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**HAROLD S. MARENUS, CLERK
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NOT FOR PUBLICATION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-04-1052-McBMa
7	JOHN W. ERNST,)	Bk No.	SV 99-20380-KL
8	Debtor.)	Adv. No.	SV 00-01260-KL
9	_____)		
10	HOVANESIAN & HOVANESIAN,)		
	A PROFESSIONAL CORPORATION,)		
11	Appellant,)		
12	v.)	MEMORANDUM¹	
13	JOHN W. ERNST,)		
14	Appellee.)		
15	_____)		

Argued and Submitted on September 28, 2005
at Pasadena, California

Filed - November 21, 2005

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

Honorable Kathleen Thompson, Bankruptcy Judge, Presiding

Before: McMANUS,² BRANDT, and MARLAR, Bankruptcy Judges.

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

²Hon. Michael S. McManus, Chief Bankruptcy Judge for the Eastern District of California, sitting by designation.

1 This is an appeal from a final order granting the appellee's
2 renewed motion for judgment on the pleadings and dismissing the
3 appellant's complaint objecting to the appellee's discharge
4 pursuant to 11 U.S.C. § 727. The bankruptcy court did not commit
5 clear error when it found that an underlying state court action
6 had been dismissed with prejudice, nor did the bankruptcy court
7 err when it concluded that such dismissal deprived the appellant
8 of standing to object to the appellee's chapter 7 discharge. We
9 therefore AFFIRM the order granting the renewed motion for
10 judgment on the pleadings.

11
12 FACTS

13 Before the appellee John W. Ernst filed his bankruptcy
14 petition, the appellant Hovanesian & Hovanesian, a professional
15 corporation, commenced a state court action against the appellee
16 and other defendants, including the appellee's brother, Mark
17 Ernst, and their business, Chatsworth Insurance Services ("CIS").
18 The action sought recovery for implied indemnity, negligence, and
19 negligent misrepresentation in connection with the placing of the
20 appellant's malpractice insurance policy with a company that
21 later became insolvent.

22 When the appellee filed a chapter 13 petition, on September
23 2, 1999, the state court action was automatically stayed as to
24 the appellee. On January 18, 2000, the appellee's case was
25 converted to one under chapter 7.

26 Despite the fact that the appellee failed to list the
27 appellant as a creditor and did not disclose the pending lawsuit
28 in the statement of financial affairs, the appellant managed to

1 commence a timely adversary proceeding objecting to the
2 appellee's discharge pursuant to 11 U.S.C. § 727(a)(2)(A),
3 (a)(4)(A), and (a)(4)(D). The discharge complaint alleged,
4 amongst other things, that the appellee knowingly failed to
5 disclose in his schedules his 50% interest in his business, CIS,
6 and cash on hand or on deposit.

7 The appellee denied these allegations and pointed out that
8 in his initial schedules he listed his CIS shares with a value of
9 \$50,000. Also, the appellee later amended his schedules to
10 change the value of his CIS interest to "none," to add the
11 appellant as a creditor, and to list Mark Ernst as a co-debtor of
12 the appellant.

13 With the appellee protected by the automatic stay, the state
14 court action proceeded against his co-defendants, Mark Ernst and
15 CIS. After the state court action went to arbitration, in a
16 letter dated January 26, 2002, the arbitrator Judge Title granted
17 the appellant's request to dismiss Mark Ernst and CIS from the
18 action.³

19 The state court thereafter issued an Order to Show Cause
20 ("the OSC") for "failure to submit and file a default judgment."
21 At an April 29, 2002 hearing on the OSC, the state court
22 dismissed the appellee. The dismissal minute order simply
23 indicates that the appellee "is dismissed." The reasons given

24
25 ³Judge Title's fax transmission to counsel indicates: "Mr.
26 Hovanesian further states in his letter that we 'should' dismiss
27 this arbitration as to Mark Ernst and Chatsworth Ins. Services,
28 Inc. . . . it is my order that this matter is dismissed with
prejudice as to those defendants, leaving only John Ernst as a
defendant, against who the action has been stayed because of his
bankruptcy proceedings."

1 for the dismissal are not explained in the order and no
2 transcript of the hearing has been included in the record for
3 this appeal.

4 The dismissal of the state court action prompted the
5 appellee to file a motion for judgment on the pleadings in the
6 section 727 action. The basis for the motion was that the
7 dismissal of the state court action precluded the appellant from
8 arguing that it held a claim against the appellee's bankruptcy
9 estate. Without a claim, it had no standing to seek denial of
10 the appellee's chapter 7 discharge.

11 At a hearing on October 17, 2002, the bankruptcy court
12 allowed the appellee additional time to present further evidence
13 in support of the motion. When he presented nothing, the court
14 denied the motion on January 8, 2003, on the basis that there was
15 no evidence that the state court action had been adjudicated on
16 the merits. After the denial of this motion, the appellee
17 returned to state court and obtained an order clarifying the
18 original minute order dismissing him from the state court action.
19 The second state court order, dated April 30, 2003, provided that
20 "the Defendant JOHN ERNST is dismissed with prejudice from this
21 case." The court also interlineated the words "effective 4-29-
22 02" indicating that such dismissal was effective from the date of
23 the original minute order. With this new evidence, the appellee
24 renewed his motion for judgment on the pleadings in the section
25 727 action. The bankruptcy court granted his motion on January
26 13, 2004 and the instant appeal ensued.

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28 //

1 JURISDICTION

2 The bankruptcy court had jurisdiction over the adversary
3 proceeding pursuant to 28 U.S.C. §§ 1334 and 157(b) (1). The
4 panel has jurisdiction over the appeal under 28 U.S.C.
5 § 158(a) (1).
6

7 ISSUES

8 1. Whether the bankruptcy court committed clear error when
9 it found that the state court action had been dismissed with
10 prejudice.

11 2. Whether the bankruptcy court erred in concluding that
12 the dismissal of the state court action precluded the appellant
13 from asserting its claim against the appellee's bankruptcy estate
14 and thereby depriving it of standing to object to the appellee's
15 discharge pursuant to section 727.
16

17 STANDARD OF REVIEW

18 The bankruptcy court's findings of fact are reviewed for
19 clear error and its conclusions of law are reviewed de novo.
20 Higgins v. Vortex Fishing Sys., Inc., 379 F.3d 701, 705 (9th Cir.
21 2004), *quoting* Galam v. Carmel (In re Larry's Apt., LLC), 249
22 F.3d 832, 836 (9th Cir. 2001). We review de novo the preclusive
23 effect of a judgment, which presents a mixed question of law and
24 fact in which legal issues predominate. The Alary Corp. v. Sims
25 (In re Associated Vintage Group, Inc.), 283 B.R. 549, 554 (9th
26 Cir. BAP 2002).

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28 //

1 DISCUSSION

2 In the adversary proceeding, the appellee sought and
3 obtained a judgment on the pleadings on the grounds that the
4 dismissal of the appellee from the state court action was a
5 retraxit, which operated as an adjudication on the merits of the
6 appellant's claims, thereby depriving the appellant of its
7 standing as a creditor to object to the appellee's discharge.
8 The appellant contends that the state court dismissal was an
9 involuntary dismissal for failure to prosecute, and therefore not
10 a retraxit or an adjudication on the merits. Thus, it maintains
11 that it is still a creditor with standing to object to the
12 appellee's discharge in bankruptcy.

13
14 I

15 In its decision granting the appellee's motion for judgment
16 on the pleadings, the bankruptcy court found that the state court
17 dismissal was a retraxit, a common law term describing "an open
18 and voluntary renunciation of the suit in open court." Rice v.
19 Crow, 81 Cal. App. 4th 725, 733 (2002), citing Ghiringhelli v.
20 Riboni, 95 Cal. App. 2d 503, 506 (1950). A voluntary dismissal
21 with prejudice is the modern-day equivalent of the common law
22 doctrine of retraxit. According to Black's Law Dictionary, a
23 retraxit is the following:

24 A plaintiff's voluntary withdrawal of the lawsuit in
25 court so that the plaintiff forfeits the right of
26 action. In modern practice, retraxit is called
voluntary dismissal with prejudice.

27 Black's Law Dictionary, 1342 (8th ed. 2004) [emphasis in
28 original].

1 Ascertaining whether the dismissal of the state court action
2 was a retraxit or an involuntary dismissal is not a simple task.
3 The minute order dismissing the action states only that the
4 appellee "is dismissed."⁴ There is no mention of whether the
5 dismissal was voluntary or involuntary, or with or without
6 prejudice.

7 The appellant asserts that the dismissal of the appellee
8 from the state court action was based on his failure to submit a
9 default judgment. It argues that it opposed the dismissal at the
10 hearing. Hence, the dismissal was involuntary and therefore
11 without prejudice and not a disposition on the merits.

12 Pursuant to Cal. Civ. Proc. Code § 581(g) and (h), a court
13 may dismiss a complaint for any inexcusable delay in prosecuting
14 the complaint. Cal. Civ. Proc. Code § 581(g) & (h); see B.E.
15 Witkin, California Procedure, Proceedings Without Trial §§ 341 &
16 458 (4th ed. 1997).⁵ Such dismissals are without prejudice to a
17 further action by the plaintiff. Id. Thus, if the dismissal was
18

19 ⁴The entirety of the text of the minute order is as follows:

20 Nature of Proceedings:
21 OSC Re: Failure to Submit and File a Default Judgment
22 Matter is called for hearing.
23 Counsel argue.
24 Defendant John Ernst is dismissed from this case.
25 Matter is continued to 5-3-02 at 8:30 a.m. in this
26 department.

27 ⁵While failure to file a default judgment previously
28 constituted an independent ground for dismissal under former Cal.
Civ. Proc. Code § 581a(c), that statute was repealed in 1984.
Cal. Civ. Proc. Code § 467. A dismissal for delay in entering a
default judgment is now incorporated into the general provisions
regulating dismissal for failure to prosecute. Id. (citation
omitted).

1 involuntary, as the appellant argues, then the dismissal was
2 without prejudice.

3 The appellee counters that the OSC for failure to prosecute
4 was not issued with reference to the appellee. Rather, the OSC
5 was issued due to the appellant's failure to file proof that
6 process had been served and/or to request default judgments
7 against the other defendants in the action.⁶

8 Indeed, the issuance of the OSC did not likely involve the
9 appellee. He was protected by the automatic stay, a fact that
10 had previously been noted by the state court in connection with
11 the mandated arbitration. Consequently, because the automatic
12 stay enjoined prosecution of the case against the appellee, it is
13 difficult to believe that the state court would threaten to
14 dismiss the appellant's case against the appellee because of a
15 failure to prosecute it.

16 The appellee further asserts that at the hearing on the OSC,
17 the state court judge noted that the appellant had voluntarily
18 dismissed Mark Ernst and CIS from the action and inquired whether
19 the appellant wished to dismiss the claims against the appellee
20 as well. According to the appellee, the appellant agreed to
21 voluntarily dismiss him from the state court action and, as a
22 result, the dismissal was with prejudice.

23 Neither the appellant's nor the appellee's version of what
24 transpired at the OSC hearing can be verified because neither
25

26
27 ⁶According to the appellee, the OSC was issued because the
28 appellant had failed to "tidy up either the services of process
or the defaults on the other 25 named defendants." Appellee's
Brief at 9, n. 2.

1 party provided a transcript of that hearing to the bankruptcy
2 court.

3 As noted above, the language of the state court minute order
4 dismissing the appellee is likewise of no assistance in
5 determining the basis for the dismissal. As it turns out, that
6 minute order was also ineffective. Cal. Civ. Proc. Code § 581d
7 provides that a dismissal ordered by the court "shall be in the
8 form of a written order signed by the court and filed in the
9 action." Id. Here, the minute order was not signed by the
10 judge, and therefore was not effective. Cal. Civ. Proc. Code
11 § 581d; see B.E. Witkin, California Procedure, Judgment § 49 (4th
12 ed. 1997).

13 However, the minute order's ambiguity and the lack of
14 signature were rectified when the state court filed another order
15 on April 30, 2003. That order was signed and provided that the
16 action against the appellee had been dismissed with prejudice,
17 effective April 29, 2002.

18 The fact that the April 30, 2003 order specifies that the
19 dismissal was with prejudice suggests that the appellee must have
20 requested the dismissal. After all, and as noted by the
21 appellant, an involuntary dismissal is generally without
22 prejudice under California procedure. And, the nature of the
23 dismissal was something the state court obviously deliberated
24 upon. Not only did it enter a second order clarifying that the
25 dismissal was with prejudice, the state court added text to the
26 second order indicating that such dismissal was effective April
27 29, 2002.

28 //

1 Other facts support the conclusion that the dismissal was
2 voluntary. First, the appellant did not appeal or otherwise
3 attack the April 30, 2003 state court order even though it
4 unambiguously provides that the dismissal was with prejudice.
5 Second, the voluntary dismissal of the appellee's brother and CIS
6 supports the inference that the dismissal of the appellee was
7 also voluntary.⁷

8 Finally, other than the language of the OSC, the appellant
9 failed to present any evidence to the bankruptcy court
10 demonstrating that the appellee's dismissal was involuntary. If
11 the appellant had not requested the dismissal at the state court
12 OSC hearing, the transcript of that hearing would have shown this
13 to be the case. Yet, the appellant did not produce that
14 transcript.

15 The appellant further argues that "no hearing was noticed or
16 held in connection with this second order of dismissal."
17 However, the appellant does not dispute that the April 30, 2003
18 order was entered by the state court. If a hearing was necessary
19 before entry of the order, the appellant should have appealed or
20 otherwise challenged the April 30, 2003 order in state court. It
21 did not. And, given that California law prohibits unsigned
22 minute orders dismissing actions, the April 30, 2003 order was
23 the first and only effective order issued by the state court. No

24
25 ⁷In his fax transmission, Judge Title states as to Mark
26 Ernst and CIS that: "While ambiguous, it appears reasonable to
27 assume that [plaintiff] is now dismissing as to those defendants
28 with prejudice as per the previous dismissal form which he sent
me. Any such dismissal must under the circumstances be
considered to be with prejudice in view of the impending trial
date."

1 authority has been cited by the appellant to support its
2 contention that the state court was required to hold a hearing to
3 decide the form of its order.

4 The appellant also contends that “[a]dding the words ‘with
5 prejudice’ after one year to the earlier Order of dismissal
6 entered April 29, 2002, adds nothing.” The appellant cites
7 Goddard v. Security Title Ins. & Guarantee Co., 14 Cal. 2d 47
8 (1939), for the proposition that a mere statement in a dismissal
9 order that it is with prejudice is not conclusive. In Goddard,
10 the court held that a judgment based on the sustaining of a
11 special demurrer for defects in form is not an adjudication on
12 the merits for res judicata purposes, even when the dismissal
13 order recites that it is with prejudice. Id. at 52 (citations
14 omitted).

15 Here, unlike in Goddard, the appellant failed to present any
16 evidence beyond the language of the OSC that the dismissal was
17 not on the merits. The appellant’s dismissive attitude toward
18 the April 30, 2003 order has continued in its appeal and is
19 reflected in its argument that the appellee “did not present any
20 new or further evidence to support the same contentions that were
21 proffered in his first motion which was denied by the
22 [bankruptcy] court” Appellant’s Opening Brief at 6.
23 This is factually incorrect. The appellee submitted the April
24 30, 2003 order with his renewed motion for judgment on the
25 pleadings.

26 Therefore, the bankruptcy court’s finding that the
27 underlying state court action had been dismissed voluntarily and
28 with prejudice is supported by the record of the state court

1 action, at least to the extent that record was made available to
2 the bankruptcy court. That is, based on the wording of the April
3 30, 2003 order, the appellant's failure to appeal such order, the
4 voluntary dismissal of the appellee's brother and CIS, the
5 bankruptcy court did not commit clear error in finding that the
6 state court dismissal was voluntary and with prejudice.

7
8 II

9 The bankruptcy court was required to give full faith and
10 credit to the state court order dismissing the action. See 28
11 U.S.C. § 1738. This means that whatever preclusive effect the
12 order would have in a subsequent state court action also had to
13 be accorded in any proceeding filed in the bankruptcy court. See
14 Smyth v. City of Oakland (In re Brooks-Hamilton), 329 B.R. 270,
15 279 (9th Cir. BAP 2005), *citing* In re Nourbakhsh, 67 F.3d 798,
16 800 (9th Cir. 1995).

17 Under California law, the doctrine of claim preclusion
18 applies when the following requirements are met:

- 19 1) a claim or issue raised in the present action is
20 identical to a claim or issue litigated in a prior
21 proceeding;
22 2) the prior proceeding resulted in a final judgment on
23 the merits; and
24 3) the party against whom the doctrine is being
asserted was a party or in privity with a party to the
prior proceeding.

25 In re Brooks-Hamilton, 329 B.R. at 279, *citing* Brinton v. Bankers
26 Pension Serv., Inc., 76 Cal. App. 4th 550, 556 (1999).

27 Here, the appellant disputes the second factor, arguing that
28 the dismissal was without prejudice and therefore it continued to

1 hold a claim against the appellee and had standing to seek the
2 denial of the appellee's chapter 7 discharge. However, the
3 premise of this argument is false. The state court ordered the
4 dismissal of the state court action with prejudice. It therefore
5 was an adjudication on the merits of the appellant's claim
6 against the appellee. See Johnson v. County of Fresno, 111 Cal.
7 App. 4th 1087, 1095 (2003).

8 The claim the appellant was attempting to preserve in the
9 appellee's bankruptcy case was the same claim that was dismissed
10 with prejudice by the state court. The state court action
11 involved the same parties. Consequently, all three elements of
12 claim preclusion are present. The appellant had no claim against
13 the appellee when the adversary proceeding was dismissed by the
14 bankruptcy court.⁸

16 III

17 As noted by the bankruptcy court in its ruling, in order for
18 a case to be adjudicated in federal court, "an actual controversy
19

20
21 ⁸At the hearing on the renewed motion for judgment on the
22 pleadings, the appellant acknowledged that he has no further
remedy in state court:

23 THE COURT: You and I know that you can't go back and resurrect
24 this case in state court, or at least that's my belief; that the
25 way you get past this result is that you demonstrate that in
state court you still got a cause of action, because you don't,
under California law. And you don't have an independent cause of
action under bankruptcy law.

26 MR. HOVANESIAN: Even without the dismissal with prejudice, we
27 would not have a cause of action that would stand up to challenge
28 because we'd be barred at this point by the statute of
limitations.

1 must be extant at all stages of review, not merely at the time
2 the complaint is filed." Arizonans for Official English v.
3 Arizona, 520 U.S. 43, 45 (1997), quoting Preiser v. Newkirk, 422
4 U.S. 395, 401 (1975).

5 Pursuant to section 727(c)(1), only the trustee, a creditor,
6 or the United States Trustee may object to the granting of a
7 debtor's discharge. 11 U.S.C. § 727(c)(1). A creditor is
8 defined in the Bankruptcy Code as "an entity that has a claim
9 against the debtor that arose at the time of or before the order
10 for relief concerning the debtor." 11 U.S.C. § 101(10)(A). A
11 claim, in turn, is a "right to payment, whether or not such right
12 is reduced to judgment, liquidated, unliquidated, fixed,
13 contingent, matured, unmatured, disputed, undisputed, legal,
14 equitable, secured, or unsecured; or . . . an equitable remedy
15 for breach of performance" 11 U.S.C. § 101(5)(A).

16 In order to file an objection to a debtor's discharge, a
17 creditor must have a claim that will be affected by the debtor's
18 discharge. See Stanley v. Vahlsing (In re Vahlsing), 829 F.2d
19 565, 567 (5th Cir. 1987), citing In re Chandler, 138 F. 637 (7th
20 Cir. 1905).

21 In re Vahlsing involved an appeal by a debtor of the
22 bankruptcy court's denial of discharge at the behest of a
23 creditor. In re Vahlsing, 829 F.2d at 567. The judgment in
24 favor of the creditor was entered even though the bankruptcy
25 court had previously modified the automatic stay to permit the
26 creditor to proceed with its claim against the debtor in state
27 court. But the state court resolved the claim in favor of the
28 debtor. Id. at 566.

1 In reversing the judgment of the bankruptcy court, the Fifth
2 Circuit concluded that once the claim of the "would-be creditor"
3 had been dismissed by the state court, there was no possibility
4 that the grant or denial of a discharge could affect the putative
5 creditor's interests. Id. at 567.⁹ Therefore, the creditor
6 lacked standing to continue with its adversary proceeding to deny
7 the debtor's discharge.

8 The appellant asserts that In re Vahlsing is distinguishable
9 because in that case there was a full evidentiary hearing in
10 state court. The appellant's argument is misplaced. Here, like
11 in In re Vahlsing, the appellant's claim was dismissed in the
12 state court. Whether the dismissal followed a full evidentiary
13 hearing or not, under California law, it is dispositive of the
14 appellant's claim against the appellee. See Torrey Pines Bank v.
15 Superior Court, 216 Cal. App. 3d 813, 820 (1989).

16 The appellant also argues that he has maintained his
17 creditor status because a claim need not be adjudicated in state
18 court in order for it to be a valid claim in a bankruptcy case.
19 In support of this assertion, the appellant cites First
20 Commercial Fin. Group, Inc. v. Hermanson (In re Hermanson), 273
21 B.R. 538 (Bankr. N.D. Ill. 2002), for the proposition that a
22 creditor has standing to object to a debtor's discharge even
23

24 ⁹See also Jeffrey M. Goldberg & Assocs., Ltd. v. Holstein
25 (In re Holstein), 299 B.R. 211, 225, n.13 (Bankr. N.D. Ill. 2003)
26 ("Some courts have denied a creditor standing when the automatic
27 stay had been modified to permit the creditor to pursue his claim
28 in another court, and the creditor did so and lost" (citations
omitted)); see generally 6 Collier on Bankruptcy ¶ 727.14[1], p.
727-62, 63 (Alan N. Resnick & Henry J. Sommer eds., 15th ed. rev.
2005) (citations omitted).

1 though its claim may be disputed and not yet liquidated or fully
2 adjudicated.

3 In re Hermanson is distinguishable from the present case,
4 however, because the appellant's claim is no longer subject to
5 any dispute. The appellant's claim does not exist. It has been
6 dismissed with prejudice, and therefore adjudicated on the
7 merits. The appellant no longer has a right to payment, and
8 hence has no claim that could be affected should the appellee's
9 discharge be denied. Without his creditor status, the appellant
10 does not have standing to challenge the appellee's discharge
11 under section 727.

12 13 CONCLUSION

14 Based on the April 30, 2003 order dismissing the underlying
15 state court action with prejudice, the bankruptcy court did not
16 clearly err when it found that the dismissal of the state court
17 action was voluntary and with prejudice. Further, given that the
18 dismissal was with prejudice, the bankruptcy court properly
19 concluded that the doctrine of claim preclusion barred any
20 subsequent action in state court and deprived the appellant of
21 his status as a creditor in the bankruptcy proceeding.
22 Accordingly, the appellant lacked standing to continue with its
23 objection to the appellee's discharge. The panel therefore
24 AFFIRMS the bankruptcy court's granting of the appellee's renewed
25 motion for judgment on the pleadings and dismissal of the
26 appellant's section 727 adversary proceeding.