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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NOT FOR PUBLICATION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

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.	**M E M O R A N D U M**[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.

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[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.

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

I. FACTS

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

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

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[2] For simplicity we refer to "Appellees" even if not all of them have been involved in every matter we discuss. In 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.

[3] 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.

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

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

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

> (1) for injunctive relief requiring rescission of the foreclosure sale of the House based on alleged procedural defects and misstatement of the amount owed;
>
> (2) for declaratory relief that the 1998 loan transaction is unconscionable, rescission of the loan documents, and repayment of "the excess interest

paid;"

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

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

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

The Second AP adds another claim:

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

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

A. Disposition of the First AP

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

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

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

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

> The "newly-discovered" evidence upon which the [Reconsideration] Motion is based is a grant deed dated March 16, 2004 transferring title to [the House] from defendant Winston Financial [] to defendant [Weinstein]. On the face of that grant 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."

> Based on this newly-discovered evidence (collectively, the "Representations"), [Debtor] contends that Winston [Financial] and Weinstein have somehow defrauded this Court in connection with the [First AP] and that the [First AP Final Order] should be declared null and void. The Court rejects both contentions.
>
> The fact that Winston [Financial] and/or Weinstein have made or consented to the Representations in connection with the execution of a grant deed does not establish that they are in fact alter egos of one another for all purposes. However, even [if they were alter egos for all purposes], this "newly-discovered" fact has no bearing whatsoever on any issue resolved by the Bankruptcy Court in this adversary proceeding. . . .

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

B. The Dismissal Order in the Second AP

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

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

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

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

The Dismissal Order strikes portions of claim (5) on pages "8" and "9" of the Complaint, but what Debtor calls his Fifth Cause of Action appears on pages 18-20 of the Complaint. The 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.

Using the above adjustments, the Dismissal Order makes sense. 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.

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

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

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

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

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

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]

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[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...)

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

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

> His [claim (4) for malicious prosecution] requires a slightly different analysis [from the dismissed claims]. To the extent that he alleges the same facts that were set forth in his original complaint [in the First AP] and now claims that these amount to malicious prosecution rather than abuse of process, 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

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[6](...continued)
parties have waived that requirement by continuing to treat the Summary Judgment Order as a final judgment. See Casey v. 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).

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

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

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

D. The UD Actions

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

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

of trustee's sale on June 3, 2003.

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

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

E. History of the current appeal

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

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

II. JURISDICTION

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

III. ISSUES

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

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

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

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[7] We question whether Debtor has standing to pursue some claims and whether his other claims are moot. The pre-petition damage claims appear to be property of the estate that only the Chapter 7 trustee, not Debtor, has standing to prosecute. Moneymaker v. CoBen (In re Eisen), 31 F.3d 1447, 1451 n. 2 (9th Cir. 1994). The post-petition damage claims mostly rest on the proposition that Winston Financial had no right to foreclose because of pre-petition events, so these claims might also belong to the estate not Debtor. See id. (exclusive Chapter 7 trustee 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.

IV. STANDARDS OF REVIEW

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

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

V. DISCUSSION

A. The Dismissal Order

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

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

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

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

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

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

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

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

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

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

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

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

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

One example is sufficient. The Complaint (¶ 10) alleges that Debtor and his wife executed a promissory note -- specifically, "a Promissory Note Secured by Deed of Trust Balloon Payment Required Upon Maturity to pay Winston [Financial] $250,000.00" (emphasis 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 promissee. This is not a proper analysis. The identity of Winston Financial as promissee is incorporated into the definition of the promissory note, so there is no denial of that fact.

At oral argument before us Appellees' counsel requested 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.

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

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

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

C. The merits of summary judgment

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

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

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

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

and his wife. Although Debtor asserts that Winston Financial was not entitled to foreclose in the first place, that claim has been rejected. The excerpts of record do not contain evidence of any other legal proceeding that was brought to a legal termination in his favor, and we are entitled to presume that Debtor does not regard anything omitted from the excerpts of record as helpful to his appeal. Captain Blythers, Inc. v. Thompson (In re Captain Blythers, Inc.), 311 B.R. 530, 535 n. 6 (9th Cir. BAP 2004). Therefore, Debtor has not raised a genuine issue of material fact as to whether he pursued any matters to a legal termination in his favor and his claim for malicious prosecution must fail.

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

VI. CONCLUSION

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

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

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

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

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