

JUN 02 2005

NOT FOR PUBLICATION

HAROLD S. MARENUS, CLERK
U.S. BKCY. APP. PANEL
OF THE NINTH CIRCUIT

UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT

In re:) BAP No. OR-04-1532-MoRK
)
ALLAN LEE BENNETT; WANDA MAY) Bk. No. 01-64498
BENNETT; WANDA M. BENNETT,)
Trustee of the Wanda Bennett Trust,) Adv. No. 01-06302
)
Debtors.)

C. FREDERICK BURT, Conservator for)
Ronny Lynn Bennett,)
)
Appellant,)

v.) **MEMORANDUM**¹
)

ALLAN LEE BENNETT, WANDA MAY)
BENNETT, and WANDA M. BENNETT,)
Trustee of the Wanda Bennett Trust,))
)
Appellees.)

Argued and Submitted on May 20, 2005
at Eugene, Oregon

Filed - June 2, 2005

Appeal from the United States Bankruptcy Court
for the District of Oregon

Honorable Albert E. Radcliffe, Chief Bankruptcy Judge, Presiding.

Before: MONTALI, RIEGLE² and KLEIN, Bankruptcy Judges.

¹This disposition is not appropriate for publication and may not be cited except when relevant under the doctrines of law of the case, res judicata, or collateral estoppel. See 9th Cir. BAP Rule 8013-1.

²Hon. Linda B. Rieggle, Bankruptcy Judge for the District of Nevada, sitting by designation.

1 Appellant's predecessor obtained a judgment in state court
2 against debtors and subsequently filed a nondischargeability
3 action against debtors. Applying the principles of issue
4 preclusion, the bankruptcy court found that the judgment against
5 the debtor husband was nondischargeable but that the judgment
6 against the debtor wife was dischargeable. Appellant appealed
7 that portion of the judgment declaring the debtor wife's debt to
8 be dischargeable. We AFFIRM.

9
10 **I.**
FACTS

11 Beginning in 1992, debtor Allan Lee Bennett ("Allan") served
12 as conservator for the estate of his brother, Ronny Bennett
13 ("Ronny"). After Allan was removed as conservator, at least three
14 successor conservators were appointed (including the current
15 successor conservator, appellant C. Frederick Burt ("Burt")).

16 One of the successor trustees, Gregory C. Hansen ("Hansen"),
17 sued Allan in Oregon state court for conversion, breach of
18 fiduciary duty, and fraudulent conveyance.³ He also sued debtor
19 Wanda Bennett ("Wanda"), individually and in her capacity as
20 trustee of the Wanda Bennett Living Trust ("Trust"), for
21 fraudulent conveyance. After a jury trial, the state court
22 entered a judgment (the "Judgment") in January 1997 against Allan
23 for conversion, breach of fiduciary duty and fraudulent conveyance
24 and against Wanda and the Trust for fraudulent conveyance. In
25 addition, punitive damages were awarded against the Trust and
26 against Wanda in her capacity as trustee of the Trust.

27
28

³The record in this appeal is deficient. The state court
complaint is not a part of the record; neither is the complaint
initiating the underlying adversary proceeding.

1 In 2001, Wanda and Allan filed a joint bankruptcy petition.
2 Mark Hoyt ("Hoyt"), another successor conservator, filed the
3 underlying adversary proceeding to have the Judgment declared
4 nondischargeable under 11 U.S.C. § 523(a).⁴ Thereafter, Burt was
5 appointed as successor conservator but did not substitute himself
6 as plaintiff in the nondischargeability proceeding.

7 Trial commenced in the nondischargeability proceeding on June
8 4, 2003. On June 11, 2004, the bankruptcy court entered a
9 judgment in favor of Allan and Wanda, because the real party in
10 interest (Burt) was not acting as plaintiff. We reversed and
11 remanded, holding that the bankruptcy court erred in not giving
12 Burt a reasonable opportunity to substitute himself as plaintiff.
13 See Memorandum issued by BAP on December 15, 2003, in BAP No. OR-
14 03-1383-BKMu.

15 Following the remand, Burt was substituted as plaintiff and
16 the bankruptcy court resumed the trial that originally commenced
17 in 2003. The bankruptcy court noted that the claims against the
18 Trust and against Wanda as trustee of the Trust had been dismissed
19 from the nondischargeability proceeding. Applying the doctrine
20 of collateral estoppel (now commonly called issue preclusion),⁵

22 ⁴Unless otherwise indicated, all section and rule references
23 are to the Bankruptcy Code, 11 U.S.C. §§ 101-1330 and the Federal
Rules of Bankruptcy Procedure, Rules 1001-9036.

24 ⁵In addressing the preclusive effect of the Judgment, the
25 bankruptcy court repeatedly referred to issue preclusion or
26 collateral estoppel. Both this panel and the Oregon Supreme Court
27 now refer to collateral estoppel as "issue preclusion." See Paine
28 v. Griffin (In re Paine), 283 B.R. 33, 38 (9th Cir. BAP 2002)
(noting that "issue preclusion" includes the doctrines of direct
estoppel and collateral estoppel while "claim preclusion" has
"often been called 'res judicata' in a non-generic sense"), citing
Migra v. Warren City School Dist. Bd. of Educ., 465 U.S. 75, 77

(continued...)

1 the bankruptcy court held that the portion of the Judgment against
2 Allan for breach of fiduciary duty was nondischargeable.⁶ In
3 contrast, the court found that the portion of the Judgment against
4 Wanda and Allan for fraudulent conveyance was dischargeable,
5 because liability for fraudulent conveyance in Oregon does not
6 require a showing of intent while section 523(a)(6) does.⁷

7 On August 26, 2004, the bankruptcy court entered its judgment
8 declaring the Judgment against Allan to be nondischargeable and
9 against Wanda to be dischargeable. Burt filed a timely notice of

10
11 ⁵(...continued)
n.1 (1984); Drews v. EBI Cos., 795 P.2d 531, 535 (Ore. 1990).

12 At one point in its oral decision, the bankruptcy court
13 stated that "claim preclusion" would apply. As noted above, claim
14 preclusion is the more modern nomenclature for "res judicata."
The Supreme Court has explained the distinctions between claim and
issue preclusion:

15 [W]e use the term "claim preclusion" to refer to "res
16 judicata" in a narrow sense, i.e., the preclusive effect
17 of a judgment in foreclosing litigation of matters that
18 should have been raised in an earlier suit. In
contrast, we use the term "issue preclusion" to refer to
the effect of a judgment in foreclosing relitigation of
a matter that has been litigated and decided.

19 Marrese v. American Academy of Orthopaedic Surgeons, 470 U.S. 373,
20 376 n.1 (1985). We believe that the bankruptcy court intended to
21 state "issue preclusion" instead of "claim preclusion," inasmuch
as its analysis shows that the relevant issue (breach of fiduciary
duty by Allan) had been litigated and decided by the state court.

22 ⁶The Judgment against Allan totalled \$32,504.92 in principal
23 and \$612.50 in costs. Allan was found liable in the amount of
24 \$32,504.92 on the conversion count, in the same amount for the
breach of fiduciary duty count, and in the same amount for the
25 fraudulent conveyance count. Wanda was found individually liable
for the same amount on the fraudulent conveyance count. The
26 punitive damages were not assessed against Allan or Wanda
individually.

27 ⁷At oral argument before this panel, counsel for Burt
28 conceded that liability for fraudulent conveyance in Oregon does
not require a finding of intent to defraud; a finding of
constructive fraud is sufficient.

1 appeal. Neither Allan nor Wanda filed a cross-appeal, but they
2 did file (on January 12, 2005) a motion for sanctions against
3 Burt's counsel or for dismissal of the appeal ("Motion for
4 Sanctions"). We entered an order taking the Motion for Sanctions
5 under advisement pending resolution of the appeal on the merits.
6 For the reasons set forth in a separate order, we are denying the
7 Motion for Sanctions.

8
9 **II.
ISSUE**

10 Did the bankruptcy court err in refusing to grant preclusive
11 effect to that portion of the Judgment holding Wanda liable for
12 fraudulent conveyance?

13
14 **III.
STANDARD OF REVIEW**

15 We review de novo the preclusive effect of a judgment; the
16 issue presents a mixed question of law and fact in which the legal
17 questions predominate. The Alary Corp. v. Sims (In re Associated
18 Vintage Group, Inc.), 283 B.R. 549, 554 (9th Cir. BAP 2002).

19
20 **IV.
DISCUSSION**

21 Issue preclusion applies in nondischargeability proceedings.
22 Grogan v. Garner, 498 U.S. 279, 284-85 (1991). Because Burt is
23 arguing that the Judgment against Wanda is preclusive in the
24 underlying nondischargeability action, he "must introduce a record
25 sufficient to reveal the controlling facts and pinpoint the exact
26 issues litigated [in the state court action]." Kelly v. Okoye (In
27 re Kelly), 182 B.R. 255, 258 (9th Cir. BAP 1995), aff'd, 100 F.3d
28 110 (9th Cir. 1996).

1 The preclusive effect of a state court judgment is determined
2 by the law of the state in which the judgment was entered. Gayden
3 v. Nourbakhsh (In re Nourbakhsh), 67 F.3d 798, 800 (9th Cir.
4 1995). In Oregon, “[i]f one tribunal has decided an issue, the
5 decision on that issue may preclude relitigation of the issue in
6 another proceeding if five requirements are met:

7 1. The issue in the two proceedings is identical.

8 2. The issue was actually litigated and was essential
9 to a final decision on the merits in the prior
proceeding.

10 3. The party sought to be precluded has had a full and
11 fair opportunity to be heard on that issue.

12 4. The party sought to be precluded was a party or was
in privity with a party to the prior proceeding.

13 5. The prior proceeding was the type of proceeding to
14 which this court will give preclusive effect.”

15 Nelson v. Emerald People’s Util. Dist., 862 P.2d 1293, 1296-97
16 (Ore. 1993) (internal citations omitted).

17 Here, the bankruptcy court determined that the first two
18 elements were not present with respect to Burt’s
19 nondischargeability claims against Wanda. The state court
20 judgment imposed liability on Wanda individually only on the claim
21 for fraudulent conveyance. Burt contends that the judgment is
22 preclusive with respect to his nondischargeability claim against
23 Wanda for “willful and malicious injury” under section 523(a)(6).
24 We disagree. Because section 523(a)(6) requires a showing of
25 intent and Oregon fraudulent conveyance law does not, the issues
26 in the two proceedings were not identical; moreover, no evidence
27 has been presented that the issue of Wanda’s intent was actually
28 litigated.

1 Under Oregon law, a fraudulent conveyance can be actionable
2 if a debtor did not receive a reasonably equivalent value for a
3 transfer and (1) was engaged in a transaction for which its
4 remaining assets were unreasonably small or (2) reasonably should
5 have believed that it would incur debts beyond its ability to pay.
6 Ore. Rev. St. § 95.230(1). In other words, a conveyance may be
7 fraudulent even without actual intent to hinder, delay or defraud
8 a creditor. In contrast, section 523(a)(6) requires a showing
9 that a debtor intended to cause an injury, not just that he
10 intended to perform the act itself. Kawaauhau v. Geiger, 523 U.S.
11 57, 61-62 (1998) (“The word ‘willful’ in (a)(6) modifies the word
12 ‘injury,’ indicating that nondischargeability takes a deliberate
13 or intentional injury, not merely a deliberate or intentional act
14 that leads to injury.”); see also Carrillo v. Su (In re Su), 290
15 F.3d 1140, 1143 (9th Cir. 2002) (noting that Geiger establishes
16 that section 523(a)(6) does not apply to those debts arising from
17 unintentionally inflicted injuries). Therefore, because intent to
18 injure can be irrelevant in a fraudulent conveyance action in
19 Oregon, and because Burt has introduced no evidence to show that
20 the state court and jury considered whether Wanda acted with
21 intent to injure, the issues decided by the state court judgment
22 with respect to the fraudulent conveyance claim were different
23 than those presented by a section 523(a)(6) claim. Moreover, no
24 evidence has been presented that the intent issue was actually
25 litigated.

26 In his opening brief, Burt cites Impulsora Del Territorio
27 Sur, S.A. v. Cecchini (In re Cecchini), 780 F.2d 1440, 1443 (9th
28 Cir. 1986) for the proposition that when a wrongful act is “done

1 intentionally, necessarily produces harm and is without just cause
2 or excuse, it is 'willful and malicious' even absent proof of
3 specific intent to injure." Id. at 1443. Burt, however,
4 overlooks that Cecchini's standard for determining willful and
5 malicious injury under section 523(a)(6) was overruled by the
6 Supreme Court in Geiger. See Baldwin v. Kilpatrick (In re
7 Baldwin), 245 B.R. 131, 135 (9th Cir. BAP 2000), aff'd, 249 F.3d
8 912 (9th Cir. 2001) (noting that Geiger overrules Cecchini).
9 Consequently, Burt's sole argument on appeal -- that issue
10 preclusion applies because the state court judgment satisfies
11 Cecchini's standard for "malicious and willful injury" -- is not
12 well-taken.

13 The Ninth Circuit's decision in Harmon v. Kobrin (In re
14 Harmon), 250 F.3d 1240 (9th Cir. 2001) is instructive in the
15 current appeal. In Harmon, a creditor sued a debtor in state
16 court on many grounds, alleging facts which would have satisfied
17 the elements of a section 523(a)(2) claim. Id. at 1246. The
18 creditor obtained a default judgment against the debtor and then
19 requested the bankruptcy court to grant preclusive effect to the
20 state court judgment in a subsequent nondischargeability
21 proceeding. The Ninth Circuit held that issue preclusion was
22 inapplicable because the state court had not necessarily decided
23 the fraud and intent to defraud issue in entering its judgment;
24 the state court could have entered the judgment without finding
25 that the debtor had committed actual fraud (or acted with intent

26
27
28

1 to defraud). Id. at 1248-49 n.10.⁸ In the present case, the
2 Oregon state court could have imposed liability on Wanda for
3 fraudulent conveyance without considering or deciding whether she
4 acted with intent to injure or defraud. Thus, one of the elements
5 of section 523(a)(6) (intent to injure) was not addressed or
6 resolved by the state court. The Judgment against Wanda does not
7 preclude litigation on the section 523(a)(6) issue in bankruptcy
8 court.

9 Because the state court litigation and the
10 nondischargeability proceeding did not require similar showings of
11 intent to harm, the issues presented in each were not identical.
12 In addition, the element of intent was not necessarily decided in
13 order for the state court to enter its judgment against Wanda.
14 Accordingly, under Oregon law, the Judgment against Wanda is not
15 entitled to preclusive effect in the underlying section 523(a)(6)
16 action against Wanda. The bankruptcy court did not err and we
17 affirm.

18 **V.**
19 **CONCLUSION**

20 For the foregoing reasons, we AFFIRM.

21
22
23 ⁸The Ninth Circuit noted in Harmon that the state court could
24 have granted the plaintiff relief under the California
25 Corporations Code section entitling partners to rescind
26 partnership agreements for fraud or misrepresentation because the
27 state court had found that the debtor had engaged in constructive
28 fraud. "But such a finding [of constructive fraud on the part of
the debtor] would be insufficient to establish fraud under
§ 523(a)(2)(A), because under § 523(a)(2)(A), the debtor must have
intended to deceive the creditor, but in the case of 'constructive
fraud . . . it is not necessary to prove deliberate or intentional
fraud.'" Id. at 1248 n. 10 (internal citation omitted).