

OCT 8 2013

NOT FOR PUBLICATION

SUSAN M. SPRAUL, CLERK
U.S. BKCY. APP. PANEL
OF THE NINTH CIRCUIT

UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT

5	In re:)	BAP No. NC-12-1601-JuPaD
6	ARMIN D. VAN DAMME,)	Bk. No. NC-09-41772-RLE
7	Debtor.)	Adv. No. NC-09-04161-RLE
8	<hr/>)	
9	ARMIN D. VAN DAMME,)	
	Appellant,)	
10	v.)	M E M O R A N D U M *
11	HAMMER 1994 TRUST and BILL)	
12	HAMMER, TRUSTEE and)	
13	INDIVIDUALLY,)	
	Appellees.)	
14	<hr/>)	

Argued and Submitted on September 20, 2013
at San Francisco, California

Filed - October 8, 2013

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

Honorable Roger L. Efremsky, Bankruptcy Judge, Presiding

Appearances: Christina Ann-Marie DiEdoardo, Esq. argued for
appellant Armin Van Damme; John G. Benedict,
Esq., argued for appellees Hammer 1994 Trust and
Bill C. Hammer.

Before: JURY, PAPPAS, 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 Chapter 7¹ debtor, Armin Van Damme (defendant or debtor),
2 appeals from the bankruptcy court's judgment in favor of
3 creditor-appellees, Hammer 1994 Trust, Bill C. Hammer, trustee,
4 and Bill C. Hammer, as an individual (plaintiffs or Hammer),
5 finding that the state court judgment debt in the amount of
6 \$378,295.03 owed by debtor to plaintiffs was nondischargeable
7 under § 523(a)(6) on the basis of issue preclusion. We AFFIRM.

8 **I. FACTUAL BACKGROUND AND PROCEDURAL HISTORY²**

9 In the late 1980's, the Hammer family built a single-family
10 home on property located in Las Vegas, Nevada, and has lived
11 there ever since (Hammer Property). In January 2004, Armin and
12 his wife, Geraldine Van Damme (collectively, the Van Dammes),
13 purchased property in the Twin Palms subdivision (Defendant's
14 Property). Defendant's Property is adjacent to the Hammer
15 Property although they are in different subdivisions.

16 Sometime in the mid-1980's, developers of Defendant's
17 Property erected a stone wall along the common boundary between
18 the Hammer Property and Defendant's Property. The following
19 year, developers of the Hammer Property erected a retaining and
20

21 ¹ Unless otherwise indicated, all chapter and section
22 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532.
23 "Rule" references are to the Federal Rules of Bankruptcy
24 Procedure and "Civil Rule" references are to the Federal Rules of
25 Civil Procedure.

26 ² In stating the facts and procedural background, we borrow
27 heavily from the bankruptcy court's findings of fact stated on
28 the record on August 23, 2012, from the Panel's decision in
Hammer v. Van Damme (In re Van Damme), BAP No. NC-10-1169-KiSaH
filed February 1, 2011, and from the Findings of Fact and
Conclusions of Law (FFCL) filed by plaintiffs and adopted by the
state court in Nevada District Court Case No. A493040.

1 privacy wall on the Hammer Property approximately one foot from
2 the stone wall along the common boundary, leaving a gap (Gap)
3 between the two walls. At all relevant times, plaintiffs owned
4 the Gap.

5 In June 2004, the Van Dammes demolished a portion of the
6 stone wall and began constructing a pool grotto using the Hammer
7 Property's wall as an anchor for attaching devices to support
8 associated pool features. Plaintiffs immediately orally advised
9 the Van Dammes that the construction was illegal and they were
10 trespassing and requested the Van Dammes cease all work on the
11 pool grotto. Between June 23, 2004, and July 12, 2004,
12 plaintiffs warned the Van Dammes on at least five occasions of
13 the illegality of the trespass by posting "no trespassing" signs
14 and providing them with copies of the relevant Nevada statutes.
15 The Van Dammes removed or destroyed all of the signs.
16 Plaintiffs also sent the Van Dammes three written notices of
17 their trespass. The Van Dammes refused to remove that portion
18 of the grotto encroaching on the Hammer Property and continued
19 with its construction.

20 As part of the construction of the grotto, defendant
21 submitted a building permit application representing that he
22 owned all the land upon which the grotto would be constructed.
23 Also during the construction of the grotto on the Hammer
24 Property, defendant intentionally spray-painted Bill Hammer in
25 the face and upper body.

26 As a result of the spray paint incident and trespass,
27 plaintiffs filed a complaint with the local police authorities.
28 Criminal charges were filed against defendant. At trial,

1 however, he was found not guilty.

2 In October 2004, plaintiffs commenced a civil proceeding
3 against the Van Dammes in the Nevada state court asserting
4 claims for trespass, quiet title, slander of title, and battery,
5 Case No. A493040. Plaintiffs also sought an injunction
6 requiring the Van Dammes to cease construction of the pool
7 grotto and return the Hammer Property to its prior condition.

8 In response, the Van Dammes filed a counterclaim against
9 plaintiffs asserting claims for quiet title, malicious use of
10 process, and trespass. Van Dammes based their quiet title
11 counterclaim on a claim for adverse possession.

12 Plaintiffs filed two motions for partial summary judgment,
13 one directed at Van Dammes' counterclaim for quiet title and the
14 other directed at their malicious use of process and trespass
15 counterclaims. The Van Dammes did not oppose plaintiff's motion
16 regarding their counterclaim for quiet title (they failed to
17 file an opposition or appear at the hearing), but they did
18 oppose plaintiff's motion regarding their counterclaims for
19 malicious use of process and trespass.

20 On July 8, 2008, the Nevada state court issued two orders
21 granting partial summary judgment in favor of plaintiffs and
22 against the Van Dammes. The two orders effectively eliminated
23 the Van Dammes' counterclaims against plaintiffs, as well as
24 adjudicated plaintiffs' affirmative claim for quiet title – the
25 Gap belonged to plaintiffs.

26 The first order ("PSJ Order 1") dismissed the Van Dammes'
27 quiet title counterclaim, with prejudice. It determined that in
28 three years of litigation the Van Dammes failed to provide a

1 scintilla of admissible evidence to support an adverse interest
2 in the Hammer Property; they had failed to prove even one
3 element of the adverse possession statute. Thus, the Nevada
4 state court concluded that the Van Dammes' counterclaim for
5 quiet title was filed in bad faith because no justifiable basis
6 existed for the counterclaim.

7 Specifically, it ruled the Van Dammes willfully,
8 intentionally, and deliberately encroached upon the Hammer
9 Property by partially tearing down the stone wall and, in
10 disregard of multiple warnings to cease and without consent,
11 willfully, intentionally, and deliberately utilized portions of
12 the Hammer Property wall to support the pool grotto. Further,
13 the Van Dammes' conduct was "malicious because [their] actions
14 were without any just cause or excuse and were substantially
15 certain to cause harm to the [Hammer] Property . . ." as
16 demonstrated by their refusal to cease trespass and construction
17 of the pool grotto despite plaintiffs' repeated warnings. The
18 Van Dammes' failure to conduct any due diligence whatsoever
19 prior to construction was another factor showing the "willful
20 and malicious nature of their scheme and substantially certain
21 resulting harm for which there was no just cause or excuse." As
22 a result, the Van Dammes' willful and malicious conduct caused
23 the title of the Hammer Property to become uninsurable, and it
24 caused a cloud on the title which restricted conveyance of the
25 Hammer Property and destroyed its value at a time when it was a
26 "seller's" market in Las Vegas.

27 The second order ("PSJ Order 2") dismissed the Van Dammes'
28 counterclaims for malicious use of process and trespass, with

1 prejudice. Although the Van Dammes opposed plaintiffs'
2 underlying motion, they again failed to produce in over three
3 years a shred of admissible evidence to support either claim.
4 PSJ Order 2 further stated that the Van Dammes' actions were
5 done willfully, intentionally and deliberately and were
6 substantially certain to, and did, result in harm to plaintiffs.

7 The Nevada state court tried plaintiffs' remaining claims
8 over several days in August and October 2008. The final date of
9 trial was set for December 22, 2008.

10 On December 16, 2008, Geraldine filed a chapter 7 petition
11 in the Northern District of California bankruptcy court, Case
12 No. 08-47480. In that case, Geraldine listed Mr. Hammer as a
13 creditor. Geraldine's filing stayed the state court action as
14 to her.

15 However, the state court trial continued and was concluded
16 as to debtor. The Nevada court took the matter of damages under
17 submission.

18 On February 25, 2009, the Nevada court issued a detailed,
19 twenty-three page Memorandum of Decision finding in favor of
20 plaintiffs and against debtor on all claims. Although the state
21 court judge signed the Memorandum of Decision on February 25,
22 2009, it was not filed until March 18, 2009. The Nevada court
23 instructed plaintiffs to prepare the FFCL in line with its
24 decision.

25 On March 6, 2009, debtor filed his chapter 7 petition in
26 the Northern District of California bankruptcy court.

27 **Plaintiffs' Adversary Proceeding Against Geraldine**

28 On the same date, plaintiffs filed an adversary proceeding

1 in Geraldine's bankruptcy case seeking to have their judgment
2 debt declared nondischargeable under § 523(a)(6).

3 Plaintiffs' then-counsel, Marion Marshall, advised the
4 bankruptcy court that the trial in the Nevada state court had
5 been completed and after the judgment was entered she might be
6 able to proceed with summary judgment in the adversary against
7 Geraldine.

8 On March 11, 2009, Geraldine received her discharge under
9 § 727.

10 On April 29, 2009, the bankruptcy court granted plaintiffs
11 limited relief from stay for the Nevada court to make its FFCL
12 and enter final judgment.

13 Geraldine filed a motion for judgment on the pleadings
14 under Civil Rule 12(c). Plaintiffs filed a counter motion for
15 summary judgment (MSJ) relying on PSJ Orders 1 and 2 and issue
16 preclusion, contending that both orders established the willful
17 and malicious requirements under § 523(a)(6).

18 On October 5, 2009, the bankruptcy court heard the motions
19 and took the matters under submission.

20 On November 9, 2009, the bankruptcy court entered its
21 Memorandum of Decision denying Geraldine's motion and denying
22 plaintiffs' MSJ. In applying California preclusion law³ to PSJ
23 Order 1, the bankruptcy court found that not all the elements

24
25 ³ In Hammer v. Van Damme (In re Van Damme), BAP No.
26 NC-10-1169-KiSaH, the Panel concluded that Nevada preclusion law
27 rather than California preclusion law should have been applied,
28 but that the bankruptcy court's application of California law was
harmless because the same result would follow upon application of
Nevada law.

1 for issue preclusion were met. At issue was the fourth element
2 which requires an issue to be actually and necessarily
3 litigated.

4 Although the court found that the issues of willfulness,
5 malice, and resulting injury to an entity other than the debtor
6 were actually litigated and determined in the state court action
7 based on the state court's ruling in PSJ Order 1, the court
8 determined that those issues were not "necessarily determined"
9 because in an action to quiet title, the state of mind or motive
10 of the party making the adverse assertion of title was
11 irrelevant. Accordingly, the bankruptcy court determined that
12 the state court's findings and holdings with respect to the Van
13 Dammes' willful and malicious conduct were not "necessarily
14 determined" in connection with the quiet title claim and thus
15 could not be used for issue preclusion purposes in the
16 bankruptcy court action. The court did not consider PSJ Order 2
17 in its decision because that order simply dismissed the Van
18 Dammes' counterclaims for malicious use of process and trespass
19 and did not determine any of plaintiffs' other affirmative
20 claims: slander of title, trespass and battery. The bankruptcy
21 court denied plaintiffs' subsequent motion for reconsideration.
22 Plaintiffs then voluntarily elected to not proceed to trial
23 against Geraldine.

24 On April 28, 2010, the bankruptcy court issued an order
25 dismissing plaintiffs' adversary proceeding against Geraldine,
26 with prejudice, for failure to prosecute. Plaintiffs appealed
27 the order dismissing the adversary proceeding, the order denying
28 their MSJ and the order denying their motion for reconsideration

1 to this Panel. The Panel affirmed the bankruptcy court's orders
2 denying plaintiffs' MSJ and dismissing the case in BAP No. NC-
3 10-1169-KiSaH.⁴

4 **Plaintiffs' Adversary Proceeding Against Debtor**

5 On March 31, 2009, plaintiffs filed the instant adversary
6 proceeding seeking to have the state court judgment debt against
7 debtor declared nondischargeable under § 523(a)(6). In their
8 general allegations, plaintiffs reiterated many of the facts
9 stated above in connection with the Nevada state court lawsuit.
10 However, in debtor's proceeding, plaintiffs relied on the actual
11 trial record in the Nevada state court, not just the PSJ orders,
12 since that court had concluded the trial against debtor after
13 Geraldine filed her bankruptcy petition. They attached copies
14 of their state court complaint, the Nevada court's Memorandum of
15

16 ⁴ Since the adversary proceeding was dismissed, Geraldine's
17 discharge protects postpetition community property from
18 collection efforts by any creditor holding a prepetition
19 community claim because a discharge permanently enjoins
enforcement of prepetition community claims against all
future-acquired community property:

20 [A] nondebtor spouse in a community property state
21 typically benefits from the discharge of the debtor
22 spouse. According to Section 524(a)(3), after-acquired
23 community property is protected by injunctions against
24 collection efforts by those creditors who held
allowable community claims at the time of filing. This
is so even if the creditor claim is against only the
nonbankruptcy spouse; the after-acquired community
property is immune.

26 Roos v. Kimmel (In re Kimmel), 378 B.R. 630, 638 (9th Cir. BAP
27 2007). Thus, although the issue is not before us despite the
28 briefing of the issue in the appellate briefs, the Van Dammes'
after acquired community property would be immune from collection
under this holding.

1 Decision, and PSJ Order 1 and 2. Under their § 523(a)(6) claim,
2 plaintiffs alleged that debtor's conduct in creating and
3 maintaining the trespass was willful and malicious, that his
4 conduct in spraying Bill Hammer in the face and torso with paint
5 constituted a battery that was willful and malicious, and that
6 debtor's conduct resulted in a slander of title to the trust
7 property and constituted deliberate acts which were willful and
8 malicious.

9 On April 17, 2009, the bankruptcy court granted limited
10 relief from stay for the Nevada court to enter its FFCL and
11 final judgment.⁵

12 On May 3, 2011, the bankruptcy court held a status
13 conference in debtor's adversary.⁶ Plaintiffs' counsel failed
14 to appear and the adversary proceeding was dismissed.

15 Plaintiffs filed a motion to reconsider the dismissal based
16 on their counsel's failure to appear at the status conference
17 due to a calendaring error. At the August 2, 2011 hearing, the
18 bankruptcy court granted the motion. At that time, the court
19 asked plaintiffs' counsel whether the adversary proceeding could
20 be decided by summary judgment. Plaintiffs' counsel advised the

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22 ⁵ The order also retroactively annulled the automatic stay
23 to validate the Nevada court's Memorandum Decision which was
24 signed prepetition on February 25, 2009, but file-stamped
postpetition on March 18, 2009.

25 ⁶ Evidently the parties agreed to proceed to trial in
26 Geraldine's case first since it involved the same parties and
27 many of the same claims. The bankruptcy court approved this
28 approach and trailed the trial date for debtor's adversary
proceeding. Thereafter, debtor's adversary proceeding was
continued on multiple occasions due to the pendency of the BAP
appeal in Geraldine's adversary proceeding.

1 court that it could; debtor's counsel disagreed. The court also
2 noted that despite plaintiffs having limited relief from stay to
3 return to state court to obtain the FFCL and final judgment in
4 the Nevada state court, they had apparently taken no action to
5 do so. In other words, there still was no final judgment
6 entered in the state court action.⁷ Plaintiffs' counsel then
7 requested that the court not set a trial date. The bankruptcy
8 court declined this request and set the matter for trial to
9 commence on October 28, 2011.

10 On September 8, 2011, the court issued a scheduling order
11 governing pretrial procedures. Thereafter, plaintiffs' counsel
12 was successful in obtaining from the state court judge the
13 signed FFCL, which plaintiffs' counsel had prepared, and a final
14 judgment. The FFCL and judgment were filed in the state court
15 on September 22, 2011, with notice of entry dated October 4,
16 2011.

17 On September 27, 2011, plaintiffs filed a MSJ in the
18 adversary proceeding and scheduled a hearing for October 27,
19 2011, the day before trial. Plaintiffs alleged that the Nevada
20 judgment and FFCL established the elements of their § 523(a)(6)
21 claim for nondischargeability and thus issue preclusion should
22 apply. Attached to the MSJ were the Nevada state court's
23 eighty-one pages of FFCL.

24 On October 12, 2011, debtor appealed the state court's
25

26 ⁷ Recall that plaintiffs had obtained limited relief from
27 stay in debtor's case on April 17, 2009. Yet, more than two
28 years later, plaintiffs had taken no action to obtain a final
judgment in the Nevada state court.

1 decision.

2 On October 13, 2011, debtor filed opposition to the MSJ.
3 Debtor argued that the MSJ was untimely because the bankruptcy
4 court had scheduled a trial date. Debtor also raised numerous
5 issues as to why issue preclusion was not applicable under the
6 circumstances.⁸ Finally, debtor filed a counter motion for
7 abuse of process complaining about plaintiffs' delay. Debtor
8 requested dismissal of the adversary proceeding as a sanction
9 or, in the alternative, an order to prevent plaintiffs from
10 submitting any of the Nevada court's findings in a trial.

11 On October 18, 2011, debtor filed his trial brief.

12 On October 19, 2011, plaintiffs filed their trial brief.
13 On October 21, 2011, the bankruptcy court entered an order
14 vacating plaintiffs' MSJ hearing scheduled for October 27, 2011.
15 The court noted that the parties were ready for trial and that
16 if summary judgment were not granted in full, the trial would be
17 delayed again which would be "inappropriate, inefficient and
18 unfair." The court, however, noted that it may or may not give
19 issue-preclusive effect to the Nevada court's FFCL.

20 On October 28, 2011, the bankruptcy court conducted the
21 trial. In his opening statement, plaintiffs' counsel stated
22 that he was prepared to go to trial, but believed that, as a
23

24 ⁸ At one point debtor's counsel alleges that the state
25 court's FFCL were "hardly a model of judicial temperance" and
26 make "unsupported accusations of criminal activity wholly
27 inappropriate to a civil proceeding against Mr. Van Damme. . . ."
28 In connection with this statement, counsel contends that the
judge in the Nevada action, "has been intemperate in other
contexts as well" and then points out that he received a public
reprimand for driving under the influence of alcohol.

1 matter of law, issue preclusion should be given effect based
2 upon the Nevada court's Memorandum of Decision, the FFCL and the
3 judgment that was entered in the state court. Debtor's counsel
4 objected, but the bankruptcy made clear that its decision to
5 vacate the hearing on plaintiffs' MSJ did not mean that
6 plaintiffs could not rely upon the FFCL and the judgment that
7 was entered. The court explained that it vacated the hearing on
8 the MSJ because it did not want the MSJ to delay the trial.
9 Accordingly, the bankruptcy court informed plaintiffs' counsel
10 that he could try the case from the ground up or simply rely on
11 the judgment and the FFCL.

12 The court admitted numerous documents over the objection of
13 debtor's counsel. Plaintiffs' counsel then moved under Civil
14 Rule 52(c) seeking to have the bankruptcy court enter judgment
15 on the basis of the preclusive effect of the Nevada judgment and
16 the FFCL entered in the state court action. Debtor's counsel
17 argued against applying issue preclusion to the state court
18 judgment and complained about plaintiffs' delay in obtaining a
19 final judgment in the state court. She also asserted that
20 California rather than Nevada law applied and, therefore, the
21 state court judgment was not final because it had been appealed.
22 Finally, she urged the bankruptcy court to thoroughly examine the
23 record because plaintiffs' counsel had drafted the FFCL, citing
24 Silver v. Exec. Car Leasing Long-Term Disability, 466 F.3d 727,
25 733 (9th Cir. 2006).⁹

26
27 ⁹ Silver holds that "the wholesale and verbatim adoption of
28 one party's findings requires us to review the record and the
(continued...)

1 The bankruptcy court stated that it did not condone the
2 amount of time that had passed, but found that plaintiffs' MSJ
3 was properly filed. In vacating the MSJ, the court explained:
4 "I just wasn't going to let it interfere with the trial, because
5 at the time there was no findings of fact and conclusions of law
6 or final judgment when I initially set it for the trial date."
7 The court further found that it would apply Nevada law for
8 purposes of applying issue preclusion. In addition, the court
9 observed that plaintiffs' counsel's drafting of the FFCL was an
10 issue for the Nevada court of appeal. In the end, the
11 bankruptcy court concluded that it had to treat the Nevada
12 judgment as final and consider its preclusive effect. The
13 bankruptcy court took the matter under advisement.

14 On July 27, 2012, plaintiffs filed a motion requesting a
15 status conference regarding the bankruptcy court's decision.
16 Apparently plaintiffs had filed a cross-appeal in the state
17 court and the Nevada Supreme Court ordered the pending appeal to
18 be assigned to the Mandatory Settlement Program. The assigned
19 settlement judge vacated the settlement hearing due to the fact
20 that the bankruptcy court had not yet issued its decision and,
21 as a result, she did not feel she had authority to conduct the
22 settlement hearing. The Nevada Supreme Court later issued an
23 order which instructed state counsel for debtor to file a status
24 report regarding the bankruptcy proceeding within fifteen days.
25 Plaintiffs represented that debtor's counsel did not file any
26

27 ⁹(...continued)
28 [bankruptcy] court's opinion more thoroughly."

1 status report and therefore contended that they were caught in a
2 "whipsaw" between the bankruptcy court and their duties and
3 responsibilities to report objectively and accurately to the
4 Nevada Supreme Court. Therefore, plaintiffs requested a hearing
5 so that they could obtain information from the court regarding
6 the status of its decision.

7 On the same day, debtor's counsel filed a response to
8 plaintiffs' motion. Counsel stated that she was not
9 representing debtor in the state court appeal and told the court
10 to take all the time it needed "to issue a reasoned and proper
11 decision."

12 On August 23, 2012, the bankruptcy court read its FFCL into
13 the record. The court gave preclusive effect to the state
14 court's FFCL and concluded that the judgment debt was
15 nondischargeable under § 523(a)(6).

16 On October 30, 2012, the bankruptcy court entered the
17 judgment finding the amount of \$378,295.03 nondischargeable.
18 Broken down, the bankruptcy court found that as to all
19 plaintiffs, for trespass and slander of title, actual damages of
20 \$36,400, punitive damages of \$200,000, attorneys' fees of
21 \$10,000 for trespass, and attorneys' fees of \$100,000 for
22 slander of title, for a total of \$346,400 were nondischargeable
23 under § 523(a)(6). As to Bill C. Hammer, an individual, for
24 battery, compensatory damages of \$10,000, and punitive damages
25 of \$10,000, for a total of \$20,000 was nondischargeable under
26 § 523(a)(6). As to all plaintiffs, costs awarded in the amount
27 of \$11,895.03 were deemed nondischargeable under § 523(a)(6).

28 On November 12, 2012, debtor filed a timely notice of

1 appeal.

2 **II. JURISDICTION**

3 The bankruptcy court had jurisdiction over this proceeding
4 under 28 U.S.C. §§ 1334 and 157(b)(2)(I). We have jurisdiction
5 under 28 U.S.C. § 158.

6 **III. ISSUE**

7 Whether the bankruptcy court erred by giving preclusive
8 effect to the state court judgment for purposes of exclusion
9 from discharge under § 523(a)(6).

10 **IV. STANDARD OF REVIEW**

11 We review de novo the bankruptcy court's determination that
12 issue preclusion is available. Lopez v. Emerg. Serv.
13 Restoration, Inc. (In re Lopez), 367 B.R. 99, 103 (9th Cir. BAP
14 2007). Once we determine that issue preclusion is available, we
15 review whether applying it was an abuse of discretion. Id. A
16 bankruptcy court abuses its discretion when it applies the
17 incorrect legal rule or its application of the correct legal
18 rule is "(1) illogical, (2) implausible, or (3) without support
19 in inferences that may be drawn from the facts in the record."
20 United States v. Loew, 593 F.3d 1136, 1139 (9th Cir. 2010)
21 (quoting United States v. Hinkson, 585 F.3d 1247, 1261-62 (9th
22 Cir. 2009)(en banc)(internal quotation marks omitted)).

23 The question whether a claim is dischargeable presents
24 mixed issues of law and fact, which we also review de novo.
25 Peklar v. Ikerd (In re Peklar), 260 F.3d 1035, 1037 (9th Cir.
26 2001).

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1 V. DISCUSSION

2 A. Civil Rule 52(c)

3 We first address debtor's assertion that the bankruptcy
4 court's consideration of plaintiffs' Civil Rule 52(c) motion
5 seeking judgment against debtor on issue preclusion grounds was
6 procedurally improper. According to debtor, plaintiffs' Civil
7 Rule 52(c) motion was procedurally inappropriate because the
8 bankruptcy court had advised plaintiffs' counsel that it would
9 not continue the trial to consider a tardy motion for summary
10 judgment seeking nondischargeability of the state court judgment
11 debt based on issue preclusion and then, at the trial, the court
12 entertained plaintiffs' oral motion for a judgment based on
13 issue preclusion and took the matter under submission. As a
14 result, debtor maintains that his due process rights were
15 compromised because he was deprived of his right to a trial. We
16 disagree with debtor's procedural analysis.

17 Under Civil Rule 52(c), made applicable to this adversary
18 proceeding by Rule 7052, a court may grant a motion made by
19 either party, or may grant judgment sua sponte at any time
20 during a bench trial, so long as the party against whom judgment
21 is to be rendered has been "fully heard" with respect to an
22 issue essential to that party's case.¹⁰ As a result, the court

23
24 ¹⁰ Civil Rule 52(c) provides in relevant part:

25 If a party has been fully heard on an issue during a
26 nonjury trial and the court finds against the party on
27 that issue, the court may enter judgment against that
28 party on a claim or defense that, under the controlling
law, can be maintained or defeated only with a

(continued...)

1 need not wait until that party rests its case-in-chief to enter
2 judgment. Granite State Ins. Co. v. Smart Modular Techs., Inc.,
3 76 F.3d 1023, 1031 (9th Cir. 1996) (“[T]he rule ‘authorizes the
4 court to enter judgment at any time that it can appropriately
5 make a dispositive finding of fact on the evidence.’”).

6 The requirement that a party must first be “fully heard”
7 does not “amount to a right to introduce every shred of evidence
8 that a party wishes, without regard to the probative value of
9 that evidence.” First Va. Banks, Inc. v. BP Exploration & Oil,
10 Inc., 206 F.3d 404, 407 (4th Cir. 2000). The trial court has
11 discretion to enter a judgment on partial findings even though a
12 party has represented that it can adduce further evidence if,
13 under the circumstances, the court determines that the evidence
14 will have little or no probative value. Id.

15 Here, the bankruptcy court considered plaintiffs’ Civil
16 Rule 52(c) motion after the parties’ opening statements and
17 after considering debtor’s objections to plaintiffs’ evidence.
18 The court also allowed argument of counsel on whether judgment
19 was appropriate on issue preclusion grounds. In her opening
20 statement and again during the trial, debtor’s counsel argued
21 that, the evidence would show that at most, debtor’s actions
22 were negligent but not willful and malicious. Further, debtor’s
23 counsel argued vigorously against the application of issue
24 preclusion. Finally, the bankruptcy court asked plaintiffs’
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26 ¹⁰(...continued)
27 favorable finding on that issue. The court may,
28 however, decline to render any judgment until the close
of the evidence. . . .

1 counsel numerous questions about the state court judgment and
2 FFCL to determine whether their Civil Rule 52(c) motion was
3 warranted.

4 We surmise that after hearing the parties' extensive
5 arguments and the bankruptcy court's examination of the evidence
6 in support of issue preclusion, the court concluded that it was
7 "manifestly clear" that debtor's testimony could not prove that
8 the state court judgment had no preclusive effect. Once it
9 determined that debtor's testimony would not be sufficient to
10 rebut the application of issue preclusion, the bankruptcy court
11 properly exercised its discretion to halt the trial and take the
12 matter under submission. See Granite State Ins. Co., 76 F.3d at
13 1031; Stone v. Millstein, 804 F.2d 1434, 1437-38 (9th Cir.
14 1986). Accordingly, plaintiffs' Civil Rule 52(c) motion was
15 procedurally appropriate, and debtor was not deprived of his
16 right to a trial.

17 **B. Section 523(a)(6)**

18 Plaintiffs bear the burden of proving their claims against
19 defendant are excepted from discharge under § 523(a)(6) by a
20 preponderance of the evidence. Grogan v. Garner, 498 U.S. 279,
21 284 (1991). Section 523(a)(6) excepts from discharge any debt
22 for willful and malicious injury by the debtor to another entity
23 or to the property of another entity.

24 The standards for determining whether a debt falls within
25 the scope of § 523(a)(6) are well-defined. First,
26 nondischargeable debts under § 523(a)(6) must arise from
27 intentionally inflicted injuries. Carrillo v. Su (In re Su),
28 290 F.3d 1140, 1143 (9th Cir. 2002) (citing Kawaauhau v. Geiger,

1 523 U.S. 57 (1998)). Second, the "willful" and "malicious"
2 requirements under the statute involve separate analyses.
3 In re Su, 290 F.3d at 1146-47; see also Barboza v. New Form,
4 Inc. (In re Barboza), 545 F.3d 702, 711 (9th Cir. 2008)
5 (reinforcing Su and the requirement of courts to apply a
6 separate analysis for each prong of "willful" and "malicious").

7 A willful injury is proved by establishing facts that show
8 the debtor had the subjective intent to cause harm or the
9 subjective knowledge that harm was substantially certain to
10 occur from his conduct. Su, 290 F.3d at 1146. Proving
11 malicious conduct requires a showing that the debtor:
12 (1) committed a wrongful act; (2) done intentionally; (3) which
13 necessarily caused injury; and (4) was done without just cause
14 or excuse. Id. at 1146-47.

15 **C. Issue Preclusion**

16 The doctrine of issue preclusion applies to bankruptcy
17 dischargeability proceedings. Grogan v. Garner, 498 U.S. 279,
18 284 (1991). Plaintiffs had the burden of proving that the
19 elements for issue preclusion were met. Kelly v. Okoye
20 (In re Kelly), 182 B.R. 255, 258 (9th Cir. BAP 1995), aff'd,
21 100 F.3d 110 (9th Cir. 1996). To sustain this burden,
22 plaintiffs must have introduced a record sufficient to reveal
23 the controlling facts and the exact issues litigated in the
24 prior action. Reasonable doubts about what was decided in the
25 prior action should be resolved against the party seeking
26 preclusion. Id.

27 In determining the preclusive effect of a state court
28 judgment in nondischargeability proceedings, we apply the issue

1 preclusion rules of the state from which the judgment arose.
2 28 U.S.C. § 1738; Gayden v. Nourbakhsh (In re Nourbakhsh),
3 67 F.3d 798, 800 (9th Cir. 1995). Debtor contends that the
4 bankruptcy court erred by applying Nevada law rather than
5 California law. According to debtor, without citation to any
6 authority, the proper subject of inquiry is the preclusion law
7 of the state of residence of the debtor, since the point of the
8 proceeding is whether or not plaintiffs' claims would be
9 excepted from debtor's chapter 7 discharge. Debtor is mistaken.

10 The preclusive effect of a state court judgment in a
11 subsequent federal lawsuit is determined by the full faith and
12 credit statute, which provides that state judicial proceedings
13 "shall have the same full faith and credit in every court within
14 the United States . . . as they have by law or usage in the
15 courts of such State . . . from which they are taken."

16 28 U.S.C. § 1738 (emphasis added); Marrese v. Am. Acad. of
17 Orthopaedic Surgeons, 470 U.S. 373, 380 (1985). Debtor's
18 argument not only turns the plain language of the full faith and
19 credit statute on its head, but also ignores scores of case
20 authorities that apply the issue preclusion rules of the state
21 from which the judgment arose. See, e.g. In re Nourbakhsh,
22 67 F.3d at 800; Robi v. Five Platters, Inc., 838 F.2d 318, 321
23 (9th Cir. 1988) (Full Faith and Credit Act requires federal
24 courts to apply the res judicata rules of a particular state to
25 judgments issued by courts of that state and therefore the court
26 applied California law of res judicata to California judgment,
27 New York law to New York judgment and federal law to federal
28 judgment) (citing Parsons Steel, Inc. v. First Ala. Bank,

1 474 U.S. 518, 519 (1986)). Accordingly, since plaintiffs'
2 judgment was entered by a Nevada court, that state's issue
3 preclusion law applies.

4 Under Nevada law, application of issue preclusion requires
5 that (1) the issue is identical; (2) the initial ruling was
6 final and on the merits; (3) the party against whom the judgment
7 is asserted was a party or in privity with a party in the prior
8 case; and (4) the issue was actually and necessarily litigated.
9 Five Star Capital Corp. v. Ruby, 194 P.3d 709, 713 (Nev. 2008).
10 At the outset, we observe that the record shows that the third
11 element has been met; the parties are the same.

12 **1. The Issues are Identical**

13 Here, when the elements for plaintiffs' § 523(a)(6) claim
14 are compared to the elements of their state court slander of
15 title, trespass, and battery claims, the issues are identical.
16 Slander of title, trespass and battery are all intentional torts
17 under Nevada law. They thus fall within the purview of
18 § 523(a)(6) under Geiger, 523 U.S. at 60-62.

19 Slander of title "involves false and malicious
20 communications disparaging to one's title and land and causing
21 special damages." Exec. Mgmt. v. Ticor Title Ins. Co., 963 P.2d
22 465, 478 (Nev. 1988). Malice is a necessary element of a
23 slander of title claim. "In order to prove malice it must be
24 shown that the defendant knew that the statement was false or
25 acted in reckless disregard of its truth or falsity." Rowland
26 v. Lepire, 662 P.2d 1332, 1335 (Nev. 1983).

27 Under Nev. Rev. Stat. 207.200, "any person who, under
28 circumstances not amounting to a burglary: . . .(b) [w]illfully

1 goes or remains upon any land or in any building after having
2 been warned by the owner or occupant thereof not to trespass, is
3 guilty of a misdemeanor."

4 Nev. Rev. Stat. 200.481(1)(a) defines a battery as any
5 willful and unlawful use of force or violence upon the person of
6 another.

7 Finally, as to punitive damages, Nev. Rev. Stat. 42.005
8 mandates clear and convincing evidence of conduct which
9 constitutes "oppression, fraud or malice, express or implied,"
10 all of which terms are defined in Nev. Rev. Stat. 42.001:

11 (1) "Oppression" means despicable conduct that subjects a person
12 to cruel and unjust hardship with conscious disregard of the
13 rights of the person; (2) "Fraud" means an intentional
14 misrepresentation, deception or concealment of a material fact
15 known to the person with the intent to deprive another person of
16 his or her rights, property or to otherwise injure another
17 person; and (3) "Malice, express or implied" means conduct which
18 is intended to injure a person or despicable conduct which is
19 engaged in with a conscious disregard of the rights or safety of
20 others.

21 **2. The Nevada Judgment is Final**

22 Debtor argues on appeal that the order which plaintiffs
23 rely upon was not a "final order" because it was under appeal to
24 the Nevada Supreme Court at the time of the October 28, 2011
25 trial. Under Nevada law, in issue preclusion cases, a decision
26 is final and maintains its preclusive effect even if the
27 judgment is on appeal. Edwards v. Ghandour, 123 Nev. 105, 117,
28 159 P.3d 1086, 1094 (2007), rejected on other grounds by Five

1 Star Capital, 124 Nev. at 1053-54, 194 P.3d at 712-13 (Nev.
2 2008). Nevada's Supreme Court recognizes that in circumstances
3 where the first judgment is reversed or vacated and a second
4 judgment was rendered based on issue preclusion, the second
5 judgment should also be reversed. Edwards, 159 P.3d at 1094.
6 Here, the bankruptcy court also recognized this premise.¹¹
7 There is no indication in the record that the Nevada Supreme
8 Court has reversed the judgment. Therefore, the judgment is
9 final for issue preclusion purposes.

10 **3. The Issues Were Actually and Necessarily Litigated**

11 Under Nevada law, an issue is actually and necessarily
12 litigated if the "court in the prior action addressed and
13 decided the same underlying factual issues." Kahn v.
14 Morse & Mowbray, 117 P.3d 227, 235 (Nev. 2005). Here, the
15 Nevada court's Memorandum Decision and the more detailed FFCL
16 show that the prior action addressed and decided the same
17 underlying factual issues that are raised in this
18 nondischargeability action.

19 We start with the trial court's findings in its Memorandum
20 Decision which demonstrate that during the course of the trial,
21 the elements for a willful and malicious injury under
22 § 523(a)(6) were squarely addressed. That debtor's conduct was
23 willful is borne out by the trial court's finding that all the
24 elements for the intentional torts of slander of title, trespass
25 and battery were met. Furthermore, several findings demonstrate

26 _____
27 ¹¹ Civil Rule 60(b)(5), incorporated by Rule 9024, expressly
28 allows relief from judgment when an underlying judgment has been
reversed or vacated.

1 debtor's subjective intent to harm plaintiffs. The trial court
2 found that (1) debtor was the aggressor in each important
3 confrontation; (2) debtor cared nothing about the fact that some
4 of the Gap across which he trespassed and the wall he used as
5 structural support for his beloved grotto didn't ever belong to
6 him; and (3) referring to an exhibit, the court noted that
7 debtor had a "gleeful look" in his eyes when he carried the
8 paint gun up the ladder before spraying Hammer in the face.

9 The trial court's findings also expressly show that malice
10 motivated debtor's actions against plaintiffs. In addressing
11 the battery claim, the trial court found that debtor
12 "intentionally assaulted Mr. Hammer, and the [c]ourt finds that
13 he did so with malice and without sufficient provocation." In
14 awarding punitive damages on this claim, the court found that in
15 the "context of this case, it is truly serious and egregious
16 behavior on the part of Mr. Van Damme. As a consequence, the
17 [c]ourt is going to award exemplary damages, in the hope that
18 part of this Judgment will survive a [bankruptcy] petition by
19 Mr. Van Damme"

20 In addressing the slander of title and trespass claims, the
21 trial court found that each of the elements for slander of title
22 and trespass had been proven at trial by preponderance of the
23 evidence, "including by clear and convincing evidence the
24 necessary malice to support an award of exemplary damages. It
25 was the same continuing malice, which infected and motivated
26 Mr. Van Damme's actions in his trespass, in his lawsuit and in
27 his fraudulent claim to title."

28 The FFCL fill in more detail. In the FFCL, the court found

1 that debtor acted willfully, wantonly, and maliciously by
2 continuing to build the grotto and encroach on the Hammer
3 Property "knowing full well that such action would impede,
4 impair, or diminish the value of the property owned by the
5 Trust." The findings further show that plaintiffs repeatedly
6 told the Van Dammes verbally and in writing that they owned the
7 Gap, posted "No Trespassing" signs, obtained a Record of Survey
8 showing that the Hammer Trust owned all the property in the GAP
9 and attached that survey to the verified complaint plaintiffs
10 filed and served on the Van Dammes. Nonetheless, despite
11 plaintiffs' warning to cease construction of the grotto, the Van
12 Dammes continued with the construction of the grotto, falsely
13 asserted ownership to the Gap, and trespassed on the Hammer
14 Property. Finally, the trial court found that the "Van Dammes
15 had absolutely no good faith basis for a claim of ownership to
16 any property in the [G]ap or to the Hammer [t]rust [p]rivacy
17 [w]all." These findings leave no doubt that debtor had the
18 subjective intent to cause plaintiffs harm. Su, 290 F.3d at
19 1146.

20 They further show that debtor acted with malice. He
21 committed the wrongful acts of slander of title, trespass and
22 battery, and did so intentionally. The Nevada court found that
23 those acts caused plaintiffs economic harm and were done without
24 just cause or excuse. Id. at 1146-47.

25 Any liability duly imposed as a direct, but-for result of
26 the defendant's nondischargeable conduct constitutes a
27 nondischargeable debt, regardless of whether the liability
28 reflects the actual damages incurred by the plaintiff. See

1 Cohen v. de la Cruz, 523 U.S. 213, 220 (1998) (holding
2 nondischargeable under § 523(a)(2)(A) treble damages based on
3 debtor's fraudulent conduct). Therefore, on the slander of
4 title and trespass claims with respect to all plaintiffs, actual
5 damages of \$36,400, punitive damages of \$200,000, plus
6 attorneys' fees of \$10,000 attributable to the trespass, and
7 \$100,000 attributable to the slander of title for a total of
8 \$346,400 are nondischargeable under § 523(a)(6). On the battery
9 claim, with respect to Bill C. Hammer individually, actual
10 damages of \$10,000 and punitive damages of \$10,000 are
11 nondischargeable under § 523(a)(6). As to all plaintiffs, costs
12 awarded in the amount of \$11,895.03 as determined by the Nevada
13 state court are also nondischargeable under § 523(a)(6).

14 **D. Abuse of Discretion**

15 Having concluded that issue preclusion was available
16 because all of the doctrine's requirements were met, we consider
17 next whether the bankruptcy court properly exercised its
18 discretion to apply it. "The discretionary aspect of issue
19 preclusion is settled as a matter of federal law." In re Lopez,
20 367 B.R. at 107-08. Nevada law is in accord, holding that once
21 it is determined that issue preclusion is available, the actual
22 decision to apply it is left to the discretion of the "tribunal
23 in which it is invoked." Redrock Valley Ranch v. Washoe Cnty.,
24 254 P.3d 641, 646-47 (Nev. 2011). The doctrine of issue
25 preclusion is grounded in considerations of basic fairness to
26 the litigants. In re Sandoval, 232 P.3d at 424-25.

27 Debtor contends that issue preclusion should not be
28 available because the trial judge rubber-stamped plaintiffs'

1 views by signing the FFCL. However, we see no rubber-stamping
2 here. The trial court itself provided the framework for the
3 proposed FFCL when it issued its Memorandum Decision. In its
4 decision, the trial court set forth its essential findings and
5 directed plaintiffs' counsel to submit a more detailed set of
6 findings consistent with them. Under these circumstances, we
7 see no reason to doubt that the FFCL signed by the trial judge
8 represent the judge's own considered conclusions regarding
9 debtor's conduct. See Anderson v. City of Bessemer, N.C.,
10 470 U.S. 564, 572 (1985).

11 Debtor also complains that the bankruptcy court erred by
12 applying issue preclusion "retroactively" because debtor's
13 bankruptcy and adversary proceeding predated the state court
14 judgment by several years. Debtor's use of the term
15 "retroactive issue preclusion" is misleading. What debtor seems
16 to be complaining about is plaintiffs' long delay in filing the
17 FFCL in the state court, requesting entry of a final judgment
18 and then over two years later proceeding with the bankruptcy
19 court trial. However, part of the delay in proceeding with
20 debtor's trial was the bankruptcy court's decision to postpone
21 the trial until plaintiffs' adversary proceeding against
22 debtor's wife in her bankruptcy case concluded.

23 In sum, while in certain cases it is fundamentally unfair
24 to apply issue preclusion, this is not such a case. Therefore,
25 the bankruptcy court did not abuse its discretion in applying
26 the doctrine to the state court judgment.

27 **E. Entry of a Money Judgment**

28 Finally, debtor argues that the bankruptcy court erred in

1 granting plaintiffs a money judgment given that their complaint
2 only sought a finding that an allegedly preexisting claim was
3 excepted from debtor's discharge. Bankruptcy courts in this
4 Circuit have subject matter jurisdiction to enter a money
5 judgment in a nondischargeability proceeding where the
6 underlying debt has been reduced to judgment in a state court.
7 Sasson v. Sokoloff (In re Sasson), 424 F.3d 864, 869-70 (9th
8 Cir. 2005); Deitz v. Ford (In re Deitz), 469 B.R. 11, 20 (9th
9 Cir. BAP 2012). To the extent debtor is arguing that the
10 bankruptcy court granted relief beyond that requested in the
11 complaint, that contention is wholly without merit.

12 VI. CONCLUSION

13 For the reasons stated above, we conclude that the
14 bankruptcy court properly applied issue preclusion and we see no
15 abuse of discretion in the bankruptcy court's decision.
16 Therefore, plaintiffs' judgment debt against debtor is
17 nondischargeable under § 523(a)(6). We AFFIRM.