalf of
the corporation. Because the amended complaint alleges the same
facts as the initial complaint, the "two pleadings . . . share a
common core of operative facts sufficient to impart fair notice of
the transaction, occurrence, or conduct called into question."
Fed. Dep. Ins. Corp. v. Jackson, 133 F.3d 694, 702 (9th Cir.
1998). Consequently, because the specified conduct in the amended
complaint is identifiable with the conduct alleged in the initial
complaint, the amended complaint relates back to the initial
complaint. Id.

1 B. Creditor's Individual Section 523(a)(6) Claim

2 The bankruptcy court erred in holding that as a matter of
3 undisputed fact and law, Creditor had no cognizable individual
4 claim under section 523(a)(6); rather, Creditor raised issues of
5 material fact which should not be resolved in the context of a
6 summary judgment motion.

7 The court and Debtor correctly stated that intentional breach
8 of contract, in and of itself, does not give rise to a section
9 523(a)(6) nondischargeability claim for willful and malicious
10 injury. Petralia v. Jercich (In re Jercich), 238 F.3d 1202, 1206
11 (9th Cir. 2001), cert. denied, 533 U.S. 930 (2001). To be
12 excepted from discharge under section 523(a)(6), "a breach of
13 contract must be accompanied by some sort of 'tortious conduct'
14 that gives rise to 'willful or malicious injury.'" Id.

15 The bankruptcy court held that Debtor's breach of the
16 Guaranty and the Letter Agreement was not accompanied by any
17 tortious conduct by Debtor, and therefore granted summary judgment
18 denying Creditor's individual nondischargeability claims under
19 section 523(a)(6). The record, however, does not establish as a
20 matter of undisputed fact that the breaches of contract were
21 unaccompanied by tortious acts.

22 In his amended complaint and other pleadings, as well as in
23 affidavits opposing summary judgment, Creditor alleges that Debtor
24 committed forgery in a scheme to justify or hide that he had
25 wrongfully breached the Letter Agreement. At the summary judgment
26 hearing, Creditor argued that this act of purported forgery
27 constituted a "tortious act" accompanying the breach of the Letter
28 Agreement. The court disagreed, observing that the forgery must

1 have occurred after Debtor breached the contracts and Creditor
2 sustained his losses. But the record contains evidence that is
3 inconsistent with that observation. The Purported Forgery in the
4 Excerpts of Record shows a transmission stamp dated December 22,
5 2000, from Debtor's fax machine. Debtor allegedly breached the
6 Letter Agreement by wrongfully paying himself excess salary in
7 2001 and 2002. Thus, the record contains evidence that a material
8 factual and legal issue may be in dispute: was Debtor's
9 intentional breach accompanied by a tortious act?

10 If Debtor forged documents in a scheme to cover or justify
11 his breaches of the Letter Agreement before he actually committed
12 the breaches, Debtor's breaches of contract were potentially
13 accompanied by tortious conduct which may or may not give rise to
14 a claim under Jercich and section 523(a)(4). At a minimum,
15 Creditor has presented an issue for the trier of fact which cannot
16 be resolved as a matter of undisputed fact and law: Did Debtor
17 engage in tortious conduct in connection with his breach of
18 contracts and did that tortious conduct result in the willful and
19 malicious injury of Creditor?

20 Because Debtor has not established as a matter of undisputed
21 fact and law that Creditor has no individual section 523(a)(6)
22 claim, we REVERSE this aspect of the bankruptcy court's summary
23 judgment.

24 C. Debtor's Derivative Counterclaim for Fraudulent Transfer

25 Acting derivatively on behalf of Monterey, Debtor asserted a
26 fraudulent transfer counterclaim against Creditor pursuant to
27 California Civil Code section 3439.04(a) and (b). Creditor sought
28 dismissal of the counterclaim on the ground that Debtor lacked

1 standing to assert the claims. The bankruptcy court dismissed the
2 counterclaim, but did so on the grounds that Debtor's wrongful
3 conduct equitably estopped him from asserting derivative claims on
4 behalf of Monterey. We affirm the dismissal as correct for a
5 different reason: as a participant in the purported fraudulent
6 transfer (i.e., the Resolution designating Note payments as bonus
7 payments from Monterey to Creditor for services previously
8 rendered), Debtor lacked standing under California law to assert
9 the fraudulent transfer claims.

10 First, to the extent Debtor is acting derivatively on behalf
11 of Monterey, he lacks standing because Monterey lacks standing to
12 assail a fraudulent transfer in which it participated. Tognazzi
13 v. Wilhelm, 6 Cal.2d 123, 125, 56 P.2d 1227, 1228 (1936). ("'[H]e
14 who executes a conveyance of property for the purpose of
15 hindering, delaying or defrauding his creditors cannot by an
16 action in equity obtain a reconveyance from his grantee, nor can
17 anyone claiming under him, except an innocent purchaser.'"); see
18 also Jones v. Re-Mine Oil Co., 47 Cal.App.2d 832, 842, 119 P.2d
19 219 (1941) (one who has transferred his property to defraud his
20 creditors cannot thereafter recover from his grantee that which he
21 has conveyed); Xydias v. Adamson (In re Xydias' Estate), 92
22 Cal.App.2d 857, 860-61, 208 P.2d 378, 379 (1949) ("No rule of law
23 is more strictly adhered to than the rule that one who has
24 conveyed his property in order to defraud his creditors, under
25 circumstances such as are present here, cannot thereafter recover
26 from his grantee that which he has conveyed.").

27 Secondly, the California fraudulent transfer laws on their
28 face only confer standing on a creditor of the transferor debtor.

1 Gen. Elec. Capital Auto Lease, Inc. v. Broach (In re Lucas Dallas,
2 Inc.), 185 B.R. 801, 805 (9th Cir. BAP 1995). Debtor's
3 counterclaim does not allege that he was acting as a creditor of
4 Debtor. Moreover, and more importantly, to the extent Debtor is
5 acting as a creditor of Monterey in seeking to invalidate the
6 purported fraudulent transfer, he cannot do so because he executed
7 the Resolution giving rise to the transfer. A creditor who
8 ratifies or participates in a fraudulent transfer may be estopped
9 from attacking the transfer. 16A Cal. Jur. 3d Creditors § 404
10 (2006) (citing Sullivan v. Johnson, 127 Cal. 230, 59 P. 583
11 (1899)).

12 Because the panel can affirm for any reason supported by the
13 record (Dittman v. California, 191 F.3d 1020, 1027 n.3 (9th Cir.
14 1999)), we AFFIRM the bankruptcy court's dismissal of Debtor's
15 fraudulent transfer claims, but base the affirmance on Debtor's
16 lack of standing to pursue such claims.

17 **V. CONCLUSION**

18 For the foregoing reasons, we AFFIRM the bankruptcy court's
19 summary judgment denying Creditor's derivative section 523(a)(4)
20 and (a)(6) claims, REVERSE the bankruptcy court's summary judgment
21 denying Creditor's individual section 523(a)(6) claims, and AFFIRM
22 the bankruptcy court's dismissal of Debtor's derivative fraudulent
23 transfer counterclaim.

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