

FEB 28 2007

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

NOT FOR PUBLICATION

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

6	In re:)	BAP No.	CC-06-1202-KMoD
)		
7	SHANEL ANN STASZ,)	Bk. No.	LA 05-43980-AA
)		
8	Debtor.)	Adv. No.	LA 06-01305-AA
)		
9	_____)		
)		
10	SHANEL ANN STASZ,)		
)		
11	Appellant,)		
)		
12	v.)	MEMORANDUM*	
)		
13	HUGO W. QUACKENBUSH.)		
)		
14	Appellee.)		
)		
15	_____)		

Submitted without oral argument
on February 22, 2007

Filed - February 28, 2007

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

Honorable Alan M. Ahart, Bankruptcy Judge, Presiding

Before: KLEIN, MONTALI, and DUNN, Bankruptcy Judges.

*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.

1 Appellant/debtor, Shanel Stasz, challenges the bankruptcy
2 court's decision to give preclusive effect to a confirmed final
3 arbitration award and grant summary judgment in favor of
4 appellee, Hugo Quackenbush, on his complaint for
5 nondischargeability of debt under 11 U.S.C. § 523(a)(6). We
6 AFFIRM.

7 FACTS

8 Appellee, a wealthy businessman and longtime employee of a
9 prominent securities firm, and appellant were involved in a
10 romantic relationship from 1997-2000. In 2000 their relationship
11 soured and came to a bitter end.

12 Appellee filed an action in state court against appellant
13 and obtained a temporary restraining order against her
14 (Quackenbush v. Stasz, Super. Ct. San Francisco County, 2000, No.
15 FL 036974). Appellant threatened to file a countersuit against
16 appellee to publicly embarrass him by making public statements
17 concerning him, his employer, his friends, and his colleagues
18 based on information she gained during their relationship and
19 from information she found while going through his personal
20 papers and effects.

21 Appellant further threatened to contact the District
22 Attorney's Office to have appellee investigated and criminally
23 prosecuted.

24 In an effort to avoid such public humiliation and further
25 distress, and to bring their acrimonious relationship to an end,
26 appellee entered into a detailed written Confidential Settlement
27 Agreement and General Release ("Agreement") with appellant on May
28 1, 2000. The Agreement was intensively negotiated in April 2000

1 with several drafts being exchanged between the parties.
2 Appellee was represented by counsel, and appellant, who herself
3 holds a law degree, was also represented by counsel of her
4 choosing.

5 Pursuant to the Agreement, both appellant and appellee were
6 to keep confidential the existence and terms of the Agreement and
7 the nature of their disputes. Neither party was to contact or
8 directly communicate with each other in any way, other than
9 through counsel.

10 Pursuant to the Agreement, appellee was to pay appellant a
11 total of \$3,175,000, secured by a deed of trust ("DOT") on an
12 apartment building owned by appellee. Appellee made an initial
13 payment of \$2.5 million, and additional payments of \$225,000 were
14 to be made on the first, second, and third anniversaries of the
15 Agreement's effective date, provided appellant complied with all
16 the provisions of the Agreement.

17 The Agreement also contained an arbitration provision. Id.
18 That provision states:

19 12. Dispute Resolution. Any and all disputes of any
20 kind between the parties, including but not limited to
21 ones arising out of or related to interpretation or
22 enforcement of any provision of this Agreement, shall
23 be resolved by confidential binding arbitration before
24 the American Arbitration Association Large, Complex
25 Commercial Dispute Panel in San Francisco, California
26 before a single neutral arbitrator under the AAA Large,
27 Complex Commercial Dispute Rules and Rules for
28 Emergency Measures of Protection and California law.
All aspects of the arbitration (including but not
limited to pre-hearing, discovery (if any) and hearing
procedures) shall be kept strictly confidential and
sealed. The arbitrator shall have the power to award
provisional, ancillary, temporary, preliminary and
permanent equitable remedies, including but not limited
to injunctive relief, but either party may at its
option without waiving its right to arbitration
hereunder seek injunctive relief from a court with

1 jurisdiction over the parties and the subject matter.
2 The arbitrator's award or awards shall be final and
3 binding, and judgment on any award may be entered by
4 any court having jurisdiction over the parties and the
5 subject matter. Without waiving or limiting the
6 generality of the foregoing agreement to arbitrate
7 disputes, the parties agree that any court proceedings
8 between them shall be brought and conducted in the
9 Superior Court in and for the City and County of San
10 Francisco, and each party agrees to be subject to the
11 personal jurisdiction of that court and that it is and
12 will be a proper venue. All pleadings and other
13 documents in any court proceedings between the parties
14 shall be filed to the extent legally permitted under
15 seal.

9 A little more than one month after the parties voluntarily
10 and knowingly entered into the Agreement, appellant personally
11 and directly contacted appellee by telephone on several
12 occasions. During some of those calls, appellant told appellee
13 that she would make embarrassing statements to third parties
14 about him, his colleagues, and his employer unless he gave her
15 more money. Appellant also sent letters to appellee's place of
16 employment that discussed appellee and their confidential
17 Agreement.

18 In July 2000, appellee initiated arbitration proceedings
19 against appellant by filing a claim with the American Arbitration
20 Association ("AAA") alleging violations of the no-contact and
21 confidentiality provisions of their Agreement. Appellant refused
22 to pay her share of the AAA filing fee. Due to appellant's
23 refusal to pay, appellee paid the entire filing fee. Appellant
24 filed a counterclaim seeking specific performance of their
25 Agreement.

26 After appellant's harassing phone calls continued, appellee
27 initiated proceedings with the AAA for an interim restraining
28 order against appellant to stop her from continuing to violate

1 their Agreement. The AAA appointed a retired California superior
2 court judge to serve as arbitrator and hear the restraining order
3 request. Appellant filed two written oppositions to appellee's
4 request for a restraining order.

5 While appellee's restraining order request was pending,
6 appellant sent appellee's counsel a letter in which she
7 threatened to file a lawsuit in the Los Angeles Superior Court
8 unless she was paid \$50 million. A copy of the draft complaint
9 was attached to the letter. Appellant also telephoned appellee
10 and threatened him directly.

11 On November 30, 2000, appellant stipulated to the entry of
12 an interim restraining order. Over appellant's objection, the
13 arbitrator made findings that the claims asserted in appellant's
14 draft complaint must be resolved through arbitration, not in
15 state court, and some of the allegations, if made public, would
16 violate the terms of the confidentiality provisions of the
17 Agreement.

18 After appellant stipulated to entry of a restraining order,
19 and after the arbitrator announced at a hearing on the
20 restraining order request that he intended to enter detailed
21 findings over appellant's objection, appellant filed an action in
22 Los Angeles Superior Court (Stasz v. Quackenbush, (Super. Ct.
23 L.A. County 2000, No. BS066549) ("Stasz I"). Appellant
24 challenged the arbitration provision in the Agreement as
25 "unconscionable", and brought a motion to have the arbitration
26 provision excised.

27 On January 17, 2001, the Superior Court in Stasz I denied
28 appellant's motion to "excise" and found the arbitration

1 provision to be fully enforceable and not unconscionable.
2 Appellant appealed, and the California Court of Appeal for the
3 Second Appellate District affirmed the Order in an unpublished
4 decision (Stasz v. Quackenbush (Nov. 19, 2002, B147388)).

5 On June 25, 2001, appellant filed a second suit against
6 appellee in state court alleging invasion of privacy, breach of
7 fiduciary duty, intentional infliction of emotional distress,
8 fraud, and deceit. (Stasz v. Quackenbush, (Super. Ct. L.A. Co.
9 2001, No. BC252954) ("Stasz II"). Appellant also sought
10 injunctive relief. The complaint filed in Stasz II was based on
11 the same claims and allegations contained in the draft complaint
12 appellant had threatened to file against appellee. Pursuant to
13 the arbitrator's interim restraining order, those claims were to
14 be pursued in arbitration, not in state court.

15 Appellant also had the Stasz II complaint delivered to
16 appellee's place of employment in a concentrated effort to
17 embarrass and humiliate appellee.¹

18 In August 2001, appellee filed a Motion to Compel
19 Arbitration in Stasz II. Appellant opposed the motion.²

20 In September and October 2001, appellee filed and served an
21 Application and Supplemental Application for Remedies with the

22
23 ¹Appellant had the complaint delivered to the guard station
24 at appellee's office. The guard on duty delivered the complaint
25 to the legal department. Appellee's friends and colleagues in
management were notified of the complaint and the matters
contained therein.

26 ²Appellant's opposition repeated several of the factual
27 allegations contained in her state court complaint. She also
28 attached, as a matter of public record, a document that contained
approximately 200 pages of exhibits that had been kept
confidential in the arbitration or under seal in Stasz I.

1 arbitrator, for appellant's repeated violations of the
2 restraining order.

3 On October 12, 2001, the Superior Court granted appellee's
4 Motion to Compel Arbitration in Stasz II and stayed Stasz II
5 pending the outcome of the arbitration.

6 A few days before the arbitration hearing on appellant's
7 Application for Remedies, appellant informed the AAA and the
8 arbitrator by faxed letter that she would not participate in the
9 hearing.³

10 The arbitrator proceeded with the duly noticed hearing
11 without the appellant.

12 In late 2001, the arbitrator issued an interim award of
13 damages in favor of appellee based on appellant's violations of
14 the Agreement and restraining order. The arbitrator found the
15 appellant's violations to be "willful" and had caused appellee
16 "real and significant injuries and damages." Appellee was
17 awarded \$369,553.40 in compensatory damages, and \$28,000 in
18 arbitration costs, for a total interim award of \$397,553.40.⁴

19 The same day that the arbitrator issued his first interim
20 award order, appellant faxed a letter to upper management and
21 general counsel at appellee's place of employment that contained
22 statements about appellee, their disputes and the pending
23 arbitration.

24
25 ³Appellant requested that a letter and 50 pages of
26 "exhibits" included with that letter be considered as her
27 opposition to appellee's Application for Remedies. This "letter"
was a personal letter sent to appellee's counsel stating why her
conduct was justified.

28 ⁴The arbitrator denied appellee's request for punitive
damages "without prejudice to proof of continued violations
should they actually occur."

1 In January 2002, appellee sought further remedies for
2 appellant's further violations of their Agreement. The following
3 week, appellant filed a third lawsuit in Los Angeles Superior
4 Court alleging causes of action against appellee's attorneys, his
5 employer, and the AAA (Stasz v. [appellee's firm] (Super. Ct.
6 L.A. Co. 2002, No. BC266691)) ("Stasz III").

7 With respect to appellee's second request for remedies,
8 notice was duly served on all parties, and the arbitrator held
9 two telephonic hearings in February and March 2002. Appellant
10 again informed the AAA and the arbitrator by faxed letter that
11 she would not participate in either hearing. Appellant did not
12 appear for the February hearing. However, at the March hearing,
13 appellant initially appeared via telephone, but when she was
14 informed that any participation on her part would be "on the
15 record", appellant hung up the phone and did not participate
16 further.

17 The arbitrator later issued his second interim remedies
18 award order in which he awarded appellee an additional \$150,000
19 in compensatory damages, and \$250,000 "in recognition of the
20 willful and repetitive nature of [appellant's] violations, and to
21 deter her from any further violations." The arbitrator found
22 that appellant violated the Agreement and restraining order
23 "willfully and with the intent to injure" appellee.

24 Despite the increased damage award against her, appellant
25 continued to violate the Agreement and restraining order.

26 Because of appellant's continued violations, appellee filed
27 a Motion for Judgment on All Claims and Counterclaims in the
28 arbitration ("Motion for Judgment"). The Motion for Judgment was

1 heard on June 4, 2002, at the AAA offices in Los Angeles. Both
2 parties were duly notified of the hearing, date, time, and
3 location. Appellee attended through his counsel. Appellant,
4 however, notified the arbitrator through written letter that she
5 elected not to attend the hearing "on advice of counsel."
6 Appellant did not submit any evidence in opposition to appellee's
7 motion, other than a letter stating her position that the
8 arbitration was automatically stayed pending her appeal of Stasz
9 I.

10 In appellant's voluntary absence, the arbitrator requested
11 appellee to present evidence in support of his claim.

12 On July 31, 2002, the arbitrator issued a Final Award in
13 appellee's favor on all claims. The arbitrator also reaffirmed
14 and incorporated the factual findings, legal conclusions, and
15 remedies of the interim awards into the Final Award.

16 The arbitrator found that appellant breached the Agreement
17 by:

18 (1) directly contacting [appellee] and threatening to
19 make embarrassing statements about him to third
20 parties; (2) filing suit against [appellee] (Stasz II)
21 instead of pursuing her claims through arbitration; (3)
22 making allegations in the Stasz II complaint that
23 violated the confidentiality provisions of the
24 agreement and that were unnecessary to plead her causes
25 of action; (4) sending a letter to the [appellee's]
26 firm on December 21, 2001, that contained inaccurate
27 and disparaging assertions about [appellee]; and (5)
28 filing another suit related to the agreement (Stasz
III) in which she made unnecessary, disparaging remarks
about [appellee], the [appellee's] firm, and some of
the firm's officers.

26 The Final Award further stated,

27 The Arbitrator finds that [appellant] knew clearly from
28 the Arbitrator's prior interim awards that the various
statements in the complaint and opposition . . . were

1 unnecessary, improper, violative of the parties'
2 Agreement and the Arbitrator's orders, and were
3 undertaken with specific intent to injure [appellee]
4 emotionally, embarrass him at his place of work, and
5 undermine the value to [appellee] of the Agreement into
6 which she had entered. . . .

7
8 41. [Appellee] has been embarrassed before his
9 colleagues at work, one of whom is a lifelong personal
10 friend. He provided evidence that he has suffered
11 personal humiliation, emotional anguish and anxiety in
12 his personal and professional life, with accompanying
13 sleeplessness and occasional bouts of nausea. . . .

14
15 43. The Arbitrator's First Interim Remedies Award
16 denied damages for willfulness and deterrence without
17 prejudice to proof of further violations. The
18 Arbitrator found the willful violations shown in
19 [appellee's] second application to support \$250,000 in
20 recognition of the willful and repetitive nature of
21 [appellant's] intentional and tortious acts, and to
22 deter her from any further violations. The deterrent
23 effect of this award apparently was not sufficient.
24 [Appellant] has continued - in fact, has escalated -
25 conduct that since the entry of the Interim Restraining
26 Order can only be considered intentionally tortious,
27 and malicious and oppressive within the meaning [of]
28 California Civil Code Section 3294(c). Upon
[appellee's] motion, the Arbitrator awards an
additional \$350,000 for the most recent violations in
recognition of the recalcitrantly malicious,
oppressive, willful and repetitive nature of
[appellant's] violations, and to deter her more
forcefully from any further violations.

19 The Final Award also excused appellee from making any
20 further payments to appellant under the Agreement and imposed an
21 injunction enforcing the Agreement's noncontact and
22 confidentiality provisions against appellant.

23 The damages awarded to appellee totaled approximately \$1.5
24 million.⁵

26	⁵	First Interim Award:	\$369,553.40
27		Second Interim Award:	\$400,000
28		<u>Additional damages:</u>	<u>\$700,000</u>
		Total damages:	\$1,469,553.40

1 After the Final Award was issued, appellant and appellee
2 returned to state court in Stasz II, which had been stayed
3 pending the arbitration of appellant's claims. Appellee moved to
4 confirm the Final Award, and appellant moved to vacate the Final
5 Award.

6 On September 30, 2002, the state court confirmed the Final
7 Award in its entirety and entered judgment against appellant.
8 Appellant appealed.⁶

9 On August 5, 2004, the California Court of Appeal for the
10 Second Appellate District affirmed the judgment of the state
11 court that confirmed the Final Award. The California Supreme
12 Court denied review on November 17, 2004.

13 Appellant filed a chapter 7 bankruptcy case on October 13,
14 2005.

15 On February 3, 2006, appellee filed an adversary proceeding
16 against appellant to except the confirmed Final Award from
17 discharge under 11 U.S.C. § 523(a)(6).

18 Appellee made, and the bankruptcy court granted, a Motion
19 for Summary Judgment ("MSJ") in the adversary proceeding based
20 upon the confirmed Final Award. The bankruptcy court concluded
21 that the issues litigated before the arbitrator and the state
22 court were done so in an adjudicatory manner, and that the
23 "detailed findings of the judicially confirmed Arbitration Award
24 conclusively and preclusively establish that the monetary relief
25 awarded in favor of [appellee] . . . is based on [appellant's]

26
27 ⁶Appellant appealed portions of Stasz III and Stasz II. The
28 Second Appellate District of the California Court of Appeal
consolidated the three appeals.

1 willful and malicious injury to [appellee] within the meaning" of
2 § 523(a)(6).

3 The bankruptcy court entered judgment in favor of appellee
4 excepting from discharge \$1,984,778.18 in damages (plus judgment
5 interest) established in the judicially confirmed Final Award.⁷

6 This timely appeal ensued.

7
8 JURISDICTION

9 The bankruptcy court had jurisdiction via 28 U.S.C. § 1334.
10 We have jurisdiction under 28 U.S.C. § 158(a)(1).

11
12 ISSUE

13 Whether the judicially confirmed arbitration award was
14 eligible for issue preclusive effect under California law so as
15 to be applied in a bankruptcy nondischargeability action to
16 establish willful and malicious injury under § 523(a)(6).

17
18 STANDARD OF REVIEW

19 We review summary judgment de novo to assess whether there
20 is a genuine issue of material fact and whether the moving party
21 is entitled to judgment as a matter of law. Khaligh v. Hadaegh
22 (In re Khaligh), 338 B.R. 817, 823 (9th Cir. BAP 2006).

23 We review rulings regarding rules of res judicata, including
24 issue and claim preclusion, de novo as mixed questions of law and

25
26 ⁷The court also concluded that the non-monetary obligations
27 under the Agreement and the permanent injunction issued by the
28 Superior Court did not give rise to a "claim" by appellant within
the meaning of 11 U.S.C. § 105(5), and thus the enforceability of
those obligations were not affected by any discharge appellant
may have received.

1 fact in which legal questions predominate. Robi v. Five
2 Platters, Inc., 838 F.2d 318, 321 (9th Cir. 1988); Alary Corp. v.
3 Sims (In re Assoc. Vintage Group, Inc.), 283 B.R. 549, 554 (9th
4 Cir. BAP 2002); Khaligh, 338 B.R. at 823. Once it is determined
5 that preclusion doctrines are available to be applied, the actual
6 decision to apply them is left to the trial court's discretion.
7 Robi, 838 F.2d at 321; George v. City of Morro Bay (In re
8 George), 318 B.R. 729, 733 (9th Cir. BAP 2004), aff'd, 144 Fed.
9 Appx. 636 (9th Cir. 2005), cert. denied, ___ U.S. ___, 126 S.Ct.
10 1068, 163 L.Ed.2d 861 (2006); Khaligh, 338 B.R. at 823. When
11 state preclusion law controls, such discretion is exercised in
12 accordance with state law. Gayden v. Nourbakhsh (In re
13 Nourbakhsh), 67 F.3d 798, 800-01 (9th Cir. 1995).

14 15 DISCUSSION

16 The question is whether, as a matter of California law, a
17 California court would be permitted to give issue preclusive
18 effect to the confirmed arbitration award that was entered as
19 between the parties. If so, then the bankruptcy court was also
20 entitled to give issue preclusive effect. McDonald v. City of
21 West Branch, Mich., 466 U.S. 284, 287 (1984); Harmon v. Kobrin
22 (In re Harmon), 250 F.3d 1240, 1245 (9th Cir. 2001); Khaligh, 338
23 B.R. at 824.

24 California law prescribes that a confirmed arbitration award
25 has the status of a judgment in a civil action. Cal. Civ. Proc.
26 Code § 1287.4; Khaligh, 338 B.R. at 826.

27 Under California preclusion law, there are six elements that
28 must be satisfied before issue preclusion will be applied in the

1 context of mutuality. Lucido v. Super. Ct., 795 P.2d 1223, 1225-
2 27 (Cal. 1990); Khaligh, 338 B.R. at 825. The first five
3 "threshold" elements are: (1) identical issue; (2) actually
4 litigated in the former proceeding; (3) necessarily decided in
5 the former proceeding; (4) former decision final and on the
6 merits; and (5) party against whom preclusion sought either the
7 same, or in privity with, party in former proceeding. Khaligh,
8 338 B.R. at 824. The sixth element is an additional inquiry into
9 whether it would be fair and consistent with sound public policy
10 to impose issue preclusion in the particular setting. Id. at
11 824-25.

12 Under the sixth element, when applying issue preclusion
13 based on a confirmed arbitration award, the court must examine
14 "whether the underlying arbitration followed basic elements of
15 adjudicatory procedure and was, thus, 'adjudicatory in nature.'" Id.
16 at 828 quoting Kelly v. Vons Cos., 67 Cal. App. 4th 1329,
17 1336 (1998).

18 Whether an underlying arbitration is "adjudicatory in
19 nature" and thus eligible for preclusion depends, in California
20 courts, on whether the proceeding entailed the "essential
21 elements of adjudication" as outlined by Restatement (Second) of
22 Judgments § 83. Khaligh, 338 B.R. at 828-30. Those essential
23 elements include:

24 (a) Adequate notice to persons who are to be bound by
25 the adjudication, as stated in § 2;

26 (b) The right on behalf of a party to present evidence
27 and legal argument in support of the party's
contentions and fair opportunity to rebut evidence and
argument by opposing parties;

28 (c) A formulation of issues of law and fact in terms of
the application of rules with respect to specified

1 parties concerning a specific transaction, situation,
2 or status, or a specific series thereof;

3 (d) A rule of finality, specifying a point in the
4 proceeding when presentations are terminated and a
5 final decision is rendered; and

6 (e) Such other procedural elements as may be necessary
7 to constitute the proceeding a sufficient means of
8 conclusively determining the matter in question, having
9 regard for the magnitude and complexity of the matter
10 in question, the urgency with which the matter must be
11 resolved, and the opportunity of the parties to obtain
12 evidence and formulate legal contentions.

13 Restatement (Second) of Judgments § 83(2); Khaligh, 338 B.R. at
14 830.

15 Appellant's opening brief sets forth several arguments why
16 the underlying arbitration was not adjudicatory in nature. She
17 first argues that the arbitrator, who was a seasoned California
18 Superior Court judge, was chosen by the AAA on an emergency basis
19 and not by the parties as required by their Agreement.

20 Our review of the arbitration provision in the Agreement
21 does not reveal a requirement that the parties agree to a
22 mutually acceptable arbitrator. The arbitrator was designated
23 pursuant to AAA rules. Furthermore, had the chosen arbitrator
24 exceeded his authority when he presided over the Motion for
25 Judgment and thereafter entered his Final Award, the state court
26 was authorized to vacate the Final Award. Cal. Civ. Proc. Code
27 § 1286.2(a)(4); Khaligh, 338 B.R. at 826.

28 The state court order confirming the Final Award in its
entirety was affirmed by the California Court of Appeal, and the
California Supreme Court denied review. It follows that the
validity of the arbitration, including the status of the
arbitrator, was necessarily approved and does not affect the

1 adjudicatory nature of the arbitration.

2 Appellant also argues that she did not participate in the
3 final arbitration hearing because of her contention that the
4 arbitration was stayed pending resolution of Stasz I (whether the
5 arbitrator provision was unconscionable and should be removed
6 from their Agreement). When appellant voluntarily chose not to
7 participate in arbitration, and she refused to pay her share of
8 the arbitration fee, appellee paid the arbitration fee in total
9 and proceeded without her.

10 Appellant does not dispute that she had adequate notice of
11 all the arbitration hearings and she admits that she voluntarily
12 chose not to participate or to submit evidence on her behalf.
13 Further, the arbitrator expressly found that appellant had
14 actively participated at various stages of the arbitration and
15 subsequent judicial proceedings.

16 In the Final Award, the arbitrator expressly noted that
17 despite being duly notified of the hearing, the appellant
18 voluntarily chose not to appear and not to submit evidence or
19 argument on her behalf. Faced with appellant's deliberate
20 absence, the arbitrator invoked AAA Rule R-31, which provides:

21 **Arbitration in the Absence of a Party or**
22 **Representative.** Unless the law provides to the
23 contrary, the arbitration may proceed in the absence of
24 any party or representative who, after due notice,
25 fails to be present or fails to obtain a postponement.
An award shall not be made solely on the default of a
party. The arbitrator shall require the party who is
present to submit such evidence as the arbitrator may
require for the making of an award.

26 In its Final Award, the arbitrator expressly found that "no
27 aspect of this Final Award has been entered solely on the basis
28 of [appellant's] failure to appear or submit evidence." Id.

1 Because the appellant was adequately notified, her voluntary
2 absence does not dictate a finding that the arbitration was not
3 "adjudicatory in nature." See Papadakis v. Zelis (In re Zelis),
4 66 F.3d 205, 208-09 (9th Cir. 1995) (debtor's voluntary decision
5 not to appear at various hearings or file any opposition does not
6 preclude a finding that an issue was litigated.)

7 Further, appellant's contention that the arbitration
8 proceeding was stayed pending her appeal of Stasz I was rejected
9 by the arbitrator and by the Los Angeles Superior Court three
10 times.

11 The arbitration was not stayed pending the appeal and
12 appellant's voluntary choice not to appear does not vitiate the
13 adjudicatory nature of the arbitration.

14 As noted, the record reveals that the arbitrator was a
15 retired California Superior Court judge who, by definition, had
16 extensive knowledge and dealings with the adjudicatory process.
17 All parties were adequately notified of all hearings, including
18 the final hearing. Appellee appeared through his counsel, and
19 appellant voluntarily chose not to appear or to present evidence
20 in opposition. The Final Award is a twenty-six page reasoned
21 decision that reaffirms and incorporates the factual findings,
22 legal conclusions, and remedies from the three interim awards.

23 The Final Award reflects that the arbitrator reviewed the
24 entire record of all proceedings before him, which included
25 evidence and written statements from appellant during the two-
26 year course of the proceedings. The arbitrator explained, in
27 detail, the facts and evidence before him and concluded that the
28 appellant engaged in conduct that was "intentionally tortious,

1 and malicious and oppressive[.]”

2 Therefore, the arbitration process satisfies the essential
3 elements of adjudication and was conducted in an inherently
4 adjudicatory fashion. See Khaligh, 338 B.R. at 830.

5 Having concluded that the sixth element regarding
6 adjudicatory process was satisfied, we turn to whether the five
7 “threshold” requirements of issue preclusion were satisfied.
8 Because appellee brought a nondischargeability action under
9 § 523(a)(6) in the bankruptcy court, the issues litigated in the
10 arbitration would need to equate with “willful and malicious”
11 injury. Id. at 831.

12 The § 523(a)(6) inquiry involves a two-step analysis. The
13 first step is whether there was a “willful injury.” Id.
14 “Willful” injury entails a “deliberate or intentional” injury.
15 Id. Intent is either the “subjective intent of the actor to
16 cause harm or the subjective knowledge of the actor that harm is
17 substantially certain to occur.” Id.

18 The second step is whether the subject conduct was
19 “malicious.” Id. To constitute malicious conduct, there must be
20 a (1) wrongful act; (2) done intentionally; (3) which necessarily
21 causes injury; and (4) without just cause and excuse. Id.

22 In all three interim awards and in the Final Award (which
23 incorporated the interim awards), the arbitrator specifically
24 found the appellant’s conduct to be intentionally tortious and
25 malicious. The arbitrator also found that appellant’s conduct
26 was deliberate and “undertaken with specific intent to injure
27 [appellee] emotionally, embarrass him at his place of work, and
28 undermine the value to [appellee] of the Agreement into which she

1 had entered.”

2 The arbitrator also awarded a total of \$600,000 in punitive
3 damages to appellee “in recognition of the recalcitrantly
4 malicious, oppressive, willful and repetitive nature of
5 [appellant’s] violations” and to deter her from further
6 violations.

7 Thus, the issue of whether appellant’s conduct was willful
8 and malicious was actually litigated and necessarily decided in
9 the arbitration. The Final Award was made on the merits of the
10 case and was not based on appellant’s default. The Final Award
11 was confirmed over appellant’s objection by the Superior Court,
12 and affirmed on appeal by the California Court of Appeal, and the
13 California Supreme Court denied review. And finally, both
14 proceedings (the arbitration and the adversary proceeding)
15 involve the same parties. Thus, all five “threshold” elements
16 are satisfied.

17 The bankruptcy court did not err when it concluded issue
18 preclusion was available to establish willful and malicious
19 injury for purposes of § 523(a)(6). Further, the bankruptcy
20 court did not abuse its discretion when it chose to impose issue
21 preclusion as a basis for summary judgment without relitigating
22 the issue of willful and malicious injury. See Khaligh, 338 B.R.
23 at 832.

24
25 CONCLUSION

26 The bankruptcy court did not err when it entered summary
27 judgment in favor of appellee without relitigating the issue of
28 willful and malicious injury under § 523(a)(6). AFFIRMED.