NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL

OF THE NINTH CIRCUIT

In re:	BAP No. SC 05-1345-PaMaS
DAVID KIM and CALMA L. KIM,	Bk. No. 04-09892
Debtors.	Adv. No. 05-90027
DAVID KIM and CALMA L. KIM,	
Appellants,	
v.	**M E M O R A N D U M**[1]
CARL MICHEL and SYDNE MICHEL,	
Appellees.	

Argued and Submitted on February 24, 2006
at San Diego, California

Filed – March 17, 2006

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

Honorable John J. Hargrove, Bankruptcy Judge, Presiding.

_____

Before: PAPPAS, MARLAR and SMITH, Bankruptcy Judges.

[1] This disposition is not appropriate for publication and may not be cited except when relevant 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.

Debtors David Kim and Calma L. Kim ("Kims") appeal a final order of the bankruptcy court granting summary judgment in favor of creditors Carl Michel and Sydne Michel ("Michels") determining that a judgment debt is excepted from discharge in Kims' bankruptcy case under §§ 523(a)(2)(A) and (a)(6).[2] We AFFIRM.

FACTS

In July 2000, Kims sold their residence in Palos Verdes Peninsula, California, to Michels for $895,000. As part of the transaction, Kims signed and delivered a Real Estate Transfer Disclosure Form ("RTDS") to Michels. In the RTDS, Kims represented that they had no knowledge of: improvements constructed on the property without permits; soil problems or easements on the property; a homeowners' association; or cracks to the interior or exterior of the home.[3]

After Michels took possession of the property, numerous cracks in the ceiling and walls of the home appeared. Upon further investigation, Michels discovered, among other things, that: the property was constructed on adobe soil which, from time to time, contracted or expanded based on the amount of moisture present in the soil; on at least two occasions, Kims had experienced cracks in the house which they had patched; Kims had

---

[2] 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, prior to the effective date of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCA"), Pub. L. 109-8, 119 Stat. 23 (Apr. 20, 2005)..

[3] While not an issue here, Kims did disclose there were cracks in the driveway and that a floor in one of the bedrooms was uneven.

replaced a balcony without obtaining a permit; the property was subject to a homeowners' association; there was an easement along the rear of the property that was used as a horse trail. Moreover, Michels learned that before the sale of the property, Kims had consulted a real estate broker, Michael Fitzpatrick, who gave them a list of various problems, including the cracking, that must be disclosed if the property were to be sold. However, this list was not provided to the broker whom Kims ultimately retained to list the property.

In 2001, as provided in the parties' contract of sale, Michels demanded arbitration, before the American Arbitration Association ("AAA"), of the claims they asserted against Kims which arose out of the sale. An attorney was selected to serve as arbitrator. Michels alleged four separate claims against Kims in the arbitration action: (1) breach of contract; (2) violation of § 1102 of the California Civil Code;[4] (3) fraudulent concealment of defects; and (4) negligent non-disclosure of defects.

The arbitration was bifurcated into a liability phase and a damages phase. To address the issues raised in the liability phase hearing, the arbitrator issued an Interim Memorandum Decision. In his written decision, the arbitrator concluded that Kims were liable to Michels under both California Civil Code § 1102 and common law for damages to compensate for Kims' failure to disclose the history of cracks in the house, as well as for any damages attributable to Kims' failure to disclose that the

[4] CAL. CIV. CODE § 1102 prescribes the written disclosure requirements in connection with the sale of real estate.

property was subject to a homeowners' association. However, the arbitrator decided that there was no breach of contract and that Kims were not liable for failure to disclose the lack of a permit for the constructed deck or for the easement.

After another hearing, the results of the damage phase of the arbitration were outlined in the arbitrator's Memorandum of Decision in Support of the Award for Damages of June 14, 2004, and the Award of Arbitrator of July 8, 2004. In these documents, the arbitrator concluded Michels should recover a total of $501,284.95 from Kims, plus accruing interest. The damage award was computed as follows: (1) $150,000 compensatory damages; (2) $8,746.14 consequential damages; (3) $58,783.58 arbitration costs; (4) $234,057.50 attorneys' fees; (5) $10,000 exemplary [punitive] damages; (6) $39,698.63 in interest from 9/1/2000 to 6/13/2004, plus $28.78 per day until the award was reduced to judgment; and (7) AAA administrative fees.

Michels then filed a Petition to Confirm Arbitration in the Superior Court of Los Angeles County on July 22, 2004. The following items were attached to, and referenced in, the Petition: (1) Residential Purchase Agreement; (2) Interim Award and Interim Memorandum Decision of Arbitrator of March 10, 2004; (3) Award of Arbitrator and Memorandum Decision in Support of the Award of Damages of Arbitrator of July 8, 2004; and (4) a Declaration of Serge Tomassian, Esq., attorney for Michels, with accompanying Memorandum of Points and Authorities in support of petition to confirm arbitration award.

Kims did not object to confirmation of the arbitration award. A confirmation hearing was conducted by the state court

on July 28, 2004. After the hearing, the Superior Court confirmed the Award of Arbitrator "in all respects" and entered a Judgment on Arbitration Award (the "Arbitration Judgment") in favor of Michels and against Kims on October 15, 2004. No transcript of the hearing before the state court was provided in our record, nor did the state court issue an explanatory memorandum or other written statement of its findings of fact. Indeed, the Arbitration Judgment entered by the court notes that "no statement of decision [has] been requested by any party." Kims did not appeal the Arbitration Judgment.

Kims filed a chapter 7 bankruptcy petition on November 17, 2004. They listed Michels as creditors in their schedules. Michels timely commenced an adversary proceeding against Kims, alleging that the debt represented by the Arbitration Judgment should be excepted from discharge under § 523(a)(2)(A) & (a)(6). Thereafter, Michels filed a motion for summary judgment, arguing that all necessary findings to establish their right to relief had been made in the arbitration and state court proceedings and, thus, by application of collateral estoppel or issue preclusion, they were entitled to judgment as a matter of law. Michels supported their motion by submission, *inter alia*, of certified copies of the Arbitration Judgment, the Arbitrator's Interim Memorandum Decision, the Memorandum of Decision in Support of Award for Damages, and the Award of Arbitrator. Kims opposed this motion, arguing that collateral estoppel should not be applied in this case because the state court's Arbitration Judgment contained no findings of fact, and that the arbitrator's findings set forth in his memoranda and the Award of Arbitration

were inadmissible in the adversary proceeding.

In a detailed Memorandum Decision ("Memorandum Decision"), the bankruptcy court rejected Kims' argument that issue preclusion could not be applied to the Arbitration Judgment because it did not contain express findings that Kims had engaged in fraud or willful and malicious conduct. The court reasoned that, in applying issue preclusion, the court must look at the entire record of the proceedings and cannot be limited to a review of the Arbitration Judgment in isolation. According to the bankruptcy court, it was therefore appropriate that the court consider the two memoranda and Award of Arbitrator issued by the arbitrator.

The bankruptcy court then determined that the arbitrator made extensive findings of fact in the Interim Memorandum Decision which showed that Kims' actions satisfied the elements of common law fraud:

> The findings establish that [Kims] failed to disclose existing defects and failed to disclose that the property was subject to a [homeowners' association agreement]. The findings also establish that the concealment was done with the intent and knowledge of Mr. Kim. The findings further explain in great detail that [Michels'] reliance on Kim that there were no defects was justifiable. Finally, the arbitrator's findings establish that the damage to [Michels] was proximately caused by their reliance on Mr. Kim's statements.

The bankruptcy court concluded that the elements of proof required to except Michels' claim from discharge for fraud under § 523(a)(2)(A) are identical to those which the arbitrator found to exist in this case, that the issues raised in the adversary proceeding had been actually litigated and necessarily decided in

the arbitration proceedings, and that all remaining requirements for issue preclusion under California law had been satisfied. Therefore, the total amount awarded to Michels in the Arbitration Judgment was a nondischargeable debt.

The bankruptcy court also considered Michels' claim that the arbitration award was nondischargeable under § 523(a)(6). The court noted that the arbitrator had found the existence of a "sufficient pattern [of conduct] to conclude that the concealment of the prior cracks was done with the intent and knowledge of Mr. Kim . . . ." It also observed that the arbitrator had awarded Michels punitive damages because the "Kims intentionally failed to disclose the cracking problems to the buyers . . . ." The bankruptcy court concluded that these findings by the arbitrator were sufficient to establish that Kims had engaged in intentionally tortious conduct. As a result, the court concluded that all elements for issue preclusion were met and that Kims' debt from the Arbitration Judgment was also nondischargeable under § 523(a)(6).

The bankruptcy court granted Michels' motion for summary judgment in an Order dated August 8, 2005. Kims timely appealed on August 16, 2005.

JURISDICTION

The bankruptcy court had jurisdiction via 28 U.S.C. §§ 1334 and 157(b)(2)(I). We have jurisdiction under 28 U.S.C. § 158(a)(1).

ISSUE

Whether the bankruptcy court erred in granting issue preclusive effect to a state court judgment confirming an

arbitration award when the findings of the arbitrator were not expressly incorporated in that judgment.

STANDARD OF REVIEW

A bankruptcy court's decision to grant summary judgment is reviewed de novo to assess whether there is a genuine issue of material fact and whether the moving party is entitled to judgment as a matter of law. Thrifty Oil Co. v. Bank of America Nat. Trust and Sav. Ass'n, 322 F.3d 1039, 1046 (9th Cir. 2003); Gertsch v. Johnson & Johnson (In re Gertsch), 237 B.R. 160, 165 (9th Cir. BAP 1999).

We apply de novo review to the bankruptcy court's rulings regarding the application of res judicata, including claim and issue preclusion, as mixed questions of law and fact in which legal questions predominate. Robi v. Five Platters, Inc., 838 F.2d 318, 321 (9th Cir. 1988); Khaligh v. Hadaegh (In Re Khaligh), BAP No. CC-05-1148, ___ B.R. ____ (9th Cir. BAP 2006); 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 applicable, the decision to apply them is left to the trial court's discretion. Robi, 838 F.2d at 321; George v. City of Morro Bay, Cal. (In re George), 318 B.R. 729, 732-33 (9th Cir. BAP 2004), aff'd, 144 F. App'x 636 (9th Cir. 2005), cert. denied, 126 S.Ct. 1068, 74 U.S.L.W. 3382 (2006). When state preclusion law controls, such discretion is exercised in accordance with state law. Gayden v. Nourbakhsh (In re Nourbakhsh), 67 F.3d 798, 800-01 (9th Cir. 1995).

DISCUSSION

If a state court would give preclusive effect to a judgment rendered by another court of that state, then the Full Faith and Credit Act, 28 U.S.C. § 1738, imposes the same obligation on a federal court. McDonald v. City of W. Branch, 466 U.S. 284, 287 (1984). Thus, Federal courts must afford a state court's judgment confirming an arbitration award the same preclusive effect as would occur in state court. Caldeira v. County of Kauai, 866 F.2d 1175, 1178 (9th Cir. 1989), cert. denied, 493 U.S. 817 (1989).

This Panel recently engaged in a comprehensive review of the law applicable to affording preclusive effect to an arbitration award confirmed by a California state court in the context of a summary judgment entered by the bankruptcy court in a § 523(a) dischargability action. Khaligh, supra. There is no need to repeat that discussion here, other than to acknowledge that a bankruptcy court may properly apply issue preclusion to establish the grounds for an exception to discharge in bankruptcy based upon a California arbitration award, where the traditional elements for issue preclusion are satisfied,[5] and where the arbitration process

---

[5] As the California Supreme Court has summarized:

> Traditionally, we have applied the [issue preclusion] doctrine only if several threshold requirements are fulfilled. First, the issue sought to be precluded from relitigation must be identical to that decided in a former proceeding. Second, this issue must have been actually litigated in the former proceeding. Third, it must have been necessarily decided in the former proceeding. Fourth, the decision in the former proceeding must be final and on the merits. Finally, the party against whom preclusion is

(continued...)

encompassed the "basic elements of adjudicatory procedure", including the opportunity for judicial review of adverse rulings. Khaligh, supra, slip opinion at 11-18. This arbitration proceeding appears to have afforded Kims the necessary adjudicatory procedures to justify binding them to the results of that process.[6]

We do not understand Kims to argue in this appeal that the

---

[5](...continued)
sought must be the same as, or in privity with, the party in the former proceeding. ...

> Even assuming all the threshold requirements are satisfied, however, our analysis is not at an end. We have repeatedly looked to the public policies underlying the doctrine before concluding that collateral estoppel should be applied in a particular setting. [Citations omitted.] Accordingly, the public policies underlying collateral estoppel – preservation of the integrity of the judicial system, promotion of judicial economy, and protection of litigants from harassment by vexatious litigation – strongly influence whether its application in a particular circumstance would be fair to the parties and constitutes sound judicial policy.

Lucido v. Superior Court, 51 Cal.3d 335, 338, 795 P.2d 1223, 1226 (1990), cert. denied, 500 U.S. 920 (1990).

[6] As we noted in Khaligh:

> Parties to an arbitration, like parties to administrative hearings, are often afforded the opportunity for a hearing before an impartial and qualified officer, at which they may give formal recorded testimony under oath, cross-examine and compel the testimony of witnesses, and obtain a written statement of decision. When an arbitration has these attributes, it is not unjust to bind the parties to determinations made during the proceeding.

Khaligh, supra, slip opinion at 16, quoting Kelly v. Vons Companies, Inc., 67 Cal. App. 4th 1329, 1336-37 (Cal. Ct. App. 1998).

arbitration award, and state court judgment confirming that award, fail in any respect to satisfy the elements for preclusive effect under the California cases. Instead, Kims contend that since the state court's Arbitration Judgment did not contain express findings of fact, or repeat those findings made by the arbitrator, that judgment cannot be relied upon by the bankruptcy court for issue preclusion purposes.

The bankruptcy court rejected Kims' narrow view that the bankruptcy court must look solely at the text of the Arbitration Judgment to determine whether to apply issue preclusion. Instead, the court determined that it should review the entire record of the prior proceeding, not just the judgment. We agree.

The bankruptcy court' decision to look to the entire record of the prior proceedings rather than just the Arbitration Judgment is consistent with case law in this circuit. For example, in In re Houton, the Ninth Circuit noted:

> This does not mean that the documents which officially enshrine the state court proceedings may not be considered by the bankruptcy court as establishing the dischargeability of a debt. What is required is that the bankruptcy court consider all relevant evidence, including the state court proceedings, that is offered by the parties, or requested by the court, and on the basis of that evidence determine the nondischargeability of judgment debts.

In re Houtman, 568 F.2d 651 (9th Cir. 1978). See also, In re Daley, 776 F.2d 834, 836-37 (9th Cir. 1985), cert. denied, 476 U.S. 1159 (1986).

Following Houtman, the courts of this and other circuits have insisted that bankruptcy courts review "the entire record, not just the judgment" in determining the issue preclusive effect of

prior state court judgments on nondischargeability in bankruptcy. In re Silva,190 B.R. 889, 889 (9th Cir. BAP 1995)("In order to properly apply the doctrine of collateral estoppel, a bankruptcy court must look at the entire record of the prior proceeding, not just the judgment."); Spillman v. Harley, 656 F.2d 224, 228 (6th Cir. 1981)("entire record. . . not just the judgment"); In re Shuler, 722 F.2d 1253, 1257 (5th Cir. 1984), cert. denied, 469 U.S. 817 (1984)(same); In re Latch, 820 F.2d 1163, 1167 (11th Cir. 1987)(same). See also, 4 COLLIER ON BANKRUPTCY ¶ 523.12[5] (2005)("The court called upon to determine whether the judgment is dischargeable should look to the entire record to determine the wrongful character of the act, for even the pleadings are not necessarily conclusive.").

Citing a decision of this Panel, the bankruptcy court correctly noted that

> The party seeking to assert collateral estoppel has the burden of proving all the requisites for its application. To sustain this burden, the party must introduce a record sufficient to reveal the controlling facts and pinpoint the exact issues litigated in the prior action.

This statement is taken from In re Silva, 190 B.R. at 892 (emphasis added). In the emphasized text, the Panel had in turn paraphrased the earlier ruling of the Ninth Circuit in United States v. Lasky: "It is not enough that the party introduce the decision of the prior court; rather, the party must introduce a sufficient record of the prior proceeding to enable the trial court to pinpoint the exact issues previously litigated." United States v. Lasky, 600 F.2d 765, 769 (9th Cir. 1978), cert. denied, 444 U.S. 979 (1979).

As instructed by the case law, we conclude the bankruptcy court correctly reviewed the entire record submitted to the state court, including the memoranda and Award of Arbitrator, and not just the Arbitration Judgment, in determining whether the elements necessary to afford issue preclusive effect to the Arbitration Judgment were satisfied in the context of the dischargeability action.

Two flawed themes dominate Kims' attack on the bankruptcy court's decision to review the memoranda and Award of Arbitrator in its determination that issue preclusion applied and that the Arbitration Judgment is nondischargeable. First, Kims argue that the arbitrator's memoranda and the Award of Arbitrator, which contain the findings of fact and reasons for his decision, were not part of the record submitted to the Superior Court during the confirmation proceedings.[7] However, as shown by our record, this assertion is plainly incorrect. The Interim Memorandum Decision, the Award of Arbitrator and the Memorandum of Decision in Support of Award of Damages were attached, and explicitly incorporated by reference, as exhibits to the Petition to Confirm Arbitration, filed with the Los Angeles Superior Court on July 22, 2004.[8] Therefore, these documents were obviously before the state court as part of its record in the confirmation action.

---

[7] This argument was presented in four different locations in Appellant's Opening Brief.

[8] In their Reply Brief, and at oral argument, Kims acknowledged their error and conceded that the Arbitrator's memoranda were attached to the Petition to Confirm Arbitration. Indeed, Kims' Reply Brief weakens their case because it seems to ignore their own arguments in their Opening Brief that the memoranda were not part of the record.

Kims' second contention is that the memoranda and Award of Arbitrator constitute inadmissible hearsay in the bankruptcy court adversary proceeding. At no point do Kims explain why these documents are inadmissible or hearsay. We also reject this argument.

The California Code of Civil Procedure requires that a petition to confirm an arbitration award "[s]et forth or have attached a copy of the award and the written opinion of the arbitrators, if any." CAL. CODE CIV. PROC. § 1285.4. Far from being inadmissible, by statute the memoranda and Award of Arbitrator in this case were required components of the record of the confirmation proceedings.

The Petition to Confirm Arbitration expressly incorporated the Interim Award and Interim Memorandum Decision attached as Exhibit 2, and the Award of Arbitrator and Memorandum of Decision attached as Exhibit 3 to the Petition. The copy of the petition, with its exhibits, which was submitted to the bankruptcy court on June 28, 2005, was certified by the Clerk of the Superior Court as full, true and correct copies of the originals on file in the Superior Court. As such, they are self-authenticating public records, and are admissible. FED. R. EVID. 902(4); 803(8). See also FED. R. EVID. 201 and Mullis v. U.S. Bankruptcy Court for Dist. of Nevada, 828 F.2d 1385, 1388, n. 9 (9th Cir. 1987)(allowing courts to take notice of the contents of documents in underlying court files).

Finally, Kims' argument that the state court did not make express findings of fact overlooks an important recitation in the arbitration Judgment. As noted, the Arbitration Judgment confirms

the Arbitrator's decisions and the Award of Arbitrator "in all respects." While we conclude the Arbitration Judgment can be preclusively applied in the dischargeability action even if it did not include "express" findings, one fair reading of this provision is that it indeed serves to incorporate the findings made in the decisions and Award in the state court's judgment.

In short, we think that the bankruptcy court acted properly in reviewing the entire record before the California Superior Court in exercising its discretion to apply the doctrine of issue preclusion in this action. That record included the arbitrator's memoranda and the Award of Arbitrator. When those documents are consulted, the bankruptcy court had an ample basis to conclude that sufficient findings were made during the arbitration to show the debt evidenced by the Arbitration Judgment was based upon an intentional fraud committed by Kims in the real estate transactions with Michels, and that the debt should be excepted from discharge under §§ 523(a)(2)(A) and (a)(6). See Cohen v. de la Cruz, 523 U.S. 213, 218 (1998)("[O]nce it is established that specific money or property has been obtained by fraud, . . .'any debt' arising therefrom is excepted from discharge."), cited in Roussos v. Michaelides (In re Roussos), 251 B.R. 86 (9th Cir. BAP 2000).

CONCLUSION

The decision of the bankruptcy court is AFFIRMED.