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U.S. BKCY. APP. PANEL
OF THE NINTH CIRCUIT

NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT

5	In re:)	BAP No.	CC-10-1411-MkKiD
)		
6	HEROICO MARTIN AGUILUZ,)	Bk. No.	LA 09-42254-PC
)		
7	Debtor.)	Adv. No.	LA 10-01231-PC
	_____)		
8)		
9	HEROICO MARTIN AGUILUZ,)		
)		
10	Appellant,)		
)		
11	v.)	MEMORANDUM*	
)		
12	HOWARD M. JAFFE, as Trustee,)		
)		
13	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.

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

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

19 **B. Aguiluz's Bankruptcy Case and the Sanctions Awards**

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

1 forth below.

2 **1. October 24, 2003 Sanctions Award**

3 On October 24, 2003, the state court issued an order in the
4 Long Beach Action compelling Pacelli to respond to Jaffe's post-
5 judgment discovery requests. The October 24, 2003 order further
6 directed that Pacelli and Aguiluz, jointly and severally, must
7 pay \$2,000 to Jaffe on account of Pacelli's failure to respond to
8 Jaffe's discovery requests and on account of Pacelli's and
9 Aguiluz's failure to meet and confer in a good faith attempt to
10 resolve a discovery dispute. The October 24, 2003 order does not
11 make an explicit finding that either Pacelli or Aguiluz violated
12 any particular statute or court order, but the order does recite
13 that the underlying sanctions request was based on Pacelli's and
14 Aguiluz's violations of Cal. Civil Procedure Code ("C.C.P.")
15 §§ 708.020(a)³ and 708.030(a)⁴ and the state court's order of
16 April 26, 2000.

17 **2. January 13, 2004 Sanctions Award**

18 On January 13, 2004, the state court issued a minute entry
19 in the Long Beach Action imposing \$2,000 in sanctions against
20 Aguiluz and in favor of Jaffe. The minute entry gives no detail
21 whatsoever regarding the basis for this Sanctions Award, other
22

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

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

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

7 **3. First December 21, 2006 Sanctions Award**

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

18 **4. Second December 21, 2006 Sanctions Award**

19 On December 21, 2006, the state court issued an order in the
20 Fraudulent Transfer Action deeming admitted each of the matters
21 set forth in Jaffe's first set of requests for admissions to
22 Pacelli. This December 21, 2006 order further directed that
23

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

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

1 Pacelli and Aguiluz, jointly and severally, must pay \$500 to
2 Jaffe because of their "joint and several misuses of the
3 discovery process" under C.C.P. § 2023.010(d) and because of
4 their failure to respond to Jaffe's first set of requests for
5 admissions, which necessitated Jaffe's motion to have the matters
6 set forth in the first set of requests for admissions deemed
7 admitted under C.C.P. § 2033.280(b).⁷ According to this December
8 21, 2006 order, Pacelli and Aguiluz jointly and severally misused
9 the discovery process by "[f]ailing to respond or to submit to an
10 authorized method of discovery."

11 **5. July 16, 2007 Sanctions Award**

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

18
19 ⁷C.C.P. § 2033.280(b) provides in relevant part: "[t]he
20 requesting party may move for an order that the genuineness of
21 any documents and the truth of any matters specified in the
22 requests be deemed admitted, as well as for a monetary sanction
23"

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

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

(continued...)

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

5 **6. January 16, 2008 Sanctions Award**

6 On January 16, 2008, the state court issued an order in the
7 Fraudulent Transfer Action compelling Pacelli's bookkeeper/
8 accountant Pedro Mundo ("Mundo") - also represented by Aguiluz -
9 to comply with Jaffe's deposition subpoena and document requests.
10 The January 16, 2008 order also directed Pacelli to comply with a
11 notice of deposition and document requests. The January 16, 2008
12 order further directed that Mundo and Aguiluz, jointly and
13 severally, must pay \$2,381.67 to Jaffe on account of their "joint
14 and several misuses of the discovery process" under C.C.P.
15 § 2023.010(d). According to the January 16, 2008 order, Pacelli
16 and Aguiluz jointly and severally misused the discovery process
17 by "[f]ailing to respond or to submit to an authorized method of
18 discovery."

19 **7. February 15, 2008 Sanctions Award**

20 On February 15, 2008, the state court issued an order in the
21 Fraudulent Transfer Action compelling Pacelli to respond to
22

23 ⁹(...continued)
24 notice."

25 ¹⁰CRC 3.1204(a) provides: "[w]hen notice of an ex parte
26 application is given, the person giving notice must: (1) State
27 with specificity the nature of the relief to be requested and the
28 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."

1 Jaffe's second set of document requests and second set of
2 interrogatories. The February 15, 2008 order further directed
3 that Pacelli and Aguiluz, jointly and severally, must pay
4 \$2,381.67 to Jaffe on account of their "joint and several misuses
5 of the discovery process" under C.C.P. § 2023.010(d). According
6 to this February 15, 2008 order, Pacelli and Aguiluz jointly and
7 severally misused the discovery process by "[f]ailing to respond
8 or to submit to an authorized method of discovery."

9 **8. March 7, 2008 Sanctions Award**

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

24 **9. July 29, 2008 Sanctions Award**

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

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

10 **C. The Discharge Litigation**

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

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

17 Jaffe's first set of admission requests was voluminous and
18 covered just about every allegation in Jaffe's § 523(a)(6)
19 complaint. In relevant part, Jaffe asked Aguiluz to admit,
20 separately as to each Sanctions Award, that the debt arising
21 therefrom was for a willful injury to Jaffe or his property.
22 More specifically, each such admission request stated that
23 Aguiluz "had the subjective motive to inflict injury." April 26,
24 2010 First Set of Requests For Admissions at ¶¶ 25, 40, 56, 70,
25 84, 100, 116, 132 & 148. Jaffe also asked Aguiluz to admit,
26 separately as to each Sanctions Award, that the debt arising
27 therefrom was for a malicious injury to Jaffe or his property.
28 More specifically, each such admission request stated that the

1 "injury necessarily (1) involved wrongful acts by [Aguiluz],
2 (2) were done intentionally by [Aguiluz], (3) caused injury to
3 Jaffe and (4) were done by [Aguiluz] without just cause or
4 excuse." April 26, 2010 First Set of Requests For Admissions at
5 ¶¶ 26, 41, 57, 71, 85, 101, 117, 133 & 149.

6 On August 20, 2010, Jaffe filed a motion for summary
7 judgment and a separate motion to preclude Aguiluz from offering
8 any evidence in opposition to Jaffe's summary judgment motion.
9 Jaffe based his evidence preclusion motion on Aguiluz's failure
10 to make his initial disclosures required by Civil Rule 26(a)(1).
11 Jaffe based his summary judgment motion on three grounds: (1) the
12 deemed admission of all of the matters set forth in Jaffe's first
13 set of admissions requests; (2) the issue preclusive effect of
14 the Sanctions Awards; and (3) the fact that Aguiluz should be
15 precluded from presenting any evidence in response to the summary
16 judgment motion because of his noncompliance with Civil Rule
17 26(a)(1).

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

1 Litigation.

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

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

15 JURISDICTION

16 The bankruptcy court had jurisdiction under 28 U.S.C.
17 §§ 1334 and 157(b)(2)(I). We have jurisdiction under 28 U.S.C.
18 § 158.

19 ISSUE

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

23 STANDARDS OF REVIEW AND SUMMARY JUDGMENT STANDARDS

24 We review a denial of a request for continuance for abuse of
25 discretion. Orr v. Bank of America, 285 F.3d 764, 783 (9th Cir.
26 2002). Under the abuse of discretion standard, we apply a two-
27 part test. First, we consider de novo whether the bankruptcy
28 court identified the correct law to consider in light of the

1 relief requested. United States v. Hinkson, 585 F.3d 1247, 1262
2 (9th Cir. 2009) (en banc). Second, we review the bankruptcy
3 court's factual findings, and its application of those findings
4 to the relevant law, to determine whether they were either
5 "(1) 'illogical,' (2) 'implausible,' or (3) without 'support in
6 inferences that may be drawn from the facts in the record.'" Id.
7 (quoting Anderson v. City of Bessemer City, N.C., 470 U.S. 564,
8 577 (1985)).

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

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

1 477 U.S. at 323-24.

2 At the time of the bankruptcy court's ruling, Civil Rule
3 56(e)(2) provided:

4 Opposing Party's Obligation to Respond. When a motion
5 for summary judgment is properly made and supported, an
6 opposing party may not rely merely on allegations or
7 denials in its own pleading; rather, its response must
8 - 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.

9 Civil Rule 56(e)(2) (West 2010).¹¹

10 Finally, we note that we may affirm the bankruptcy court's
11 ruling on any basis supported by the record. See, e.g., Heilman
12 v. Heilman (In re Heilman), 430 B.R. 213, 216 (9th Cir. BAP
13 2010); FDIC v. Kipperman (In re Commercial Money Center, Inc.),
14 392 B.R. 814, 826-27 (9th Cir. BAP 2008); see also McSherry v.
15 City of Long Beach, 584 F.3d 1129, 1135 (9th Cir. 2009).

16 DISCUSSION

17 **A. The bankruptcy court did not err when it granted summary** 18 **judgment.**

19 In order to establish his entitlement to summary judgment,
20 Jaffe needed to show there was no factual dispute concerning the
21 nondischargeability of Aguiluz's debt under § 523(a)(6). A debt
22

23 ¹¹The latest version of Civil Rule 56, which became
24 effective December 1, 2010, uses different language and
25 numbering, but it embodies the same key concepts as set forth in
26 the old version. For instance, the new version of Civil Rule
27 56(e) provides in relevant part that, when the moving party has
28 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).

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

5 None of these terms are defined in the statute, but they
6 have been defined in subsequent case law. An injury is
7 considered willful if the debtor subjectively intends to cause
8 the injury, or subjectively believes that harm is substantially
9 certain to occur. Carrillo v. Su (In re Su), 290 F.3d 1140,
10 1143-45 (9th Cir. 2002). An injury is malicious if it "involves
11 '(1) a wrongful act, (2) done intentionally, (3) which
12 necessarily causes injury, and (4) is done without just cause or
13 excuse.'" Barboza v. New Form, Inc. (In re Barboza), 545 F.3d
14 702, 706 (9th Cir. 2008)(citation omitted). Meanwhile, "injury"
15 has been defined to include, in relevant part, the incurrence of
16 litigation expenses, including attorneys' fees and costs. See
17 Suarez v. Barrett (In re Suarez), 400 B.R. 732, 738-39 (9th Cir.
18 BAP 2009) (citing, among other cases, Papadakis v. Zelis (In re
19 Zelis), 66 F.3d 205 (9th Cir.1995)); see also Cohen v. de la
20 Cruz, 523 U.S. 213, 223 (1998) (holding that attorneys fees and
21 costs were nondischargeable when they flowed from defendant's
22 nondischargeable conduct under § 523(a)(2)(A)).

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

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

3 Pursuant to Civil Rule 36(a)(3) (made applicable in
4 adversary proceedings by Rule 7036), Aguiluz was deemed to have
5 admitted all of the matters duly set forth in the requests for
6 admission. The operation of Civil Rule 36(a)(3) is automatic and
7 self-executing. See F.T.C. v. Medicor, LLC, 217 F. Supp. 2d
8 1048, 1053 (C.D. Cal. 2002) (citing Schwarzer, Tashima &
9 Wagstaffe, CAL. PRACTICE GUIDE: FED. CIV. PROC. BEFORE TRIAL, at ¶¶ 811-
10 12 (Rutter Group 2002)).

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

22
23 ¹²Admission requests properly may cover ultimate facts as
24 well as evidentiary facts. See 8B Charles Alan Wright, Arthur R.
25 Miller, Mary Kay Kane & Richard L. Marcus, FEDERAL PRACTICE &
26 PROCEDURE § 2255 (3d ed. 2010). The issue regarding Aguiluz's
27 willfulness was an issue of ultimate fact inquiring into
28 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...)

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

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

14
15 ¹²(...continued)

16 36(a)(1); FEDERAL PRACTICE & PROCEDURE, supra, at § 2255. The first
17 three factors of the maliciousness element also are questions of
18 fact, but the fourth and final element - just cause or excuse -
19 is a mixed question of law and fact. Murray v. Bammer (In re
20 Bammer), 131 F.3d 788, 792 (9th Cir. 1997), abrogated in part on
21 other grounds by, Kawaauhau v. Geiger, 523 U.S. 57 (1998). A
22 request for admission also can properly cover mixed questions of
23 law and fact. See Civil Rule 36(a)(1)(A); Marchand v. Mercy Med.
24 Ctr., 22 F.3d 933, 937 n.4 (9th Cir. 1994); FEDERAL PRACTICE &
25 PROCEDURE, supra, at § 2255. Moreover, even if we were to assume
26 that the requests for admission relating to just cause or excuse
27 were for some reason improper, Aguiluz waived any objection to
28 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).

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

8 Here, the general availability of relief under Civil Rule
9 36(b) does not alter our analysis because Aguiluz never sought
10 such relief, either by written motion or oral request. But even
11 if Aguiluz had requested such relief, the record reflects that
12 withdrawal or amendment of Aguiluz's admissions would not have
13 facilitated determination of the Discharge Litigation on its
14 merits and would have prejudiced Jaffe. Both of these facts are
15 apparent because of Aguiluz's demonstrated unwillingness to
16 cooperate with any form of discovery. In the absence of the
17 matters deemed admitted, it would have been reasonable to expect
18 on this record that the Discharge Litigation ultimately would
19 have concluded not based on the merits but rather based on
20 terminating sanctions resulting from Aguiluz's failure to
21 participate in discovery. Likewise, prejudice to Jaffe
22 necessarily would have flowed from the withdrawal/amendment of
23 the matters deemed admitted in light of Jaffe's inability to
24 obtain any discovery responses of any kind whatsoever from
25 Aguiluz - an inability that would have made it difficult if not
26 impossible for Jaffe to adduce evidence regarding Aguiluz's
27 intent/state of mind - an essential element in determining
28 nondischargeability under § 523(a)(6).

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

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

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

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

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

26
27 ¹³Cal. Civil Code § 1474 provides: "Performance of an
28 obligation, by one of several persons who are jointly liable
under it, extinguishes the liability of all."

1 granted, would have satisfied the requesting party's stated need
2 for the continuance, (3) whether the court and the adverse party
3 would have been inconvenienced by the continuance and (4) whether
4 the requesting party was prejudiced by the denial. Hasso v.
5 Mozsgai (In re La Sierra Fin. Serv., Inc.), 290 B.R. 718, 726
6 (9th Cir. BAP 2002); see also United States v. Pope, 841 F.2d
7 954, 956 (9th Cir. 1988); United States v. 2.61 Acres of Land,
8 791 F.2d 666, 671 (9th Cir. 1985).

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

17 Furthermore, the requested continuance would not have served
18 any legitimate need of Aguiluz's. It is clear on this record
19 that no continuance, no matter how long, would have enabled
20 Aguiluz to factually support his extinguishment claim. Both the
21 court's evidence preclusion order and the effect of the matters
22 deemed admitted pursuant to Civil Rule 36(a)(3) would have
23 prevented Aguiluz from offering evidence to support a claim that
24 he no longer was liable under the Sanctions Awards. We also note
25 that it is debatable whether Aguiluz's liability was even at
26 issue in the Discharge Litigation. Jaffe commenced the Discharge
27 Litigation to determine the nondischargeability of the Sanctions
28

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

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

21 Finally, for the same reasons that the requested continuance
22 would not have served any legitimate need, denial of the
23 requested continuance did not prejudice Aguiluz. Based on the
24 circumstances discussed above, Aguiluz likely could not have
25

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

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

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

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

17 **Debts that are Not Discharged.**

18 Some of the common types of debts which are not
19 discharged in a chapter 7 bankruptcy case are:

19 * * *

20 h. Debts that the bankruptcy court specifically has
21 decided or will decide in this bankruptcy case are not
22 discharged.

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

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

