

MAY 12 2014

NOT FOR PUBLICATION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. CC-13-1267-PaTaKu
6	ALLEN WILLIAMS BROWN,)	Bankr. No. 12-49655-BR
7	Debtor.)	Adversary 13-01002-BR
8	_____)	
9	ALLEN WILLIAMS BROWN,)	
10	Appellant,)	
11	v.)	MEMORANDUM ¹
12	HELEN ACOSTA; OSCAR ALEMAN,)	
13	Appellees.)	
	_____)	

Submitted Without Oral Argument²
on February 20, 2014

Filed - May 12, 2014

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

Honorable Barry Russell, Bankruptcy Judge, Presiding

Appearances: Appellant Allen Williams Brown, pro se on brief;
Appellees Helen Acosta and Oscar Aleman, pro se on
brief.

Before: PAPPAS, TAYLOR and KURTZ, 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.

² By order entered December 11, 2013, the Panel, after
examining the briefs and the record, unanimously determined that
this appeal is suitable for submission without oral argument
pursuant to Fed. R. Bankr. P. 8012.

1 Chapter 7³ debtor Allen Williams Brown ("Brown") appeals the
2 judgment of the bankruptcy court that a debt based upon a state
3 court judgment in favor of appellees Helen Acosta ("Acosta") and
4 Oscar Aleman ("Aleman" and, together, "Appellees") was excepted
5 from discharge under § 523(a)(2)(A), and the order denying
6 reconsideration of that judgment. We AFFIRM.

7 **FACTS**

8 **A.**

9 **The State Court Proceedings and Judgment**

10 Brown filed a petition under chapter 7 on November 30, 2012.
11 On his Schedule F, he listed a debt to Appellees for \$200,000
12 stemming from a 2011 state court fraud judgment entered against
13 him (the "State Court Judgment"). On May 2, 2007, Appellees had
14 filed a complaint in Los Angeles Superior Court against Diana
15 Beard-Williams ("Williams"), Rod Flowers ("Flowers"),⁴ the F.A.B.
16 Partnership ("F.A.B."), and Does 1-20. The complaint was
17 thereafter amended, and Does 1 and 2 were subsequently identified
18 as Brown, the estranged husband of Williams, and Patricia
19 Ashburne ("Ashburne"), Williams' sister.

20 Williams filed an answer to the complaint on April 10, 2008.
21 Though they had been served, neither Brown, Ashburne, nor F.A.B.
22 filed answers. Notice of entry of defaults against Brown,
23

24 ³ Unless otherwise indicated, all chapter and section
25 references are to the Bankruptcy Code, 11 U.S.C. §§ 101 - 1532.

26 ⁴ Although Flowers was a named defendant in the complaint,
27 the record is silent regarding his participation in the state
28 court proceedings. There was no award against him personally in
the State Court Judgment.

1 Ashburne, and F.A.B. were entered by the state court on July 9,
2 2010; none of the defaulted defendants moved for relief from the
3 default within the time provided by statute.

4 Williams filed a chapter 7 bankruptcy petition on May 5,
5 2010. The bankruptcy court granted Appellees relief from
6 automatic stay in Williams' bankruptcy case on October 1, 2010,
7 to allow the state court proceedings to continue.

8 Trial was scheduled to begin in state court April 15, 2011.
9 Neither Williams, Brown, nor Ashburne appeared. Although
10 Williams had filed an answer to the complaint, her failure to
11 appear caused the state court to strike her answer. Trial
12 proceeded by default against all defendants. The state court
13 entered judgment on May 31, 2011 (the "State Court Judgment"), in
14 favor of Appellees and against Brown, Ashburne, Williams, and
15 F.A.B.

16 In the State Court Judgment, the court found that, in the
17 summer of 2006, Williams, a licensed real estate broker,
18 approached Acosta, inviting her to join a partnership with
19 Williams and a third party, Flowers, to invest in income
20 producing properties in Memphis, Tennessee, and to reinvest
21 income from those properties in continued acquisitions. On
22 July 31, 2006, Williams, Flowers, and Acosta signed a written
23 partnership agreement creating F.A.B. A few days earlier, Acosta
24 had given Williams a check for \$10,000 representing her
25 contribution to the partnership.

26 Williams represented to Acosta that her sister, Ashburne, as
27 buyer, had four properties in escrow that would be quitclaimed to
28 the partnership upon close of escrow. The four properties were:

1 220 North Willet Street, 8508 Tournament Drive, 3422 Tournament
2 Drive and 1242 Peabody Avenue, all in Memphis. Of the four
3 properties, the 3422 Tournament Avenue property was particularly
4 attractive for investment purposes because there was an agreement
5 in place to lease the property to FedEx as an executive home and
6 there would be a \$100,000 cash-back bonus for the buyer of the
7 property. Williams represented to Acosta that the bonus money
8 would be available to repay Acosta's investment and to use for
9 additional acquisitions.

10 In August 2006, Aleman was added to the F.A.B. partnership,
11 and the name of the partnership was changed to F.A.A.B. (Flowers,
12 Acosta, Aleman and [Beard-]Williams). Aleman invested \$10,000,
13 and would later increase that to \$13,000.

14 Then, in an email to the partners dated October 18, 2006,
15 Williams indicated that she had decided to leave the partnership,
16 but that the investments made by Acosta and Aleman were secure.
17 Williams represented that Aleman and Acosta would be given trust
18 deeds on three properties to secure their investments.

19 In November 2006, the Appellees informed Williams that they
20 were not happy with the operation of the partnership, in that
21 they were not given information on the properties and were not
22 being included in decision-making. The Appellees indicated their
23 intention to dissolve the partnership and recover their
24 investment. In December 2006, Williams told Acosta that she was
25 consulting with an attorney to prepare a promissory note through
26 which Acosta and Aleman would be repaid their investments.

27 The state court found that Williams never provided a
28 promissory note or trust deeds to the Appellees. However, on

1 January 31, 2007, Williams told Acosta: "There is no agreement
2 between you and [Ashburne,] or [Ashburne] and any particular
3 group The [F.A.A.B. partnership] has one property and
4 only one property. There are no bank accounts with [F.A.A.B.]
5 funds." State Court Judgment at 8. The state court found that:

6 These statements by Williams were a direct contradiction
7 of statements that [Williams] had made both to Acosta and
8 to Aleman in order to induce them to provide her with
9 \$23,000 in funds for the F.A.B. and F.A.A.B. Group and in
10 order to assist her and her family to purchase the
11 specific properties that she had told Acosta and Aleman
12 were going to be purchased for the partnership by her and
13 her sister and then placed into the name of the
14 partnership. Further, the statement that there were no
15 profits to distribute, and that there were no bank
16 accounts with [F.A.A.B.] funds were false, in that – as
17 reflected in the bank statement from Wells Fargo Bank for
18 account ending in 1084 and for the statement end date
19 November 30, 2006 – on November 22, 2006, one day after
20 escrow had closed on the 3422 Tournament Drive property,
21 Williams received a \$112,000 wire transfer from Preferred
22 Title and Escrow LLC, representing the bonus monies that
23 Williams had told Acosta and Aleman would be paid to the
24 buyer upon purchase of the 3422 Tournament Drive property.

25 State Court Judgment at 8-9.

26 The state court also found that, after receiving the
27 \$112,000, Williams deposited \$45,000 in her personal savings
28 account and \$15,000 to her personal checking account, took \$7,000
in cash, paid \$8,000 on a family member's Advanta Card [Stanley
Beard not otherwise identified by the state court], and wrote two
personal checks for \$10,000 and \$25,000. According to the state
court, "Williams exhausted funds which should have belonged to
the partnership (based on the representations that she had made
to the partners) by paying more than half of those funds to
herself and her relatives or for their benefit." State Court
Judgment at 11.

Importantly for purposes of this appeal, the state court

1 made the following specific findings relating to Brown:

2 Escrow closed on the property located at
3 8508 Tournament, Memphis on September 23, 2006. The
4 purchaser of that property was "Diana Williams."
5 Williams quitclaimed that property to her husband
6 [Brown] on July 30, 2007. This is another of the
7 properties that Williams had repeatedly represented to
8 Acosta and Aleman was going to be partnership property
9 that would be quitclaimed to the partnership after
10 purchase.

7 State Court Judgment at 10.

8 Escrow closed on the property located at 1242 Peabody
9 Avenue, Memphis, on November 17, 2006. The listed
10 purchaser of that property was [Brown]. Again, this
11 property was one of the properties which Williams
12 represented was to be a partnership property and which
13 would be quitclaimed to the partnership after close of
14 escrow.

12 Id.

13 Defendants Ashburne and Brown benefitted from Williams'
14 false and fraudulent representations in that the
15 properties which were supposed to be titled in the name
16 of the partnership and the monies which Williams
17 received as a result of her use of the capital
18 investment funds provided by [Appellees] were - in fact
19 - titled in [Ashburne and Brown's] names, and the funds
20 were used by Williams to pay their debts. By way of
21 example, bank records . . . reflect payment of
22 mortgages on behalf of Brown and Ashburne during the
23 months November 2006 through February 2007. The court
24 finds that Williams' husband, Brown, and Williams'
25 sister, Ashburne, were thus co-conspirators and joint
26 venturers with Williams in the fraud and breach of
27 fiduciary duty whereby they also took advantage of [the
28 Appellees], and thus they should be held jointly
responsible with Williams for losses suffered by [the
Appellees].

23 State Court Judgment at 11. And finally,

24 The court therefore finds, based on the foregoing
25 facts, that the plaintiffs have met their burden of
26 proof . . . and have also presented evidence sufficient
27 for the court to find that defendants Williams,
28 Ashburne and Brown collaborated in a civil conspiracy
and joint venture from which the defendants, and each
of them, benefitted at plaintiff's expense.

28 State Court Judgment at 12 (emphasis added).

1 The State Court Judgment awarded Acosta damages of \$38,000
2 and \$21,266.20 in attorneys fees, and awarded Aleman \$41,000 in
3 damages, all jointly and severally against Williams, Brown,
4 Ashburne, and F.A.B. Brown and Ashburne appealed the State Court
5 Judgment to the California Court of Appeals. Acosta v. Ashburne,
6 case no. B233748. On April 25, 2012, the state appellate court
7 affirmed the decision of the trial court, noting in its decision
8 only that "Beard-Williams converted partnership funds to purchase
9 properties in her own name, and in the names of Ashburne and
10 Brown." Slip op. at 2.

11 **B.**

12 **The Bankruptcy Adversary Proceeding**

13 When Brown filed for chapter 7 relief, the Appellees
14 commenced an adversary proceeding against him on January 2, 2013.
15 In the complaint, they alleged two claims, one for an exception
16 to discharge of Brown's debts to them for fraud under
17 § 523(a)(2)(A), and the other for denial of discharge under
18 § 727(a) because Brown had allegedly made false and misleading
19 statements in his bankruptcy schedules. Brown filed an answer
20 pro se to the complaint, generally denying the allegations, and
21 arguing that he should not be held liable based on the State
22 Court Judgment because it was a default judgment.

23 The bankruptcy court conducted a status conference in the
24 adversary proceeding. Although the Appellees had not formally
25 asked it to do so, the bankruptcy court began the status
26 conference by informing the parties that it was prepared to rule
27 that Brown's obligations to the Appellees based on the State
28 Court Judgment were excepted from discharge in Brown's bankruptcy

1 case under § 523(a)(2)(A). Speaking primarily to Brown, the
2 bankruptcy court stated:

3 The reason that I wanted you here is very important
4 because there was a superior court judgment
5 filed. . . . I'm bound by that, I'm stuck with that
6 judgment. . . . It was basically your wife or ex-wife
7 whatever [who] entered into this conspiracy and at the
8 end of the day that the judge found that you were part
9 of that. You may disagree, but I'm bound by what the
10 superior court judge says. So you're responsible for
11 all of her fraud which the Court found. . . . I am
12 bound by that. I can't change that. . . . In this
13 particular case . . . I have to find that that is
14 nondischargeable because of fraud, because of what the
15 superior court did, not because of anything I'm doing.
16 . . . I'm finding, looking at the superior court
17 judgment that you in fact engaged in this fraud and
18 therefore this debt under section 523 is
19 nondischargeable.

20 Hr'g Tr. 2:16-3:3, March 20, 2013.

21 Given the bankruptcy court's conclusion, and with the
22 agreement of the Appellees, the court dismissed the claim against
23 Brown for denial of discharge under § 727(a). Hr'g Tr. 7:5-6.

24 The bankruptcy court entered findings and conclusions on
25 May 2, 2013. They included the following:

26 [Finding] 2. The Court explained to the parties at the
27 March 20, 2013 status conference that the state court
28 judgment contained a specific finding of fact that the
debtor/defendant conspired with Diana Beard-Williams,
among others, to defraud the plaintiffs.

[Finding] 3. The Court further explained to the parties
that as a result of the state court's specific finding
of fraud, the elements of the plaintiffs' claim for
relief were met under the principles of collateral
estoppel and the debt was therefore non-dischargeable.

[Conclusion] 1. Under the principles of collateral
estoppel, the finding in the state court's judgment
that the debtor defrauded the plaintiffs renders the
debt to plaintiffs nondischargeable under
§ 523(a)(2)(A).

Findings of Fact at 2. The same day, the bankruptcy court
entered a judgment determining that Brown's debt to the Appellees

1 under the State Court Judgment was excepted from discharge under
2 § 523(a)(2)(A) and dismissing the Appellees' claim for denial of
3 discharge under § 727(a)(2) and (4).

4 Brown filed a motion for reconsideration of the bankruptcy
5 court's judgment on May 16, 2013. The bankruptcy court denied
6 the reconsideration motion without a hearing or any explanation
7 in an order entered May 29, 2013.

8 Brown filed a timely appeal on June 6, 2013.

9 **JURISDICTION**

10 The bankruptcy court had jurisdiction under 28 U.S.C.
11 §§ 1334 and 157(b)(2)(I). We have jurisdiction under 28 U.S.C.
12 § 158.

13 **ISSUE**

14 Whether the bankruptcy court erred in ruling that Brown's
15 debt to Appellees was excepted from discharge under
16 § 523(a)(2)(A) by application of issue preclusion based upon the
17 State Court Judgment.

18 Whether the bankruptcy court abused its discretion in
19 denying Brown's motion for reconsideration.

20 **STANDARD OF REVIEW**

21 Whether a claim is excepted from discharge under
22 § 523(a)(2)(A) presents mixed issues of law and fact which we
23 review de novo. Diamond v. Kolcum (In re Diamond), 285 F.3d 822,
24 826 (9th Cir. 2001). We review the bankruptcy court's findings
25 of fact for clear error. Honkanen v. Hopper (In re Honkanen),
26 446 B.R. 373, 378 (9th Cir. BAP 2011). Clear error is found when
27 the reviewing court has a definite and firm conviction that a
28 mistake has been committed. Lewis v. Ayers, 681 F.3d 992, 998

1 (9th Cir. 2012). De novo review requires the Panel to
2 independently review an issue, without giving deference to the
3 bankruptcy court's conclusions. First Ave. W. Bldg., LLC v.
4 James (In re Onecast Media, Inc.), 439 F.3d 558, 561 (9th Cir.
5 2006).

6 The availability of issue preclusion is reviewed de novo,
7 and the bankruptcy court's decision to apply it is reviewed for
8 abuse of discretion. Af-Cap Inc. v. Chevron Overseas (Congo)
9 Ltd., 475 F.3d 1080, 1086 (9th Cir. 2007).

10 Denial of a motion for reconsideration under Rule 9023 is
11 reviewed for abuse of discretion. Determan v. Sandoval
12 (In re Sandoval), 186 B.R. 490, 493 (9th Cir. BAP 1995).

13 A bankruptcy court abuses its discretion if it applies an
14 incorrect legal standard, or misapplies the correct legal
15 standard, or if its factual findings are illogical, implausible
16 or without support from evidence in the record. United States v.
17 Hinkson, 585 F.3d 1247, 1262 (9th Cir. 2009) (en banc)).

18 DISCUSSION

19 I. The bankruptcy court did not err in determining that issue 20 preclusion was available based on the State Court Judgment.

21 A.

22 The bankruptcy court ruled that, because the state court
23 found in the State Court Judgment that Brown conspired to defraud
24 the Appellees, under the doctrine of issue preclusion, Brown's
25 debt to the Appellees was excepted from discharge under
26 § 523(a)(2)(A). We conclude that the bankruptcy court correctly
27 determined that issue preclusion was available.

28 To determine the preclusive effect of a California state

1 court's findings in a judgment or order in a later bankruptcy
2 case, the bankruptcy court must first determine if issue
3 preclusion is available under California law. See 28 U.S.C.
4 § 1738 (the Full Faith and Credit Statute); Marrese v. Am. Acad.
5 of Orthopaedic Surgeons, 470 U.S. 373, 380 (1985). When state
6 preclusion law controls, a bankruptcy court's discretion to apply
7 the doctrine must be exercised in accordance with state and
8 federal law. Khaligh v. Hadegh (In re Khaligh), 338 B.R. 817,
9 823 (9th Cir. BAP 2006), aff'd, 506 F.3d 956 (9th Cir. 2007).

10 Under California law, the party asserting issue preclusion
11 has the burden of establishing the following "threshold"
12 requirements for its availability: First, the issue sought to be
13 precluded from relitigation must be identical to that decided in
14 a former proceeding. Second, this issue must have been
15 actually litigated in the former proceeding. Third, it
16 must have been necessarily decided in the former proceeding.
17 Fourth, the decision in the former proceeding must be final and
18 on the merits. Finally, the party against whom preclusion is
19 sought must be the same as, or in privity with, the party to the
20 former proceeding. Harmon v. Kobrin (In re Harmon), 250 F.3d
21 1240, 1245 (9th Cir. 2001) (the "Harmon" requirements). A sixth
22 element requires a mandatory "additional" inquiry into whether
23 imposition of issue preclusion in a particular setting would be
24 fair and consistent with sound public policy. Lucido v. Super.
25 Ct., 51 Cal. 3d 335, 341-43 (1990).

26 Section 523(a)(2)(A) provides that a debt for money,
27 property, services, or an extension, renewal, or refinancing of
28 credit is excepted from discharge to the extent obtained by

1 "false pretenses, a false representation, or actual fraud, other
2 than a statement respecting the debtor's or an insider's
3 financial condition." Thus, the issues that must have been
4 determined in the state court proceedings to permit exception to
5 discharge under § 523(a) (2) (A) are:

6 A creditor must show that (1) the debtor made the
7 representations; (2) that at the time he knew they were
8 false; (3) that he made them with the intention and
9 purpose of deceiving the creditor; (4) that the
10 creditor [justifiably] relied on such representations;
11 (5) that the creditor sustained the alleged loss and
12 damage as the proximate result of the representations
13 having been made.

14 Am. Express Travel Related Servs. Co. v. Hashemi (In re Hashemi),
15 104 F.3d 1122, 1125 (9th Cir. 1996).

16 The State Court Judgment principally addresses the fraud
17 perpetrated on the Appellees by Williams. The state court's
18 findings would appear to satisfy the factors listed above, at
19 least as to Williams:

20 The Court finds that Williams made many fraudulent and
21 false representations of material fact to Acosta and
22 Aleman upon which they relied to their detriment.

23 State Court Judgment at 10.

24 However, Williams is not the debtor in this case – Brown is.
25 And the State Court Judgment does not find that Brown made any
26 representations to Appellees. Indeed, there is nothing in the
27 record to suggest that Brown ever communicated, or was otherwise
28 in contact, with the Appellees. Thus, Brown can not be held
directly liable under § 523(a) (2) (A) for the fraudulent
representations made to the Appellees by Williams.

Even so, our case law has long held that fraud committed by
another can be imputed to the debtor, but only under limited

1 circumstances. In March 2014, the Panel published an en banc
2 Opinion concerning the imputation of liability for an exception
3 to discharge under § 523(a)(2)(A). Sachan v. Huh (In re Huh),
4 506 B.R. 257 (9th Cir. BAP 2014). As discussed in that Opinion,
5 earlier BAP case law measured a debtor's responsibility for
6 another's fraud under principles of agency, finding that
7 liability for the actions of a partner could be imputed to the
8 debtor under theories of partnership and agency. Id. at 269-72
9 (discussing Tsurukawa v. Nikon Precision, Inc.
10 (In re Tsurukawa), 287 B.R. 515, 525 (9th Cir. BAP 2002)).

11 However, after a comprehensive review of the case law, the Panel
12 adopted the standard for imputation of fraud liability
13 articulated by the Eighth Circuit in Walker v. Citizens State
14 Bank (In re Walker), 726 F.2d 452 (8th Cir. 1984). Id. at 266.

15 The Panel concluded that, to be true to the policies of the
16 Bankruptcy Code and later case law, instead of focusing primarily
17 on the debtor's status as an agent of the fraudster, the emphasis
18 should instead be on the actions of the debtor. As the Panel
19 explained, to show that another's fraud should be imputed to the
20 debtor, the creditor seeking an exception to discharge must show
21 that the debtor acted with "culpable state of mind," and that the
22 debtor "knew or should have known" of the perpetrator's
23 fraudulent activities. Id. at 267.

24 **B.**

25 In this case, the bankruptcy court's decision to except from
26 discharge Brown's debt to Acosta and Aleman was based on its
27 conclusion that the State Court Judgment's finding that Williams,
28 Brown, and Ashburne engaged in a "civil conspiracy" to defraud

1 the Appellees was entitled to preclusive effect. We agree that,
2 under California law, a finding of civil conspiracy may qualify
3 for issue preclusion.

4 Recall, the State Court Judgment provided, in relevant part,
5 that

6 Williams' husband, Brown, and Williams' sister,
7 Ashburne, were thus co-conspirators and joint venturers
8 with Williams in the fraud and breach of fiduciary duty
9 whereby they also took advantage of Acosta and Aleman.

10 and

11 That the plaintiffs . . . have also presented evidence
12 sufficient for the court to find that defendants
13 Williams, Ashburne and Brown collaborated in a civil
14 conspiracy and joint venture from which the defendants,
15 and each of them, benefitted at plaintiffs' expense.

16 State Court Judgment at 11, 12.

17 In California, "a civil conspiracy is the formation of a
18 group of two or more persons who have agreed to a common plan or
19 design to commit a tortious act." Kidron v. Movie Acquisition
20 Corp., 40 Cal. App. 4th 1571, 1582 (1995) (citing 1 Levy et al.,
21 Cal. Torts Civil Conspiracy, § 9.03[2], p. 9-12 (1995)); see also
22 Youst v. Longo, 43 Cal. 3d 64, 79 (1987) ("the conspirators must
23 agree to do some act which is classified as a 'civil wrong']").
24 Liability for civil conspiracy under California law requires that
25 three elements be satisfied: (1) formation of the conspiracy
26 (i.e., that there be an agreement to commit wrongful acts);
27 (2) operation of the conspiracy (i.e., the commission of the
28 wrongful acts); and (3) damage resulting from operation of the
29 conspiracy. People ex rel. Kennedy v. Beaumont Investment, Ltd.,
30 111 Cal. App. 4th 102, 137-38 (2003).

31 The first element, that there be an agreement to commit

1 wrongful acts, requires knowledge by the conspirators that the
2 acts are wrongful. Put another way, the conspiring defendants
3 "must have actual knowledge that a tort is planned and concur in
4 the tortious scheme with knowledge of its unlawful purpose."
5 Favila v. Katten Muchin Rosenman, LLP, 188 Cal. App. 4th 189, 206
6 (2010); 1-800 Contacts, Inc. v. Steinberg, 107 Cal. App. 4th 568,
7 589 (2003) (same); see also People v. Austin, 23 Cal. App. 4th
8 1596, 1607 (1979) ("without knowledge of the illegal purpose
9 there is no basis for inferring a [civil conspiracy] agreement").

10 In addition, knowledge of the planned tort must be combined
11 with the intent by a conspirator to aid in its commission.
12 Kidron, 40 Cal. App. 4th at 1582 ("Knowledge and intent may be
13 inferred from the nature of the acts done, the relation of the
14 parties, the interest of the alleged conspirators, and other
15 circumstances.").

16 In finding that Brown, Williams, and Ashburne were involved
17 in a civil conspiracy, the State Court Judgment highlighted
18 several facts concerning Brown's participation in that
19 conspiracy. The state court found that two of the four houses
20 that were supposed to be titled in the names of the partnership
21 were instead titled in Brown's name; and that bank records for
22 the accounts, which contained the \$122,000 that was to be used
23 for the partnership or distributed to the partners, were instead
24 used to pay Brown's mortgages from November 2006 through February
25 2007. State Court Judgment at 11. On this record, then, it is
26 clear that the state court found that Brown's actions were
27 sufficient to meet the elements for a civil conspiracy to
28 defraud.

1 The record also supports that, given the findings in the
2 State Court Judgment, an exception to discharge is appropriate
3 based upon the imputation of Williams' fraud to Brown under the
4 test announced in In re Huh. In concluding that Brown
5 participated in a civil conspiracy under California law, the
6 state court necessarily concluded that Brown collaborated with
7 Williams to defraud the Appellees and, thus, that Brown "knew or
8 should have known" of Williams' wrongdoings.

9 In sum, the bankruptcy court did not err in determining that
10 the state court's findings in the State Court Judgment were
11 preclusive. Because those findings satisfy the standard the
12 Panel announced in In re Huh, Williams' liability for fraud is
13 properly imputed to Brown for purposes of an exception from
14 discharge under § 523(a)(2)(A).

15 **C.**

16 As discussed above, even though issue preclusion is
17 available as to a judgment under state law, the bankruptcy court
18 must nonetheless exercise discretion concerning whether to apply
19 the doctrine. In re Khaligh, 338 B.R. at 832. Because the
20 bankruptcy court must use judgment, based on the facts, in
21 deciding to apply issue preclusion, the bankruptcy judge's
22 several statements to the parties at the status conference
23 indicating that he was "bound" by the State Court Judgment, that
24 "there's nothing really I can do about it," and that "I'm stuck
25 with it" are, at best, imprecise. However, in examining the
26 context of those comments, we observe that the bankruptcy court
27 was attempting to explain issue preclusion to non-lawyers. In
28 response to the arguments of both parties challenging the factual

1 findings of the state court, we perceive the bankruptcy court was
2 attempting to explain, primarily to Brown, that, absent
3 unfairness, he should accept the findings of the state court:
4 "I'm stuck with that judgment. So that judgment controls a good
5 portion of this case. That is, the findings in that judgment."
6 Hr'g Tr. 2:8-10, March 20, 2010. We conclude that the bankruptcy
7 court's comments that it was "stuck with the judgment," and so on
8 were at most harmless error. The court correctly noted that it
9 could not revisit the individual findings of the state court.

10 In re Khaligh instructs that we should find an abuse of
11 discretion by the bankruptcy court only if, in applying issue
12 preclusion, "the court applied an incorrect standard of law, a
13 clearly erroneous view of the facts, or otherwise did something
14 that leaves us with the definite and firm conviction that there
15 was a clear error of judgment." Id. at 832. Brown has the
16 burden of proof to establish that the court should not have
17 applied issue preclusion. Id. at 831-32. Brown has not
18 addressed this question and thus has not met that burden. We
19 conclude that the bankruptcy court did not abuse its discretion
20 in deciding to apply issue preclusion.

21 **II. The bankruptcy court did not abuse its discretion in denying**
22 **reconsideration of the judgment.**

23 Brown's motion asking the bankruptcy court to reconsider the
24 judgment excepting his debt to the Appellees from discharge was
25 filed fourteen days after entry of the judgment. It is thus
26 treated as a motion to alter or amend judgment under Rule 9023,
27 which incorporates Civil Rule 59(e). Heritage Pac. Fin., LLC v.
28 Edgar (In re Montano), 501 B.R. 96, 112 (9th Cir. BAP 2013). A

1 motion for reconsideration under Civil Rule 59(e) should not be
2 granted, absent highly unusual circumstances, unless the court is
3 presented with newly discovered evidence, committed clear error,
4 or if there is an intervening change in the controlling law.
5 Marlyn Nutraceuticals, Inc. v. Mucos Pharma GmbH & Co., 571 F.3d
6 873, 880 (9th Cir. 2009); Jeffries v. Carlson (In re Jeffries),
7 468 B.R. 373, 380 (9th Cir. BAP 2012).

8 In the reconsideration motion, Brown did not present newly
9 discovered evidence, argue that there was a change in controlling
10 law, or contend that the bankruptcy court committed clear error.
11 Rather, as he has done in this appeal, Brown merely reargued his
12 position on the merits: that the findings in the State Court
13 Judgment were wrong. Brown has not demonstrated the existence of
14 the highly unusual circumstances needed to justify
15 reconsideration, and the bankruptcy court did not abuse its
16 discretion in denying the motion.

17 **CONCLUSION**

18 We AFFIRM the judgment of the bankruptcy court.
19
20
21
22
23
24
25
26
27
28