

DEC 10 2013

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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NOT FOR PUBLICATION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

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In re:)	
MENELAOS SARIDAKIS and)	BAP Nos. CC-13-1028-PaTaD
LISA SARIDAKIS,)	CC-13-1029-PaTaD
)	(Consolidated)
Debtors.)	
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)	Bk. No. 10-24580-BR
)	Adv. No. 11-01499-BR
JAN JANURA; CAROL ANDERSON;)	
JAN JANURA as trustees of the)	
Janura-Anderson Revocable Trust;)	
CAROL ANDERSON as trustee of the,)	
Janura-Anderson Revocable Trust,)	
)	
Appellants,)	
)	
v.)	M E M O R A N D U M ¹
)	
MENELAOS SARIDAKIS;)	
LISA SARIDAKIS,)	
)	
Appellees.)	
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Argued and Submitted on November 22, 2013
at Pasadena, California

Filed - December 10, 2013

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

Honorable Barry Russell, Bankruptcy Judge, Presiding

Appearances: Michael David Franco, Esq. argued for appellants;
Stephen B. Goldberg, Esq. of Spierer Woodward
Cobalis & Goldberg APC argued for appellees.

Before: PAPPAS, TAYLOR and DUNN, Bankruptcy Judges.

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

1 Appellants Jan Janura and Carol Anderson, as individuals and
2 as trustees of the Janura-Anderson Revocable Trust ("Appellants"),
3 appeal the bankruptcy court's judgment denying an exception to
4 discharge as to the debt owed them by Lisa and Menelaos Saridakis
5 ("Debtors") under § 523(a)(2)(A), (a)(4) and (a)(6), and the order
6 denying Appellants' motion for a new trial based on newly
7 discovered evidence. We AFFIRM.

8 **FACTS**

9 Appellants entered into a contract to purchase a condominium
10 unit in Redondo Beach, California (the "Property") from Debtors,
11 who were both the builders and sellers of the Property. After the
12 September 2008 closing, and upon taking possession, Appellants
13 discovered numerous building defects, only some of which were
14 repaired or resolved by Debtors. Appellants sued Debtors and
15 their construction company, Saridakis Construction, Inc., in state
16 court.² The action was stayed when, on April 15, 2010, Debtors
17 filed a chapter 7 bankruptcy petition.

18 Appellants sought relief from the automatic stay in the
19 bankruptcy case to proceed with the state court action, which
20 relief was granted by the bankruptcy court on August 19, 2011.
21 The state court action progressed to the point where Appellants
22 sought entry of a default judgment against both Debtors
23 individually and their company on February 2, 2012. Appellants
24 submitted a proposed default judgment to the state court on
25 July 27, 2012, as to Debtors individually, and on August 14, 2012,
26 as to their corporation. After a lengthy delay, during which it

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28 ² Esplande Redondo, LLC fka Jan Janura and Carol Anderson v. Williams Campbell, et al., Cal. Superior Ct. Case No. YC065041.

1 appears the proposed judgments were lost, Appellants resubmitted
2 the proposed default judgments and, on November 7, 2012, the
3 default judgment was entered against the corporation. Unbeknownst
4 to the parties, a default judgment also apparently was entered
5 against Debtors individually on November 7, 2012. The default
6 judgment against Debtors specifically found that Debtors engaged
7 in fraud, and awarded damages to Appellants totaling \$272,905.10.³

8 On February 10, 2011, Appellants commenced an adversary
9 proceeding in the bankruptcy court against Debtors seeking a
10 determination that the judgment debt was excepted from discharge
11 under § 523(a)(2)(A), (a)(4) and (a)(6). A trial occurred on

12 ³ While Appellants contend there was a default judgment
13 against Debtors in place at the time the bankruptcy court
14 conducted the trial, we have concerns about the accuracy of that
15 representation. The record on appeal includes a copy of the
16 default judgment against Debtors, dated November 7, 2012, as well
17 as a copy of the state court's docket. Curiously, the judgment
18 does not appear in the docket. The docket instead indicates that
19 only one default judgment was entered, against the corporation,
20 dated November 7, 2012, and provides: "Default Judgment (FOR
21 PLAINTIFFS VS. SARIDAKIS CONSTRUCTION, INC. FOR A TOTAL MONETARY
22 JUDGMENT OF \$272,905.10 - JUDGMENT SIGNED BY JUDGE GRAY)." At
23 trial in the bankruptcy court, Appellants' counsel acknowledged
24 that this judgment was against the corporation only.

25 To add to the confusion, the Panel questions the continuing
26 validity of the default judgment against the corporation on the
27 date the bankruptcy court trial was conducted. Fed. R. Evid.
28 201(b)(2) authorizes a bankruptcy court to take judicial notice of
facts which may be accurately and readily determined from sources
whose accuracy may not reasonably be questioned. Pursuant to this
authority, we have independently checked the state court's docket,
which shows, as to the default judgment against the corporation,
that "***JUDGMENT VACATED PURSUANT TO COURT'S 11/15/12 ORDER **."
However, no order dated November 15, 2012 appears on the docket to
explain this addendum.

29 The import of all this is perplexing. It is possible that
30 the state court entered a default judgment against Debtors on
31 November 7, 2012, as it appears in the record on appeal, but for
32 some reason, this judgment was not entered in the state court's
33 docket. There are other possible scenarios about which we will
34 not speculate. However, because the record contains a copy of a
35 default judgment against Debtors dated November 7, 2012, for
36 purposes of this appeal, the Panel assumes it was validly entered
37 on that date.

1 November 14, 2012, at which the bankruptcy court determined that
2 the state court had entered a default judgment against the
3 corporation only. After hearing the parties' evidence, the
4 bankruptcy court ruled that Appellants had not shown that Debtors
5 knew of the defects and concealed them. In light of this
6 determination, during the oral ruling following the trial, the
7 bankruptcy court vacated its prior stay relief order, indicating
8 that it did not want a second judgment to be entered by the state
9 court. The bankruptcy court's oral ruling was followed up with a
10 written order, filed November 16, 2012, vacating the prior stay
11 relief order.

12 On January 9, 2013, Appellants filed an Application/Motion
13 for New Trial on the Basis of Newly Discovered Evidence. In the
14 motion, Appellants argued that the default judgment that had been
15 entered against Debtors in state court on November 7, 2012, was
16 new evidence which could not have been discovered prior to trial
17 by due diligence. To prove this allegation, Appellants pointed to
18 the Declaration of Robert Duzey, their counsel in the state court
19 proceedings, filed on November 14, 2012, the same date as the
20 trial in bankruptcy court. In that Declaration, Mr. Duzey
21 declared that, while a state court default judgment against the
22 Debtors should be forthcoming, it had not yet been entered.
23 Attached to the declaration was a copy of the state court docket
24 printed the day before, November 13, 2012. Appellants asserted to
25 the bankruptcy court that had the default judgment been entered,
26 its fraud findings would be entitled to preclusive effect, likely
27 resulting in a judgment in their favor in the adversary
28 proceeding, making this newly discovered evidence highly relevant.

1 The bankruptcy court denied Appellants' motion the following
2 day, January 10, 2013, in an order entered without a hearing. On
3 January 14, 2013, the bankruptcy court entered a judgment in
4 Debtors' favor, in which it concluded that Appellants failed to
5 prove the elements for an exception to discharge under
6 § 523(a)(2), (a)(4), and (a)(6).

7 On January 24, 2013, Debtors filed timely appeals of the
8 Order Denying Motion for New Trial on the Basis of Newly
9 Discovered Evidence, and the Judgment. The Panel ordered the
10 appeals consolidated on March 29, 2013.

11 JURISDICTION

12 The bankruptcy court had jurisdiction over the adversary
13 proceeding under 28 U.S.C. §§ 1334 and 157(b)(2)(I). We have
14 jurisdiction under 28 U.S.C. § 158.

15 ISSUE ON APPEAL

16 Whether the bankruptcy court erred in denying Appellants'
17 Motion for New Trial and granting a judgment in Debtors' favor.

18 STANDARD OF REVIEW

19 "We review a [bankruptcy] court's order denying a motion for
20 a new trial made on the ground of newly discovered evidence for
21 abuse of discretion." United States v. Hinkson, 585 F.3d 1247,
22 1259 (9th Cir. 2009) (en banc) (quoting United States v. Reyes-
23 Alvarado, 963 F.2d 1184, 1188 (9th Cir. 1992)).

24 A bankruptcy court abuses its discretion if its decision is
25 based on an incorrect legal rule, or if its findings of fact were
26 illogical, implausible, or without support in the record. Hinkson,
27 585 F.3d at 1262.

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1 judgment entered against Debtors individually, but it clearly did
2 not occur prior to trial.

3 The second factor is also met. Counsel for Appellants had
4 not received a copy of the signed default judgment in the mail,
5 nor did it appear on the state court's docket; indeed, it still
6 does not appear on that docket. Thus, there was no reason to
7 believe the judgment had been entered against Debtors.

8 Application of the third factor is more complex. That factor
9 instructs us to consider whether the newly discovered evidence was
10 of such magnitude that, had it been discovered earlier, the
11 outcome of the case would likely have been different. If the
12 bankruptcy court would have been compelled to give preclusive
13 effect to the default judgment concerning Debtors' alleged fraud,
14 this element would very likely be met. But we conclude that the
15 bankruptcy court was not required to give the default judgment
16 preclusive effect.

17 The doctrine of collateral estoppel⁴ applies in
18 dischargeability proceedings to preclude the relitigation of state
19 court findings relevant to exceptions to discharge. Harmon v.
20 Kobrin (In re Harmon), 250 F.3d 1240, 1245 (9th Cir. 2001); T & D
21 Moravits & Co. v. Munton (In re Munton), 352 B.R. 707, 712 (9th
22 Cir. BAP 2006). Under the Full Faith and Credit Act,⁵ we apply

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24 ⁴ We recognize that the preferred term is "issue
25 preclusion," rather than collateral estoppel. However, since the
26 parties and the other courts cited here employ the latter term, we
27 will also do so.

28 ⁵ The Full Faith and Credit Act requires federal courts to
give state judicial proceedings "the same full faith and credit
. . . as they have by law or usage in the courts of [the] State
. . . from which they are taken." 28 U.S.C. § 1738. In practical
(continued...)

1 the preclusion law of the state in which the judgment originates.

2 In re Harmon, 250 F.3d at 1245; In re Munton, 352 B.R. at 712.

3 Under California law, five threshold requirements must be met in
4 order for issue preclusion to apply:

5 First, the issue sought to be precluded from
6 relitigation must be identical to that decided in a
7 former proceeding. Second, this issue must have been
8 actually litigated in the former proceeding. Third, it
9 must have been necessarily decided in the former
proceeding. Fourth, the decision in the former
proceeding must be final and on the merits. Finally,
the party against whom preclusion is sought must be the
same as, or in privity with, the party to the former
proceeding.

10 In re Harmon, 250 F.3d at 1245 (citing Lucido v. Super. Ct.,
11 51 Cal.3d 335, 337 (1990)). The party asserting collateral
12 estoppel bears the burden of proof on each of these requirements.

13 In re Harmon, 250 F.3d at 1245.

14 In the state court complaint, Appellants alleged that Debtors
15 committed actual fraud. Thus, for purposes of § 523(a)(2)(A), the
16 first criterion is met. This is not the case for § 523(a)(4) and
17 (a)(6), as there were no allegations in the state court complaint
18 that Debtors were fiduciaries, nor that they willfully and
19 maliciously injured Appellants.

20 With regard to the second requirement, it is settled under
21 California law that a default judgment fulfills the criterion
22 requiring that the issues be actually litigated in the earlier
23 proceeding:

24 [A default judgment is] conclusive to the issues
25 tendered by the complaint as if it had been rendered

26 ⁵(...continued)
27 terms, this act requires federal courts to apply the res judicata
28 rules of a particular state to judgments issued by courts of that
state. Parsons Steel, Inc. v. First Alabama Bank, 474 U.S. 518,
519 (1986).

1 after answer filed and trial had on the allegations
2 denied by the answer. . . . Such a judgment is res
3 judicata as to all issues aptly pleaded in the complaint
and defendant is estopped from denying in a subsequent
action any allegations contained in the former
complaint.

4 Younie v. Gonya (In re Younie), 211 B.R. 367, 375 (9th Cir. BAP
5 1997) (citing In re Moore, 186 B.R. 962, 971 (Bankr. N.D.Cal.
6 1995) (quoting Fitzgerald v. Herzer, 78 Cal.App. 2d 127, 129
7 (1947))).⁶ Thus, in California, a default judgment satisfies the
8 "actually litigated" requirement for the application of collateral
9 estoppel. In re Younie, 211 B.R. at 375 (citing Lake v. Capps
10 (In re Lake), 202 B.R. 751, 757 & n.6 (9th Cir. BAP 1996); Green
11 v. Kennedy (In re Green), 198 B.R. 564, 566 (9th Cir. BAP 1996)).
12 The third criterion is also met, as the issue of actual fraud was
13 necessarily decided according to the allegations of the complaint.

14 As to the fourth requirement, a default judgment is "final"
15 at the conclusion of the sixty-day appeal period. McKee v. Nat'l
16 Union Fire Ins. Co., 15 Cal. App.4th 282, 289 (1993) ("A judgment
17 is not 'final' for res judicata purposes until the appeal is
18 concluded or the time within which to appeal has passed"); Cal.
19 Rules of Ct., Rule 8.104. Thus, the default judgment became
20 final at the earliest on January 6, 2013, three days before
21 Appellants filed their motion for new trial, although it was not
22 final when the bankruptcy court conducted its trial.

23 The parties in the state court and the bankruptcy court are
24 the same for purposes of the fifth requirement.

25 It would appear, then, aside from the question of the

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27 ⁶ We observe in passing, however, that California is in the
28 minority, and most states do not afford preclusive effect to
default judgments. See Murray v. Alaska Airlines, Inc., 522 F.3d
920, 924 (9th Cir. 2008)(citing Restatement (Second) of Judgments
§ 27, cmt. e).

1 finality of the judgment against Debtors, that the default
2 judgment could have been afforded preclusive effect in the
3 dischargeability proceeding. The bankruptcy court seemed to
4 acknowledge this at the trial, in a colloquy with counsel:

5 GOLDBERG (Debtors' counsel): What I would expect is if
6 there is a fraud judgment, which might even be used as
7 collateral estoppel in this Court -

8 THE COURT: Oh, it would be if - I've read their papers
9 here - if the judge signs that, there would be a pretty
10 good chance of it.

11 Trial Tr. 9:20-25, November 14, 2012.

12 However, even if collateral estoppel otherwise would be
13 available to a bankruptcy court, under both federal bankruptcy law
14 and California law, the bankruptcy court retains discretion
15 whether to apply it, because "issue preclusion is not applied
16 automatically or rigidly, and courts are permitted to decline to
17 give issue preclusive effect to prior judgments in deference of
18 countervailing considerations of fairness." In re Lopez, 367 B.R.
19 99, 108 (9th Cir. BAP 2007). Put another way, even if all five
20 requirements are met, California courts will give preclusive
21 effect to a judgment "only if application of preclusion furthers
22 the public policies underlying the doctrine." In re Harmon,
23 250 F.3d at 1245. When asked to give a judgment preclusive
24 effect, the trial court should balance "the need to limit
25 litigation against the right of a fair adversary proceeding in
26 which a party may fully present the facts." Id. (quoting 1 Ann
27 Taylor Schwing, CAL. AFFIRMATIVE DEFENSES 2d § 15:8 (2006)); see also
28 Direct Shopping Network, LLC, 206 Cal. App. 4th 1551, 1562 (2012)
(quoting Smith v. ExxonMobil Oil Corp. 153 Cal. App. 4th 1407,
1414 (2007)) ("[E]ven where the technical requirements are all

1 met, the [collateral estoppel] doctrine is to be applied 'only
2 where such application comports with fairness and sound public
3 policy.'" As this Panel has noted, "the preferable approach
4 . . . in the federal courts is not to preclude the use of
5 offensive collateral estoppel, but to grant trial courts broad
6 discretion to determine when it should be applied." In re Lopez,
7 367 B.R. at 107-08 (quoting Parklane Hosiery Co. v. Shore,
8 439 U.S. 322, 331 & nn.14-16 (1979)).

9 Here, while the bankruptcy court acknowledged that the
10 default judgment could potentially be given preclusive effect, it
11 instead exercised its discretion and declined to do so in favor of
12 conducting a live trial. The court repeatedly expressed a dislike
13 for default judgments, stating "this is a very good example of why
14 I personally do not like default judgments. Because you only see
15 one side, and it's fairly easy to get them." Trial Tr. 121:18-20.
16 The court reiterated this theme in the order denying Appellants'
17 motion for a new trial:

18 It is true that at the time of trial, this Court and the
19 parties were unaware of the November 7, 2012 default
20 judgment of the superior court, but it would be an
21 incredible injustice to grant the motion for a new
22 trial. Although the circumstances are unusual, this is
23 a court of equity and, as stated above, it would be an
24 incredible injustice to give preclusive effect to the
25 state court judgment. Default judgments are disfavored
26 for many reasons, including that such a judgment is a
27 one-sided story without an opportunity for defendants to
28 tell their side of the story. Before us is a classic
example that given a full and fair trial, the truth will
prevail.

25 The bankruptcy court's decision not to give preclusive effect
26 to the state court judgment under the circumstances of this case
27 is consistent with longstanding Ninth Circuit policy that default
28 judgments are disfavored because "cases should be decided upon

1 their merits whenever reasonably possible." Westchester Fire Ins.
2 Co. v. Mendez, 585 F.3d 1183, 1189 (9th Cir. 2009). In commenting
3 on application of California collateral estoppel, the Ninth
4 Circuit recognized that whether the parties had the opportunity to
5 fully litigate a dispute could be considered by the bankruptcy
6 court in the decision to apply collateral estoppel:

7 Under California law, the presence or absence of a full
8 and fair opportunity to litigate usually is relevant not
9 to the threshold inquiry, but rather to the public
policy inquiry[.]

10 In re Harmon, 250 F.3d at 1247 n.6 (internal citations omitted).

11 The bankruptcy court concluded that it would be unjust to
12 give preclusive effect to the newly discovered state court default
13 judgment under the circumstances. The bankruptcy court previously
14 conducted a trial on the merits which included evidence and
15 testimony, and after which it issued oral findings and
16 conclusions. Indeed, in its oral findings of fact and conclusions
17 of law, the bankruptcy court repeatedly stated there was no
18 evidence "whatsoever" of fraud, and found that Appellants "[had]
19 not even come close to meeting" the burden of proof required.
20 Trial Tr. 122:8-9, 14; 123:7-9, 16-18; 124:11-13. Given these
21 facts, the bankruptcy court did not abuse its discretion when it
22 declined to give preclusive effect to a default judgment
23 discovered only post-trial.

24 Accordingly, we conclude that the existence of a state court
25 default judgment against Debtors would not constitute evidence of
26 such magnitude that it would change the outcome of the case.
27 Appellants' request for an exception to discharge was rejected
28 after a trial on the merits. Moreover, even if the bankruptcy

1 court had given preclusive effect to the default judgment, such
2 would not guarantee a victory for Appellants. Rather, the
3 bankruptcy court would have had to consider whether all of the
4 required elements of § 523(a) had been met through the default
5 judgment. In other words, even if given preclusive effect, the
6 default judgment may have limited the issues for trial, but it
7 would not necessarily have dictated the outcome.

8 In short, because dischargeability is unique to the
9 bankruptcy arena, and because in California application of the
10 preclusion doctrine must comport with overall fairness, the
11 bankruptcy court had the discretion to deny preclusive effect to
12 the state court default judgment under these facts. Since
13 Appellants failed to establish the preclusive effect of the state
14 court judgment, they failed in their burden of proof to establish
15 an exception to discharge under § 523(a)(2)(A).

16 **CONCLUSION**

17 We AFFIRM the bankruptcy court's order denying Appellants'
18 motion for a new trial and the judgment.

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