NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL

OF THE NINTH CIRCUIT

In re:	BAP No. CC-10-1411-MkKiD
HEROICO MARTIN AGUILUZ,	Bk. No. LA 09-42254-PC
Debtor.	Adv. No. LA 10-01231-PC
HEROICO MARTIN AGUILUZ,	
Appellant,	
v.	**MEMORANDUM**[*]
HOWARD M. JAFFE, as Trustee,	
Appellee.	

Argued and Submitted on June 17, 2011
at Pasadena, California

Filed – July 12, 2011

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

Honorable Peter H. Carroll, Chief Bankruptcy Judge, Presiding

Appearances: Appellant Heroico Martin Aguiluz, in propria persona, argued on his own behalf; and Arthur L. Martin of Jaffe + Martin argued for Appellee Howard M. Jaffe, as trustee.

Before: MARKELL, KIRSCHER and DUNN, Bankruptcy Judges.

[*]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.

INTRODUCTION

Debtor Heroico Aguiluz ("Aguiluz") appeals the bankruptcy court's summary judgment determining that the debts he owes to Howard M. Jaffe, as sole remaining trustee of a court-ordered trust ("Jaffe"), are nondischargeable under 11 U.S.C. § 523(a)(6).[1] We AFFIRM.

FACTS

A. The State Court Lawsuits

Jaffe is a court-appointed trustee in the probate case entitled In re the Estate of Edward V. Hamilton, Los Angeles County Superior Court Case No. P 734226. In his capacity as trustee, Jaffe obtained sizeable judgments against Aguiluz's client Zenaida Pacelli ("Pacelli") in two long-running state-court lawsuits,[2] the Long Beach Action and the Fraudulent Transfer Action. The record indicates that Jaffe, in his capacity as trustee, sought in the Long Beach Action to collect on a promissory note executed by Pacelli and others, and he obtained a default judgment therein against Pacelli in the amount of $458,621.83. According to Jaffe, he commenced the Fraudulent

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[1]Unless specified otherwise, all chapter and section references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532, and all "Rule" references are to the Federal Rules of Bankruptcy Procedure, Rules 1001-9037. All "Civil Rule" references are to the Federal Rules of Civil Procedure.

[2]Jaffe refers to the first of these lawsuits as the "Long Beach Action" (Los Angeles County Superior Court Case No. NC 016962), and the second one as the "Fraudulent Transfer Action" (Los Angeles County Superior Court Case No. BC 313713). For ease of identification, we will refer to them individually in the same manner as Jaffe. We will refer to them jointly as the "State Court Lawsuits."

Transfer Action after his initial attempts to enforce the Long Beach Action judgment proved unsuccessful and after he learned that "Pacelli conceived and set in motion a series of twenty-two (22) fraudulent transfers with respect to six parcels of Los Angeles real property," as a result of which title to those parcels ultimately resided in affiliated entities controlled by Pacelli and her relatives. February 22, 2010 Complaint to Determine Nondischargeability of Debts at ¶¶ 5, 8. Ultimately, Jaffe obtained in the Fraudulent Transfer Action a judgment declaring that each of the subject transfers was void, as well as compensatory damages, punitive damages, attorney's fees and costs totaling in excess of $4 million.

As Pacelli's attorney in both of the State Court Lawsuits, Aguiluz battled Jaffe's litigation efforts for years. As one consequence of his representation of Pacelli, the state court imposed sanctions against Aguiluz (and sometimes also Pacelli) on a number of occasions, which ultimately led to Aguiluz's bankruptcy filing as described below.

B. Aguiluz's Bankruptcy Case and the Sanctions Awards

On November 17, 2009, Aguiluz filed his chapter 7 bankruptcy. In his schedules, he only listed nine debts, all unsecured, all owed to Jaffe and all identified as arising from "discovery sanctions" (collectively, the "Sanctions Awards"). According to Aguiluz's Schedule F listing of unsecured debts, the aggregate amount of the Sanctions Awards was $31,288.28, and Aguiluz incurred each of these Sanctions Awards in either the Long Beach Action or the Fraudulent Transfer Action. The relevant details of each of the nine Sanctions Awards are set

forth below.

1. October 24, 2003 Sanctions Award

On October 24, 2003, the state court issued an order in the Long Beach Action compelling Pacelli to respond to Jaffe's post-judgment discovery requests. The October 24, 2003 order further directed that Pacelli and Aguiluz, jointly and severally, must pay $2,000 to Jaffe on account of Pacelli's failure to respond to Jaffe's discovery requests and on account of Pacelli's and Aguiluz's failure to meet and confer in a good faith attempt to resolve a discovery dispute. The October 24, 2003 order does not make an explicit finding that either Pacelli or Aguiluz violated any particular statute or court order, but the order does recite that the underlying sanctions request was based on Pacelli's and Aguiluz's violations of Cal. Civil Procedure Code ("C.C.P.") §§ 708.020(a)[3] and 708.030(a)[4] and the state court's order of April 26, 2000.

2. January 13, 2004 Sanctions Award

On January 13, 2004, the state court issued a minute entry in the Long Beach Action imposing $2,000 in sanctions against Aguiluz and in favor of Jaffe. The minute entry gives no detail whatsoever regarding the basis for this Sanctions Award, other

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[3]C.C.P. § 708.020(a) provides in relevant part: "[t]he judgment debtor shall answer the interrogatories in the manner and within the time provided by Chapter 13 (commencing with Section 2030.010) of Title 4 of Part 4."

[4]C.C.P. § 708.030(a) provides in relevant part: "[t]he judgment debtor shall respond and comply with the demand in the manner and within the time provided by Chapter 14 (commencing with Section 2031.010) of Title 4 of Part 4."

than to note that this Sanctions Award resolved a request for sanctions previously taken under submission. In a subsequent notice of ruling filed by Jaffe on January 16, 2004, Jaffe represented that this Sanctions Award was based on C.C.P. § 1008(d)[5] and on account of Aguiluz's bringing an improper motion to vacate the October 24, 2003 Sanctions Award.

3. First December 21, 2006 Sanctions Award

On December 21, 2006, the state court issued an order in the Fraudulent Transfer Action compelling Pacelli to respond to Jaffe's first set of document requests and first set of interrogatories. This December 21, 2006 order further directed that Pacelli and Aguiluz, jointly and severally, must pay $500 to Jaffe on account of their "joint and several misuses of the discovery process" under C.C.P. § 2023.010(d).[6] According to this December 21, 2006 order, Pacelli and Aguiluz jointly and severally misused the discovery process by "[f]ailing to respond or to submit to an authorized method of discovery."

4. Second December 21, 2006 Sanctions Award

On December 21, 2006, the state court issued an order in the Fraudulent Transfer Action deeming admitted each of the matters set forth in Jaffe's first set of requests for admissions to Pacelli. This December 21, 2006 order further directed that

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[5]C.C.P. § 1008(d) provides in relevant part: "[a] violation of this section may be punished as a contempt and with sanctions as allowed by Section 128.7."

[6]C.C.P. § 2023.010(d) provides: "[m]isuses of the discovery process include, but are not limited to, the following: . . . (d) Failing to respond or to submit to an authorized method of discovery."

Pacelli and Aguiluz, jointly and severally, must pay $500 to Jaffe because of their "joint and several misuses of the discovery process" under C.C.P. § 2023.010(d) and because of their failure to respond to Jaffe's first set of requests for admissions, which necessitated Jaffe's motion to have the matters set forth in the first set of requests for admissions deemed admitted under C.C.P. § 2033.280(b).[7] According to this December 21, 2006 order, Pacelli and Aguiluz jointly and severally misused the discovery process by "[f]ailing to respond or to submit to an authorized method of discovery."

5. July 16, 2007 Sanctions Award

On July 16, 2007, the state court issued an order in the Fraudulent Transfer Action imposing $8,500 in sanctions against Aguiluz and in favor of Jaffe. The state court explicitly found that Aguiluz had violated several provisions of the California Rules of Court ("CRC") governing ex parte procedure, including CRC 3.1202(c),[8] 3.1203(a)[9] and 3.1204(a).[10] According to the

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[7]C.C.P. § 2033.280(b) provides in relevant part: "[t]he requesting party may move for an order that the genuineness of any documents and the truth of any matters specified in the requests be deemed admitted, as well as for a monetary sanction . . . ."

[8]CRC 3.1202(c) provides: "[a]n applicant must make an affirmative factual showing in a declaration containing competent testimony based on personal knowledge of irreparable harm, immediate danger, or any other statutory basis for granting relief ex parte."

[9]CRC 3.1203(a) provides: "[a] party seeking an ex parte order must notify all parties no later than 10:00 a.m. the court day before the ex parte appearance, absent a showing of exceptional circumstances that justify a shorter time for

(continued...)

state court, Aguiluz's violations of ex parte procedure caused Jaffe's counsel to expend time and effort, which the court valued at "not less than $8,500," and the state court awarded the sanctions on that basis.

6. January 16, 2008 Sanctions Award

On January 16, 2008, the state court issued an order in the Fraudulent Transfer Action compelling Pacelli's bookkeeper/ accountant Pedro Mundo ("Mundo") – also represented by Aguiluz – to comply with Jaffe's deposition subpoena and document requests. The January 16, 2008 order also directed Pacelli to comply with a notice of deposition and document requests. The January 16, 2008 order further directed that Mundo and Aguiluz, jointly and severally, must pay $2,381.67 to Jaffe on account of their "joint and several misuses of the discovery process" under C.C.P. § 2023.010(d). According to the January 16, 2008 order, Pacelli and Aguiluz jointly and severally misused the discovery process by "[f]ailing to respond or to submit to an authorized method of discovery."

7. February 15, 2008 Sanctions Award

On February 15, 2008, the state court issued an order in the Fraudulent Transfer Action compelling Pacelli to respond to

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[9](...continued)
notice."

[10]CRC 3.1204(a) provides: "[w]hen notice of an ex parte application is given, the person giving notice must: (1) State with specificity the nature of the relief to be requested and the date, time, and place for the presentation of the application; and (2) Attempt to determine whether the opposing party will appear to oppose the application."

Jaffe's second set of document requests and second set of interrogatories. The February 15, 2008 order further directed that Pacelli and Aguiluz, jointly and severally, must pay $2,381.67 to Jaffe on account of their "joint and several misuses of the discovery process" under C.C.P. § 2023.010(d). According to this February 15, 2008 order, Pacelli and Aguiluz jointly and severally misused the discovery process by "[f]ailing to respond or to submit to an authorized method of discovery."

8. March 7, 2008 Sanctions Award

On March 7, 2008, the state court issued an order in the Fraudulent Transfer Action deeming admitted each of the matters set forth in Jaffe's second set of requests for admissions to Pacelli. The March 7, 2008 order further directed that Pacelli and Aguiluz, jointly and severally, must pay $3,206.67 to Jaffe because of their "joint and several misuses of the discovery process" under C.C.P. § 2023.010(d) and because of their failure to respond to Jaffe's second set of requests for admissions, which necessitated Jaffe's motion to have the matters set forth in the second set of requests for admission deemed admitted under C.C.P. § 2033.280(b). According to the March 7, 2008 order, Pacelli and Aguiluz jointly and severally misused the discovery process by "[f]ailing to respond or to submit to an authorized method of discovery."

9. July 29, 2008 Sanctions Award

On July 29, 2008, the state court issued an order in the Fraudulent Transfer Action precluding Pacelli from presenting evidence on a number of issues. The July 29, 2008 order further directed that Pacelli and Aguiluz, jointly and severally, must

pay $9,720.35 to Jaffe on account of their "obstructive misconduct" and their "joint, several and continuing misuses of the discovery process" under C.C.P. §§ 2023.010(d) and (g). According to the July 29, 2008 order, both Pacelli and Aguiluz misused the discovery process by "[f]ailing to respond or to submit to an authorized method of discovery" and by "[d]isobeying [] court order[s] to provide discovery," including the state court's orders issued on July 16, 2007, January 16, 2008, and February 15, 2008.

C. The Discharge Litigation

On February 22, 2010, Jaffe filed in the bankruptcy court a complaint against Aguiluz for a determination that the Sanctions Awards were nondischargeable pursuant to § 523(a)(6) (the "Discharge Litigation"). Jaffe alleged that Aguiluz advised and directed Pacelli and Mundo not to cooperate with Jaffe's discovery requests made in the Fraudulent Transfer Action and post-judgment in the Long Beach Action. Jaffe further alleged that Aguiluz noticed spurious ex parte motions in the Fraudulent Transfer Action. According to Jaffe, Aguiluz engaged in this conduct with the intent to hinder and delay Jaffe's efforts to collect on his judgment in the Long Beach Action and to obtain a judgment in the Fraudulent Transfer Action and with the intent to cause Jaffe to waste time and money (in the form of incurred attorney's fees) enforcing his rights under the various procedural rules and orders that Aguiluz had violated. Jaffe thus asserted that the Sanctions Awards were all debts for Aguiluz's "willful and malicious injury" to Jaffe within the meaning of § 523(a)(6).

On April 26, 2010, Jaffe served discovery requests on Aguiluz in the Discharge Litigation. Jaffe's discovery requests included a first set of requests for admissions, a first set of interrogatories and a first set of document requests. When Aguiluz did not respond to any of Jaffe's discovery requests, Jaffe sent Aguiluz a "meet and confer" letter requesting that the parties meet and confer within seven days to resolve their discovery issues. The meet and confer letter warned Aguiluz of the consequences of his failure to timely respond to the discovery requests. The meet and confer letter also warned Aguiluz that his failure to make initial disclosures as required by Rule 7026 and Civil Rule 26(a)(1) ultimately might preclude him from presenting evidence concerning information that should have been included in his initial disclosures. Aguiluz ignored the meet and confer letter and continued to ignore the discovery requests.

Jaffe's first set of admission requests was voluminous and covered just about every allegation in Jaffe's § 523(a)(6) complaint. In relevant part, Jaffe asked Aguiluz to admit, separately as to each Sanctions Award, that the debt arising therefrom was for a willful injury to Jaffe or his property. More specifically, each such admission request stated that Aguiluz "had the subjective motive to inflict injury." April 26, 2010 First Set of Requests For Admissions at ¶¶ 25, 40, 56, 70, 84, 100, 116, 132 & 148. Jaffe also asked Aguiluz to admit, separately as to each Sanctions Award, that the debt arising therefrom was for a malicious injury to Jaffe or his property. More specifically, each such admission request stated that the

"injury necessarily (1) involved wrongful acts by [Aguiluz], (2) were done intentionally by [Aguiluz], (3) caused injury to Jaffe and (4) were done by [Aguiluz] without just cause or excuse." April 26, 2010 First Set of Requests For Admissions at ¶¶ 26, 41, 57, 71, 85, 101, 117, 133 & 149.

On August 20, 2010, Jaffe filed a motion for summary judgment and a separate motion to preclude Aguiluz from offering any evidence in opposition to Jaffe's summary judgment motion. Jaffe based his evidence preclusion motion on Aguiluz's failure to make his initial disclosures required by Civil Rule 26(a)(1). Jaffe based his summary judgment motion on three grounds: (1) the deemed admission of all of the matters set forth in Jaffe's first set of admissions requests; (2) the issue preclusive effect of the Sanctions Awards; and (3) the fact that Aguiluz should be precluded from presenting any evidence in response to the summary judgment motion because of his noncompliance with Civil Rule 26(a)(1).

Four days before the hearing on Jaffe's motions, Aguiluz filed an untimely response to the summary judgment motion. In it, he argued that the court already had entered an order granting him a discharge, so the Discharge Litigation was moot. According to Aguiluz, the court's form discharge order entered in his bankruptcy case on August 15, 2010, essentially precluded further litigation regarding whether the Sanctions Awards were nondischargeable. Aguiluz also argued that he did not incur liability under the Sanctions Awards as the result of willful and malicious injury to Jaffe. Finally, Aguiluz attempted to attack the underlying merits of the Sanctions Awards and the State Court

Litigation.

At the hearing on Jaffe's motions, Aguiluz attempted to claim for the first time that the Sanctions Awards had been satisfied in part or full, and he requested a continuance so he could present evidence to support this claim. The court denied Aguiluz's oral request for a continuance and granted both of Jaffe's motions. Jaffe submitted proposed uncontroverted facts and conclusions of law, which the court adopted. The uncontroverted facts and conclusions of law reflect that the court granted the summary judgment motion based on the three grounds that Jaffe had relied upon in support of his motion.

On October 8, 2010, the court entered summary judgment determining that the debts arising from each of the Sanctions Awards were nondischargeable, and Aguiluz timely appealed.

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.

ISSUE

Did the bankruptcy court err when it denied Aguiluz's request for continuance or when it granted Jaffe's summary judgment motion?

STANDARDS OF REVIEW AND SUMMARY JUDGMENT STANDARDS

We review a denial of a request for continuance for abuse of discretion. Orr v. Bank of America, 285 F.3d 764, 783 (9th Cir. 2002). Under the abuse of discretion standard, we apply a two-part test. First, we consider de novo whether the bankruptcy court identified the correct law to consider in light of the

relief requested. United States v. Hinkson, 585 F.3d 1247, 1262 (9th Cir. 2009) (en banc). Second, we review the bankruptcy court's factual findings, and its application of those findings to the relevant law, to determine whether they were either "(1) 'illogical,' (2) 'implausible,' or (3) without 'support in inferences that may be drawn from the facts in the record.'" Id. (quoting Anderson v. City of Bessemer City, N.C., 470 U.S. 564, 577 (1985)).

We review orders granting summary judgment de novo. Bamonte v. City of Mesa, 598 F.3d 1217, 1220 (9th Cir. 2010). In conducting our summary judgment review, we are bound by the same principles as the trial court. See Id.

Summary judgment is appropriate when no genuine and disputed issues of material fact remain, and, when viewing the evidence most favorably to the non-moving party, the movant is clearly entitled to prevail as a matter of law. Civil Rule 56 (made applicable in adversary proceedings by Rule 7056); Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986). Material facts that would preclude summary judgment are those which, under applicable substantive law, may affect the outcome of the case. The substantive law determines which facts are material. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). The moving party bears the initial burden of showing that there is no material factual dispute. Celotex, 477 U.S. at 322-23. Once the moving party has established a prima facie case of entitlement to summary judgment, the burden then shifts to the non-moving party to establish the existence of a genuine issue of material fact which would preclude entry of summary judgment. See Celotex,

477 U.S. at 323-24.

At the time of the bankruptcy court's ruling, Civil Rule 56(e)(2) provided:

> Opposing Party's Obligation to Respond. When a motion for summary judgment is properly made and supported, an opposing party may not rely merely on allegations or denials in its own pleading; rather, its response must – by affidavits or as otherwise provided in this rule - set out specific facts showing a genuine issue for trial. If the opposing party does not so respond, summary judgment should, if appropriate, be entered against that party.

Civil Rule 56(e)(2) (West 2010).[11]

Finally, we note that we may affirm the bankruptcy court's ruling on any basis supported by the record. See, e.g., Heilman v. Heilman (In re Heilman), 430 B.R. 213, 216 (9th Cir. BAP 2010); FDIC v. Kipperman (In re Commercial Money Center, Inc.), 392 B.R. 814, 826-27 (9th Cir. BAP 2008); see also McSherry v. City of Long Beach, 584 F.3d 1129, 1135 (9th Cir. 2009).

DISCUSSION

A. The bankruptcy court did not err when it granted summary judgment.

In order to establish his entitlement to summary judgment, Jaffe needed to show there was no factual dispute concerning the nondischargeability of Aguiluz's debt under § 523(a)(6). A debt

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[11]The latest version of Civil Rule 56, which became effective December 1, 2010, uses different language and numbering, but it embodies the same key concepts as set forth in the old version. For instance, the new version of Civil Rule 56(e) provides in relevant part that, when the moving party has properly supported his summary judgment motion and has made a sufficient showing that he is entitled to it, the court may grant summary judgment if the adverse party fails to properly or sufficiently challenge the moving party's showing. See Civil Rule 56(e)(3) (West 2011).

is nondischargeable under § 523(a)(6) if it results from the debtor's willful and malicious injury to another or to the property of another. Accordingly, there are three elements: (1) willfulness; (2) maliciousness and (3) injury.

None of these terms are defined in the statute, but they have been defined in subsequent case law. An injury is considered willful if the debtor subjectively intends to cause the injury, or subjectively believes that harm is substantially certain to occur. Carrillo v. Su (In re Su), 290 F.3d 1140, 1143-45 (9th Cir. 2002). An injury is malicious if it "involves '(1) a wrongful act, (2) done intentionally, (3) which necessarily causes injury, and (4) is done without just cause or excuse.'" Barboza v. New Form, Inc. (In re Barboza), 545 F.3d 702, 706 (9th Cir. 2008)(citation omitted). Meanwhile, "injury" has been defined to include, in relevant part, the incurrence of litigation expenses, including attorneys' fees and costs. See Suarez v. Barrett (In re Suarez), 400 B.R. 732, 738-39 (9th Cir. BAP 2009) (citing, among other cases, Papadakis v. Zelis (In re Zelis), 66 F.3d 205 (9th Cir.1995)); see also Cohen v. de la Cruz, 523 U.S. 213, 223 (1998) (holding that attorneys fees and costs were nondischargeable when they flowed from defendant's nondischargeable conduct under § 523(a)(2)(A)).

The record here reflects that Jaffe served on Aguiluz a comprehensive set of requests for admissions and that Aguiluz simply ignored this and all other discovery that Jaffe served in the Discharge Litigation. The record further indicates that Aguiluz's non-responsiveness to Jaffe's discovery requests was part of a larger pattern of Aguiluz's wholesale noncompliance

with discovery rules and procedures throughout the years of litigation between the parties.

Pursuant to Civil Rule 36(a)(3) (made applicable in adversary proceedings by Rule 7036), Aguiluz was deemed to have admitted all of the matters duly set forth in the requests for admission. The operation of Civil Rule 36(a)(3) is automatic and self-executing. See F.T.C. v. Medicor, LLC, 217 F. Supp. 2d 1048, 1053 (C.D. Cal. 2002) (citing Schwarzer, Tashima & Wagstaffe, CAL. PRACTICE GUIDE: FED. CIV. PROC. BEFORE TRIAL, at ¶¶ 811-12 (Rutter Group 2002)).

As to each Sanctions Award, Jaffe separately asked Aguiluz to admit: (1) he willfully injured Jaffe or his property – that is, he had the subjective intent to cause injury; and (2) he maliciously injured Jaffe or his property – that is, his injury of Jaffe necessarily (a) involved a wrongful act, (b) that he did intentionally, (c) that caused injury, (d) without just cause or excuse. In light of these requests for admissions, and Aguiluz's complete failure to answer or otherwise respond to them, Jaffe met his initial burden of showing that there was no material factual dispute as to any of the elements for nondischargeability under § 523(a)(6).[12]

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[12]Admission requests properly may cover ultimate facts as well as evidentiary facts. See 8B Charles Alan Wright, Arthur R. Miller, Mary Kay Kane & Richard L. Marcus, FEDERAL PRACTICE & PROCEDURE § 2255 (3d ed. 2010). The issue regarding Aguiluz's willfulness was an issue of ultimate fact inquiring into Aguiluz's intent or state of mind, which is a question of fact. See Hernandez v. New York, 500 U.S. 352, 364 (1991). Thus, Jaffe's admission requests concerning Aguiluz's willfulness were within the proper scope for admission requests. See Civil Rule (continued...)

Furthermore, Aguiluz was precluded by both the court's evidence preclusion order and by operation of Civil Rule 36(a)(3) from refuting Jaffe's showing. In any event, Aguiluz did not present any evidence tending to challenge Jaffe's showing that there was no dispute as to any material fact.

Under Civil Rule 36(b) a court may, upon the affected party's motion, grant relief from the impact of matters deemed admitted. Civil Rule 36(b) gives the court discretion to allow the moving party to withdraw or amend its admission if two conditions are met: (1) if such withdrawal or amendment would facilitate determination of the action on its merits; and (2) if the court is not persuaded that the adverse party would be prejudiced by the withdrawal or amendment. See Conlon v. United

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[12](...continued)
36(a)(1); FEDERAL PRACTICE & PROCEDURE, supra, at § 2255. The first three factors of the maliciousness element also are questions of fact, but the fourth and final element – just cause or excuse – is a mixed question of law and fact. Murray v. Bammer (In re Bammer), 131 F.3d 788, 792 (9th Cir. 1997), abrogated in part on other grounds by, Kawaauhau v. Geiger, 523 U.S. 57 (1998). A request for admission also can properly cover mixed questions of law and fact. See Civil Rule 36(a)(1)(A); Marchand v. Mercy Med. Ctr., 22 F.3d 933, 937 n.4 (9th Cir. 1994); FEDERAL PRACTICE & PROCEDURE, supra, at § 2255. Moreover, even if we were to assume that the requests for admission relating to just cause or excuse were for some reason improper, Aguiluz waived any objection to those admission requests several times over. He waived them by not timely filing any objection as required by Civil Rule 36(a)(3) and (5). See FEDERAL PRACTICE & PROCEDURE, supra, at § 2262. He again waived them by not seeking any relief in the bankruptcy court under Civil Rule 36(b) or in any other way challenging the deemed admission in the bankruptcy court. Finally, he waived them by not raising and arguing the issue on appeal. See Golden v. Chicago Title Ins. Co. (In re Choo), 273 B.R. 608, 613 (9th Cir. BAP 2002); Branam v. Crowder (In re Branam), 226 B.R. 45, 55 (9th Cir. BAP 1998), aff'd, 205 F.3d 1350 (9th Cir. 1999).

States, 474 F.3d 616, 621 (9th Cir. 2007). The moving party must show that the withdrawal/amendment will facilitate a determination on the merits, whereas the adverse party has the burden of proof to show prejudice. Id. at 621-22. Prejudice as used in this context means the difficulty the adverse party would have in proving its case as a direct result of the withdrawal/amendment. Id. at 622.

Here, the general availability of relief under Civil Rule 36(b) does not alter our analysis because Aguiluz never sought such relief, either by written motion or oral request. But even if Aguiluz had requested such relief, the record reflects that withdrawal or amendment of Aguiluz's admissions would not have facilitated determination of the Discharge Litigation on its merits and would have prejudiced Jaffe. Both of these facts are apparent because of Aguiluz's demonstrated unwillingness to cooperate with any form of discovery. In the absence of the matters deemed admitted, it would have been reasonable to expect on this record that the Discharge Litigation ultimately would have concluded not based on the merits but rather based on terminating sanctions resulting from Aguiluz's failure to participate in discovery. Likewise, prejudice to Jaffe necessarily would have flowed from the withdrawal/amendment of the matters deemed admitted in light of Jaffe's inability to obtain any discovery responses of any kind whatsoever from Aguiluz – an inability that would have made it difficult if not impossible for Jaffe to adduce evidence regarding Aguiluz's intent/state of mind – an essential element in determining nondischargeability under § 523(a)(6).

Under these circumstances, the bankruptcy court did not err when it gave full force and effect under Civil Rule 36(a)(3) to the matters deemed admitted or when it granted summary judgment in favor of Jaffe and against Aguiluz.

Because the requests for admissions provided sufficient support for Jaffe's motion for summary judgment, we need not inquire whether the issue preclusive effect of the Sanctions Awards provided a separate and independent ground for granting summary judgment.

B. None of Aguiluz's arguments on appeal justify reversal.

As his premier argument on appeal, Aguiluz argues that his liability under the Sanctions Awards was extinguished pursuant to Cal. Civil Code § 1474 because the liability was paid off by a co-debtor.[13] But Aguiluz did not present any evidence in support of this allegation in his written opposition to Jaffe's summary judgment motion. In fact, Aguiluz raised this argument for the first time at the summary judgment hearing. The bankruptcy court denied Aguiluz's oral request for a continuance, which he claimed was necessary so that he could present evidence in support of his extinguishment claim.

When we consider whether a bankruptcy court abused its discretion in denying a request for continuance, we look at the circumstances of the particular case and we consider four factors: (1) whether the requesting party's lack of diligence necessitated the request, (2) whether the continuance, if

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[13]Cal. Civil Code § 1474 provides: "Performance of an obligation, by one of several persons who are jointly liable under it, extinguishes the liability of all."

granted, would have satisfied the requesting party's stated need for the continuance, (3) whether the court and the adverse party would have been inconvenienced by the continuance and (4) whether the requesting party was prejudiced by the denial. Hasso v. Mozsgai (In re La Sierra Fin. Serv., Inc.), 290 B.R. 718, 726 (9th Cir. BAP 2002); see also United States v. Pope, 841 F.2d 954, 956 (9th Cir. 1988); United States v. 2.61 Acres of Land, 791 F.2d 666, 671 (9th Cir. 1985).

Here, the record amply establishes that each of the four factors militated against the continuance. Aguiluz offered no excuse before the bankruptcy court or on appeal why he waited until the hearing to raise his extinguishment claim. Indeed, if he had participated in discovery as required by the relevant procedural rules, he likely would have "discovered" the existence of his extinguishment claim much earlier and thus would not have needed to request a continuance at all.

Furthermore, the requested continuance would not have served any legitimate need of Aguiluz's. It is clear on this record that no continuance, no matter how long, would have enabled Aguiluz to factually support his extinguishment claim. Both the court's evidence preclusion order and the effect of the matters deemed admitted pursuant to Civil Rule 36(a)(3) would have prevented Aguiluz from offering evidence to support a claim that he no longer was liable under the Sanctions Awards. We also note that it is debatable whether Aguiluz's liability was even at issue in the Discharge Litigation. Jaffe commenced the Discharge Litigation to determine the nondischargeability of the Sanctions

Awards and not to determine Aguiluz's liability thereunder.[14] The Sanctions Awards themselves already had established Aguiluz's liability. To the extent any of the Sanctions Awards subsequently have been paid, Aguiluz always can assert such payment in response to Jaffe's judgment enforcement efforts. See Jhaveri v. Teitelbaum, 98 Cal. Rptr. 3d 268, 278 (Cal. App. 2009) ("An order under [C.C.P.] section 724.110 directing a plaintiff to execute and deliver a partial satisfaction of judgment is the appropriate means by which a codebtor on a judgment may be credited with money received by the plaintiff in offset against the judgment.").

The record also establishes that the court and Jaffe would have been inconvenienced by the requested continuance. Both the court and Jaffe reasonably expected that Jaffe's summary judgment motion would be decided at the summary judgment hearing, and both the court and Jaffe prepared for the hearing with that expectation in mind. If the court had granted Aguiluz's continuance request, both the court and Jaffe would have needed to prepare again for the continued summary judgment hearing at some later date.

Finally, for the same reasons that the requested continuance would not have served any legitimate need, denial of the requested continuance did not prejudice Aguiluz. Based on the circumstances discussed above, Aguiluz likely could not have

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[14]Bankruptcy courts may determine the dischargeability of a debt without necessarily resolving whether debtor is liable for that debt. See Jett v. Sicroff (In re Sicroff), 401 F.3d 1101, 1103 n.3 (9th Cir. 2005).

proven his extinguishment claim, which probably was irrelevant to the resolution of the Discharge Litigation in any event.

Accordingly, the bankruptcy court did not abuse its discretion by denying the requested continuance, and the denial of the continuance does not justify reversal.

Next, Aguiluz argues on appeal that the court should have dismissed as moot the Discharge Litigation because the court already had granted Aguiluz his discharge. Alternately stated, Aguiluz argues that the court's discharge order precluded a determination that Aguiluz's indebtedness to Jaffe was nondischargeable. We disagree. The court's discharge order was based on Official Form 18, as required by Rule 4004(e) ("An order of discharge shall conform to the appropriate Official Form."). In relevant part, the court's discharge order, and Official Form 18, provide in explanatory language that is part of the form:

> **Debts that are Not Discharged.**
> Some of the common types of debts which are not discharged in a chapter 7 bankruptcy case are:
>
> * * *
>
> h. Debts that the bankruptcy court specifically has decided or will decide in this bankruptcy case are not discharged.

See Official Form 18 (West 2011); August 15, 2010 Discharge Order.

Simply put, the plain language of the court's discharge order expressly allowed the court to subsequently determine in the Discharge Litigation the nondischargeability of the Sanctions Awards. Thus, the court's discharge order does not justify reversal of the court's summary judgment against Aguiluz.

The other issues that Aguiluz attempted to raise on appeal either are unsupported by any argument or are insufficient to show that Aguiluz established in the bankruptcy court the existence of any genuine issue of material fact concerning the elements for nondischargeability under § 523(a)(6). In sum, Aguiluz has not established any basis that would justify reversal of the judgment on appeal.

CONCLUSION

For the reasons set forth above, the bankruptcy court's summary judgment is AFFIRMED.