NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL

OF THE NINTH CIRCUIT

In re:	BAP No. EC-09-1096-DJuBa
ROBERT LEO SHEPARD AND SHERYL LYNN SHEPARD,	Bk. No. 08-13398-WRL
Debtors.	Adv. No. 08-1210-WRL
ROBERT LEO SHEPARD,	
Appellant,	
v.	**M E M O R A N D U M**[1]
GLENN CONKLIN,	
Appellee.	

Argued and Submitted on September 25, 2009
at San Francisco, California

Filed - November 24, 2009

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

Honorable W. Richard Lee, Bankruptcy Judge, Presiding.

Before: DUNN, JURY and BAUM,[2] Bankruptcy Judges.

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[1] This disposition is not appropriate for publication. Although it may be cited for whatever persuasive value it may have (see Fed. R. App. P. 32.1), it has no precedential value. See 9th Cir. BAP Rule 8013-1.

[2] Hon. Redfield T. Baum, Sr., U.S. Bankruptcy Judge for the District of Arizona, sitting by designation.

The pro se debtor, Robert Leo Shepard, appeals the bankruptcy court's grant of summary judgment in favor of Glenn Conklin ("Conklin") excepting a judgment debt from discharge under § 523(a)(4) and (a)(6) based on the issue preclusive effects of a prior state court judgment.[3] We AFFIRM.

I. FACTS

A. State court action[4]

From 1996 to 2004, the debtor and Conklin owned and operated a general partnership,[5] New Stone Age ("New Stone Age" or "Partnership"), which engaged in the business of granite fabrication. Sometime in late 2004, the debtor and Conklin entered into negotiations for dissolution of the Partnership but did not reach an agreement.

On or about April 20, 2005, the debtor formed a corporation, New Stone Age Granite & Marble, Inc. ("New Stone Age Granite"), without informing Conklin. On the same day, the debtor transferred $50,000 from New Stone Age's bank account to New Stone Age Granite's operating account ("Transfer") without Conklin's knowledge or consent.

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[3] Unless otherwise indicated, all chapter, section and rule references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532, and to the Federal Rules of Bankruptcy Procedure, Rules 1001-9037.

[4] We take most of the facts regarding the state court action from the state court's Findings of Fact, Conclusions of Law and Judgment ("Findings and Conclusions").

[5] The debtor and Conklin each owned 50% of New Stone Age.

Conklin discovered the Transfer nine days later. After calculating the value of the Partnership, he withdrew $109,200 – one-half of the Partnership's value – from New Stone Age's bank account.

The debtor later changed the locks on the Partnership's business premises and converted its assets to his own use in New Stone Age Granite. The debtor operated New Stone Age Granite at the Partnership's business premises, using the Partnership's inventory, tools, vehicles, accounts, and works-in-progress to the exclusion of Conklin. He refused to relieve Conklin of responsibility for the lease payments, even though he excluded Conklin from the business premises.

On May 9, 2005, the debtor initiated a state court action against Conklin, alleging several causes of action, including conversion, dissolution of the Partnership, breach of contract, "breach of fiduciary relationship," unjust enrichment, and accounting. With respect to the "breach of fiduciary relationship" cause of action, the debtor contended that Conklin had misappropriated the Partnership's assets over time to the damage of the debtor in the amount of $520,000. Conklin filed a cross-complaint against the debtor, alleging breach of fiduciary duty.[6]

The state court bifurcated the state court action into two phases: an accounting of the Partnership's assets ("first phase")

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[6] Conklin also alleged breach of contract, but the state court declined to make a finding as to this cause of action as it was not proved.

and a determination as to the cause of action alleged in Conklin's cross-complaint ("second phase"), as the state court had dismissed all of the debtor's causes of action, except the cause of action for accounting.[7] The debtor was represented by counsel during the first phase, but he was not represented by counsel and did not appear to represent himself during the second phase.

In the first phase, the state court determined the total value of the Partnership as of April 29, 2005. The state court also determined that the debtor had misappropriated Partnership assets and exercised exclusive dominion and control over them. It further found that the debtor did not compensate Conklin for his interest in the assets the debtor removed from the Partnership.

In the second phase, the state court determined that the debtor intended to deprive Conklin of his interest in the Partnership without compensating him. It also found that the debtor concealed the Transfer because he had knowledge of its wrongfulness.

The state court determined that the Partnership dissolved on April 29, 2005. It found that the debtor owed a fiduciary duty to Conklin under California Corporations Code § 16404 ("Cal. Corp. Code"). The state court found, among other things, that

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[7] At a pre-trial hearing on October 31, 2007, the debtor abandoned all of the causes of action set forth in his complaint, except the cause of action for accounting. The state court entered an order dismissing all counts, except the count for accounting, in the debtor's complaint.

the debtor breached his fiduciary duty to Conklin by: "intentionally and wrongfully" transferring funds from New Stone Age's bank account to New Stone Age Granite's operating account; converting Partnership assets to his own personal use; "wrongfully, knowingly and maliciously" prosecuting the state court action against Conklin by alleging matters with no factual basis, which forced Conklin to employ counsel and incur obligations beyond Conklin's capacity to discharge; failing to relieve Conklin of personal liability for lease payments on the Partnership's business premises; and defaming Conklin. Findings and Conclusions, 7:9-17, 7:23-28, 8:4-6. The state court determined that, "by the wrongful conduct of [the debtor]," Conklin "was deprived of a valuable business opportunity [from 2005 to 2006]." Findings and Conclusions, 8:11-13. The state court concluded that the debtor's conduct, in violating his fiduciary duty to Conklin, was "knowing, willful and malicious." Findings and Conclusions, 8:16-17.

The state court awarded Conklin $388,519.51 in compensatory damages[8] and $100,000 in punitive damages "to punish the [debtor

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[8] The compensatory damages are broken down as follows:

- $18,333 - one-half of $36,666 that the debtor received from the Partnership from 2001 to 2005
- $6,172.95 - pre-judgment interest from date of filing of the complaint
- $146,554 - one-half of the value of the Partnership as of April 29, 2005 as compensation for Conklin's interest in the Partnership
- $49,748.06 - pre-judgment interest from date of dissolution of the Partnership
- $167,711.50 - damages for Conklin's lost business opportunity

Findings and Conclusions, 8:20-27, 9:1-27.

for his] wrongful conduct." Findings and Conclusions, 8:20-27, 9:1-27. The debtor did not appeal the state court judgment.[9]

B. Adversary proceeding

Before the second phase began, the debtor filed for chapter 7 relief on June 13, 2008. On July 30, 2008, Conklin filed a motion for relief from stay to proceed with trial of the second phase. The debtor and his bankruptcy counsel were served with the motion for relief from stay and the supporting papers.[10] Debtor's counsel appeared at the hearing on the motion for relief from stay but did not oppose the motion. An order granting Conklin's motion for relief from the stay to proceed with the second phase was entered by the bankruptcy court on August 18, 2008. Conklin later initiated an adversary proceeding against the debtor to except the state court judgment from discharge under § 523(a)(4) and (a)(6).

On January 27, 2009, Conklin filed a motion for summary judgment ("Motion"), seeking a determination that the state court judgment was nondischargeable under the doctrine of issue preclusion. He filed a declaration in support of the Motion, attaching a copy of the Findings and Conclusions thereto and requesting that the bankruptcy court take judicial notice of it.

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[9] There is no record of any appeal by the debtor of the state court judgment.

[10] Neither the debtor nor Conklin provided us with copies of any of the documents relating to the motion for relief from stay. We obtained these documents from the bankruptcy court's main case docket. See Atwood v. Chase Manhattan Mortgage Co. (In re Atwood), 293 B.R. 227, 233 n.9 (9th Cir. BAP 2003) (obtaining relevant documents not included in the record on appeal from the bankruptcy court clerk and taking judicial notice of them).

The debtor opposed the Motion, arguing that issue preclusion did not apply because the state court judgment did not establish the element of "maliciousness" under § 523(a)(6).

With respect to the issue of fraud or defalcation in a fiduciary capacity under § 523(a)(4), the debtor claimed that a genuine factual issue existed as to whether his conduct was justified and excused given that Conklin himself acted with unclean hands by making unauthorized withdrawals from the Partnership's bank account and charges to the Partnership's credit card for his personal use and removing tools and computer software from the Partnership's business premises.

The debtor also contended that the issues of fraud or defalcation in a fiduciary capacity and willful and malicious injury were not actually litigated because he was unable to participate in the state court action due to his limited finances.[11] The state court judgment, the debtor argued, thus was a default judgment. Default judgments arising from proceedings in which the judgment debtor did not substantially participate, the debtor claimed, lack issue preclusive effect.

The debtor also made evidentiary objections. He argued that the Findings and Conclusions were inadmissible as evidence

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[11] The bankruptcy court stated in its Memorandum Decision that the debtor had argued that he did not have notice of the dispositive proceedings in the second phase. Memorandum Decision, 8:6-8. This argument is not stated in any of the debtor's papers submitted in response to the Motion. The debtor may have made this argument at the January 25, 2009 hearing on the Motion, but neither the debtor nor Conklin provided a copy of the transcript of the hearing. Although the debtor filed a "Notice Regarding Transcripts on Appeal" with the bankruptcy court, indicating that he would order a transcript of the hearing on the Motion, he did not file a copy of the transcript with either the bankruptcy court or this panel.

because the underlying declaration was defective. Specifically, the debtor asserted that the declaration was defective because the declarant, Conklin's counsel, did not sign the declaration under penalty of perjury and did not have personal knowledge of the facts set forth in the Findings and Conclusions, as he did not represent Conklin or otherwise participate in the state court action.

After a hearing on January 25, 2009, the bankruptcy court granted the Motion, determining that the state court judgment had issue preclusive effect, barring the debtor from relitigating the issues of fraud or defalcation as a fiduciary under § 523(a)(4) and willful and malicious injury under § 523(a)(6).

The bankruptcy court further determined that the debtor's alleged inability to participate in the state court action did not prevent the issues from being actually litigated. The debtor, the bankruptcy court pointed out, chose not to participate in the state court action because he did not have the financial means to employ an attorney, not because he lacked actual notice of the state court action and a full and fair opportunity to litigate his claims and defenses.

Moreover, the bankruptcy court continued, the debtor had the opportunity to raise the issue of Conklin's misconduct in the state court action. The debtor could not raise it before the bankruptcy court as the state court "fully adjudicated that dispute," which the bankruptcy court was "bound by federal law to accept . . . as a final adjudication of [the debtor's] liability to Conklin." Memorandum Decision, 14:13-16.

The bankruptcy court entered a judgment in favor of Conklin excepting the debt from discharge under both § 523(a)(4) and (a)(6). The debtor timely appealed.

II. JURISDICTION

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

III. ISSUES

(1) Did the bankruptcy court abuse its discretion in not ruling explicitly on the debtor's evidentiary objections?

(2) Did the bankruptcy court improperly give the state court judgment issue preclusive effect in finding that the debtor had a fair opportunity to litigate the issues in the state court action?

(3) Did the bankruptcy court err in finding that the state court judgment was a nondischargeable debt under § 523(a)(6)?

(4) Did the bankruptcy court err in granting summary judgment as to the § 523(a)(4) claim for relief in light of the debtor's contention that a genuine factual issue existed?

IV. STANDARDS OF REVIEW

We review the bankruptcy court's evidentiary rulings for abuse of discretion. Johnson v. Neilson (In re Slatkin), 525 F.3d 805, 811 (9th Cir. 2008). We reverse the bankruptcy court on an erroneous evidentiary ruling when the bankruptcy court abused its discretion and its error was prejudicial. Id.

We review de novo exceptions to discharge claims, as they present mixed issues of law and fact. Barboza v. New Form, Inc. (In re Barboza), 545 F.3d 702, 706 (9th Cir. 2008). "We review the bankruptcy court's findings of fact for clear error and its conclusions of law de novo." Harmon v. Kobrin (In re Harmon), 250 F.3d 1240, 1245 (9th Cir. 2001).

We review de novo the bankruptcy court's grant of summary judgment. Barboza, 545 F.3d at 707. As with the bankruptcy court, Rule 56(c) of the Federal Rules of Civil Procedure ("FRCP"), made applicable through Rule 7056, governs our review. See Suzuki Motor Corp. v. Consumers Union of United States, Inc., 330 F.3d 1110, 1131 (9th Cir. 2003). Summary judgment is appropriate "if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Barboza, 545 F.3d at 707 (quoting FRCP 56(c))(internal quotation marks omitted). We must view all the evidence in the light most favorable to the nonmoving party. Id. We neither weigh the evidence nor determine the truth of the matter; we only determine whether a genuine triable issue exists. Balint v. Carson City, 180 F.3d 1047, 1054 (9th Cir. 1999). We may affirm a grant of summary judgment on any ground supported by the record. See id. ("[S]ince we can affirm on any basis in the record, we must determine if there is sufficient evidence to support the district court's grant of summary judgment.").

We review de novo the applicability of issue preclusion. I.R.S. v. Palmer (In re Palmer), 207 F.3d 566, 567-68 (9th Cir. 2000).

V. DISCUSSION

A. Evidentiary objections

The debtor contends that the bankruptcy court should have ruled on his evidentiary objections before ruling on the Motion. Because the bankruptcy court may consider only admissible evidence when ruling on a summary judgment motion, he argues, it has a duty to rule on any evidentiary objections raised "[t]o assure all parties that only properly authenticated, admissible evidence supported the plaintiff's case." Appellant's Brief at 5. As it did not consider his evidentiary objections, the debtor asks that we remand the matter to the bankruptcy court so it may rule on them.

Although the bankruptcy court did not expressly rule on the debtor's evidentiary objections in its Memorandum Decision, we conclude that the bankruptcy court effectively overruled them by considering the Findings and Conclusions.

We further determine that the bankruptcy court did not abuse its discretion in admitting and considering the Findings and Conclusions. As the bankruptcy court noted in its Memorandum Decision, Conklin lodged a certified copy of the Findings and Conclusions with the bankruptcy court in support of the Motion. In his memorandum in opposition to Conklin's Motion, the debtor admitted that the Findings and Conclusions were "self-authenticating." See United States ex rel. Robinson Rancheria

Citizens Council v. Borneo Inc., 971 F.2d 244, 248 (9th Cir. 1992)("[W]e 'may take notice of proceedings in other courts, both within and without the federal judicial system, if those proceedings have a direct relation to matters at issue.'")(quoting St. Louis Baptist Temple, Inc. v. FDIC, 605 F.2d 1169, 1172 (10th Cir. 1979)). The bankruptcy court properly took judicial notice of the Findings and Conclusions under Federal Rule of Evidence 201.[12] In reviewing the Findings and Conclusions, the bankruptcy court did not determine that the factual findings and legal conclusions contained therein were true or correct, but only determined that the findings met the elements for exceptions to discharge under § 523(a)(4) and (a)(6) and gave them issue preclusive effect. Cf. McArthur v. Bugna (In re Bugna), 137 B.R. 785, 789 (Bankr. C.D. Cal. 1992), aff'd 33 F.3d 1054 (9th Cir. 1994)(bankruptcy court stating that it must determine if the state court documents before it were sufficient for it to make an independent determination that the creditor's state court judgment should be found nondischargeable under § 523(a)(4)).

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[12] Federal Rule of Evidence 201(b) provides:

> Kinds of facts.--A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.

Federal Rule of Evidence 201(d) provides:

> When mandatory.--A court shall take judicial notice if requested by a party and supplied with the necessary information.

Even reviewing the declaration, we conclude that the bankruptcy court did not err. The debtor argued that the Findings and Conclusions were inadmissible as evidence because the underlying declaration was defective. The debtor's evidentiary objections are without merit. Contrary to the debtor's contentions, Conklin's attorney did sign the declaration under penalty of perjury. Also, the debtor misconstrues the declarant's statement of personal knowledge. The declarant stated that he had "personal knowledge of the facts set forth herein." (Emphasis added.) The declarant was not claiming he had personal knowledge of the findings made in the Findings and Conclusions but rather he was claiming he had personal knowledge of the facts stated in the declaration itself, i.e., he identified and authenticated the Findings and Conclusions. Based on this record, we conclude that the bankruptcy court did not abuse its discretion in considering the Findings and Conclusions.

B. Issue preclusion

Issue preclusion applies to exception to discharge proceedings under § 523(a). Grogan v. Garner, 498 U.S. 279, 284 n.11 (1991). The party asserting issue preclusion has the burden of establishing that it applies. Harmon, 250 F.3d at 1245 (quoting Lucido v. Superior Court, 51 Cal. 3d 335, 795 P.2d 1223, 1225, 272 Cal. Rptr. 767 (Cal. 1990)). "To sustain this burden, a party must introduce a record sufficient to reveal the controlling facts and pinpoint the exact issues litigated in the prior action. Any reasonable doubt as to what was decided by a prior judgment should be resolved against allowing [issue

preclusive] effect." Kelly v. Okoye (In re Kelly), 182 B.R. 255, 258 (9th Cir. BAP 1995), aff'd 100 F.3d 110 (9th Cir. 1996).

In determining whether to give a state court judgment issue preclusive effect, federal courts must apply, as a matter of full faith and credit, that state's law of issue preclusion. See Gayden v. Nourbakhsh (In re Nourbakhsh), 67 F.3d 798, 800 (9th Cir. 1995).

Under California law, issue preclusion applies only if: (1) the issue sought to be precluded is identical to that decided in the former proceeding; (2) the issue was actually litigated in the former proceeding; (3) the issue was necessarily decided in the former proceeding; (4) the decision in the former proceeding was final and on the merits; and (5) the party against whom issue preclusion is sought was a party, or in privity with a party, to the former proceeding. Harmon, 250 F.3d at 1245 (quoting Lucido, 795 P.2d at 1225). Even if all these requirements are met, issue preclusion should be applied only when the public policies underlying it would be furthered. Id. (citing Lucido, 795 P.2d at 1225, 1226).

The debtor does not dispute that at least some of the elements for issue preclusion are established in this case; he questions only whether malice as litigated in the state court action is the same as that element litigated in the adversary proceeding.[13]

Before we consider this contention, however, we first must address an ancillary argument advanced by the debtor: whether the

[13] Because the debtor does not dispute the "willfulness" requirement of § 523(a)(6), we will not address it.

bankruptcy court improperly gave the state court judgment issue preclusive effect as a matter of full faith and credit in finding that the debtor had a full and fair opportunity to litigate the issues in the state court action.

1. Full and fair opportunity to litigate

The debtor contends that the state court judgment should not have been accorded issue preclusive effect as a matter of full faith and credit because he did not have a "full and fair opportunity" to litigate his claims in the state court action as he had to represent himself without the aid of an attorney. In other words, he argues, it was unfair for the debtor, "a layperson unschooled in the intricacies of courtroom litigation," to have to represent himself against an experienced attorney. Appellant's Opening Brief at 7. Because the debtor lacked the requisite legal knowledge and experience to litigate his claims effectively and lacked the funds to employ an attorney, he could not "participate fairly" in the state court action. Id. Under such unequal conditions, the debtor claims, due process was violated. Id.

Issue preclusion does not apply "when the party against whom the earlier decision is asserted did not have a 'full and fair opportunity' to litigate the claim or issue." Kremer v. Chemical Constr. Corp., 456 U.S. 461, 480-81 (1982). "'Redetermination of issues is warranted if there is reason to doubt the quality, extensiveness, or fairness of procedures followed in prior litigation.'" Id. at 481 (quoting Montana v. United States, 440 U.S. 147, 164 n.11 (1979)). However, state court proceedings

need only satisfy limited procedural requirements of due process in order to be accorded full faith and credit by federal courts under 28 U.S.C. § 1738. Id. at 481. In determining whether a party had a full and fair opportunity to litigate a claim or issue, the inquiry focuses on "whether there were significant procedural limitations in the prior proceeding, whether the party had the incentive to litigate fully the issue, or whether effective litigation was limited by the nature or relationship of the parties." SIL-FLO, Inc. v. SFHC, Inc., 917 F.2d 1507, 1521 (10th Cir. 1990)(citing 18 C. Wright, A. Miller & E. Cooper, Federal Practice & Procedure § 4423 at 216-26 (1981)).

The "actual litigation" requirement also may be met "by substantial participation in an adversary contest in which the party is afforded a reasonable opportunity to defend himself on the merits but chooses not to do so." Federal Deposit Ins. Corp. v. Daily (In re Daily), 47 F.3d 365, 368 (9th Cir. 1995). In the Daily case, the debtor defendant participated actively, but obstructively for two years in litigation before judgment was entered against him after the trial court ordered all allegations of the plaintiff's complaint deemed admitted as a sanction for the debtor defendant's discovery abuses. Id. at 367-68.

At oral argument, the debtor asserted that he did not have notice of the second phase. He did not make this argument in any of the papers submitted to the bankruptcy court in opposition to the Motion, and he does not identify lack of notice of the second phase as an issue on appeal. Ordinarily, if an issue is not raised before the trial court and is not raised as an issue on appeal, either in the statement of issues presented or in the

appellant's opening brief, the issue is waived for appeal purposes. See Golden v. Chicago Title Ins. Co. (In re Choo), 273 B.R. 608, 613 (9th Cir. BAP 2002)(declining to consider appellant's arguments not raised before the bankruptcy court and in his opening brief).

However, we have noted from the bankruptcy court's Memorandum Decision that one of the debtor's contentions was that "for some reason [he] did not have notice of the dispositive proceedings in the second phase." Memorandum Decision, 8:7-8. In the circumstances of this appeal, we will consider the debtor's argument that his lack of notice of the second phase precluded him from a full and fair opportunity to defend Conklin's claims in the second phase.

The bankruptcy court ultimately determined that the debtor had actual notice of the pending state court action and had a full and fair opportunity to litigate his defense of Conklin's claims in the second phase. Since, as noted above, we were not provided with a transcript of the hearing on the Motion before the bankruptcy court, we cannot tell how the debtor's contention as to lack of notice of the second phase was raised or argued before the bankruptcy court. Unfortunately, neither of the parties has provided us any documentation from the record of the state court action in the excerpts of record to indicate what, if any, notice was provided to the debtor as to scheduling for the second phase.

However, we do know from the records in the debtor's bankruptcy case that Conklin filed a motion for relief from stay to allow litigation of the second phase to proceed, and notice of

the motion for relief from stay was served on the debtor and his bankruptcy counsel. We also know that debtor's counsel appeared by phone at the hearing on Conklin's motion for relief from stay and did not oppose the relief requested. An order subsequently was entered granting relief from stay for litigation of the second phase to proceed before the state court. At that point, the debtor clearly had notice that the second phase would proceed to trial in the state court, and he ignored the ongoing state court proceedings at his peril. In these circumstances, we conclude that the debtor's purported lack of notice of the second phase proceedings did not deprive him of a full and fair opportunity to litigate his defenses to Conklin's claims, and the bankruptcy court did not err in extending full faith and credit to the Findings and Conclusions in spite of the debtor's alleged lack of notice.

The debtor further complains that he was at a disadvantage in the state court action because he was not an attorney and did not have the financial means to employ an attorney. But the fact that the debtor did not have an attorney to represent him in the second phase in the state court action does not mean that he did not have a full and fair opportunity to litigate. See, e.g., American Express Travel Related Srvcs. Co. v. Hernandez (In re Hernandez), 195 B.R. 824, 830 (Bankr. D. Puerto Rico 1996)("Afforded all the safeguards to insure a full and fair opportunity to litigate, the fact that debtor chose not to engage in the benefit and expense of counsel or trial, for that matter, is not determinative in deciding whether collateral estoppel is applied to an issue resolved therein."); Klemens v. Wallace,

62 B.R. 91, 92 (D. N.M. 1986)("Appellant had every incentive to litigate this issue and had a full and fair opportunity to do so. The fact that Appellant appeared pro se does not lessen the collateral effect of the state court judgment."); Hill v. Putvin (In re Putvin), 332 B.R. 619, 627 (10th Cir. BAP 2005)(a debtor's alleged legal incompetence does not prevent him from having a full and fair opportunity to litigate his claims; in Utah, pro se litigants are held to the same standards as attorneys). A "full and fair opportunity to litigate" simply means that the debtor had a reasonable chance to appear in court and contest the factual and legal issues raised in the state court action, not that the debtor should have equal footing from a tactical standpoint.[14]

The bankruptcy court expressly determined that the debtor had a full and fair opportunity to litigate his claims in the state court action, as demonstrated by his participation through counsel in the first phase. The debtor does not dispute that he had a chance to appear at court and present his claims and defenses. We conclude that the bankruptcy court properly gave the state court judgment issue preclusive effect as a matter of full faith and credit.

2. § 523(a)(6)

Section 523(a)(6) excepts from discharge debts arising from a "willful and malicious injury" by the debtor to another person

[14] To the extent that the debtor is implying that he had a "due process" right to counsel, we reject this argument as "there is no absolute right to counsel in civil proceedings." Hedges v. Resolution Trust Corp., 32 F.3d 1360, 1363 (9th Cir. 1994).

or the person's property. "Willful" and "malicious" are elements analyzed separately. Carrillo v. Su (In re Su), 290 F.3d 1140, 1146 (9th Cir. 2002).

For an injury to be malicious, it must be (1) a wrongful act, (2) done intentionally, (3) which necessarily causes injury, and (4) done without just cause or excuse. Petralia v. Jercich (In re Jercich), 238 F.3d 1202, 1209 (9th Cir. 2001)(quoting Murray v. Bammer (In re Bammer), 131 F.3d 788, 791 (9th Cir. 1997)). "Within the plain meaning of this definition [of malice], it is the wrongful act that must be committed intentionally rather than the injury itself." Jett v. Sicroff (In re Sicroff), 401 F.3d 1101, 1106 (9th Cir. 2005)(citing Bammer, 131 F.3d at 791). The creditor must prove his or her claim is nondischargeable under § 523(a)(6) by a preponderance of the evidence. See Grogan, 498 U.S. at 291 (holding that preponderance of the evidence standard is standard of proof in exception to discharge actions).

The debtor argues that the state court did not make findings establishing malice under § 523(a)(6). Specifically, the state court did not find that the debtor acted deliberately and without just cause or excuse and that he caused Conklin injury.

Contrary to the debtor's assertion, the state court did determine that he intentionally committed wrongful acts in violation of his fiduciary duty to Conklin. The state court expressly found that the debtor breached his fiduciary duty to Conklin by misappropriating Partnership assets and exercising exclusive control over them "with the intent to deprive [Conklin] of his business interest without compensating [him for it]" and

with "knowledge (scienter) of [the] wrongfulness [of his acts]." Findings and Conclusions, 2:13-14, 3:2 (emphasis added).

The state court admittedly did not make an express determination as to "without just cause or excuse." However, we conclude from its finding that the debtor's conduct in breaching his fiduciary duty was wrongful and malicious and from its award of punitive damages "to punish his wrongful conduct" that the state court did determine that the debtor had no just cause or excuse for his conduct. Cf. Bammer, 131 F.3d at 793 ("As a matter of law, [the debtor's] unprincipled behavior cannot be regarded as 'just.' To do so would be inconsistent with the basic policy of granting discharge of debts, which is to give the 'honest but unfortunate debtor a fresh start.'")(quoting Brown v. Felsen, 442 U.S. 127, 128 (1979)). Moreover, the debtor did not offer the state court any justification for his acts; he asserted no defenses in the second phase. The debtor also abandoned those causes of action against Conklin in his complaint (e.g., unjust enrichment) that may have provided some justification for his conduct.

In awarding Conklin compensatory damages, the state court found that the debtor caused Conklin injury. Compensatory damages are awarded to the injured party "to make good or replace the loss caused by the injury." Berg v. First State Ins. Co., 915 F.2d 460, 465 (9th Cir. 1990). See also Eskanos & Adler, P.C. v. Roman (In re Roman), 283 B.R. 1, 9 n.9 (9th Cir. BAP 2002)("Generally, actual damages include compensatory damages, as opposed to noneconomic or punitive damages, and are defined as

'[a]n amount awarded to a complainant to compensate for a proven injury or loss; damages that repay actual losses.'")(quoting Black's Law Dictionary (7th ed. 1999)). The state court required the debtor to pay compensatory damages to Conklin, as detailed in n.8 above.

The state court also awarded Conklin punitive damages. Under California law, punitive damages can be awarded for malice. Section 3294(a) of the California Civil Code ("Cal. Civ. Code") provides:

> In an action for the breach of an obligation not arising from contract, where it is proven by clear and convincing evidence that the defendant has been guilty of oppression, fraud, or malice, the plaintiff, in addition to the actual damages, may recover damages for the sake of example and by way of punishing the defendant.

A defendant is guilty of malice if he or she intends his or her conduct to cause injury to the plaintiff or carries on despicable conduct with a willful and conscious disregard for others' rights and safety. Cal. Civ. Code § 3294(c)(1).

Here, the state court explicitly found that the debtor's conduct, "in violation of his fiduciary duty to [Conklin], was knowing, willful and malicious." (Emphasis added.) It awarded Conklin punitive damages "to punish [the debtor's] wrongful conduct." (Emphasis added.) In awarding Conklin punitive damages, the state court manifestly found that the debtor caused injury to Conklin.

Additionally, the public policy considerations underlying issue preclusion – preservation of the integrity of the judicial system, promotion of judicial economy, and protecting litigants

from harassment by vexatious litigation – support its application here. See Lucido, 795 P.2d at 1227. The state court was competent to adjudicate the issues in the action before it. Requiring the bankruptcy court to retry the issues would not only undermine the public's confidence in the state judicial system, but also "conflict with the principle of federalism that underlies the Full Faith and Credit Act." Thompson v. Monterey Mushrooms (In re Thompson), No. 08-1302, slip op. at 23 (9th Cir. BAP September 4, 2009) (citing 28 U.S.C. § 1738). Moreover, allowing the debtor to relitigate the issue of malice before the bankruptcy court would waste judicial resources. Finally, by precluding the debtor from relitigating issues, Conklin will not have to incur further expense.

We conclude that the bankruptcy court properly excepted the state court judgment from discharge under § 523(a)(6) by applying issue preclusive effect to the state court judgment.

C. Unclean hands/disputed facts

The debtor does not contest the bankruptcy court's determinations under § 523(a)(4) on the ground that the requirements of issue preclusion were not met. Rather, the debtor simply argues that genuine factual issues exist as to whether his conduct was justified and excused in light of Conklin's alleged misconduct.

We agree with the bankruptcy court that the debtor could and should have raised his defenses regarding Conklin's alleged unclean hands before the state court in the second phase. Cf.

Tamen v. Alhambra World Inv., Inc. (In re Tamen), 22 F.3d 199, 205 (9th Cir. 1994)(declining to consider the defendants' argument as to the debtor's unclean hands as the defendants did not sufficiently raise it at trial before the bankruptcy court). We therefore determine that the bankruptcy court did not err in granting summary judgment on the § 523(a)(4) cause of action.

VI. CONCLUSION

The bankruptcy court properly granted summary judgment in favor of Conklin by excepting from discharge the state court judgment under § 523(a)(4) and (a)(6) upon application of issue preclusion. We AFFIRM.