

2/26/2014

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

NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT

5	In re:)	BAP No.	AZ-12-1557-KuDPa
)		
6	ABDUL J. BALOCH and TASNEEM)	Bk. No.	11-11350
	BALOCH,)		
7)	Adv. No.	11-01321
	Debtors.)		
8	_____)		
)		
9	ABDUL J. BALOCH,)		
)		
10	Appellant,)		
)		
11	v.)	MEMORANDUM*	
)		
12	SYED BASHIR SHAH,)		
)		
13	Appellee.)		
14	_____)		

Argued and Submitted on January 23, 2014
at Tempe, Arizona

Filed - February 26, 2014

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

Honorable Charles G. Case, II, Bankruptcy Judge, Presiding

Appearances: Nicole S. Sandoval of Campbell & Coombs for
appellant Abdul J. Baloch; James P. Wohl for
appellee Syed Bashir Shah.

Before: KURTZ, DUNN and PAPPAS, 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 **INTRODUCTION**

2 Debtor Abdul Baloch appeals from a summary judgment in favor
3 of Syed Shah excepting from discharge under 11 U.S.C.
4 § 523(a)(2)(A)¹ a debt reduced to judgment in state court. We
5 agree with the bankruptcy court's determination that Shah was
6 entitled to summary judgment based on the preclusive effect of
7 the state court's default judgment. Therefore, we AFFIRM.

8 **FACTS**

9 In 2004, Shah invested \$300,000 with Baloch, which Baloch
10 represented that he would use to purchase an automobile
11 dealership. Upon Baloch's purchase of the dealership, Baloch was
12 supposed to convey to Shah partial ownership of the dealership,
13 and the two of them were to share the profits and losses from the
14 dealership as partners. According to Shah, Baloch also had
15 agreed that, after the purchase of the dealership, Baloch would
16 pay \$4,500 per month to Shah, which would constitute an advance
17 against Shah's share of dealership profits. And if Baloch was
18 unsuccessful in purchasing the dealership, Shah's \$300,000
19 investment was supposed to be treated as a loan, which Baloch was
20 obligated to repay within thirty days of Shah's demand.

21 Despite repeated requests, Shah never received from Baloch
22 proof that Baloch actually had purchased the dealership or proof
23 of Shah's partial ownership interest in the dealership, the
24 \$4,500 monthly payments/advances against profits, and the
25 repayment of his initial investment. Consequently, Shah filed a
26

27 ¹Unless specified otherwise, all chapter and section
28 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532.

1 verified complaint against Baloch and his affiliated entities in
2 the Los Angeles County Superior Court (Case No. BC 371425).

3 The state court complaint contained eight causes of action,
4 including money had and received, breach of contract,
5 constructive fraud, fraud, conversion, bad checks, RICO, and for
6 an accounting. Shah alleged in the fraud cause of action that
7 Baloch explicitly agreed to perform certain promises as described
8 above regarding Shah's \$300,000 investment, but that Baloch at
9 the time he made the promises secretly intended not to perform
10 any of them. According to the fraud cause of action, Baloch's
11 actual intent in making the false promises was to induce Shah to
12 give him \$300,000 so that Baloch could keep the \$300,000 for his
13 own personal use and benefit. Shah further alleged that he
14 justifiably relied on Baloch's false promises and that, as a
15 result, he lost his \$300,000 investment.

16 Shah was unsuccessful in his attempts to locate Baloch for
17 the purpose of serving the summons and complaint. Accordingly,
18 the state court granted Shah permission to serve Baloch by
19 publication. Pursuant to the state court's publication orders,
20 Shah served the complaint by publication in newspapers of general
21 circulation in the states of Washington and California. When
22 Baloch did not respond to the complaint, Shah sought and obtained
23 entry of default against Baloch, and the state court set the
24 matter for a default prove-up hearing, which was held on July 16,
25 2009.

26 At the default prove-up hearing, Shah testified and
27 presented documents tending to show: (1) that he wired \$300,000
28 to Baloch; (2) that in exchange for the \$300,000, Baloch made a

1 number of promises to Shah regarding the safekeeping and use of
2 the funds, regarding Shah receiving a partial ownership interest
3 in an automobile dealership to be purchased with the funds, and
4 regarding the payment of \$4,500 per month to Shah once the
5 dealership was purchased; (3) that he wired the \$300,000 to
6 Baloch because he believed Baloch's promises at the time they
7 were made; (4) that Baloch did not fulfill any of these promises;
8 and (5) that he now believes Baloch never intended to fulfill any
9 of these promises. Shah further testified that Baloch told him
10 that he had acquired a dealership known as Mitsubishi Gilroy in
11 or around July 2005, but he never saw any proof of this purchase
12 or proof that the \$300,000 was used for this purported purchase.

13 The state court ruled at the conclusion of the prove-up
14 hearing, "It appears to me that you have sufficiently proved
15 these matters." Hr'g Tr. (July 16, 2009) at 23:26-27. Based on
16 this ruling, the state court stated that Shah was entitled to a
17 default judgment in the form he proposed. In turn, the default
18 judgment expressly found for Shah and against Baloch on Shah's
19 breach of contract cause of action and on his fraud cause of
20 action. Baloch never appealed the default judgment, nor did he
21 ever take any other action in the state court seeking relief from
22 the default judgment.

23 Baloch and his spouse commenced their chapter 7 case in
24 April 2011, and Shah filed an adversary complaint against Baloch
25 in July 2011, alleging the same facts and dealings on which Shah
26 had based his state court complaint. The adversary complaint
27 further alleged that the state court judgment debt was
28 nondischargeable under §§ 523(a)(2), (4) and (6). Shah then

1 moved for summary judgment. In his summary judgment motion, Shah
2 contended that, based on the issue preclusive effect of the state
3 court judgment, he was entitled to summary judgment.

4 Baloch opposed the summary judgment motion, arguing that he
5 did not have a full and fair opportunity to litigate the issues
6 raised in the state court because the complaint was served by
7 publication and because he did not actually learn of the
8 litigation or the default judgment until April 2010, roughly nine
9 months after the entry of the default judgment, when he received
10 some papers regarding Shah's efforts to domesticate the
11 California default judgment in Arizona. Baloch further argued
12 that the elements of fraud were not actually litigated or
13 necessarily decided in the state court litigation because the
14 state court did not explicitly find that each fraud element
15 existed. Baloch acknowledged that the explicit finding
16 requirement is deemed waived when the prior court implicitly and
17 necessarily decided the requisite issues, but he maintained that
18 the fraud elements had not been implicitly and necessarily
19 decided by the state court.

20 In the alternative, Baloch argued that it was impossible to
21 attribute any particular amount of the state court's damages
22 award to Shah's fraud cause of action because the default
23 judgment did not specify, as between fraud and breach of
24 contract, which type of conduct caused Shah's damages.

25 The bankruptcy court rejected all of Baloch's arguments and
26 held that the state court judgment was entitled to issue
27 preclusive effect. Based on the preclusive effect of the state
28 court judgment, the bankruptcy court granted summary judgment on

1 Shah's § 523(a)(2)(a) claim for relief. On October 17, 2012, the
2 bankruptcy court entered summary judgment in Shah's favor, and on
3 October 30, 2012, Baloch timely appealed.

4 **JURISDICTION**

5 The bankruptcy court had jurisdiction pursuant to 28 U.S.C.
6 §§ 1334 and 157(b)(2)(I). We have jurisdiction under 28 U.S.C.
7 § 158.²

8 **ISSUE**

9 Did the bankruptcy court commit reversible error by applying
10 issue preclusion to the state court judgment and granting Shah
11 summary judgment on his § 523(a)(2)(A) claim?

12 **STANDARDS OF REVIEW**

13 We review de novo the bankruptcy court's grant of summary
14 judgment. Boyajian v. New Falls Corp. (In re Boyajian), 564 F.3d
15 1088, 1090 (9th Cir. 2009); Lopez v. Emergency Serv. Restoration,
16 Inc. (In re Lopez), 367 B.R. 99, 103 (9th Cir. BAP 2007). We
17 also review de novo the issue of the nondischargeability of a
18 specific debt. Peklar v. Ikerd (In re Peklar), 260 F.3d 1035,
19 1037 (9th Cir. 2001); Honkanen v. Hopper (In re Honkanen),
20 446 B.R. 373, 378 (9th Cir. BAP 2011).

21 Our review of the bankruptcy court's decision to apply issue
22 preclusion is a two-step process. First, we review de novo the
23 bankruptcy court's determination that issue preclusion was

24
25 ²While the bankruptcy court's summary judgment left
26 unresolved Shah's claims for relief under §§ 523(a)(4) and
27 (a)(6), the finality defect arising from these unresolved claims
28 was cured by the bankruptcy court's subsequent dismissal of the
City of Long Beach, 603 F.3d 684, 691 (9th Cir. 2010).

1 available. See In re Lopez, 367 B.R. at 103; Khaligh v. Hadaegh
2 (In re Khaligh), 338 B.R. 817, 823 (9th Cir. BAP 2006). And
3 second, if we determine that issue preclusion was available, we
4 then review the bankruptcy court's decision to apply it for an
5 abuse of discretion. In re Lopez, 367 B.R. at 103; In re
6 Khaligh, 338 B.R. at 823.

7 The bankruptcy court abused its discretion only if it
8 applied the incorrect legal rule or its application of the
9 correct legal rule was illogical, implausible, or without support
10 in the record. United States v. Hinkson, 585 F.3d 1247, 1261-62
11 (9th Cir. 2009)(en banc).

12 **DISCUSSION**

13 A bankruptcy court may grant summary judgment when the
14 pleadings and evidence demonstrate "that there is no genuine
15 issue as to any material fact and that the moving party is
16 entitled to a judgment as a matter of law." Celotex Corp. v.
17 Catrett, 477 U.S. 317, 322 (1986). The issue preclusive effect
18 of a prior state court judgment may serve as the basis for
19 granting summary judgment. See In re Khaligh, 338 B.R. at 832;
20 see also Groqan v. Garner, 498 U.S. 279, 284 (1991) (holding that
21 the doctrine of issue preclusion applies in bankruptcy court
22 actions seeking to except debts from discharge).

23 We must apply California issue preclusion law to determine
24 the preclusive effect of Shah's California state court judgment.
25 See Gayden v. Nourbakhsh (In re Nourbakhsh), 67 F.3d 798, 800
26 (9th Cir. 1995); see also 28 U.S.C. § 1738 (requiring federal
27 courts to give "full faith and credit" to state court judgments).
28 Under California issue preclusion law, the proponent must

1 establish the following:

2 1) the issue sought to be precluded . . . must be
3 identical to that decided in the former proceeding;
4 2) the issue must have been actually litigated in the
5 former proceeding; 3) it must have been necessarily
6 decided in the former proceeding; 4) the decision in
7 the former proceeding must be final and on the merits;
8 and 5) the party against whom preclusion is being
9 sought must be the same as the party to the former
10 proceeding.

11 In re Honkanen, 446 B.R. at 382; Lucido v. Super. Ct., 51 Cal.3d
12 335, 341 (1990).

13 In addition, before applying issue preclusion, the
14 bankruptcy court also must determine "whether imposition of issue
15 preclusion in the particular setting would be fair and consistent
16 with sound public policy." In re Khaligh, 338 B.R. at 824-25
17 (citing Lucido, 51 Cal.3d at 342-43).

18 The party asserting issue preclusion has the burden of proof
19 to establish each of the above requirements. See Harmon v.
20 Kobrin (In re Harmon), 250 F.3d 1240, 1245 (9th Cir. 2001). To
21 satisfy this burden, the moving party "must introduce a record
22 sufficient to reveal the controlling facts" and must "pinpoint
23 the exact issues litigated in the prior action." Kelly v. Okoye
24 (In re Kelly), 182 B.R. 255, 258 (9th Cir. BAP 1995), aff'd,
25 100 F.3d 110 (9th Cir. 1996). Any reasonable doubt regarding
26 what the prior court decided is resolved against the moving
27 party. See id.

28 In this appeal, we are confronted with the question of the
preclusive effect of a default judgment. Most jurisdictions do
not consider a default judgment capable of satisfying the
requirements for the application of issue preclusion. See
Murray v. Alaska Airlines, Inc., 522 F.3d 920, 924 (9th Cir.

1 2008) (citing Restatement (Second) Judgments § 27, cmt. e).

2 However, California courts have adopted a different view. In
3 California, issue preclusion may apply to a default judgment so
4 long as two conditions are met. These conditions supplement the
5 standard issue preclusion requirements and are as follows:

6 (1) the defendant must have had "actual notice of the proceedings
7 and a 'full and fair opportunity to litigate,'" Cal-Micro, Inc.
8 v. Cantrell (In re Cantrell), 329 F.3d 1119, 1123-24 (9th Cir.
9 2003) (citing In re Harmon, 250 F.3d at 1247 n.6); and (2) the
10 material factual issues must have been raised in the pleadings
11 and must have been necessary to sustain the judgment.³

12 Here, Baloch contends that, because the summons was served
13 by publication, and because he did not learn of the litigation
14 and the default judgment until roughly nine months after the
15 default judgment was entered, he did not have sufficient notice
16 of the litigation or a full and fair opportunity to litigate for
17 issue preclusion purposes. We disagree. In re Cantrell
18 addressed this same issue. Relying on California law,
19 In re Cantrell held that, when, as here, the defendant learns of
20 the default judgment in time to seek relief therefrom under
21 California Code of Civil Procedure ("CCCP") § 473.5,⁴ the

22
23 ³Conceptually, the second condition is a variation on the
24 actually litigated requirement, which must be met for issue
25 preclusion to apply to any prior judgment - not just default
26 judgments. See In re Harmon, 250 F.3d at 1247. Additionally, in
27 the default judgment context, if a particular issue has been
28 necessarily decided, that issue also has been actually litigated.
See id. at 1248.

⁴CCCP § 473.5(a) provides:

(continued...)

1 defendant has been given sufficient notice of the default
2 judgment and a full and fair opportunity to litigate for issue
3 preclusion purposes. Baloch here has admitted that he learned of
4 the litigation and the default judgment roughly fifteen months
5 before the deadline expired to seek relief under CCCP § 473.5.
6 Notwithstanding his actual knowledge of the default judgment,
7 Baloch did not avail himself of the opportunity to seek relief
8 from the default judgment under CCCP § 473.5(a). Accordingly,
9 following In re Cantrell, we hold that the first condition is met
10 for applying issue preclusion to the state court's default
11 judgment.

12 Baloch also contends that the factual issues underlying
13 Shah's fraud cause of action were not actually litigated. Citing
14 both In re Cantrell and In re Harmon, Baloch points out that a
15 California default judgment does not actually litigate an issue
16 unless that issue was alleged in the complaint and unless the
17 court explicitly rendered a finding on that issue. However,
18 Baloch concedes that the explicit finding requirement is deemed
19 waived if the court implicitly rendered a finding on that issue

21 ⁴(...continued)

22 When service of a summons has not resulted in actual
23 notice to a party in time to defend the action and a
24 default or default judgment has been entered against
25 him or her in the action, he or she may serve and file
26 a notice of motion to set aside the default or default
27 judgment and for leave to defend the action. The
28 notice of motion shall be served and filed within a
reasonable time, but in no event exceeding the earlier
of: (i) two years after entry of a default judgment
against him or her; or (ii) 180 days after service on
him or her of a written notice that the default or
default judgment has been entered.

1 and if that implicit finding was necessary to support the court's
2 decision. See In re Cantrell, 329 F.3d at 1124 (citing
3 In re Harmon, 250 F.3d at 1248). That is precisely what happened
4 here. In its judgment, the state court explicitly found in
5 Shah's favor and against Baloch on Shah's fraud cause of action.
6 While the state court did not make explicit findings on each of
7 the fraud elements, it could not have rendered a finding on the
8 ultimate issue of Baloch's fraud (as it did) unless it implicitly
9 found that each of the fraud elements had been established.
10 Simply put, the state court implicitly found all of the
11 underlying fraud elements, and these findings were necessary to
12 support the state court's explicit fraud finding. Baloch has not
13 and cannot argue that Shah did not allege all of the fraud
14 elements.⁵ In light of Shah's fraud allegations and the state
15 court's implicit findings on the fraud elements, we hold that the
16 state court necessarily decided all of the requisite fraud
17 elements. Consequently, the fraud elements also were actually
18 litigated, resulting in a judgment in Shah's favor.

19 Baloch alternately contends that it is impossible to tell
20 from the state court's judgment whether the state court
21 attributed any damages to Baloch's fraud or instead attributed
22 all of the damages to Baloch's breach of contract. Citing
23 In re Kelly, 182 B.R. at 258, Baloch claims that any doubt must
24

25 ⁵As mentioned above, Shah alleged in the state court
26 complaint false promises without an intent to perform,
27 justifiable reliance and damages proximately caused by the false
28 promises. These allegations were sufficient under California law
to state a fraud cause of action. See Lazar v. Super. Ct.,
12 Cal.4th 631, 638-39 (1996).

1 be decided against the application of issue preclusion and that,
2 because the damages all might have been attributable to his
3 breach of contract, the bankruptcy court should not have applied
4 issue preclusion to determine that his fraud caused Shah's
5 damages.

6 But Baloch's damages contention is based on a false premise.
7 Baloch wrongly assumes that only one or the other cause of
8 action, but not both, could be the source of Shah's damages. We
9 are convinced that Shah's damages are attributable to both causes
10 of action. On this record, it is clear that Shah suffered a
11 single loss and that fraud and breach of contract were pled as
12 alternate theories of relief based on the same loss.⁶ Thus, we
13 have no doubt that all of Shah's damages properly are
14 attributable to Baloch's fraud.

15 We can readily ascertain in this case all of California's
16 issue preclusion elements. Baloch has not disputed that the
17 default judgment was a final judgment on the merits or that the
18 same parties were involved in both the state court litigation and
19

20 ⁶In his appeal brief, Baloch attempts to argue that the
21 state court erred by granting Shah judgment on both his fraud and
22 contract causes of action. Baloch argues that the state court
23 violated the election of remedies doctrine in doing so.
24 Generally speaking, California's election of remedies doctrine is
25 considered a form of estoppel that precludes a litigant from
26 obtaining judgment on a particular legal theory if that litigant
27 already has taken action against the other party based on an
28 alternate legal theory arising from the same facts. See Roam v.
Koop, 41 Cal. App. 3d 1035, 1039-40 (1974). We do not understand
how assertion of the election of remedies doctrine benefits
Baloch in this appeal. If Baloch believed that the state court
erred in granting judgment based on both Shah's fraud and breach
of contract causes of action, he should have raised this issue in
the state court.

1 in the nondischargeability action. And Baloch has not and cannot
2 seriously dispute that the issues involved in the state court
3 fraud cause of action were not identical to the elements for
4 nondischargeability under § 523(a)(2)(A). See Am. Express Travel
5 Related Servs. Co. Inc. v. Hashemi (In re Hashemi), 104 F.3d
6 1122, 1125 (9th Cir. 1996) (stating that the nondischargeability
7 elements under § 523(a)(2)(A) "mirror the elements of common law
8 fraud"); Younie v. Gonya (In re Younie), 211 B.R. 367, 373-74
9 (9th Cir. BAP 1997), aff'd, 163 F.3d 609 (9th Cir. 1998) (same).
10 As for actually litigated and necessarily decided, we have
11 addressed and rejected, above, Baloch's contentions that the
12 state court default judgment did not actually litigate and
13 necessarily decide the fraud elements.

14 This leaves only public policy concerns to consider. Baloch
15 did not make any explicit public policy argument in the
16 bankruptcy court; nonetheless, the bankruptcy court explicitly
17 addressed the public policy issue and determined that the
18 imposition of issue preclusion here promoted the public policy
19 goals of fostering judicial economy and integrity and
20 discouraging vexatious litigation.

21 Baloch has not directly challenged on appeal the bankruptcy
22 court's public policy determination but instead reiterates his
23 contention that he did not have a full and fair opportunity to
24 litigate in light of the fact that he did not know of the state
25 court litigation or the default judgment until several months
26 after the state court entered the default judgment. In essence,
27 Baloch complains that he never had an opportunity to raise any
28 substantive defenses to Shah's fraud cause of action and this,

1 according to him, violated the public policy favoring decisions
2 on the merits. We agree with Baloch that having a full and fair
3 opportunity to litigate is an appropriate public policy concern.
4 See In re Harmon, 250 F.3d at 1247 n.6. However, as discussed
5 above, we disagree with Baloch's argument that he did not have a
6 full and fair opportunity to litigate the fraud issue. By way of
7 CCCP § 473.5, California has afforded defendants like Baloch a
8 means of obtaining relief from default judgments when they do not
9 know about the litigation before entry of the default judgment
10 and if they desire to defend against the merits of the
11 litigation. But Baloch chose not to seek relief under
12 CCCP § 473.5. As a result, it is disingenuous for Baloch to
13 complain that the California courts did not afford him the
14 opportunity to address the merits of Shah's fraud cause of
15 action.

16 Having determined that the bankruptcy court identified the
17 correct legal standard for applying issue preclusion and having
18 found nothing in the record suggesting any misapplication of that
19 legal standard, we conclude that the bankruptcy court did not
20 commit reversible error in granting summary judgment on the basis
21 of the preclusive effect of the state court's default judgment.

22 **CONCLUSION**

23 For the reasons set forth above, we AFFIRM the bankruptcy
24 court's summary judgment in favor of Shah.