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OF THE NINTH CIRCUIT

NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL

OF THE NINTH CIRCUIT

In re: DAVID MURESAN, Debtor. _____	BAP Nos. WW 05-1484-PaNK WW 05-1507-PaNK Bk. No. 05-24501 Adv. No. 05-01367
DAVID MURESAN, Appellant, v. MICHAEL COLE; UNITED STATES TRUSTEE, Appellees. _____	**M E M O R A N D U M**[1]

Argued and Submitted on June 23, 2006
at Seattle, Washington

Filed - July 7, 2006

Appeal from the United States Bankruptcy Court
for the Western District of Washington

The Honorable Karen A. Overstreet,
Chief Bankruptcy Judge, Presiding.

Before: PAPPAS, NIELSEN,[2] and KLEIN, Bankruptcy Judges.

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

[2] Hon. George B. Nielsen, United States Bankruptcy Judge for the District of Arizona, sitting by designation.

This is an appeal from orders of the bankruptcy court dismissing a chapter 11[3] bankruptcy case and dismissing the adversary proceeding commenced by the debtor David Muresan ("Muresan") against Michael Cole ("Cole") and awarding sanctions in favor of Cole and against Muresan. We AFFIRM the bankruptcy court's decision to dismiss the bankruptcy case and adversary proceeding against Cole. We REVERSE the award of sanctions.

FACTS

Muresan operated several adult care homes in the Seattle area. At some point not identified in the record, the licensing authority, the Department of Health and Social Services, Residential Care Services of the State of Washington ("DHSS/RCS") revoked Muresan's licenses to operate these homes. Acting pro se,[4] Muresan filed a petition under chapter 11 of the Bankruptcy Code on October 6, 2005. He listed as principal assets seven houses (presumably his residence and the premises where he operated the adult care homes) with current total market value of $2,930,000 and secured claims against those properties of $2,443,000. He also listed an ownership interest in four United States patents, without declared value. There were no secured

[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, as enacted and promulgated prior to the effective date of The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. 109-8, April 20, 2005, 119 Stat. 23.

[4] On November 14, 2005, Muresan filed a motion to employ Jason Anderson as counsel to the debtor-in-possession. Anderson appears to have functioned as counsel to Muresan from November 14, 2005, to the hearing on November 29, 2005, although he did not necessarily file all Muresan's pleadings during that period. On November 20, 2005, Anderson moved to withdraw as counsel, citing irreconcilable differences with his client and alleging that his client was not following his advice and had filed court pleadings on his own. The bankruptcy court entered an order on December 21, 2005, allowing the withdrawal.

claims other than the house claims, and Muresan scheduled no priority unsecured claims. On his schedule F, Muresan listed six unsecured creditors, all credit card companies, with claims totaling $50,300.

On the same day that Muresan filed his bankruptcy petition, he commenced four adversary proceedings: (1) against DHSS/RCS, Adv. No. 05-1366;[5] (2) against Michael Cole, Adv. No. 05-1367; (3) against Holly Schramm, Adv. No. 05-1368; and (4) against Prime West, Adv. No. 05-1369. Only Adv. No. 05-1367 against Michael Cole, as well as dismissal of the bankruptcy case itself, is before us on appeal.

The Cole Adversary. The adversary proceeding against Cole had its genesis in a series of proceedings in the state courts of Washington.

On August 17, 2005, Muresan sued Cole in San Juan County District Court, Cause No. CI04-90, alleging that, in connection with Muresan's sale of a house to him, Cole had breached the sale contract and an agreement to continue to operate the adult family home after the sale until Muresan could obtain a license to take over the business. Muresan's suit against Cole came on for trial in state district court on December 8, 2004. The state court ruled against Muresan, and found in favor of Cole on his

[5] Although the adversary proceeding against DHSS/RCS is not before us in this appeal, the relief Muresan sought in that action (licensing) is, according to Muresan, somehow implicated in the bankruptcy case and in the Cole adversary as well. Specifically, DHSS/RCS allegedly revoked Muresan's licenses and refused to grant a license to Muresan's daughter. In the DHSS/RCS adversary, Muresan requested a jury trial before the BAP, $13 million for damages to Muresan's business by taking away his licenses, and an order requiring the State to reinstate the licenses. Despite the bankruptcy judge's suggestion that granting such relief was beyond the authority of a bankruptcy court, Muresan continued to argue in the bankruptcy case, the Cole adversary proceeding and now in this appeal that the bankruptcy court (and this Panel) should somehow pressure the State of Washington into reinstating his licenses.

counterclaim in the amount of $14,696.88. Among the state court's conclusions of law were the following:

> The real estate purchase and sale agreement entered into by and between the parties did not include an agreement to purchase a business.
>
> The "business agreement" entered into by the parties is ambiguous and must be interpreted against the Plaintiff [Muresan] as the party who drafted it.
>
> The Plaintiff has failed to prove that Defendant breached the "business agreement." . . .
>
> The Plaintiff failed to provide any evidence or produce any testimony in support of his claims regarding: 1) removal of furniture from the residence, 2) failure to clean the premises/grounds at closing, and 3) failure to pay for an electric service call. Said allegations should be dismissed.

Muresan v. Cole, Dist. Ct. of Washington, San Juan County, CI08-90, Findings of Fact, Conclusions of Law and Judgment, January 26, 2005 [hereafter, "CI08-90"] at p. 2.

Thereafter, Muresan filed a second action against Cole in San Juan County District Court, Cause No. CI05-08. The state court granted summary judgment in favor of Cole, concluding that Muresan was attempting to relitigate the issues previously decided against Muresan in the prior action. The court in CI05-08 also found that "The Plaintiff's complaint is not well grounded in fact or existing law, and has been interposed for the improper purpose of harassment and to increase the Defendant's litigation costs." The court sanctioned Muresan $1,000 pursuant to Wash. CRLJ 11.

On March 29, 2005, Muresan filed a motion for relief from judgment in CI05-08. The state court denied the motion and

sanctioned Muresan an additional $250.

On September 19, 2005, Muresan filed a motion in the San Juan County Superior Court, Case No. 05-2-05017-0, seeking a de novo trial on the same issues raised in the two earlier District Court cases. The Superior Court struck Muresan's motion and imposed yet another sanction against him for $1,000.

Then, as noted above, on October 6, 2005, Muresan commenced the adversary proceeding in the bankruptcy court against Cole. Among the claims raised in the complaint are the following:

> 2.1 (Case CI04-90)[6] Defendant (seller) breached the Business Contract by no [sic] paying to Plaintiff (buyer) a portion of the business income according to Business Contract considered as rent.
>
> 2.2 (CI05-08) Defendant (seller) breached the Sale Agreement by:
>
> 2.2.1 not leaving on the property a refrigerator,
>
> 2.2.2 not paying a bill of $407.64, for an electric repair which happened 10 days before the Plaintiff took possession of the property.
>
> 2.2.3 and not removing the trash from the property.
>
> [And a new claim]
>
> 2.2.4 Close the adult family home after Plaintiff bought it.

Summons and Complaint, pp. 2-3.[7]

On October 27, 2005, Cole moved to dismiss the adversary

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[6] As can be seen, in drafting his adversary complaint, Muresan did not even bother to remove references to the earlier state court proceedings, instead apparently copying these allegations from his state court pleadings.

[7] As noted several times herein, Muresan was less than careful in styling his pleadings. This complaint was filed with the bankruptcy court as docket number 1 in the adversary proceeding as part of his document "Notice of Removal of Case."

proceeding and for sanctions under Fed. R. Civ. P. 11. Cole alleged that 1) the issues in the adversary proceeding were identical to those adjudicated in state court and thus barred by the doctrine of collateral estoppel [issue preclusion], 2) Muresan was fully aware that his actions were adjudicated in the state courts and dismissed with prejudice and yet he continued to press these actions to harass Cole and cause Cole litigation expenses, and 3) Muresan's action in the bankruptcy court was not well grounded in existing law and was brought for an improper purpose. A hearing was set on Cole's motion for November 18, 2005, and Muresan was given notice of that hearing.

The November 18, 2005, hearing. In addressing Cole's motion to dismiss, the bankruptcy judge first discussed her concerns over the status of Muresan's relationship with his proposed counsel, Jason Anderson, who appeared with him in court:

> And Mr. Anderson, you're either in or you're out. Because if you're out, I'm going to appoint a trustee on my own today, because I will not allow estate assets to be used in the way this debtor is using them. I will not allow him to file unsupervised adversary proceedings. I will not allow him to act as if he is going to incur debt on behalf of the post-petition estate. I will not allow him to file motions to sell property to his relatives. It doesn't work for me as a chapter 11.

Hr'g Tr. 3:16-25 (November 18, 2005).

The court continued by listing other problems it perceived with Muresan's bankruptcy case and tactics: that Muresan's properties were apparently not insured, that Muresan was attempting to get the bankruptcy court to reinstate his licenses, and the court's concern for the welfare of residents residing in

the debtor's homes and for liability of any potential trustee appointed in the bankruptcy case.

The court then addressed Cole's motion to dismiss the adversary proceeding, concluding:

> looks pure and simple, collateral estoppel, res judicata. The pro se complaint filed by the debtor here is just a rehash of issues that were litigated on the merits in a state court below. And I will not revisit them here. . . . This is not a plaintiff I would cut slack to. This is a completely frivolous action. And the state judgment is entitled to collateral estoppel and res judicata effect. So I will grant the summary judgment. I will grant the motion to dismiss.

Hr'g Tr. 12:7-12, 14:25-15:1-5 (November 18, 2005). Even Muresan's counsel admitted:

> Well, speaking frankly, Your Honor, I'm probably going to advise my client that, you know, it's a groundless complaint and to remove it.

Hr'g Tr. 12:16-18.

The bankruptcy court also granted Cole's request for sanctions, awarding him $700 as compensation for the cost of one-half day of his counsel's time to appear at the hearing.

The court then stated that she was inclined to dismiss or convert the bankruptcy case; directed Muresan's counsel to discuss the benefits and disadvantages of voluntary dismissal or conversion with Muresan; and set a hearing to consider dismissal of the chapter 11 case for November 29, 2005.

A written order dismissing the adversary proceeding and imposing sanctions was entered on November 18, 2005. Muresan moved for reconsideration on November 28, 2005. The bankruptcy court denied the motion for reconsideration without a hearing in

an order entered on November 29, 2005. Muresan filed a timely appeal of the dismissal of this adversary proceeding on December 2, 2005.[8]

The November 29, 2005, hearing. Before the hearing on November 29, Muresan personally sent a "Note of Hearing" to the bankruptcy court, requesting, inter alia, that the court "recommend to DSHS [sic] to give to debtor back the licenses temporarily until the DSHS case will be tried." Also, on November 28, the U.S. Trustee filed a statement in support of dismissal rather than conversion.

At the beginning of the hearing, the bankruptcy court noted that counsel for Muresan, Anderson, had asked to withdraw. Muresan was introduced to the court and the court was informed that Muresan had been present at the hearing on November 18. The court then attempted to disabuse Muresan of his belief that the bankruptcy court had authority to order the State to restore his licenses:

> THE COURT: Why can't you file that [the action for damages and return of his licenses] in the King County Superior Court? Why do you need a federal bankruptcy proceeding?
>
> MR. MURESAN: Because you have higher authority, I think.
>
> THE COURT: No, I don't.

Hr'g Tr. 15:23-25 - 16:1-3 (November 29, 2005).

The court asked Muresan how he intended to proceed with his chapter 11 case. He responded:

[8] Although Muresan was represented by counsel Anderson at the time of filing the motions for reconsideration and notice of appeal, our examination of the writing style and appearance of these pleadings, as well as the fact that Muresan personally signed them, persuades us that these pleadings were drafted and submitted by Muresan rather than the attorney.

> But I ask you to schedule for those adversaries causing damages to business, to allow the debtor to stay in chapter 11 to sell four to six of his properties, to recommend to DSHS to give the debtor back the license temporary until the DSHS case can be tried, and to approve the debtor proposal order to vacate your order entered against the debtor in Michael Cole case . . . . I did not ask you to give back license because I do not think you can. But if we will create this pressure of hearing and then maybe a trial with DSHS, they will cooperate.

Hr'g Tr. 16:8-21 (November 29, 2005).

After a long discussion with Muresan and counsel to the U.S. Trustee, the bankruptcy court determined that the case should be dismissed:

> I am going to dismiss the case and for these reasons, really. My problem is that this debtor, Mr. Muresan, is without counsel. This is a chapter 11 proceeding, which generally requires somewhat [sic] who knows what they are doing. I am absolutely convinced that Mr. Muresan has no idea how to comply with his duties as a fiduciary under the Bankruptcy Code and that he will not comply with those duties under the bankruptcy code.

Hr'g Tr. 17:20 - 18:3.

The court then discussed the four adversary proceedings launched by Muresan, and how they "expose this estate to continued awarding of attorneys' fees to these defendants and possibly to the sanctions that I'm going to have to award to these defendants." Hr'g Tr. 18:6-9.

First, the court found that the DHSS/RCS action, despite the protests of Muresan, was merely an attempt to coerce the State into restoring his licenses and that the bankruptcy court was powerless to do so.

Second, the court noted that it had already dismissed the

Cole adversary proceeding because it was barred by issue preclusion.

The court found that the third and fourth adversary proceedings, the Schramm and Prime West actions, also involved issues which had been fully litigated in the state courts and were likely barred by issue preclusion.

Finally, the court noted that, although Muresan wanted to use the equity in his houses to fund a reorganization plan, the only sale he had proposed was of a house owned by his former wife, to be sold to his son. The court noted "That is just not the kind of sale that we approve here in bankruptcy court." Hr'g Tr. 19:15-19.

The court concluded: "And all of this convinces me that he just has no idea what he is supposed to do as a fiduciary and debtor in possession in the bankruptcy proceeding. So I'm going to dismiss the case." Hr'g Tr. 19:20-22.

On November 29, 2005, the court entered its order dismissing the chapter 11 case for cause pursuant to § 1112(b), incorporating the findings of fact and conclusions of law recited on the record at the hearing pursuant to Fed. R. Civ. P. 52(a) and Fed. R. Bankr. P. 7052 and 9014. Muresan filed a timely notice of appeal on December 2, 2005.

JURISDICTION

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

ISSUES

Muresan's statement of the issues in his Opening Brief states that "All issues involved in this case are specific to bankruptcy, and can be addressed based on Rule 7023.2, about adversary cases, and other rules." Of course, no issue involving Rule 7023.2, which governs adversary proceedings relating to unincorporated associations, is involved in this appeal.

Instead, in our view, the appeals present the following issues:

1. Whether the bankruptcy court abused its discretion in dismissing Muresan's bankruptcy case for cause under § 1112(b).
2. Whether the bankruptcy court erred in dismissing the adversary proceeding against Michael Cole on the grounds of issue preclusion.
3. Whether the bankruptcy court abused its discretion in sanctioning Muresan $700 pursuant to Fed. R. Civ. P. 11, incorporated in Fed R. Bankr. P. 9011.

STANDARDS OF REVIEW

A trial court's dismissal of an adversary proceeding on the grounds of res judicata or issue preclusion is subject to de novo review. Maldonado v. Harris, 370 F.3d 953, 956 (9th Cir. 2004).

We review a bankruptcy court's decision to dismiss a chapter 11 case for abuse of discretion. Loya v. Rapp (In re Loya), 123 B.R. 338, 340 (9th Cir. BAP 1991). We also review a bankruptcy court's decision to impose sanctions for an abuse of discretion. Miller v. Cardinale (In re Deville), 361 F.3d 539, 547 (9th Cir.

2004). In awarding sanctions, the bankruptcy court abuses it discretion if it bases its ruling on an erroneous view of the law." Smyth v. City of Oakland (In re Brooks-Hamilton), 329 B.R. 270, 277 (9th Cir. BAP 2005).

DISCUSSION

1. Adequacy of the Record on Appeal.

This Panel generally limits its review on appeal to an examination of the excerpts of the record as provided by the parties, and it is not obligated to examine portions of the record not included in the excerpts. See Kritt v. Kritt (In re Kritt), 190 B.R. 382, 386-87 (9th Cir. BAP 1995); Bank of Honolulu v. Anderson (In re Anderson), 69 B.R. 105, 109 (9th Cir. BAP 1986). Muresan has presented a woefully insufficient record to assist the Panel in conducting an informed review of the bankruptcy court's decisions. For example, Muresan's "Appellant's Appendix" did not include most of the documents required by Fed. R. Bankr. P. 8009(b). And the few documents that he did submit were annotated with comments, glosses and underlines that were not included in the original documents filed with the bankruptcy court. Moreover, the transcripts provided to the Panel consist of a few "snippets" of court hearings, and are in most instances inadequate to discern what occurred or was said on the record in the bankruptcy court and otherwise incomplete.

Muresan's brief also failed to comply with Fed. R. Bankr. P. 8010(a)(1), in that he failed to provide a table of contents or any table of cases; and his statements of jurisdiction, issues presented, and arguments were, in large part, unintelligible. Two

of the four forms of relief sought in the conclusion to his brief (for a jury trial in the BAP, and for restoration of his state licenses) would seem manifestly beyond the authority of this Panel to grant. And this approach is nothing new, since Muresan has persisted throughout this case in seeking these unavailable remedies, even after the bankruptcy court informed him that they could not be granted.

In general, if an appellant fails to provide a sufficient, or at least intelligible, record and arguments to support informed review of trial court determinations, the Panel may either dismiss the appeal or affirm the trial court based upon the appellant's inability to demonstrate error. Kyle v. Dye (In re Kyle), 317 B.R. 390, 393 (9th Cir. BAP 2004), aff'd 170 Fed. Appx. 15 (9th Cir. 2006), (citing Cmty. Commerce Bank v. O'Brien (In re O'Brien), 312 F.3d 1135, 1136-37 (9th Cir. 2002) and others). The same general rules operate where the appellant fails to supply the appellate court with a sufficient transcript to allow review. Id. (citing Hall v. Whitley, 935 F.2d 164, 165 (9th Cir. 1991) and others).

However, the Court of Appeals expects us "to consider whether informed review is possible in light of what record has been provided." In re Kyle, 317 B.R. at 394. Where the record is incomplete, but the appellate court has enough information to obtain a complete understanding and engage in informed review, we should not summarily affirm or dismiss. Id.

In this instance, the record presented by Muresan is dismal. However, we have been able to reconstruct the critical facts and events occurring in the bankruptcy court by our own review of the

bankruptcy court's dockets and the original pleadings. While we would likely be justified in affirming for an inadequate record, we will utilize this reconstructed record to review the merits of Muresan's arguments. In doing so, it is clear that the bankruptcy court did not err in dismissing the adversary proceeding against Cole on the grounds of issue or claim preclusion, nor did it abuse its discretion in dismissing the bankruptcy case for cause pursuant to § 1112(b).

2. The bankruptcy court did not abuse its discretion in dismissing Muresan's bankruptcy case for cause under § 1112(b).

The statutory authority for dismissal of a chapter 11 petition is found in § 1112(b), which provides that ". . . the court may convert a case under this chapter to a case under chapter 7 of this title or may dismiss a case under this chapter, whichever is in the best interest of creditors and the estate for cause, including [ten noninclusive conditions]." The bankruptcy court has broad discretion in determining what constitutes "cause" adequate for dismissal under § 1112(b). Marsch v. Marsch (In re Marsch), 36 F.3d 825 (9th Cir. 1994)(holding that court had discretion in considering factors not explicitly listed in § 1112(b), such as attempting to unreasonably deter and harass creditors); Chu v. Syntron Biosearch, Inc., (In re Chu), 253 B.R. 92, 95 (9th Cir. BAP 2000)(holding that the list of causes in § 1112(b) is non-exclusive and bankruptcy court has broad discretion in determining cause); Pioneer Liquidating Corp. v. U.S. Trustee, (In re Consol. Pioneer Mortgage Entities), 248 B.R.

368, 375 (9th Cir. BAP 2000)(holding that "the enumerated causes [in § 1112(b)] are not exhaustive, and 'the court will be able to consider other factors as they arise, and to use its equitable powers to reach an appropriate result in individual cases.' [citing, in part] H.R. No. 95-595, 95th Cong., 1st Sess. 405-06 (1977)).

During two separate hearings, the bankruptcy court expressed its various concerns about the merits of Muresan's chapter 11 case, and the difficulties it perceived about the manner in which Muresan was performing his duties as a debtor-in-possession. At the hearing on November 29, the court summarized the reasons supporting dismissal of the bankruptcy case:

- Muresan was not represented by counsel and, in the court's opinion, his chapter 11 case required someone "who knows what he is doing." The court was convinced that Muresan did not understand his fiduciary duties, or if he did, that he had no intention of performing them.
- Muresan had filed four adversary proceedings against other parties of doubtful or no merit which could expose the bankruptcy estate to awards of attorneys' fees, costs and possibly sanctions.
- One of the actions was apparently filed for the sole purpose of attempting to recover Muresan's state licenses, relief which the court believed it was powerless to grant.
- The Cole adversary proceeding had already been dismissed as an attempt to relitigate issues decided in state court.
- The remaining two adversary proceedings were also likely subject to dismissal on the basis of issue preclusion.

- While Muresan hoped to sell his houses to fund a plan, the only sale that he had proposed involved a property that he acknowledged he no longer owned, and the sale was to be made to his son.

The bankruptcy court concluded, based upon these findings, that good cause existed to dismiss the chapter 11 case.

We conclude that the above findings and conclusions, when taken together, support dismissal for cause under § 1112(b)(1) because, among other possible causes, they demonstrate there was a continuing loss to or diminution of the bankruptcy estate and an absence of any reasonable likelihood of rehabilitation.

There are two elements to show the existence of cause for dismissal under § 1112(b)(1): that there is a continuing drain on the resources of the bankruptcy estate; and that there is no reasonable possibility of rehabilitating the debtor's business. Johnston v. Jem Development Co. (In re Johnston), 149 B.R. 158, 160-62 (9th Cir. BAP 1992). Here, the bankruptcy court found that Muresan's incorrigible commitment to pursuit of frivolous litigation represented a misuse of the resources of the estate (and the court), and exposed the estate to potential claims by the victims of his misplaced litigation strategy. In addition, the bankruptcy court correctly decided that there was little likelihood that Muresan could rehabilitate[9] his business because: (1) the court could not grant Muresan's demand that his state licenses be restored, without which he could not continue his adult home care business; and (2) Muresan either did not

[9] "Rehabilitation" in this context refers to the ability of a debtor to propose a plan of reorganization that provides for continuity of a business; it is a more restrictive term than reorganization. In re Johnston, 149 B.R. at 160.

understand his fiduciary duties as a debtor-in-possession, or he was unwilling to perform them.

Under these circumstances, we believe that the bankruptcy court did not abuse its discretion in dismissing Muresan's bankruptcy case for cause pursuant to § 1112(b).

3. The bankruptcy court did not err in dismissing the adversary proceeding against Michael Cole on the grounds of preclusion.[10]

The Full Faith and Credit Statute, 28 U.S.C. § 1738, requires federal courts to give the same "full faith and credit" to the judgments and orders of a state court to which they would be entitled under the law of the state in which they arise. Caldeira v. County of Kauai, 866 F.2d 1175, 1178 (9th Cir. 1998). To ascertain the preclusive effect in the adversary proceeding of the various state court judgments, we look to Washington law.

In Washington, issue preclusion bars relitigation of issues where the party against whom the doctrine is to be asserted had a full and fair opportunity to present its case. World Wide Video

[10] At oral argument, Muresan for the first time argued that he did not have adequate notice of the hearing concerning Cole's motion to dismiss the Cole adversary proceeding. While the Panel need not examine any argument raised for the first time in oral argument, Law Offices of Neil Vincent Wake v. Sedona Inst. (In re Sedona Inst.), 220 B.R. 74, 76 (9th Cir BAP 1998), we have nonetheless reviewed the bankruptcy court's docket, and found that Muresan unquestionably was given adequate notice of the motion to dismiss. According to a declaration of Jane Hutchison, who worked in the law office of Cole's attorney, she mailed a copy of the Notice of Motion and Motion to Dismiss Adversary and Impose Sanctions to Muresan at his residence address on October 28, 2005. This notice explained that a hearing on the motion would occur in the bankruptcy court on November 18, 2005, at 9:30 a.m. This constitutes adequate notice. FED. R. BANKR. P. 9006(d)(providing that, unless a different time is specified in the Rules, a motion and notice of hearing be served not less than five days before the date of the hearing.)

of Washington, Inc. v. City of Spokane, 103 P.3d 1265, 1274 (2005); Barr v. Day, 124 Wash. 2d 318, 324-25 (1994). The party seeking to invoke the doctrine must show that (1) the issues decided in the earlier proceeding were identical to the issues presented in the later proceeding; (2) the earlier proceeding resulted in a judgment on the merits; (3) the party against whom issue preclusion is asserted was a party to, or in privity with, a party to the earlier proceeding; and (4) the application of issue preclusion does not work an injustice on the party against whom it is applied. World Wide Video, 103 P.3d at 1274; Christensen v. Grant County Hospital District No. 1, 152 Wash.2d 299, 307 (2004).

Without doubt, the bankruptcy court correctly concluded that Muresan's adversary proceeding against Cole should be dismissed on the grounds of "pure and simple, collateral estoppel, res judicata. The pro se complaint filed by the debtor here is just a rehash of issues that were litigated on the merits in a state court below. " Hr'g Tr. 12:7-12 (November 18, 2005). The issues raised in Muresan's adversary complaint against Cole were not only identical to the issues previously litigated in CI04-90, but they were the same as those raised in CI05-08. The state trial court adjudications constitute judgments on the merits, and at least one state appellate court refused to set those judgments aside. The parties in all the state court actions and the adversary proceeding are the same. And Muresan has not shown how the application of issue preclusion would work an injustice on him, as he has already been sanctioned three times by the state courts for his attempts to prosecute what they deemed to be groundless causes.

At oral argument, Muresan insists he stated at least one "new" claim in his adversary complaint against Cole that had not been previously litigated in state court when he sought damages for Cole's alleged breach of the "business agreement" to continue the adult home operation until Muresan could regain his license. While the bankruptcy court did not specifically discuss this claim, we think the court's decision was justified.

The state district court, in the judgment entered in Cause No. CI04-90, expressly rejected Muresan's claim: "4. The Plaintiff has failed to prove that Defendant breached the 'business agreement'." CI08-90, p.2. As a result, Muresan's claim, when included in the adversary complaint that Cole breached the "business agreement", was not new at all.

Even if this claim had not been previously rejected in state court, Muresan was barred from asserting it in the adversary proceeding under the doctrine of claim preclusion as a claim that might have been litigated or could have been raised in the original litigation. See Loveridge v. Fred Meyer, Inc., 125 Wash. 2d 759, 763 (1995) (holding that claim preclusion bars the relitigation of issues that might have been litigated in a prior action). Washington requires identity of the following factors between a prior judgment and a subsequent action in applying claim preclusion: (1) persons and parties; (2) cause of action; (3) subject matter; and (4) quality of persons for or against whom the claim is made. Id.; Pederson v. Potter, 103 Wash. App. 62 (Wash. Ct. App. 2000). As we have discussed above, all four of these factors are unquestionably present in the earlier state actions and the Cole adversary proceeding. Therefore, we conclude that

Muresan's "new" issue is barred under either the doctrines of issue or claim preclusion.

The bankruptcy court did not err in dismissing Muresan's adversary proceeding against Michael Cole as an impermissible attempt to yet again beat a long-dead horse.[11]

4. The bankruptcy court abused its discretion in awarding a sanction of $700 against Muresan.

Our review of the record discloses that neither Cole nor the bankruptcy court complied with the procedural requirements of Rule 9011(c) for the imposition of sanctions. Consequently, we conclude that the bankruptcy court abused its discretion in awarding sanctions pursuant to that Rule.[12]

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[11] Of course, that the bankruptcy case has been dismissed could constitute another possible basis for sustaining the bankruptcy court's decision to dismiss the adversary proceeding. Bankruptcy courts are not automatically divested of jurisdiction over "related-to" actions when the underlying bankruptcy case is dismissed. Carraher v. Morgan Electronics, Inc. (In re Carraher), 971 F.2d 327 (9th Cir. 1992). Whether the bankruptcy court retains, remands or dismisses an adversary proceeding arising under state law should be based on considerations of economy, convenience, fairness and comity. Id. at 328, citing Carnegie-Mellon v. Cohill, 484 U.S. 343, 353 (1988). We have held that the bankruptcy court's discretionary balancing of these factors may justify dismissal of a pending adversary proceeding following dismissal of the bankruptcy case. Linkway Investment Co., Inc. v. Olsen (In re Casamont Investors, Ltd.), 196 B.R. 517, 522-24 (9th Cir. BAP 1996)("When the bankruptcy case is dismissed proceedings related thereto are not automatically dismissed; however, the court should always consider that perhaps they should be.") Since the chapter 11 case had not yet been dismissed when the bankruptcy court granted Cole's motion to dismiss the adversary proceeding, we express no opinion concerning this point.

[12] In Cole's motion for an award of attorney fees and costs, he cited Fed. R. Civ. P. 11. The bankruptcy court, in granting the motion, relied upon the same Rule. More properly, the motion and award should have been premised upon Fed. R. Bankr. P. 9011, the bankruptcy counterpart of Civil Rule 11. However, this was a harmless error in that Rule 9011 and Civil Rule 11 have been substantially identical since 1997. 10 COLLIER ON BANKRUPTCY ¶ 9011.02 (15th ed. rev. 2002). The portions of the two Rules implicated in this instance are the same. Additionally, Civil Rule 11 precedents are of significant interest and are properly used in interpreting Rule 9011. In re Marsch, 36 F.3d at 825.

Rule 9011(c)(1) provides,

> (1) How initiated. A motion for sanctions under this rule shall be made separately from other motions or requests and shall describe the specific conduct alleged to violate subdivision (b) . . . . The motion for sanctions may not be filed with or presented to the court unless, within 21 days after service of the motion (or such other period as the court may prescribe), the challenged paper, claim, defense, contention, allegation or denial is not withdrawn or appropriately corrected . . . .

FED. R. BANKR. P. 9011(c)(1)(emphasis added.)

The Cole motion for sanctions on its face violates this provision in at least two respects. The request for sanctions was not set forth in a separate motion, as required in Rule 9011(c)(1)(A), but was instead incorporated within Cole's Motion to Dismiss. A motion for sanctions under Rule 9011(c) must be filed as a separate motion. In re Kyle, 317 B.R. at 395.

The Cole motion for sanctions also violated the 21-day "safe harbor" provision of Rule 9011. A motion for sanctions under Rule 9011 requires that the motion be served on the opposing party at least 21 days before it is "presented" to the bankruptcy court. As discussed above, the Cole Motion to Dismiss was served on Muresan on October 28, 2005, and was argued to the bankruptcy court at the hearing on November 18, 2005, only 20 days later. A sanction order based on a motion that was not served as a separate motion and does not allow for the 21-day safe harbor provision is subject to reversal. Id.; accord Brickwood Contr's Inc. v. Datanet Eng'g Inc., 369 F.3d 385 (4th Cir. 2001); Elliott v. Tilton, 64 F.3d 213 (5th Cir. 1995). Cole did not comply with the procedural requirements of the Rule, and in granting that motion,

the bankruptcy court's sanctions award was necessarily premised on an erroneous view of the law. This amounts to an abuse of discretion warranting reversal of the sanctions award.

CONCLUSION

We AFFIRM the orders of the bankruptcy court dismissing the bankruptcy case and the adversary proceeding against Cole. We REVERSE the award of $700 as sanctions in favor of Cole and against Muresan.