NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL

OF THE NINTH CIRCUIT

In re:	BAP No. CC-04-1348-KJB
BRANDI LAURANCE,	BK. No. SA 01-19470-JB
Debtor.	Adv. No. SA 02-01172-JB
BRANDI LAURANCE,	
Appellant,	
v.	**MEMORANDUM**[*]
RANGER INSURANCE CO., INC.; JAMES J. JOSEPH, Chapter 7 Trustee,	
Appellees.	

Argued and Submitted on January 18, 2006
at Pasadena, California

Filed – February 10, 2006

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

Honorable James N. Barr, Bankruptcy Judge, Presiding.

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Before: KLEIN, JAROSLOVSKY,[**] and BRANDT, Bankruptcy Judges.

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[*]This disposition is not appropriate for publication and may not be cited except when pertinent under the doctrine of law of the case or the rules of res judicata, including issue and claim preclusion. See 9th Cir. BAP Rule 8013-1.

[**]Hon. Alan Jaroslovsky, United States Bankruptcy Judge for the Northern District of California, sitting by designation.

Debtor and appellant, Brandi Laurance, d.b.a. Brandi Laurance Bail Bonds Company, entered into a Bail Bond Underwriting Agreement with appellee Ranger Insurance Company, Inc. ("Ranger"). This is an appeal from the bankruptcy court's judgment awarding Ranger $233,654.19 and excepting the debt from discharge pursuant to 11 U.S.C. §§ 523(a)(2)(A) and 523(a)(4). We AFFIRM.

FACTS

On November 15, 2001, debtor Brandi Laurance filed a voluntary petition under chapter 7.

Ranger commenced an adversary proceeding on February 15, 2002, seeking a determination of the amount of Lawrence's debt to Ranger and to except the debt from discharge pursuant to 11 U.S.C. §§ 523(a)(2)(A), 523(a)(4), and 523(a)(6).

Ranger's complaint alleged that it had entered into a written Bail Bond Underwriting Agreement with Laurance, wherein Laurance "agreed to certain underwriting restrictions concerning obtaining collateral for the issuance of bonds provided" by Ranger. The underwriting requirements were set forth in the Letter of Underwriting Authority and Instructions for Appearance Bonds. The agreement obligated Laurance to obtain tangible collateral for all bail bonds issued in an amount of $5,000 or greater to secure the bail bonds she issued. The collateral was to be held by Laurance as a fiduciary to Ranger; the collateral was to be taken in the name of "Ranger Insurance Company" with Laurance as the beneficiary of the collateral.

Additionally, Ranger's complaint alleged that Laurance committed fraud, breached her fiduciary duties under the

agreement and the letter of underwriting authority, acted intentionally to harm plaintiff and violated provisions of the applicable state insurance code and administrative regulations, by, among other things:

> a. Failing to obtain collateral for bail bonds written in an amount in excess of $5000 that would fully secure Plaintiff;
> b. Failing and refusing to pay forfeited bail bonds upon proper notice;
> c. Failing to give seven (7) days notice to Ranger of any and all bond forfeitures;
> d. Failing to turn over whatever collateral the Debtors may have had in relation to forfeited bail bonds;
> e. Failing to return all unused bail bond powers of attorney despite demand therefor;
> f. Failing to pay premiums due to Plaintiff within the time set forth in Agreement, when such premiums were to be held in trust on Plaintiff's behalf;
> g. Failing to make required payments into the Indemnity Funds specified in the Agreement;
> h. Failing to file with Plaintiff timely and accurate reports of status of all bail bonds posed by the debtor;
> i. Failing to timely pay all summary judgments issued on forfeited bail bonds posted by the Debtors; and
> j. Failing to account for all bond powers and collateral in the Debtor's possession.

On May 14, 2002, Laurance, who was represented by counsel, filed a one-sentence answer in which she denied most of the allegations in the complaint and did not assert any affirmative defenses.

At the time of Laurance's bankruptcy, there was an action by Ranger against Laurance for breach of contract pending in a state court. Ranger voluntarily dismissed the state court action without prejudice during Laurance's bankruptcy.

In the adversary proceeding, the bankruptcy court conducted a five-day trial from May 10 to May 14, 2004. The court heard testimony from Laurance and Ranger's representatives. The court made findings of fact and conclusions of law orally on the

record, and awarded judgment in favor of Ranger in the amount of $233,654.19, excepting the debt from discharge in reliance on §§ 523(a)(2) and (a)(4).

The parties agree that during the trial Laurance contended that Ranger was precluded from asserting fraud in the adversary proceeding because fraud was not asserted in the Texas action. They also agree that the bankruptcy court rejected the asserted defense because there was no final judgment.

This timely appeal ensued.

JURISDICTION

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

ISSUE

Whether the bankruptcy court correctly permitted plaintiff to allege fraud in the adversary proceeding after plaintiff had alleged only breach of contract in the previously filed action in Texas.

STANDARD OF REVIEW

We review rulings regarding rules of res judicata, including claim and issue preclusion, de novo as mixed questions of law and fact in which legal questions predominate. Robi v. Five Platters, Inc., 383 F.2d 318, 321 (9th Cir. 1988); Alary Corp. v. Sims (In re Assoc. Vintage Group, Inc.), 283 B.R. 549, 554 (9th Cir. BAP 2002). Once it is determined that preclusion doctrines are available to be applied, the actual decision to apply them is

left to the trial court's discretion. Robi, 838 F.2d at 321; George v. City of Morro Bay (In re George), 318 B.R. 729, 732-33 (9th Cir. BAP 2004), aff'd, 144 F. App'x 636 (9th Cir. 2005).

Imposition of judicial estoppel is reviewed for abuse of discretion. Cheng v. K & S Diversified (In re Cheng), 308 B.R. 448, 452 (9th Cir. BAP 2004), aff'd, 2005 WL 3525643 (9th Cir. 2005).

DISCUSSION

Although the appellant did not provide a transcript of the trial or the court's findings of fact and conclusions of law that were made orally on the record, which ordinarily would warrant either dismissal or summary affirmance, the issue presented is a question of law based on procedural facts that are not contested. Accordingly, we are able to conduct an informed review and will exercise our discretion to proceed to decide the appeal.

I

Laurance contends that the bankruptcy court erred by "allowing [Ranger] to allege fraud in the adversary proceeding" when Ranger had alleged breach of contract in the state court action. Laurance argues that Ranger was barred from proceeding with its fraud cause of action under principles of res judicata (commonly referred to as "claim and issue preclusion").

Ranger agrees in its brief that Laurance raised this argument at trial and explains that it responded that Laurance's omission of the affirmative defense of res judicata in the answer

waived the affirmative defense and the state court action had been voluntarily dismissed without prejudice.

According to Ranger, the bankruptcy court ruled that there was no final judgment on the merits in the state court action and, thus, the doctrine of res judicata did not apply. Because we do not have the transcript, we cannot ascertain precisely what the bankruptcy court explained and/or ruled in this regard. We are entitled to infer from its absence that the transcript would not be helpful to appellant regarding this issue. Gionis v. Wayne (In re Gionis), 170 B.R. 675, 680-81 (9th Cir. BAP 1994). It is plain, however, that the court rejected the defense and that its ruling was correct.

Principles of res judicata apply in bankruptcy. Grogan v. Garner, 498 U.S. 279, 284-85 n.11 (1991); Paine v. Griffin (In re Paine), 283 B.R. 33, 37 (9th Cir. BAP 2002). The bankruptcy nondischargeability question is separate and distinct from the state court proceedings. Brown v. Felsen, 442 U.S. 127, 138-39 (1979). Thus, the fact that fraud was not before the state court does not matter.

As the Supreme Court recently held in Archer v. Warner, 538 U.S. 314, 320 (2003), even if the parties had entered into a stipulation in the state court proceeding or the state court had rendered a judgment on Ranger's breach of contract action, claim preclusion would not prevent a bankruptcy court from looking beyond the record of the state-court proceeding and the documents that terminated the proceeding in order to decide whether the debt at issue was a debt for money obtained by fraud. Archer, 538 U.S. at 320. "The mere fact that a conscientious creditor

has previously reduced his claim to judgment should not bar further inquiry into the true nature of the debt." Id.

Moreover, the absence of a bankruptcy at the time the prebankruptcy state court action was filed means that the question of bankruptcy nondischargeable fraud was not then ripe, hence, not justiciable, and would remain nonjusticiable unless and until a bankruptcy case was filed.

In this instance, issue preclusion ("collateral estoppel") would apply if there were issues that were actually and necessarily litigated in the state court. Garner, 498 U.S. at 284-85 n.11. However, it appears that there was no actual litigation in the state court and that the complaint was voluntarily dismissed. As there is no judgment entered by a state court on the merits, there is nothing to which to afford preclusive effect. Nor was the action dismissed after there had been actual litigation of specific issues in a manner that might enable specific issues to be regarded as preclusively established. Since the state court decided no issue, issue preclusion does not apply.

II

Laurance also invokes the doctrine of judicial estoppel, contending that the bankruptcy court should not have allowed Ranger to allege breach of contract in one jurisdiction and then fraud in another. Laurance asserts that Ranger is "playing fast and loose" with the courts by asserting one thing in state court and litigating another thing in the bankruptcy court.

"Judicial estoppel is an equitable doctrine that encompasses a number of different abuses." Alary v. Sims (In re Associated Vintage Group, Inc.), 283 B.R. 549, 565 (9th Cir. BAP 2002). One form of judicial estoppel is preclusion of inconsistent positions, which estops a party from gaining advantage by taking one position and thereafter seeking another advantage from taking an inconsistent position. Id. at 566, citing New Hampshire v. Maine, 532 U.S. 742, 749-751, 121 S.Ct. 1808, 149 L.Ed.2d 968 (2001); Hamilton v. State Farm Fire & Cas. Co., 270 F.3d 778, 782-85 (9th Cir. 2001)(other citations omitted); Cheng, 308 B.R. at 452. Judicial estoppel situations need to be resolved in light of the authorization in modern procedural rules that parties are permitted to take inconsistent positions.

There are two independently fatal flaws in Laurance's judicial estoppel theory. First, there was no position that a court accepted in the initial state court litigation that was dismissed without prejudice before judgment. Second, there is nothing necessarily inconsistent about asserting breach of contract in prebankruptcy state court litigation and fraud in a bankruptcy nondischargeability action. As we have already explained in connection with the preclusion analysis, bankruptcy nondischargeable fraud is a different legal question than state law fraud, Brown v. Felsen, 442 U.S. 127, 138-39 (1979), even though a determination of fraud in state court litigation may become issue preclusive in bankruptcy nondischargeability litigation. Garner, 498 U.S. at 285.

All that appellant has provided to us for purposes of analyzing the appeal is the structural scenario outlined above

regarding the inconsistent pleadings as between state and federal courts. We are entitled to infer from the absence of the trial transcript, which Laurance had a duty to include in the record, that there is nothing in the trial transcript that would support her appeal. Gionis, 170 B.R. at 680-81. As there is nothing about the structure of the transaction that has been described by Laurance in the appellate record that persuades us that the trial court erred in connection with its rulings regarding claim and issue preclusion and judicial estoppel, we are obliged to AFFIRM.[1]

CONCLUSION

For the foregoing reasons, we AFFIRM.

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[1]Ranger contends this appeal is frivolous and requests the panel "notice [Laurance] of a sanction hearing." To request sanctions, Ranger must file a separate motion. Fed. R. Bankr. P. 8020. We do not elect to award sanctions on our own initiative under Federal Rule of Bankruptcy Procedure 8020, notwithstanding that this appeal lacked substantial merit. Fed. R. Bankr. P. 8020.