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NOT FOR PUBLICATION

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

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In re:

JAMES H. SANDERS,

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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.

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UNITED STATES BANKRUPTCY APPELLATE PANEL

OF THE NINTH CIRCUIT

BAP No. AZ-06-1382-PaBMo

Bk. No. 05-24529-CGC

Adv. No. 06-00211-CGC

JAMES H. SANDERS,

Debtor.

Appellant,

PROGRESSIVE CASUALTY INSURANCE)
COMPANY,
)

Appellee.

MEMORANDUM1

Submitted Without Oral Argument on March 23, 2007

Filed - March 30, 2007

Appeal from the United States Bankruptcy Court for the District of Arizona

Honorable Charles G. Case, Bankruptcy Judge, Presiding

Before: PAPPAS, BRANDT and MONTALI, Bankruptcy Judges.

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Appellant chapter 7² debtor James H. Sanders ("Sanders") appeals an order granting summary judgment in an adversary proceeding in favor of Appellee Progressive Casualty Insurance Company ("Progressive") determining that the debt Sanders owes Progressive is excepted from discharge in his bankruptcy case under § 523(a)(2) and (13). We AFFIRM.

FACTS

On January 27, 1997, a "Judgment in a Criminal Case" was entered against Sanders in the U.S. District Court for the Eastern District of California adjudging him guilty, after a jury trial, of mail fraud in violation of 18 U.S.C. § 1341, and aiding and abetting under 18 U.S.C. § 2.³ For his sentence, the district court sent Sanders to prison for 51 months, and ordered him to make restitution to Progressive in the amount of \$4,106,657.00 (the "Restitution Obligation").⁴

On May 12, 1997, Sanders filed for chapter 7 relief in the District of Oregon (the "Oregon Bankruptcy Case"). Sanders was granted a discharge on August 21, 1997, and the case was closed.

In 2004, the Oregon Bankruptcy Case was reopened to allow

² 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.

³ Case E.D. Cal. 2:94CR00328-001.

⁴ Sanders was also ordered to make restitution to two other parties not involved in this appeal.

Sanders to commence an adversary proceeding against Progressive seeking a declaration that the Restitution Obligation was discharged in the Oregon Bankruptcy Case. On June 14, 2004, the Oregon Bankruptcy Court conducted a trial in the adversary proceeding, at which Sanders appeared pro se. In dismissing the adversary proceeding, the court recited detailed findings of fact on the record, including the following:

The evidence before the court establishes that the debtor was convicted under 18 U.S.C. § 1341. . . . [Sanders] sold insurance policies to various third parties . . . involved in the trucking business, representing himself to them as a stand-alone insurance company. In fact, the policies marketed by the debtor were actually group policies obtained by the debtor through Progressive. . . [T]he debtor significantly understated the number of drivers insured under the group policies and . . . the insurance company under-billed for services it was providing These facts sufficiently allege a pattern of intentional misrepresentation by the debtor which was relied upon by Progressive. Thus I find that Progressive has met its burden of [proving] that the debt owed to it is non-dischargeable under Section 523(a)(2).

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Tr. Hr'q 24:13-14; 25:19 - 26:9 (June 14, 2005).

The debtor's restitution obligation to Progressive was entered as a part of the debtor's sentence for violation of 18 U.S.C. Section 1341. Section 523(a)(13) specifically exempts from discharge a debt, quote, "for any payment of an order of restitution . . . under title 18, United States Code," close quote. As such, the debt is clearly exempt from discharge under Section 523(a)(13).

Tr. Hr'g 29:7-13 (June 14, 2005).

On June 22, 2005, the Oregon Bankruptcy Court entered its judgment dismissing the adversary proceeding (the "Oregon Judgment"). Sanders appealed the Oregon Judgment to this Panel on

July 1, 2005. However, the appeal was dismissed for failure to prosecute on January 21, 2006.

On October 14, 2005, Sanders filed another chapter 7 petition, this time in the District of Arizona (the "Arizona Bankruptcy Case"). A discharge was granted on February 19, 2006.

Progressive commenced an adversary proceeding on February 7, 2006, seeking to deny discharge of the Restitution Obligation. Or June 23, 2006, Progressive moved for summary judgment. At a hearing on Progressive's summary judgment motion on October 2, 2006, the bankruptcy court explained its decision:

What I am confronted with here is a final judgment on the merits of the same case [i.e., the Oregon Judgment], that you say was incorrectly decided, because in effect the trial judge relied upon information that was incorrect or was later determined to be incorrect, and that you can demonstrate that. But you shouldn't demonstrate that to me. You need to demonstrate it to her. . . . I don't have jurisdiction to revisit what Judge Brown says. . . because as long as her judgment is valid and there and final, which it is as of now, then I'm bound under principles of res judicata to recognize it.

Tr. Hr'g 9:4-10; 11:1-6 (October 2, 2006).

On October 17, 2006, the bankruptcy court entered a judgment in favor of Progressive determining that the Restitution Obligation was nondischargeable under §523(a)(2) and (13) (the "Arizona Judgment"). Sanders filed a timely appeal of the Arizona Judgment on October 26, 2006.

⁵ In the appeal, Sanders sought and obtained two extensions of time to file an opening brief and excerpts of record. In granting the second extension, Sanders was warned that no further delays would be allowed absent extraordinary circumstances. The Panel denied Sanders' third motion for an extension and dismissed the appeal for failure to prosecute.

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JURISDICTION

The bankruptcy court had jurisdiction pursuant to 28 U.S.C. \$\$ 1334 and 157(b)(2)(I). We have jurisdiction pursuant to 28 U.S.C. \$ 158(b).

ISSUE

Whether the bankruptcy court erred in granting summary judgment to Progressive and determining that Sanders' debt was excepted from discharge on the ground of res judicata.

STANDARD OF REVIEW

We review summary judgment de novo. <u>Paine v. Griffin (In re Paine)</u>, 283 B.R. 33, 34 (9th Cir. BAP 2002). We also review de novo the preclusive effect of a judgment. <u>Bankruptcy Recovery</u>

<u>Network v. Garcia (In re Garcia)</u>, 313 B.R. 307, 310 (9th Cir. BAP 2004).

DISCUSSION

In granting Progressive a summary judgment, 6 the bankruptcy court determined that, as a matter of law, the debt owed by Sanders to Progressive was excepted from discharge under §§ 523(a)(2) and (13). In doing so, the bankruptcy court decided that there were no genuine issues of material fact, and that the

Summary judgment in bankruptcy adversary proceedings is governed by Rule 7056, incorporating Fed. R. Civ. P. 56. Fed. R. Civ. P. 56(c) provides that: 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 judgment as a matter of law.

Oregon Judgment precluded Sanders from contesting the dischargeability of the debt in the Arizona adversary proceeding. We agree with this decision.

On three occasions in the last five years, the Panel has issued published opinions concerning the fundamental issue presented in this appeal. Our view of the applicable law has not changed. As we stated:

The rule is that res judicata principles apply in bankruptcy so that once a debt is "excepted from discharge" in a judgment that meets the requirements for preclusion, it is, except for the eight exceptions named in [§] 523(b),[7] "excepted from discharge" in all subsequent chapter 7 cases without need for an independent basis for excepting the debt from discharge in the later case.

* * *

In other words, once nondischargeable, always nondischargeable.

<u>In re Paine</u>, 283 B.R. at 37; quoted in <u>In re Garcia</u>, 313 B.R. at 310; <u>Moncur v. Agricredit Acceptance Co. (In re Moncur)</u>, 328 B.R. 183, 186 (9th Cir. BAP 2005).⁸

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Section 523(b) applies to debts excepted from discharge under \S 523(a)(1), (3) and (8); three sections under the old Bankruptcy Act; \S 439A of the Higher Education Act of 1965; and \S 733(g) of the Public Health Service Act), none of which are applicable here.

⁸ Curiously, neither Sanders nor Progressive cited any of these decisions in their briefs in this appeal. While Sanders is a pro se litigant, and perhaps should not be expected to have ready access to the Panel's precedents, we are perplexed by the research shortcomings of Progressive. Moreover, we note that Progressive's prosecution of the Arizona adversary proceeding was likely unnecessary. As we have explained, a judgment establishing an exception to discharge entered in a bankruptcy case remains enforceable against the same debtor in a subsequent chapter 7 case; no second nondischargeability proceeding is required. In re Moncur, 328 B.R. at 183.

In the prior adversary proceeding commenced by Sanders against Progressive, the Oregon bankruptcy court entered detailed findings of fact to support its determination that Sanders had made intentional misrepresentations that were relied upon by Progressive, and thus, the Progressive claim against Sanders was nondischargeable under § 523(a)(2). The Oregon bankruptcy court also concluded that the Restitution Obligation, imposed upon Sanders by the district court in the criminal action, constituted an order for restitution under title 18 of the U.S. Code and, thus, was also clearly exempt from discharge under § 523(a)(13).

The Arizona bankruptcy court properly concluded that it was bound to give preclusive effect to the Oregon Judgment. Claim preclusion applies in bankruptcy. Brown v. Felsen, 442 U.S. 127, 134-39 (1979). "Claim preclusion generally requires that there be: (1) parties either identical or in privity; (2) a judgment rendered by a court of competent jurisdiction; (3) a prior action concluded to a final judgment on the merits; and (4) the same claim or cause of action involved in both actions." Rein v. Providian Fin. Corp., 242 F.3d 1995, 1098 (9th Cir. 2001), quoted in In re Paine, 283 B.R. at 39. All these requirements are satisfied here.

The record demonstrates, without dispute, that the parties to the two actions in question, Sanders and Progressive, are identical. And it is axiomatic that the Oregon Bankruptcy Court is a court of competent jurisdiction to enter a judgment

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⁹ Since the Oregon Judgment deals with a federal issue determined in a federal court, we do not need to examine any state-specific rules affecting res judicata.

concerning the dischargeability of debt in connection with Sanders' bankruptcy case. 28 U.S.C. § 1334(b); § 157(b)(2)(I). In re Sasson, 424 F.3d 864, 871 (9th Cir. 2005)(bankruptcy court has exclusive jurisdiction to determine whether a debt is dischargeable in bankruptcy).

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The Oregon Judgment was a final decision on the merits. While there had been an appeal of the Oregon Judgment to this Panel, it was dismissed for lack of prosecution and no further appeal was taken.

Finally, the claim addressed in both the Oregon Judgment and in the Arizona adversary proceeding was the same: whether the Progressive debt was excepted from discharge in bankruptcy under § 523(a) of the Bankruptcy Code.

Sanders argues that the Oregon Judgment should not be given preclusive effect because it was based on flawed or incorrect information given to the Oregon bankruptcy court. In particular, Sanders argues that, because of various irregularities in the filing of the criminal indictment in the district court case, the Oregon bankruptcy court relied upon an inaccurate record when it concluded that he engaged in a "pattern of intentional misrepresentation."

Sanders' argument misses the mark in this context. Even if the Oregon Bankruptcy Court erred in making its determination that the Restitution Obligation was nondischargeable under § 523(a)(2), it is of no moment. "Application of principles of res judicata is not defeated by error in the original judgment" as long as the loser had the opportunity to test the final judgment on appeal.

In re Paine, 283 B.R. at 39, citing Federated Dep't Stores v.

Moitie, 452 U.S. 394, 398 (1981); Richey v. United States, 9 F.3d 1407, 1412 (9th Cir. 1993); 18 WRIGHT & MILLER, FEDERAL PRACTICE & PROCEDURE § 4403 ("The first lesson one must learn on the subject of res judicata is that judicial findings must not be confused with absolute truth."). Though Sanders believes the Oregon Judgment was infected with error, because he failed to pursue his contention in the Oregon court, through appropriate motion to that court¹⁰ or by appeal, the Oregon Judgment is enforceable and preclusive in the Arizona adversary proceeding.

Finally, we perceive another deficiency in Sanders' argument. Sanders' contention that he is not precluded from attacking the Oregon Judgment in the Arizona action because of the alleged error in that judgment addresses only the determination by the Oregon bankruptcy court that his debt to Progressive is nondischargeable under § 523(a)(2). The Oregon Judgment also established that the Restitution Obligation was excepted from discharge under § 523(a)(13). Neither in his Statement of Issues on Appeal nor in his appeal briefs does Sanders suggest that the bankruptcy court relied upon erroneous facts in deciding that the Restitution Obligation is an order for payment of restitution issued under title 18 of the U. S. Code, and thus is nondischargeable under

The bankruptcy court apprised Sanders that he should consider asking the Oregon bankruptcy court for relief from its judgment under Fed. R. Civ. P. 60(b)(6), but "as long as her judgment is valid and there and final, which it is as of now, then I'm bound under principles of res judicata to recognize it." Tr. Hr'g 11:4-6 (October 2, 2006). In reply, Sanders admitted, "Well, I - yeah, I thought about going back to her but like I said I was here in front of this court. . ." \underline{Id} . at 11:6-8. We express no opinion concerning the availability of relief if Sanders were to pursue such a motion in the Oregon Bankruptcy Court.

§ 523(a)(13). Indeed, we can conceive of no condition under which this debt could be discharged unless the underlying Criminal Judgment awarding the restitution were reversed on appeal or modified by the district court.

CONCLUSION

We conclude that the bankruptcy court did not err in granting summary judgment to Progressive on the ground of res judicata (claim preclusion). We AFFIRM the decision of the bankruptcy court.

Sanders argued to the Oregon bankruptcy court that \$523(a) (13) was inapplicable because it constituted an expost facto law that became effective after the date of his criminal activity, and thus violated U.S. Const. art. I, sec. 9, cl. 3. The Oregon court rejected that argument, reasoning that the date of the restitution order, not the criminal activity, was implicated in determining the application of \$523(a) (13). Because the district court ordered the restitution after the enactment of \$523(a) (13), the amendment to the Bankruptcy Code was applicable in Sanders' case. Id. Sanders did not attempt to revisit his constitutional argument in either the Arizona court or in this appeal, and so we have no occasion to address it.