

SEP 30 2005

NOT FOR PUBLICATION

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

UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT

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In re:)	BAP No.	CC-04-1520-MoBK
)		
RICHARD ISAAC FINE,)	Bk. No.	LA 02-37680-BB
)		
Debtor.)	Adv. No.	LA 04-01303-BB
)		
_____)		
RICHARD ISAAC FINE,)		
)		
Appellant,)		
)		
v.)	<u>MEMORANDUM</u> ¹	
)		
WINSTON FINANCIAL GROUP, INC.;)		
LAWYERS TITLE COMPANY; GOE &)		
FORSYTHE, LLP; MICHAEL)		
WEINSTEIN; E. ROBERT BERENDS,)		
JR.,)		
)		
Appellees.)		
)		
_____)		

Argued and Submitted on July 29, 2005
at Pasadena, California

Filed - September 30, 2005

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

Honorable Sheri L. Bluebond, Bankruptcy Judge, Presiding.

Before: MONTALI, BRANDT and KLEIN, Bankruptcy Judges.

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

1 Richard Isaac Fine ("Debtor") has been a party to numerous
2 actions involving Winston Financial Group, Inc. ("Winston
3 Financial"), its principal Michael Weinstein ("Weinstein"), and
4 various combinations of the other appellees named above
5 ("Appellees")², all arising out of a \$250,000.00 loan transaction
6 in 1998 and subsequent foreclosure and unlawful detainer
7 proceedings. In this latest appeal, Debtor argues that the
8 bankruptcy court erred by dismissing four of his claims for relief
9 based on claim preclusion and issue preclusion under Fed. R. Civ.
10 P. 12(b)(6) (incorporated by Rule 7012)³ and then granting summary
11 judgment on the remaining two claims. We AFFIRM.

12 I. FACTS

13 Winston Financial loaned Debtor \$250,000.00 maturing on March
14 31, 1999. The loan bore interest of five percent per month until
15 maturity and seven percent per month thereafter until paid. The
16 loan was secured by a third priority deed of trust on Debtor's
17 residence on Summit Circle, Beverly Hills, California (the
18 "House").

19 Debtor did not pay the loan on its maturity date. In October
20 of 2000 Winston Financial commenced an action for judicial
21 foreclosure in state court. Debtor, who is an attorney, responded
22 with a cross complaint alleging misconduct by several Appellees

23
24 ² For simplicity we refer to "Appellees" even if not all
25 of them have been involved in every matter we discuss. In
26 particular, Lawyers Title Company has not filed a brief on this
appeal and did not file papers in some matters before the
bankruptcy court but the issues raised by the other Appellees are
generally applicable to it.

27 ³ Unless otherwise indicated, all chapter, section and
28 rule references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1330,
and to the Federal Rules of Bankruptcy Procedure, Rules 1001-9036.

1 (the "2000 Action"). In July of 2001 the parties entered into a
2 settlement agreement that adjusted the amount owing to
3 \$400,000.00, extended the maturity date, reduced the pre-maturity
4 interest rate to 18% per year compounded annually, and included
5 mutual releases. Pursuant to the settlement agreement Debtor
6 dismissed the 2000 Action with prejudice. Debtor did not pay the
7 loan by its new maturity date of July 10, 2002.

8 On September 22, 2002 (the "Petition Date") Debtor filed his
9 voluntary Chapter 11 petition (Case No. LA 02-37680 BB). Ten
10 months later Debtor commenced an adversary proceeding against
11 Appellees and others, but all of Debtor's claims for relief were
12 eventually dismissed (AP No. LA 03-02085 BB, the "First AP").
13 Debtor then brought an action against Appellees in California
14 Superior Court (No. BC 308031) which was removed to the bankruptcy
15 court and is the subject of this appeal (AP No. LA 04-01303 BB,
16 the "Second AP").

17 Both the First and Second APs allege that the loan
18 transactions were unconscionable and that Appellees engaged in
19 unfair business practices and abuse of process in their attempts
20 to foreclose on the House and take possession. The First AP
21 includes five claims (hereafter referred to by number):

22 (1) for injunctive relief requiring rescission of the
23 foreclosure sale of the House based on alleged
24 procedural defects and misstatement of the amount
25 owed;

26 (2) for declaratory relief that the 1998 loan
27 transaction is unconscionable, rescission of the loan
28 documents, and repayment of "the excess interest

1 paid;"

2 (3) for violation of California Civil Code Section
3 2943(e) (4) by allegedly failing "to provide a
4 Beneficiary's Statement or Payoff Statement;"

5 (4) for abuse of process for filing a police report
6 against Debtor and alleged procedural defects in
7 foreclosure and an unlawful detainer action (a "UD
8 Action"); and

9 (5) for unfair business practices under California
10 Business and Professions Code section 17204 involving
11 the 1998 loan transaction, the 2001 settlement, the
12 police report, and the foreclosure and unlawful
13 detainer proceedings.

14 The Second AP adds another claim:

15 (6) for intentional interference with prospective
16 business advantage arising from alleged defects in
17 the foreclosure process, "falsely" attempting to
18 increase debt under the 2001 settlement agreement,
19 and creating "an impediment . . . on the
20 marketability of the [House] with prospective
21 purchasers who were awaiting the foreclosure sale and
22 not willing to pay the market price."

23 The Second AP also amends claims (4) and (5) by alleging
24 procedural defects in a second UD Action, claiming malicious
25 prosecution in place of abuse of process, and including more
26 references to the 2001 settlement in conjunction with the 1998
27 loan documents. In all other respects the Second AP is
28 essentially identical to the First AP.

1 A. Disposition of the First AP

2 As noted above the First AP was dismissed. This happened in
3 two stages.

4 The bankruptcy court initially issued orders dismissing four
5 claims and ordering Debtor to file an amended complaint by
6 September 30, 2003 (the "Interlocutory Orders"). Debtor filed no
7 amended complaint and the bankruptcy court dismissed the entire
8 First AP for lack of prosecution on November 19, 2003 (the "Final
9 Order").

10 Debtor filed a premature notice of appeal from the
11 Interlocutory Orders and a late notice of appeal from the Final
12 Order. We dismissed the later appeal as untimely (BAP No. CC-03-
13 1616), ruled that the earlier appeal was no longer interlocutory
14 but encompassed only claims (2) and (4), and affirmed (BAP No. CC-
15 03-1497). Debtor has appealed our decision to the Court of
16 Appeals for the Ninth Circuit and that appeal is pending (9th Cir.
17 No. 05-55213).

18 On April 29, 2004, Debtor filed with the bankruptcy court a
19 "Motion for Order for Relief from [the Final Order] Due to New
20 Information Recently Disclosed by Winston Financial [] and
21 [Weinstein] That They Are the Same Party" (the "Reconsideration
22 Motion"). In denying that motion the bankruptcy court wrote:

23 The "newly-discovered" evidence upon which the
24 [Reconsideration] Motion is based is a grant deed
25 dated March 16, 2004 transferring title to [the
26 House] from defendant Winston Financial [] to
27 defendant [Weinstein]. On the face of that grant
28 deed, the grantor has declared that no transfer tax
is due, someone has added the notation, "no
consideration agent to principal" and the following
text has been inserted, "This conveyance confirms a
change of name, and the Grantor and Grantee are the
same party. R & T 11911."

1 Based on this newly-discovered evidence
2 (collectively, the "Representations"), [Debtor]
3 contends that Winston [Financial] and Weinstein have
4 somehow defrauded this Court in connection with the
5 [First AP] and that the [First AP Final Order] should
6 be declared null and void. The Court rejects both
7 contentions.

8 The fact that Winston [Financial] and/or Weinstein
9 have made or consented to the Representations in
10 connection with the execution of a grant deed does
11 not establish that they are in fact alter egos of one
12 another for all purposes. However, even [if they
13 were alter egos for all purposes], this "newly-
14 discovered" fact has no bearing whatsoever on any
15 issue resolved by the Bankruptcy Court in this
16 adversary proceeding. . . .

17 The bankruptcy court added, "Perhaps [Debtor] is attempting
18 to argue that any usury exemption that might otherwise have been
19 available to Winston [Financial] is no longer available because
20 Weinstein is Winston [Financial]'s alter ego and Weinstein is not
21 entitled to an exemption from the usury laws." Any such argument,
22 the bankruptcy court ruled, is (a) "inaccurate" because Debtor
23 offered no authority that an entity loses its exemption from usury
24 laws even if it proves to be the alter ego of an individual who is
25 not exempt, and (b) "irrelevant" because "the holding of the
26 [First AP Final Order]" was that Debtor had "released any and all
27 usury claims that he might have had against Winston [Financial]
28 and Weinstein" in his 2001 settlement, releases, and dismissal
29 with prejudice of the 2000 Action. Debtor did not appeal from the
30 order denying his Reconsideration Motion.

31 B. The Dismissal Order in the Second AP

32 In May, 2004, Appellees moved to dismiss the Second AP.
33 After briefing and a hearing the bankruptcy court issued an order
34 (the "Dismissal Order") striking portions of claim (5), denying
35 the motion without prejudice as to the remainder of that claim and

1 claim (4), and dismissing the remaining four claims without leave
2 to amend.⁴ The Dismissal Order states, "IT IS HEREBY ORDERED, for
3 the reasons set forth on the record at the time of hearing [on May
4 26, 2004,] that the tentative decision for this hearing is adopted
5 [in relevant part] as the order of this Court." The excerpts of
6 record do not include a transcript of that hearing or any of the
7 motion or opposition papers, but they do include the tentative
8 ruling, attached to the Dismissal Order. It states that the Final
9 Order in the First AP has a claim preclusive effect because it was
10 a disposition on the merits under Fed. R. Civ. P. 41(b)
11 (incorporated by Rule 7041).⁵ It also states:

12 As the Court advised in its [memorandum decision
13 denying the Reconsideration Motion in the First AP],
14 the fact that Winston [Financial] and/or Weinstein
 have made or consented to certain representations in

15 ⁴ Although neither party has raised the issue, the
16 Dismissal Order contains some harmless but confusing errors. For
17 the benefit of any court that may have to review this matter after
18 us we offer the following explanation.

19 The Dismissal Order strikes portions of claim (5) on pages
20 "8" and "9" of the Complaint, but what Debtor calls his Fifth
21 Cause of Action appears on pages 18-20 of the Complaint. The
22 explanation is that (a) the Fifth Cause of Action is repeated
essentially word for word in paragraph (5) of a "summary" at the
start of the Complaint; and (b) the bankruptcy court must have
used a copy of the Complaint that, like some copies in the
excerpts of record before us, have the actual page numbers cut off
and other numbering superimposed (from a prior appeal?). The
result is that actual page 1 of the Complaint is labeled page "5"
and so on.

23 Using the above adjustments, the Dismissal Order makes sense.
24 When it refers to a "colon on line 9" or "parentheses at the end
of the line," those typographical marks are where they are said to
be.

25 We also note that on page two of the Dismissal Order at lines
26 18 and 20 it purports to strike the first several lines on page
27 "9" twice. We interpret the second reference as a typographical
error meaning page "10", which contains the last four lines of
claim (5).

28 ⁵ Debtor challenged this ruling before the bankruptcy
court but does not do so on this appeal.

1 connection with the execution of a grant deed (the
2 "Representations") does not establish that they are
3 in fact alter egos of one another for all other
4 purposes. Moreover, [even if they were alter egos],
5 this alleged fact has no bearing whatsoever on any
6 issue resolved by the Bankruptcy Court in [the First
7 AP]. Therefore, it does not give rise to any reason
8 for this Court to refuse to apply basic principles of
9 res judicata, claim preclusion and issue preclusion
10 with regard to orders entered in that adversary
11 proceeding.

12 Applying these rulings, the bankruptcy court held that claims
13 (1), (2), (3) and portions of (5) were adjudicated in the First AP
14 and although claim (6) "states a new theory" for loss of
15 prospective business advantage it "is based entirely on the same
16 nucleus of operative fact as [the First AP], and is therefore
17 barred as well by the doctrine of claim preclusion." The ruling
18 concludes:

19 [Claim (4) for malicious prosecution] is based on
20 some of the same facts that formed the basis of a
21 similar claim [for abuse of process] contained
22 alleged [sic] in the [First AP], but also contains
23 new facts as well. Deny motion without prejudice
24 with regard to this claim. Court will revisit the
25 extent to which [D]ebtor is barred by the doctrine of
26 issue preclusion from relitigating specific factual
27 disputes raised by [claim (4)] at a later date.

28 C. Summary judgment in the Second AP

After the Dismissal Order was entered Appellees moved for
summary judgment on claim (4) for malicious prosecution and the
surviving portions of claim (5) for unfair business practices. On
October 6, 2004, the bankruptcy court entered an order granting
that motion (the "Summary Judgment Order").⁶

⁶ Ordinarily there should be a separate document embodying
a final judgment that is distinct from and in addition to an order
granting a motion for summary judgment. See Fed. R. Bankr. P.
9021. Pursuant to an order issued by the BAP clerk, however, the
(continued...)

1 The Summary Judgment Order states that it is "based upon the
2 reasoning stated on the record at the hearing [on September 7,
3 2004], as well as the Court's tentative ruling issued for the
4 hearing." We have neither the hearing transcript nor the
5 tentative ruling in the excerpts of record. We also lack several
6 of the parties' papers filed in connection with this summary
7 judgment motion, including Debtor's opposition. We hold below
8 that these omissions preclude our full de novo review of the
9 bankruptcy court's decision to issue the Summary Judgment Order
10 and we affirm on that basis. Nevertheless, as an alternative
11 basis for affirming we address the merits, so in this Facts
12 section we summarize what little we can glean from the excerpts of
13 record about what was presented to the bankruptcy court and its
14 reasoning in granting summary judgment.

15 The bankruptcy court's order denying Debtor's motion to
16 remand the Second AP to state court expresses the following
17 thoughts regarding the fourth claim:

18 His [claim (4) for malicious prosecution] requires a
19 slightly different analysis [from the dismissed
20 claims]. To the extent that he alleges the same
21 facts that were set forth in his original complaint
22 [in the First AP] and now claims that these amount to
23 malicious prosecution rather than abuse of process,
24 his [claim (4)] is barred, in that it arises out of
the same nucleus of operative fact. However, buried
within [claim (4)] appears to be a new claim that
defendants maliciously prosecuted a different lawsuit
-- namely, the later unlawful detainer action brought
against [Debtor's wife]. No reference to this action

25 ⁶(...continued)
26 parties have waived that requirement by continuing to treat the
27 Summary Judgment Order as a final judgment. See Casey v.
28 Albertson's Inc., 362 F.3d 1254, 1256-59 (9th Cir. 2004)
(analogizing to Bankers Trust Co. v. Mallis, 435 U.S. 381 (1978)),
cert. denied, 125 S.Ct. 108 (2004).

1 appears in the original complaint [in the First AP].

2 We do not know the bankruptcy court's reasons for granting
3 summary judgment on this new portion of claim (4) but Appellees
4 argued in their summary judgment motion that Debtor could not
5 establish the elements of malicious prosecution. They claimed
6 that on the undisputed facts there was probable cause to file the
7 later UD Action, it was not initiated with malice, and it did not
8 legally terminate in Debtor's favor.

9 The portions of claim (5) that were not stricken involved the
10 same UD Action. Appellees argued that summary judgment on this
11 claim for unfair business practices was appropriate for the same
12 reasons applicable to claim (4). The bankruptcy court apparently
13 agreed because its Summary Judgment Order disposes of both
14 claim (4) and the remaining portions of claim (5).

15 D. The UD Actions

16 Both the First and Second APs allege wrongdoing in connection
17 with Winston Financial's UD Actions, which Winston Financial
18 pursued after obtaining relief from the automatic stay. Those
19 actions continued from before foreclosure until well after Winston
20 Financial had purchased the House at a foreclosure sale in June of
21 2003.

22 The first UD Action (Superior Court No. 03-U00454) was filed
23 on May 2, 2003. It was dismissed on November 4, 2003, for failure
24 to prosecute. Meanwhile Debtor had filed motions in the
25 bankruptcy case and the First AP to rescind the foreclosure sale
26 and stay eviction based on the Notice of Trustee's Sale having
27 been published in the wrong newspaper. Those motions were denied,
28 but Appellee Lawyers Title Company recorded a notice of rescission

1 of trustee's sale on June 3, 2003.

2 The second UD Action (Superior Court No. 03 0U00734) was
3 filed in July of 2003 and dismissed without prejudice on December
4 16, 2003, apparently because the process server's proof of service
5 listed the House address at Summit "Circle" instead of Summit
6 "Drive," he may not have delivered the three day notice to an
7 employee of Debtor, and he admitted that he did not personally
8 mail the notice. Transcript (Superior Court No. 03 U00734,
9 12/16/03) pp. 38:21-26, 40:21-22, 46:16-19. Debtor's subsequent
10 motion to dismiss this UD Action with prejudice was denied.

11 The excerpts of record reflect that Winston Financial
12 obtained possession of the House after trial in another UD Action
13 in May of 2004 (Superior Court No. 04 U00003). Debtor has filed a
14 notice of appeal from the judgment in that action.

15 E. History of the current appeal

16 On October 18, 2004, Debtor filed a timely notice of appeal
17 from both the Dismissal Order and the Summary Judgment Order
18 pursuant to Rules 8002(a) and 9006(a). Debtor also filed two
19 requests for judicial notice concerning an appeal from an order
20 approving a settlement of a receivable belonging to the estate.
21 According to Debtor these proceedings somehow demonstrate that
22 Winston Financial, which is not a party to that appeal, is not a
23 creditor. Debtor's reasoning seems to be (a) that a temporary
24 stay issued by the appellate court implies that the settlement
25 amount was too low, (b) that because Winston Financial claimed a
26 security interest in the receivable it should have argued as much,
27 and (c) that because it did not make this argument it cannot be a
28 creditor. Debtor's reasoning assumes among other things that the

1 receivable is worth much more than the settlement and that
2 Appellees would find it worth their time and expense to oppose the
3 chapter 7 trustee's business judgment and appeal from the order
4 approving the settlement. There is no evidence to support these
5 assumptions, which Appellees dispute. The documents are
6 irrelevant and we hereby deny Debtor's requests for judicial
7 notice.

8 **II. JURISDICTION**

9 The bankruptcy court had jurisdiction under 28 U.S.C. §§ 1334
10 and 157(b)(1). We have jurisdiction under 28 U.S.C. § 158(a)(1).⁷

11 **III. ISSUES**

12 A. Is the bankruptcy court's Dismissal Order erroneous?

13 B. Are the excerpts of record adequate for us to review the
14 Summary Judgment Order?

15 C. Is the bankruptcy court's Summary Judgment Order
16 erroneous?

17
18

19 ⁷ We question whether Debtor has standing to pursue some
20 claims and whether his other claims are moot. The pre-petition
21 damage claims appear to be property of the estate that only the
22 Chapter 7 trustee, not Debtor, has standing to prosecute.
23 Moneymaker v. CoBen (In re Eisen), 31 F.3d 1447, 1451 n. 2 (9th
24 Cir. 1994). The post-petition damage claims mostly rest on the
25 proposition that Winston Financial had no right to foreclose
26 because of pre-petition events, so these claims might also belong
27 to the estate not Debtor. See id. (exclusive Chapter 7 trustee
28 standing, even if Debtor has pecuniary interest); In re C-Power
Products, Inc., 230 B.R. 800, 803 (N.D. Tex. 1998) (postpetition
claims can be property of estate). Debtor may have had standing
to prosecute his non-monetary claims to keep possession of his
House, but those claims appear to be moot because Debtor asserts
on this appeal that the House has been sold to a third party.
Arnold & Baker Farms v. U.S. (In re Arnold & Baker Farms), 85 F.3d
1415, 1420 (9th Cir. 1996). Nevertheless, we do not dispose of
this appeal on grounds of standing and mootness because the issues
are complex and the parties have not briefed them.

1 **IV. STANDARDS OF REVIEW**

2 We review orders granting motions to dismiss and motions for
3 summary judgment de novo. Wyler Summit P'ship v. Turner
4 Broadcasting Sys., 135 F.3d 658, 661 (9th Cir. 1998) (motion to
5 dismiss); Corey v. Hollydale Mobilehome Estates, 116 F.3d 830, 834
6 (9th Cir. 1997) (summary judgment).

7 Whether a prior judgment has a claim preclusive or issue
8 preclusive effect is either a question of law or a mixed question
9 of law and fact with the legal issues predominating. We review
10 the bankruptcy court's determinations on these issues de novo.
11 The Alary Corp. v. Sims (In re Assoc. Vintage Group, Inc.), 283
12 B.R. 549, 554 (9th Cir. BAP 2002); O'Malley Lumber Co. v. Lockard
13 (Matter of Lockard), 884 F.2d 1171, 1174 (9th Cir. 1989).

14 **V. DISCUSSION**

15 A. The Dismissal Order

16 In considering whether dismissal was proper we, like the
17 bankruptcy court, must take as true all well-pleaded allegations
18 of material fact and construe them in a light most favorable to
19 Debtor as the non-moving party. Wyler Summit P'ship, 135 F.3d at
20 661. There is no factual dispute that Debtor did not timely
21 appeal from the Interlocutory Orders dismissing claims (1), (3)
22 and (5) in the First AP, so with respect to those claims the
23 orders are final and both claim preclusive and issue preclusive.
24 Assoc. Vintage Group, 283 B.R. 549.

25 Debtor did timely appeal from that portion of the Final Order
26 dismissing claims (2) and (4) in the First AP and his appeal of
27 our affirmance is pending before the Ninth Circuit. We assume
28 solely for purposes of discussion that the pendency of that appeal

1 might prevent the Final Order from being truly final, for claim
2 preclusion purposes, because: (a) under California law judgments
3 on appeal are not final; (b) the claims are based on California
4 law; (c) the Second AP has been removed from a California court;
5 or (d) some combination of these or other factors. See generally
6 Wright, Miller & Cooper, Fed. Pract. & Proc., Jurisdiction 2d
7 §§ 4466-72 (discussing complexities of claim preclusion in federal
8 system); Audre, Inc. v. Casey (In re Audre), 216 B.R. 19, 29 n. 10
9 (9th Cir. BAP 1997) (discussing California law on finality of
10 judgment on appeal). Nevertheless, Debtor cannot collaterally
11 attack the bankruptcy court's Final Order, nor can he collaterally
12 attack our own decision affirming the Final Order, by bringing
13 another action alleging the same claims. Celotex Corp. v.
14 Edwards, 514 U.S. 300, 306 and 313 (1995). Therefore, to the
15 extent the Second AP repeats claims from the First AP those claims
16 are barred.

17 Claim (6) for loss of prospective business advantage was not
18 included in the Complaint in the First AP, but it is barred by the
19 doctrine of claim preclusion because: (1) it would destroy or
20 impair rights or interests that were vested in the First AP
21 including Winston Financial's rights to foreclose and sell the
22 House; (2) it would involve presentation of substantially if not
23 entirely the same evidence as in the First AP; (3) the Second AP
24 involves alleged infringement of the same rights that Debtor
25 claimed in the First AP regarding possession of the House and
26 rescission of the loan; and most importantly (4) it arises from
27 the same transactional nucleus of facts as alleged in the First
28 AP. Assoc. Vintage Group, 283 B.R. at 557-58 (citing cases).

1 That leaves only the new portions of claims (4) and (5),
2 which were not dismissed by the Dismissal Order. They are the
3 subject of the Summary Judgment Order which is discussed below.

4 Debtor argues on this appeal that his Second AP is not barred
5 by claim preclusion or issue preclusion because it asserts an
6 entirely new claim for fraud that was concealed at the time of the
7 First AP and the 2001 settlement and releases. Debtor appears to
8 mean that he was induced to settle and release his claims and
9 dismiss the 2000 Action by some fraud of Appellees. On this
10 appeal Debtor cites San Diego Hospice v. County of San Diego, 31
11 Cal.App.4th 1048, 1054-55 & n. 2 (1995) (party might be able to
12 rescind a release if induced by fraud in the inception or
13 misrepresentations by a fiduciary to enter the agreement).

14 Debtor is correct that he did not previously allege a claim
15 for fraud in the inducement before the bankruptcy court, as we
16 pointed out in our disposition of his prior appeal (BAP No. CC-03-
17 1497). In fact his Complaint still does not allege such a claim
18 even reading it in the light most favorable to him. Therefore, we
19 reject this argument.

20 Alternatively, even if the Complaint could be read to assert
21 the fraud claim that Debtor describes on this appeal, it is not a
22 new claim. Debtor's opening brief alleges that "Winston
23 [Financial] was not a true corporation but was really the same
24 party as Weinstein who did not have a California Lenders License
25 and could not charge interest rates in excess of the usury law."
26 Our summary of the First AP in the Facts section above shows that
27 Debtor knew all about the alleged alter ego issues at that time
28 and even filed the Reconsideration Motion in the First AP on that

1 basis.⁸ When the bankruptcy court denied that motion Debtor did
2 not appeal its order. Debtor's alleged claim for fraud in the
3 inducement amounts to a collateral attack on that order, and his
4 new theory based on the same allegations he raised in the First AP
5 is also barred by claim preclusion. Celotex, 514 U.S. at 306,
6 313; Assoc. Vintage Group, Inc., 283 B.R. 549.

7 Debtor has suggested no amendment he might make to his
8 Complaint that would change the above analysis, so dismissal was
9 properly with prejudice. Chang v. Chen, 80 F.3d 1293, 1296 (9th
10 Cir. 1996). For all of these reasons, we affirm the Dismissal
11 Order.

12 B. Lack of transcripts, tentative decision, and other
13 documents relating to the Summary Judgment Order

14 We affirm the Summary Judgment Order because Debtor has not
15 provided us with excerpts of record that are sufficient for our
16 appellate review. The Summary Judgment Order states that it is
17 "based upon the reasoning stated on the record at the hearing [on
18 September 7, 2004], as well as the Court's tentative ruling issued

19 ⁸ Debtor claims he was first alerted to Appellees' alter
20 ego "fraud" when they filed their Answer in this Second AP. The
21 Answer adds nothing to Debtor's arguments, and his reading of it
is tortured.

22 One example is sufficient. The Complaint (¶ 10) alleges that
23 Debtor and his wife executed a promissory note -- specifically, "a
24 Promissory Note Secured by Deed of Trust Balloon Payment Required
25 Upon Maturity to pay Winston [Financial] \$250,000.00" (emphasis
26 added). The Answer admits the execution of the promissory note
but denies the other allegations. Debtor reads this as a denial
that Winston Financial was the promisee. This is not a proper
analysis. The identity of Winston Financial as promisee is
incorporated into the definition of the promissory note, so there
is no denial of that fact.

27 At oral argument before us Appellees' counsel requested
28 sanctions based on Debtor's frivolous arguments. We deny that
request because it was not brought by separate motion. See Fed.
R. Bankr. P. 8020.

1 for the hearing." We have neither the hearing transcript nor the
2 tentative ruling in the excerpts of record. We also lack Debtor's
3 opposition to summary judgment and Appellees' reply papers.

4 In other cases we have been able to conduct a meaningful
5 review notwithstanding some gaps in the excerpts of record. See,
6 e.g., Gertsch v. Johnson & Johnson, Finance Corp. (In re Gertsch),
7 237 B.R. 160, 166-67 (9th Cir. BAP 1999) ("While the trial court's
8 explanation of its decision assists us in evaluating the summary
9 judgment evidence, de novo review means that we need not follow
10 the same reasoning"). This is not such a case. Debtor's claims
11 for malicious prosecution and unfair business practices are based
12 on UD Actions that are not themselves in the excerpts of record
13 and as to which we lack the bankruptcy court's familiarity, so the
14 defects in the excerpts of record hamper our de novo review. See
15 generally Adler v. Wal-Mart Stores, Inc., 144 F.3d 664, 671-72
16 (10th Cir. 1998) ("although our review is de novo, we conduct that
17 review from the perspective of the district court at the time it
18 made its ruling"). Without the benefit of the transcript, the
19 bankruptcy court's tentative decision, Debtor's opposition to
20 summary judgment, and Appellees' reply papers, including a
21 supplemental request for judicial notice, there is a risk that we
22 will misunderstand the legal issues. Therefore we apply the rules
23 that place the burden on Debtor to provide adequate excerpts of
24 record and specifically require him to provide us with not only
25 the order appealed from but also "any opinion, findings of fact,
26 and conclusions of law of the court" and all relevant transcripts.
27 Fed. R. Bankr. P. 8006 and 8007(a); 9th Cir. BAP Rule 8006-1. See
28 Bank of Honolulu v. Anderson (In re Anderson), 69 B.R. 105, 109

1 (9th Cir. BAP 1986) (declining to consider appellant's argument
2 when excerpts of record did not "contain the documentation
3 necessary for the reviewing Panel to have a complete understanding
4 of the case"); Drysdale v. Educ. Credit Mgmt. Corp. (In re
5 Drysdale), 248 B.R. 386, 388 (9th Cir. BAP 2000) ("Debtor's
6 failure to provide copies of the papers and evidence that were
7 before the bankruptcy court [on summary judgment] hampers our
8 review" and "entitles us to take such action as we deem
9 appropriate," citing Fed. R. Bankr. P. 8001(a)), aff'd, 2 Fed.
10 Appx. 776 (9th Cir. 2001). Compare Ehrenberg v. California State
11 Univ. (In re Beachport Entertainment), 396 F.3d 1083, 1087-88 (9th
12 Cir. 2005) (reversing summary dismissal when "the record before
13 the BAP appears to include everything needed in order to address
14 the merits of the appeal" and dismissal might "inappropriately
15 punish the appellant for the neglect of his counsel") (citation
16 and quotation marks omitted).

17 C. The merits of summary judgment

18 Alternatively, we hold, based on the limited excerpts of
19 record before us, that summary judgment was properly granted. On
20 our de novo review we must engage in the same analysis as the
21 bankruptcy court. Green v. Kennedy (In re Green), 198 B.R. 564,
22 566 (9th Cir. BAP 1996). We view the evidence in the light most
23 favorable to Debtor as the nonmoving party. Id. The initial
24 burden is on Appellees as the moving parties to show that there is
25 no genuine issue as to any material fact and that they are
26 entitled to judgment as a matter of law. Id. Once the moving
27 parties meet their initial burden, the burden shifts. The
28 nonmoving party must go beyond the pleadings and, by his own

1 affidavits or by the depositions, answers to interrogatories, and
2 admissions on file, come forth with specific facts to show that a
3 genuine issue of material fact exists. Hansen v. United States, 7
4 F.3d 137, 138 (9th Cir. 1993) (citing Fed. R. Civ. P. 56(e),
5 quotation marks omitted). The nonmoving party cannot rely on
6 conclusory allegations unsupported by factual data to create an
7 issue of material fact. Anderson v. Liberty Lobby, 477 U.S. 242,
8 247-257 (1986); Celotex Corp. v. Catrett, 477 U.S. 317, 323-25
9 (1986); Hansen, 7 F.3d at 138.

10 The only claims left, after the Dismissal Order, are claim
11 (4) for malicious prosecution and the portions of claim (5) for
12 unfair business practices that involve the second UD Action. As
13 Appellees argue, to establish a claim for malicious prosecution
14 Debtor would have to prove that the second UD Action or other
15 legal proceeding was begun at Appellees' direction, pursued to a
16 legal termination in Debtor's favor, and was brought without
17 probable cause and initiated with malice. Sheldon Appel Co. v.
18 Albert & Oliker, 47 Cal.3d 863, 871-872 (1989). Appellees' have
19 presented evidence in support of their motion for summary judgment
20 that Debtor did not pursue the UD Actions to a legal termination
21 in his favor. Debtor was evicted.

22 Debtor apparently relies on the dismissal of the first and
23 second UD Actions as legal terminations in his favor. He is not
24 correct. The UD Actions were dismissed without prejudice, despite
25 Debtor's attempts to the contrary, and Winston Financial was
26 successful in its last UD Action, so ultimately there was not a
27 legal termination in Debtor's favor. Moreover, Debtor has not
28 shown that he suffered any damages from the delays in evicting him

1 and his wife. Although Debtor asserts that Winston Financial was
2 not entitled to foreclose in the first place, that claim has been
3 rejected. The excerpts of record do not contain evidence of any
4 other legal proceeding that was brought to a legal termination in
5 his favor, and we are entitled to presume that Debtor does not
6 regard anything omitted from the excerpts of record as helpful to
7 his appeal. Captain Blythers, Inc. v. Thompson (In re Captain
8 Blythers, Inc.), 311 B.R. 530, 535 n. 6 (9th Cir. BAP 2004).

9 Therefore, Debtor has not raised a genuine issue of material fact
10 as to whether he pursued any matters to a legal termination in his
11 favor and his claim for malicious prosecution must fail.

12 Debtor's claim for unfair business practices is limited by
13 the Dismissal Order to the alleged procedural defects in the
14 second UD Action. Again, Debtor has not established that any
15 defects or delays in this action did anything but benefit them,
16 let alone cause them any damage. Therefore, summary judgment was
17 proper on claim (4) for malicious prosecution and the portions of
18 claim (5) for unfair business practices that were not stricken by
19 the Dismissal Order.

20 VI. CONCLUSION

21 There is no question that Winston Financial charged Debtor a
22 very high rate of interest and it also may have pursued its
23 collection aggressively and made some mistakes. Nevertheless,
24 Debtor has never shown that it or the other Appellees did anything
25 illegal or wrongful, and Debtor cannot continue to bring actions
26 involving the same claims.

27 We affirm the Dismissal Order because the dismissed claims in
28 Debtor's Second AP are barred by claim and issue preclusion, or

1 they amount to impermissible collateral attacks on orders issued
2 in the First AP, or both. Debtor is free to pursue his appeal in
3 the Ninth Circuit but he is not free to relitigate the same claims
4 in a new action.

5 We affirm the Summary Judgment Order because Debtor's
6 excerpts of record are inadequate for us to review the bankruptcy
7 court's decision to issue that order. Alternatively, Appellees
8 are entitled to summary judgment on Debtor's claim (4) for
9 malicious prosecution and the portions of claim (5) for unfair
10 business practices that were not stricken. Debtor cannot show any
11 legal proceeding that he pursued to termination in his favor so he
12 cannot establish malicious prosecution, and he has not raised any
13 genuine dispute of material fact that would establish his claim
14 for unfair business practices with respect to the second UD
15 Action.

16 The Dismissal Order and the Summary Judgment Order are both
17 AFFIRMED.

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