NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL

OF THE NINTH CIRCUIT

In re:	)	BAP No. AZ-11-1003-KiMyD
	)	
MICHAEL LEMON KEITH and VICTORIA LYNN KEITH,	)	Bk. No. 08-16180-RJH
	)	Adv. No. 10-01535-RJH
Debtors.	)	
LONNIE REED,	)	
Appellant,	)	
v.	)	**MEMORANDUM**[*]
MICHAEL LEMON KEITH; VICTORIA LYNN KEITH,	)	
Appellees.	)	

Argued and Submitted on July 22, 2011
at Phoenix, Arizona

Filed – August 5, 2011

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

Honorable Randolph J. Haines, Bankruptcy Judge, Presiding

Appearances: Lonnie Reed, appellant, argued pro se
Michael L. Keith, one of the appellees, argued pro se

Before: KIRSCHER, MYERS[**] 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.

[**] Hon. Terry L. Myers, Chief Bankruptcy Judge for the District of Idaho, sitting by designation.

INTRODUCTION

Appellant Lonnie Reed ("Reed") filed an adversary proceeding against appellees, Chapter 7[1] debtors Michael and Victoria Keith ("the Keiths"), objecting to discharge under § 727, and seeking a determination that a debt allegedly owed to him was nondischargeable under § 523(a)(6). Reed now appeals the bankruptcy court's order dismissing his entire adversary proceeding as prohibited by the doctrine of collateral estoppel.[2] We AFFIRM.

I. FACTUAL AND PROCEDURAL BACKGROUND[3]

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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] Collateral estoppel is more accurately expressed as issue preclusion. Paine v. Griffin (In re Paine), 283 B.R. 33, 38-39 (9th Cir. BAP 2002). We refer to collateral estoppel throughout this Memorandum as issue preclusion.

[3] Unless otherwise indicated, the facts set forth below have not been disputed. Reed failed to include the full Complaint to Determine Debtors' Eligibility for Discharge and Dischargeability of a Debt (Sections 727 and 523) in his excerpts of the record, and did not include any portion of the Answer to Defendants' Motion to Dismiss or the Motion for Reconsideration Under Federal Rules of Civil Procedure 60(b)(3).

Because Reed omitted necessary portions of the record from the excerpts of the record he submitted to this Panel, we are entitled to presume that any missing portions are not helpful to his position. Gionis v. Wayne (In re Gionis), 170 B.R. 675, 680-81 (9th Cir. BAP 1994). We also are entitled to affirm or dismiss his appeal summarily. Cmty. Commerce Bank v. O'Brien (In re O'Brien), 312 F.3d 1135, 1137 (9th Cir. 2002). Nonetheless, the Panel obtained copies of each of the omitted documents from the bankruptcy court docket, and takes judicial notice of them. Atwood v. Chase Manhattan Mortg. Co. (In re Atwood), 293 B.R. 227, 233 n.9 (9th Cir. BAP 2003)(the BAP may take judicial notice of the bankruptcy records).

A. Pre-Petition Events

Neal Klein Construction Company ("NKCC") constructed Reed's home in Sedona, Arizona. Reed filed a complaint with the Registrar of Contractors ("ROC") against NKCC on June 6, 2002 ("2002 Proceeding"), alleging deficiencies in the construction of the home, including that some walls in the house were not plumb. Michael Keith ("Keith"), in an individual capacity as an expert witness for NKCC, prepared a Project Summary-Preliminary Report and Cost Estimate ("Project Summary"), and testified about his opinion as to required repair work for the home. The Project Summary explained the problems in the home, his suggestions for repair, and detailed the cost of his suggested repairs. One issue in the proceeding was the proper remedy for the walls that were not plumb: Keith opined "floating the walls" would be acceptable, but Reed disagreed. Administrative Law Judge Anthony Halas issued a decision against NKCC on May 27, 2003 ("2003 Award"), requiring NKCC to repair the deficiencies, but declining to award a specific amount of monetary damages or to direct NKCC on how those repairs should be made.

As a result of Keith's testimony for NKCC, on February 24, 2005, Reed filed a Complaint ("2005 Proceeding") with ROC against the contractor's license of CMK Engineering, Inc. ("CMK"), of which Keith was president and CEO. Reed later amended his Complaint with ROC to include allegations of perjury, destruction of evidence, fraudulent statements, false affidavit, conspiracy to commit fraud, and contracting outside the scope of CMK's license. Administrative Law Judge Wendy S. Morton ("the ALJ") heard the Complaint on October 28, 2005. The ALJ issued a

decision on November 17, 2005, and an amended decision on November 17, 2005 ("2005 Decision").

In the 2005 Decision, the ALJ made numerous findings about Keith's actions regarding the NKCC complaint. The ALJ found no nexus between the Project Summary and CMK, but recognized that Keith prepared the Project Summary. The ALJ also found that Keith's allegedly false statements were matters of opinion, and therefore did not support a claim of fraudulent statements, that Keith's Project Summary did not constitute a bid for a contract, despite Reed's allegations to the contrary, and that floating the walls does not deviate from industry standards. Ultimately, the ALJ found that Reed failed to establish that CMK committed any wrongful act against him, or that CMK violated any Arizona plans, specifications, or building codes.

Reed filed a petition for rehearing of the 2005 Decision, which Administrative Law Judge Brian Brendan Tully denied because it lacked "any compelling legal or factual basis for the granting of any rehearing" and the ALJ's findings were fully supported by the testimony and evidence presented. Reed then appealed the 2005 Decision to the Arizona Superior Court for Coconino County, which affirmed the ALJ's decision. The Superior Court subsequently denied Reed's motion for reconsideration. Reed then appealed to the Arizona Court of Appeals, which also affirmed the relevant portions of the 2005 Decision.[4] The Court of Appeals denied Reed's subsequent motion to reconsider. Reed next filed a

[4] The Court of Appeals did reduce the Superior Court's award of attorney fees by $1,200 for "fees charged in connection with the hearing before the ALJ" which were improperly awarded.

petition for review of the case by the Arizona Supreme Court, but the court denied the petition.

Subsequently, additional events transpired that Reed alleges are the basis of the § 523 claims in the instant adversary proceeding. In or about 2008, Reed brought another administrative complaint against NKCC ("2008 Proceeding"). During the 2008 Proceeding, NKCC's president testified that Keith was hired to "supervise and perform" the remedial repairs, contrary to Keith's earlier representations. A decision was entered in the 2008 Proceeding on August 15, 2008 ("2008 Award"), limiting Reed's 2003 Award to $15,000, which he alleges caused him to be damaged by Keith's earlier actions and caused his intentional tort causes of action to accrue.[5]

B. Post-Petition Events

On November 12, 2008, the Keiths filed a voluntary petition for relief under Chapter 7. The Keiths did not notify Reed of the filing or list him as a creditor. Several months later, Reed filed a civil suit in the Superior Court of Maricopa County, Arizona. On March 25, 2010, the Keiths added Reed as a creditor

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[5] Reed's adversary complaint was ambiguous regarding whether the date in the allegation referred to the date Keith presented the Project Summary to NKCC, or the date Reed's damages accrued. Paragraph 184 of the complaint alleged: "On or about August 15, 2008, Plaintiff was damaged when Defendant Michael Keith presented a writing to [NKCC] . . . advising substandard remedial repairs to Plaintiff's home which did not meet the applicable Building Codes and Minimum Workmanship Standards required by the State of Arizona" which was then used in calculating a reduced damage award. However, Keith clarified in his Answer to Defendants' Motion to Dismiss that the writing mentioned was the Project Summary, and that the paragraph 184 allegation referred to when Plaintiff's damages accrued.

to their Schedule F and notified him of the bankruptcy filing.

On August 23, 2010, after the bankruptcy filing stayed the civil suit in the Superior Court, Reed filed the instant adversary proceeding. In his complaint, Reed sought a determination that the debts allegedly owed to him by Keith were nondischargeable under § 523(a)(6). Reed also sought a denial of the Keiths' discharge under § 727(a)(4)(A) and (a)(5), alleging that the Keiths made numerous false oaths and failed to explain the loss of assets.

Keith then filed a motion to dismiss the adversary proceeding, arguing that "everything [Reed] raises has already been litigated and decided." Keith included numerous exhibits with his motion, each of which was related to the 2005 Proceeding. Reed responded, arguing that issue and claim preclusion were inapplicable because Keith was not a party to the 2005 Proceeding, that the 2005 Decision was issued prior to the instant causes of action accruing against Keith, and that Keith testified falsely, which rendered the 2005 Proceeding unfair.

The bankruptcy court held a hearing on the motion to dismiss on October 19, 2010. At the hearing, both Keith and Reed were given an opportunity to argue their positions. At one point, Keith told the court that he had been "sued in state court personally and . . . prevailed with a judgment holding that [he] owe[d] nothing to Lonnie Reed." Hr'g Tr. 3:6-10 (October 19, 2010). The court then orally presented its findings of fact and conclusions of law:

> I have to find and conclude that all of the matters sought to be litigated in this discharge action were litigated before the registrar of contractors and then

> appealed to, in effect, [Superior Court] and all the way up to the Court of Appeals and ultimate petition for review to the Supreme Court. And on all of those occasions the Reeds lost on precisely the issues that are argued in the non-dischargeability complaint. While it's technically true that Keith was not a named party in that, the facts were litigated, and Arizona recognizes the affirmative use of collateral estoppel, and that's in effect what's going here because Reed had a full and fair opportunity to litigate these issues, did litigate them and lost, and this Court is not going to revisit what the registrar of contractors and the appellate courts have already resolved. And that's really what's going on here and all that's going on is an attempt to re-litigate what was once litigated and decided on basically an argument, well, you get to re-litigate it because a witness to that action lied in effect, and this Court is not going to get involved in that kind of re-litigation of matters that have already been litigated. That's what the doctrine of collateral estoppel is all about.

Id. 10:4-25. Reed then attempted to point out that the motion to dismiss did not apply to the § 727 claims. The court replied the case was over. On October 20, 2010, the bankruptcy court entered a minute entry order consistent with its oral ruling of October 19, 2010.

On October 28, 2010, Reed filed a timely motion for reconsideration under Civil Rule 60(b)(3), made applicable to this proceeding by Rule 9024 ("Motion to Reconsider"). See Rule 8002(b)(4) (timely motion under Rule 9024 tolls appeal time of the underlying judgment or order). In the Motion to Reconsider, Reed alleged that Keith misrepresented the 2005 Proceeding in his comments at the hearing on the motion to dismiss, "when he stated that he had been named personally as a party and had prevailed with a judgment holding he owed nothing." Reed also argued "that the Debtors' motion and the Court's ruling addressed only the § 523 counts of the adversary complaint, and not the § 727 counts, which therefore should not have been dismissed."

Finally, Reed reiterated some of his arguments against issue preclusion.

The bankruptcy court entered an order on December 21, 2010, denying the Motion to Reconsider. The court rejected Reed's argument, stating that though the motion to dismiss technically applied only to the § 523 claims, "if there is no debt, then Plaintiff is not a creditor, is not a proper party in interest in this bankruptcy case, and has no basis to object to the Debtors' discharge under § 727." The court also reiterated its issue preclusion reasoning, noting, "Although that prior action was a license revocation proceeding before the Registrar of Contractors, the real parties in interest were essentially the same, and Plaintiff had the same opportunity and interest in proving that the Debtor had committed some tort, provided some false testimony or for any other reason had committed some wrong or owed some debt to the Plaintiff."

On January 3, 2011, Reed timely appealed the order dismissing the adversary complaint and the order denying the Motion to Reconsider. Reed argues Keith failed to meet his burden of establishing issue preclusion is available. He argues Keith could not establish commonality of the parties because Keith was not a party to the complaint against CMK. Reed also argues that Keith could not establish a full and fair opportunity to litigate the issues in the 2005 proceeding because Keith allegedly testified falsely. Finally, Reed argues that issue preclusion cannot be applied because the 2005 Decision was entered before the instant causes of action accrued. Reed does not dispute that the issue was actually litigated in the prior

proceedings, that resolution of the issue was essential to the decision, or that a valid and final decision was entered on the merits.

II. JURISDICTION

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

III. ISSUES

Did the bankruptcy court err when it granted Keith's motion to dismiss, giving issue preclusion effect to the 2005 Decision?

Did the bankruptcy court abuse its discretion when it denied the Motion to Reconsider?

IV. STANDARDS OF REVIEW

A. Bankruptcy Court's Decision

The bankruptcy court reviewed and relied on materials outside the pleadings by relying on the documents attached to Keith's motion to dismiss for failure to state a claim upon which relief can be granted.[6] Under Civil Rule 12(d), applicable in this proceeding through Rule 7012(b), if "matters outside the pleadings are presented and not excluded by the court, the motion must be treated as one for summary judgment under Rule 56."

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[6] Keith did not specifically label his motion to dismiss as one for failure to state a claim upon which relief can be granted under Civil Rule 12(b)(6). However, courts must construe pro se pleadings liberally, including pro se motions as well as complaints. Bernhardt v. L.A. Cnty., 339 F.3d 920, 925 (9th Cir. 2003). Therefore, we recognize that under Civil Rule 12(b), the closest grounds that Keith may properly assert in a motion to dismiss are those for failure to state a claim. We analyze the motion as such.

Therefore, we will treat Keith's motion as one for summary judgment.

B. Standards of Review

A grant of summary judgment is reviewed de novo. Devereaux v. Abbey, 263 F.3d 1070, 1074 (9th Cir. 2001) (en banc). Appellate review is governed by the same standards of Civil Rule 56(c) that governed the trial court. Suzuki Motor Corp. v. Consumers Union of U.S., Inc., 330 F.3d 1110, 1131 (9th Cir. 2003). Viewing the evidence in the light most favorable to the non-moving party, we must determine whether there are any genuine issues of material fact and whether the trial court correctly applied the relevant substantive law. Devereaux, 263 F.3d at 1074.

We review rulings regarding claim and issue preclusion de novo as mixed questions of law and fact in which legal questions predominate. Robi v. Five Platters, Inc., 838 F.2d 318, 321 (9th Cir. 1988); Alary Corp. v. Sims (In re Associated Vintage Grp., Inc.), 283 B.R. 549, 554 (9th Cir. BAP 2002). Once it is determined that preclusion doctrines are available to be applied, the actual decision to apply them is left to the trial court's discretion. Robi, 838 F.2d at 321.

We review a bankruptcy court's denial of a motion for reconsideration for an abuse of discretion. Ta Chong Bank Ltd. v. Hitachi High Techs. Am., Inc., 610 F.3d 1063, 1066 (9th Cir. 2010); Zimmerman v. City of Oakland, 255 F.3d 734, 737 (9th Cir. 2001). We apply a two-part test to determine whether the bankruptcy court abused its discretion. United States v. Hinkson, 585 F.3d 1247, 1261-62 (9th Cir. 2009)(en banc). First,

we consider de novo whether the bankruptcy court applied the correct legal standard to the relief requested. Id. Then, we review the bankruptcy court's fact findings for clear error. Id. at 1262 & n.20. We must affirm the bankruptcy court's fact findings unless we conclude that they are "(1) 'illogical,' (2) 'implausible,' or (3) without 'support in inferences that may be drawn from the facts in the record.'" Id.

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 Ctr., 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).

V. DISCUSSION

A. The bankruptcy court did not err when it applied issue preclusion in granting Keith's motion to dismiss.

Issue preclusion provides that once an issue of ultimate fact has been determined by a valid and final judgment, that issue cannot be litigated again between the same parties in any future lawsuit. Ashe v. Swenson, 397 U.S. 436, 443 (1970). It is "intended to avoid inconsistent judgments and the related misadventures associated with giving a party a second bite at the apple." Lopez v. Emergency Serv. Restoration, Inc. (In re Lopez), 367 B.R. 99, 104 (9th Cir. BAP 2007).

The doctrine of issue preclusion applies in dischargeability proceedings to preclude the relitigation of nonbankruptcy court findings relevant to dischargeability. Grogan v. Garner, 498 U.S. 279, 284 n.11 (1991). To determine whether issue

preclusion can be applied to a state court order or judgment, we must, as a matter of full faith and credit, apply that state's issue preclusion principles. 28 U.S.C. § 1738; Cal-Micro, Inc. v. Cantrell (In re Cantrell), 329 F.3d 1119, 1123 (9th Cir. 2003); Honkanen v. Hopper (In re Honkanen), 446 B.R. 373, 382 (9th Cir. BAP 2011).

Arizona law states issue preclusion applies "when an issue was actually litigated in a previous proceeding, there was a full and fair opportunity to litigate the issue, resolution of the issue was essential to the decision, a valid and final decision on the merits was entered, and there is common identity of parties." Hullett v. Cousin, 63 P.3d 1029, 1034-35 (Ariz. 2003)(en banc). "Arizona courts have recognized that where, as here, administrative agencies act in adjudicative capacities, courts will, where appropriate, give preclusive effect to such decisions." J.W. Hancock Enters., Inc. v. Ariz. State Registrar of Contractors, 690 P.2d 119, 128 (Ariz. Ct. App. 1984) (applying issue preclusion to an ROC contract interpretation). See also Yavapai Cnty. v. Wilkinson, 534 P.2d 735, 737 (Ariz. 1975) (en banc) (finding issue preclusion applicable to a decision of the State Board of Property Tax Appeals).

"The party asserting the doctrine has the burden of proving that all of the threshold requirements have been met. To meet this burden, the moving party must have pinpointed the exact issues litigated in the prior action and introduced a record revealing the controlling facts. Reasonable doubts about what was decided in the prior action should be resolved against the party seeking to assert preclusion." Honkanen, 446 B.R. at 382

(citing Kelly v. Okoye (In re Kelly), 182 B.R. 255, 258 (9th Cir. BAP 1995), aff'd, 100 F.3d 110 (9th Cir. 1996)) (internal citations omitted).

The bankruptcy court correctly concluded that Reed should be precluded from relitigating issues already decided in the 2005 Proceeding. While the bankruptcy court was not explicit in its reasoning, we note that whether the recommendations in Keith's Project Summary are acceptable under Arizona Building Codes and Minimum Workmanship Standards (collectively "Building Codes") is an essential element of each of Reed's claims in the instant proceeding.[7]

1. Keith's allegedly false testimony about his contractor status did not deny Reed a full and fair opportunity to litigate the recommendations in the Project Summary.

Reed argues that the 2005 Proceeding did not afford him a full and fair opportunity to litigate the issue of whether the Project Summary's recommendations meet Building Codes, because he

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[7] Each of Reed's current exception to discharge claims requires him to prove the Project Summary's recommendations failed to comply with Building Codes. For example, in Count 22 (Consumer Fraud), Reed alleges Keith disseminated a bid written to induce him "to acquire title or interest in the resulting substandard construction repairs which do not meet the applicable Building Codes and the Minimum Workmanship Standards." In Count 23 (Intentional Interference with Economic Advantage), Reed alleges Keith "knew that [Reed] had an economic benefit in having his home repaired in a manner which would meet the applicable Building Codes and Minimum Workmanship Standards required by the State of Arizona." In Count 24 (Intentional Infliction of Emotional Distress), Reed alleges Keith advised NKCC to "conceal construction defects . . . instead of repairing them." In Count 25 (Conspiracy), Reed alleges Keith conspired with others to deprive him "of the value of a home which was repaired in accordance with the applicable Building Codes and Minimum Workmanship Standards."

alleges that Keith testified falsely during the 2005 Proceeding about whether he was acting as a contractor in the 2002 Proceeding.

Generally, issue preclusion under Arizona law requires "a full and fair opportunity to litigate" the issue. State v. Walker, 768 P.2d 668, 671 (Ariz. Ct. App. 1989). "Redetermination of issues is warranted if there is reason to doubt the quality, extensiveness, or fairness of procedures followed in prior litigation." Id. (quoting Kremer v. Chem. Const. Corp., 456 U.S. 461, 480-81 (1982)). However, the Supreme Court has noted that, in cases governed by the Full Faith and Credit Act (28 U.S.C. § 1738), a full and fair opportunity to litigate requires only that state proceedings "satisfy the minimum procedural requirements of the Fourteenth Amendment's Due Process Clause." Kremer, 456 U.S. at 481.

Reed alleges that Keith lied about his status as a contractor, and disputes the fact that Keith was acting solely as an expert witness during the 2002 Proceeding. Such a disputed fact might preclude summary judgment, but does not do so here because it is immaterial to the availability of issue preclusion regarding the acceptability of the Project Summary's recommendations. Whether Keith was acting as a contractor when he prepared the Project Summary does not impact the ALJ's conclusion that Keith's recommendation to float the walls was acceptable under Building Codes. Since the allegedly false testimony is immaterial to the precluded issue, it does not bar application of issue preclusion on summary judgment. See, e.g., Ramallo Bros. Printing, Inc. v. El Dia, Inc., 490 F.3d 86, 90-91

(1st Cir. 2007) (noting that changed circumstances do not defeat issue preclusion when they are not material).

2. Arizona law does not require Keith be a party to the 2005 Proceeding.

Reed argues that issue preclusion is inapplicable because Keith was not a party to the 2005 Proceeding. The 2005 Proceeding was instead filed against CMK, a corporation of which Keith was president and CEO.

Generally, issue preclusion under Arizona law requires "common identity of parties" between the two proceedings. Hullett, 63 P.3d at 1034-35. However, common identity is not necessary in all circumstances:

> Depending on whether collateral estoppel is being invoked "offensively" or "defensively," the last element regarding common identity of the parties may not be required. Offensive use of collateral estoppel occurs when a plaintiff seeks to prevent the defendant from relitigating an issue the defendant previously litigated unsuccessfully in an action with another party; defensive use occurs when a defendant seeks to prevent a plaintiff from asserting a claim the plaintiff previously litigated unsuccessfully against another party. Parklane Hosiery Co. v. Shore, 439 U.S. 322, 326 n.4, 99 S.Ct. 645, 58 L.Ed.2d 552 (1979). If the first four elements of collateral estoppel are present, Arizona permits defensive, but not offensive use of the doctrine. Standage Ventures, Inc. v. State, 114 Ariz. 480, 484, 562 P.2d 360, 364 (1977); Food for Health Co. v. 3839 Joint Venture, 129 Ariz. 103, 106-07, 628 P.2d 986, 989-90 (App.1981).

Campbell v. SZL Props., Ltd., 62 P.3d 966, 968 (Ariz. Ct. App. 2003).

Here, Reed brought the instant complaint against Keith, who was not a party to the 2005 Proceeding. However, Keith has asserted issue preclusion defensively to prevent relitigation of issues that Reed did not prevail on against CMK. Since Keith has

established the first four elements of issue preclusion through the record, he need not have been a party to the 2005 Proceeding in order to assert the doctrine defensively.

3. Issue Preclusion is available even though the instant causes of action accrued after the 2005 Decision was entered.

Reed argues that his adversary complaint should not be precluded because his intentional tort claims did not accrue until 2008, well after the 2005 Decision.[8] This contention might be correct if the bankruptcy court had applied claim preclusion, but is irrelevant to the question of issue preclusion.

The Supreme Court has clarified the difference between claim preclusion and issue preclusion:

> Claim preclusion generally refers to the effect of a prior judgment in foreclosing successive litigation of the very same claim, whether or not relitigation of the claim raises the same issues as the earlier suit. Issue preclusion generally refers to the effect of a prior judgment in foreclosing successive litigation of an issue of fact or law actually litigated and resolved in a valid court determination essential to the prior judgment, whether or not the issue arises on the same or a different claim.

New Hampshire v. Maine, 532 U.S. 742, 748-49 (2001).

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[8] Reed also argues that his complaint should not be precluded because he did not seek, and ROC had no jurisdiction to grant, a money judgment against CMK. Yet Reed failed to raise this argument below. Generally, appellate courts will not consider arguments that are not properly raised in the trial courts. NetBank, FSB v. Kipperman (In re Commercial Money Ctr., Inc.), 350 B.R. 465, 485 (9th Cir. BAP 2006) (citing O'Rourke v. Seaboard Sur. Co. (In re E.R. Fegert Inc.), 887 F.2d 955, 957 (9th Cir. 1989)). However, even if we did consider this issue, it is not relevant to preclusion as to the issue of the acceptability of Keith's recommendations in the Project Summary. It instead relates to a separate element of Reed's instant claims: damages.

Since the 2005 Decision has preclusive effect for an element of each of Reed's instant intentional tort claims, the question of when those claims accrued is inapposite. The ALJ's 2005 Decision that floating the walls complied with industry standards rendered the recommendation contained in the Project Summary acceptable under Building Codes. As long as issue preclusion is available to apply regarding the Project Summary recommendations, the question of when Reed's damages occurred and when his claims subsequently accrued is immaterial. Essentially, the ALJ's findings in the 2005 Decision about the Project Summary prevent Reed from prevailing on that necessary element of the instant claims, meaning he will be unable to prevail on the merits of this current proceeding absent relitigation of that question.

B. The bankruptcy court did not abuse its discretion when it denied the Motion to Reconsider.

Reed argues that the bankruptcy court erred by denying the Motion to Reconsider.[9] A bankruptcy court has broad discretion in deciding whether to reconsider its own orders, and a motion for reconsideration should not be granted in the absence of highly unusual circumstances. 389 Orange St. Partners v. Arnold, 179 F.3d 656, 665 (9th Cir. 1999). Generally, granting a motion

[9] Reed attached the order denying the Motion to Reconsider to his notice of appeal, but did not expressly argue in his appeal briefs that the bankruptcy court erred by denying that Motion. However, he did argue that the bankruptcy court erred by dismissing the § 727 claims on the basis that the bankruptcy court incorrectly concluded in its issue preclusion analysis that he is not a creditor, an argument only made in the Motion to Reconsider. We will treat that argument as an appeal of the denial of that motion.

for reconsideration is only proper if the bankruptcy court 1) is presented with newly discovered evidence that was not available at the time of the original hearing, or 2) committed clear error or made a decision that was manifestly unjust, or 3) there is an intervening change in controlling law. Zimmerman, 255 F.3d at 740.

Reed has alleged no newly discovered evidence, nor has he alleged an intervening change in controlling law, so we treat the Motion to Reconsider as alleging the bankruptcy court committed clear error or made a decision that was manifestly unjust.

Reed argues the bankruptcy court erred by dismissing his § 727 objections to discharge on the grounds that the bankruptcy court incorrectly applied issue preclusion to determine that Reed is not a creditor. Since we determined that the bankruptcy court correctly applied issue preclusion, we find no error in its conclusion that Reed is not a creditor. Section 727 governs objections to discharge, and who may assert them:

> (c)(1) The trustee, a creditor, or the United States trustee may object to the granting of a discharge under subsection (a) of this section.
>
> (2) On request of a party in interest, the court may order the trustee to examine the acts and conduct of the debtor to determine whether a ground exists for denial of discharge.

Since Reed is not the trustee, a creditor, or the United States trustee, § 727(c)(1) bars him from objecting to Keith's discharge. Additionally, Reed never requested the court order the trustee to examine Keith's acts to determine whether a ground existed to deny discharge, so we need not consider whether Reed qualified as a party in interest with the right to make such a

request under § 727(c)(2).

Reed also argued that the bankruptcy court should reconsider its minute entry order under Civil Rule 60(b)(3), because Keith committed a fraud on the bankruptcy court by misrepresenting the 2005 Proceeding during the hearing on Keith's motion to dismiss. Keith stated at the hearing that he was personally sued and the resulting decision had determined he owed no debt to Reed. However, the bankruptcy court stated on the record only a few minutes later, "While it's technically true that Keith was not a named party in that, the facts were litigated, and Arizona recognizes the affirmative [sic] use of collateral estoppel." The bankruptcy court then continued on to note that "Reed had a full and fair opportunity to litigate these issues, did litigate them and lost," which made issue preclusion available to the court. The bankruptcy court recognized that CMK, not Keith, was a party in the 2005 Proceeding, but applied issue preclusion defensively. We conclude that the bankruptcy court did not abuse its discretion in denying the Motion to Reconsider.

VI. CONCLUSION

For the reasons set forth above, we AFFIRM.