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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NOT FOR PUBLICATION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

In re:)	BAP No.	EC-13-1266-TaJuKu
)		
GERALD D. TOSTE and ROBIN D. TOSTE,)	Bk. No.	12-26789
)		
)	Adv. No.	12-02333
Debtors.)		
)		
GERALD D. TOSTE; ROBIN D. TOSTE,)		
)		
Appellants,)		
)		
v.)	MEMORANDUM*	
)		
KENNETH SMEDBERG; BONNIE SMEDBERG;** DARIN SMEDBERG,)		
)		
Appellees.)		

Submitted Without Oral Argument***
on May 15, 2014

Filed - August 12, 2014

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

Honorable David E. Russell, Bankruptcy Judge, Presiding

* 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.

** Kenneth and Bonnie Smedberg are named both individually and as trustees of the Kenneth P. Smedberg and Bonnie L. Smedberg Revocable Living Trust, Dated September 23, 1993.

*** On April 28, 2014, this Panel entered an order determining that this appeal was suitable for submission without oral argument.

1 Appearances: Charles G. Kinney, on brief, for appellants.****

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3 Before: TAYLOR, JURY, and KURTZ, Bankruptcy Judges.

4 **INTRODUCTION**

5 Chapter 13 debtors Gerald Toste and Robin Toste appeal from
6 the bankruptcy court's judgment excepting a state court judgment
7 from discharge under § 523(a)(6).¹ We conclude that, because the
8 § 523(a)(6) claim for relief was not ripe for adjudication, the
9 bankruptcy court lacked subject matter jurisdiction. Therefore,
10 we REVERSE.

11 **FACTS²**

12 This appeal arises from a protracted and contentious dispute
13 between neighbors involving an easement between adjoining real
14 property located in El Dorado County, California.

15 In 2006, Kenneth Smedberg, Bonnie Smedberg, Darin Smedberg
16 (collectively, the "Smedbergs") and Teresa Rowan³ filed an action
17 against the Debtors in California state court relating to the

18
19 **** The Smedbergs failed to timely file a brief and, thus,
20 waived the right to file a brief or participate in this appeal.

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

25 ² We exercised our discretion to take judicial notice of
26 documents electronically filed in the adversary proceeding and
27 underlying bankruptcy case. See Atwood v. Chase Manhattan Mortg.
28 Co. (In re Atwood), 293 B.R. 227, 233 n.9 (9th Cir. BAP 2003).

³ Prior to filing the adversary complaint, Ms. Rowan
assigned her interest in the Judgment to the Smedbergs; she,
thus, was not a party to the adversary proceeding, nor is she a
party to this appeal.

1 easement dispute. Among other things, they sought to quiet title
2 to the easement, to obtain declaratory and injunctive relief, and
3 to recover damages for nuisance. The complaint also alleged that
4 the Debtors verbally threatened the Smedbergs, Rowan, and those
5 working for them. In connection with their injunction claims,
6 they obtained a preliminary injunction that prohibited the
7 Debtors' interference with the easement during the pendency of
8 the state court action. Gerald, however, violated the
9 preliminary injunction. As a result, the state court issued a
10 pre-trial contempt of court order and awarded monetary sanctions
11 against Gerald.

12 Following a jury trial, the state court entered a judgment
13 ("Judgment") based, in part, on a special verdict after trial.
14 The jury found that Gerald, but not Robin, engaged in conduct
15 amounting to nuisance. The jury also found that Gerald, but
16 again not Robin, engaged in "malicious, oppressive, or
17 despicable" conduct. The state court, thus, awarded the
18 Smedbergs \$65,000 in general damages and \$40,000 in punitive
19 damages. Moreover, the Judgment permanently enjoined both Gerald
20 and Robin from "harassing, annoying, intimidating, interfering
21 with and obstructing the [plaintiffs] and the [plaintiffs']
22 invitees in their improvement, maintenance and use of the
23 easement." Adv. Dkt. No. 1 at 32. Finally, the Judgment
24 provided for the recovery of costs from both of the Debtors
25 pursuant to California Code of Civil Procedure § 1032.

26 The dispute moved to the bankruptcy court after the Debtors
27 filed a chapter 13 bankruptcy case. The Smedbergs filed a proof
28 of claim based on the Judgment in the amount of \$154,767.12.

1 They also initiated an adversary proceeding against the Debtors
2 that sought to except the Judgment from discharge under
3 § 523(a)(6) and objected to the Debtors' discharge under
4 § 727(a)(2), (a)(4), and (a)(7). The bankruptcy court held a
5 bifurcated one-day trial. After first trying the § 727 claims,
6 it overruled the Smedbergs' objections to discharge. The
7 bankruptcy court then heard argument as to the § 523(a)(6) claim
8 for relief. Stating that it was bound by the Judgment and
9 relying solely on issue preclusion, it determined that "[t]he
10 conduct of the debtor was willful and malicious and caused
11 injury, and that [was] sufficient under [§] 523(a)(6) to [except]
12 that particular judgment from discharge" Trial Tr.
13 (May 6, 2013) at 105:12-14.

14 The Debtors appealed from the bankruptcy court's § 523(a)(6)
15 determination.

16 JURISDICTION

17 As discussed below, the bankruptcy court lacked subject
18 matter jurisdiction over the § 523(a)(6) claim for relief.⁴ We,
19 however, have jurisdiction to hear the appeal under 28 U.S.C.
20 § 158. See United States v. Corrick, 298 U.S. 435, 440 (1936)
21 (where trial court lacks jurisdiction, appellate court has
22 "jurisdiction on appeal, not of the merits, but merely for the
23 purpose of correcting the error of the lower court in
24 entertaining the suit").

25
26
27 ⁴ The denial of the § 727(a) claims is not on appeal; thus,
28 we do not consider the propriety of their consideration in a
chapter 13 case.

1 **ISSUE**

2 Did the bankruptcy court have jurisdiction to determine the
3 § 523(a)(6) claim for relief given the Debtors' chapter 13 case?

4 **DISCUSSION**

5 **A. The § 523(a)(6) claim for relief was not ripe for**
6 **adjudication.**

7 The parties raised neither jurisdiction nor ripeness before
8 the bankruptcy court or on appeal. Even so, we have an
9 independent obligation to consider jurisdictional and
10 justiciability issues. See Ervine v. Desert View Reg'l Med. Ctr.
11 Holdings, LLC, 753 F.3d 862, 866 (9th Cir. 2014) (jurisdiction);
12 Am. Civil Liberties Union of Nev. v. Lomax, 471 F.3d 1010, 1015
13 (9th Cir. 2006) (justiciability).

14 Federal court jurisdiction is limited to actual cases and
15 controversies. U.S. Const. art. III § 2, cl. 1. Unless a claim
16 is ripe for adjudication, a court lacks subject matter
17 jurisdiction under the case or controversy clause of article III
18 of the federal Constitution. See St. Clair v. City of Chico,
19 880 F.2d 199, 201 (9th Cir. 1989); see also Oklevueha Native Am.
20 Church of Hawaii, Inc. v. Holder, 676 F.3d 829, 835 (9th Cir.
21 2012). The ripeness requirement prevents "the courts, through
22 avoidance of premature adjudication, from entangling themselves
23 in abstract disagreements." Id. (quoting Abbott Laboratories v.
24 Gardner, 387 U.S. 136, 148 (1967)).

25 The ripeness issue here arises because it was and remains
26 unnecessary to adjudicate the Smedbergs' § 523(a)(6) claim for
27 relief in Debtors' chapter 13 case. As discussed below, unless
28 and until Debtors seek a hardship discharge under § 1328(b),

1 § 523(a) (6) is unavailable as a basis for nondischargeability.
2 See 11 U.S.C. §§ 1328(c) (2) and 523(a); Fed. R. Bankr.
3 P. 4007(d). Thus, consideration of this claim for relief was
4 premature at best.

5 In the usual situation, a chapter 13 debtor obtains a
6 § 1328(a) bankruptcy discharge after the completion of plan
7 payments. This discharge is broader than that available under
8 other sections of the bankruptcy code, and it discharges some
9 claims that § 523(a) makes nondischargeable in other contexts.
10 Section 523(a)'s lead-in text makes no reference to § 1328(a).
11 Instead, § 1328(a) incorporates specific sub-parts of § 523(a);
12 as relevant here, it does not incorporate § 523(a) (6) willful and
13 malicious injury claims. Instead, § 1328(a) (4) makes only the
14 sub-group of civil awards based on willful or malicious personal
15 injury or wrongful death claims nondischargeable in a chapter 13
16 case. Section 1328(a) (4), thus, makes some, but not all
17 § 523(a) (6) type claims for relief nondischargeable in the
18 typical chapter 13 case. See Waag v. Permann (In re Waag),
19 418 B.R. 373, 377 (9th Cir. BAP 2009) (the two statutory sections
20 differ in significant ways and are not interchangeable).

21 In unusual cases, a § 1328(b) hardship discharge issues
22 despite a debtor's failure to complete chapter 13 plan payments.
23 This discharge is narrower than the § 1328(a) discharge; the
24 nondischargeability provisions of § 523(a) all apply. Thus, any
25 claim that is nondischargeable under § 523(a) (6) may survive the
26 hardship discharge. A debtor who requests a § 1328(b) hardship
27 discharge must meet specific criteria and may bring the motion at
28 "any time **after the confirmation of the plan** and after notice and

1 a hearing.” 11 U.S.C. § 1328(b) (emphasis added). Rule 4007(d),
2 in turn, protects a creditor holding a § 523(a)(6) claim for
3 relief. It provides that when a debtor seeks a hardship
4 discharge, the court must establish a deadline for filing a
5 § 523(a)(6) nondischargeability complaint and provide no less
6 than 30 days’ notice. Fed. R. Bankr. P. 4007(d).

7 Here, the Debtors had not confirmed their chapter 13 plan
8 prior to the bankruptcy court trial.⁵ As a result, a § 1328(b)
9 discharge was neither available nor requested at the time of
10 trial. The Smedbergs’ § 523(a)(6) claim for relief, thus, was
11 not ripe for adjudication, and, as a result, the bankruptcy court
12 lacked jurisdiction to adjudicate the claim. See Krasnoff v.
13 Marshack (In re General Carriers Corp.), 258 B.R. 181, 190-91
14 (9th Cir. BAP 2001).

15 **B. The record does not establish that § 1328(a)(4) supplies an**
16 **alternative basis for jurisdiction.**

17 We may affirm on any basis supported by the record. Caviata
18 Attached Homes, LLC v. U.S. Bank, N.A. (In re Caviata Attached
19 Homes, LLC), 481 B.R. 34, 44 (9th Cir. BAP 2012). Thus, if this
20 case involved a judgment based on personal injury or wrongful
21 death claims, we could consider whether § 1328(a)(4) provided an
22 alternative basis for jurisdiction.

23 There is little case law construing § 1328(a)(4). It is
24 unclear, for example, whether “personal injury” for § 1328(a)(4)
25 purposes: (1) refers solely to personal bodily injury;

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28 ⁵ While this appeal was pending, an order confirming the
Debtors’ chapter 13 plan was entered on January 14, 2014.

1 (2) includes nonphysical injury but not business or financial
2 injuries; or (3) includes all injuries insofar as the injury is
3 treated as a personal injury under non-bankruptcy law. In the
4 context of 28 U.S.C. § 157(b) (5), the courts have disagreed as to
5 the scope of "personal injury." See Adelson v. Smith
6 (In re Smith), 389 B.R. 902, 908 (Bankr. D. Nev. 2008) (observing
7 the three approaches taken by courts in determining personal
8 injury); see also Adams v. Adams (In re Adams), 478 B.R. 476, 486
9 (Bankr. N.D. Ga. 2012) (same).

10 Notwithstanding this dissonance, given that here the damages
11 awarded in the Judgment were based on a state law tort of
12 nuisance, we initially look to California law to determine
13 whether a private nuisance cause of action involves personal
14 injury. See id. at 487. The answer under California law
15 generally is not promising for the Smedbergs. See Institoris v.
16 City of Los Angeles, 210 Cal. App. 3d 10, 20 (1989) ("[A] private
17 nuisance can support recovery only for harm to a property
18 interest, not for personal injury").

19 More importantly, however, on this record there is
20 insufficient evidence for us to determine that the Smedbergs
21 recovered any amount for emotional distress or anything else that
22 even remotely resembles personal injury, as opposed to
23 interference with their property interests. Neither the state
24 court complaint nor the Judgment plainly reflects that the
25 Smedbergs sought or obtained damages for emotional distress,
26 mental anguish, or physical harm. And, in contrast, it is clear
27 that they asserted causes of action based on interference with
28 property rights. We cannot base jurisdiction on such a

1 speculative basis.⁶

2 **C. The bankruptcy court did not determine that the damages**
3 **award was nondischargeable as to Robin.**

4 Finally, the Panel acknowledges the limitations of the
5 bankruptcy court's determinations as to Robin. Based on our
6 review of the record, we conclude that the Smedbergs never
7 requested denial of Robin's discharge in relation to the award of
8 damages and that the bankruptcy court correctly understood that
9 the damages award was not at issue as to Robin. Instead, as to
10 Robin, the Smedbergs sought to except from discharge only the
11 injunction. The bankruptcy court's ruling as to the damages
12 award is consistent with their request.⁷

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14 ⁶ We note, however, that to the extent that any portion of
15 the Judgment encompassed a personal injury recovery, we question
16 the bankruptcy court's reliance on issue preclusion. We assume
17 that Congress intended to give § 1328(a)(4) willful or malicious
18 injury the same meaning as used in § 523(a)(6). See Patterson v.
19 Shumate, 504 U.S. 753, 758 & n.2 (1992). Here, the jury granted
20 the Judgment based on nuisance. This finding did not require a
21 determination of a state of mind that equates to willfulness or
22 malice. The jury also awarded punitive damages against Gerald.
23 In doing so, the jury found, in the disjunctive, that Gerald
24 "engaged in conduct that was malicious, oppressive, or
25 despicable." This finding is also insufficient as not all of the
26 possible bases for the award require a determination of
27 willfulness or maliciousness within the meaning of § 1328(a)(4).

28 ⁷ We also question whether the permanent injunction portion
of the Judgment can ever be nondischargeable. Both §§ 523 and
1328(a)(4) except only debts from discharge. The Code defines
"debt" as a "liability on a claim." 11 U.S.C. § 101(12). A
"claim," in turn, refers either to a payment or to certain
equitable remedies. 11 U.S.C. § 101(5)(A)-(B).

Here, the permanent injunction enjoined the Debtors from
interfering with the easement in the future and does not facially
provide a right to payment. Determining whether the injunction
is a claim pursuant to § 101(5)(B) turns on whether it gives rise
continue...

1 **CONCLUSION**

2 Based on the foregoing, we REVERSE.
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24 ⁷...continue
25 to an alternative or corollary right to payment. See Matter of
26 Udell, 18 F.3d 403, 407 (7th Cir. 1994); United States v. The LTV
27 Corp. (In re Chateaugay Corp.), 944 F.2d 997, 1008 (2d Cir.
28 1991). Nothing in the current record establishes that the
Debtors have the option to pay the Smedbergs so as to continue
interfering with the easement. See In re Chateaugay Corp.,
944 F.2d at 1008.