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NOT FOR PUBLICATION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

In re:) BAP No. CC-14-1019-TaPaKi
)
 CRISTIE TOLOTTI,) Bk. No. 9:10-bk-14856-RR
)
 Debtor.) Adv. No. 9:11-ap-01215-RR
)
)
 CRISTIE TOLOTTI,)
)
 Appellant,)
)
 v.) MEMORANDUM*
)
 SEABOARD PRODUCE DISTRIBUTORS,)
 INC.,)
)
 Appellee.)
)

Argued and Submitted on July 25, 2014
at Pasadena, California

Filed - August 25, 2014

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

Honorable Robin Riblet, Bankruptcy Judge, Presiding

Appearances: Michael Jay Berger argued for appellant Cristie Tolotti; Joshua S. Hopstone argued for appellee Seaboard Produce Distributors, Inc.

Before: TAYLOR, PAPPAS, and KIRSCHER, 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 Christie Tolotti appeals from a summary judgment in
3 favor of Seaboard Produce Distributors, Inc. based on issue
4 preclusion. The bankruptcy court held that a state court
5 judgment, issued on default, conclusively established all the
6 elements necessary to except Seaboard's claim from discharge
7 under 11 U.S.C. § 523(a) (6).¹

8 We agree that Seaboard is entitled to issue preclusive
9 effect of the state court's findings that Mrs. Tolotti committed
10 wrongful acts that resulted in more than \$600,000 in damage to
11 Seaboard's property. Thus, the bankruptcy court did not err when
12 it ruled that Seaboard is entitled to rely upon the state court
13 judgment on these elements of its § 523(a) (6) claim.

14 We determine, however, that Seaboard was not entitled to
15 rely upon the state court's apparent determination that
16 Mrs. Tolotti had the subjective state of mind necessary to except
17 the debt from discharge under § 523(a) (6). For issue preclusion
18 analysis, any reasonable doubt as to what was decided by a prior
19 judgment should be resolved against allowing issue preclusive
20 effect; and nondischargeability actions are to be strictly
21 construed in the debtor's favor. Here, Mrs. Tolotti had
22 inadequate notice that Seaboard sought determination of her
23 § 523(a) (6) subjective state of mind in the state court action.
24 Seaboard did not raise Mrs. Tolotti's subjective state of mind as
25 a material fact to be litigated, nor did its prayer for relief
26 for damages for waste and conversion so implicate. Further, the

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

1 state court did not need to consider or determine Mrs. Tolotti's
2 subjective state of mind for purposes of determining her
3 liability for waste and conversion. And finally, Seaboard failed
4 to provide any record of the default prove-up to show how or why
5 the state court otherwise might have reached the state of mind
6 determination on default. As a result, Seaboard failed to carry
7 its burden to show that the state court's § 523(a)(6) state of
8 mind findings were actually litigated and, thus, they are not
9 entitled to preclusive effect. Therefore, we VACATE the
10 bankruptcy court's summary judgment and REMAND this matter for
11 further proceedings.

12 **FACTS**

13 Seaboard, the successful bidder at a bank's foreclosure
14 sale, purchased property owned by Mrs. Tolotti and her husband in
15 Camarillo, California, consisting of a residence and
16 approximately nine acres of avocado trees. To obtain possession,
17 Seaboard filed an unlawful detainer action against the Tolottis,
18 which the Tolottis actively defended.

19 After conducting a trial, the unlawful detainer court
20 awarded possession to Seaboard, along with holdover damages, and
21 ordered the Tolottis to vacate the property. The Tolottis,
22 nonetheless, continued their efforts to avoid eviction through
23 post-trial legal maneuvers. At some point after foreclosure,
24 Seaboard offered to pay for and to ensure watering, maintenance,
25 and upkeep of the avocado trees. The Tolottis either refused or
26 failed to respond to the offer. Mrs. Tolotti then filed

1 a petition under chapter 11.²

2 Seaboard promptly obtained relief from stay and completed
3 the eviction process. When Seaboard took possession, the avocado
4 trees were damaged from neglect and lack of water. In addition,
5 the Tolottis had removed or damaged fixtures, including toilets,
6 sinks, kitchen appliances, portions of the HVAC system, ducts,
7 and the outside barbeque.

8 Mrs. Tolotti's chapter 11 case was converted to a case under
9 chapter 7, and Seaboard filed its adversary proceeding under
10 § 523(a)(6). Seaboard's complaint ("Adversary Complaint") sought
11 a nondischargeable judgment for damages caused by waste,
12 destruction and removal of fixtures from the residence, and
13 waste, destruction and damage to the avocado orchard.

14 After Mrs. Tolotti responded to the Adversary Complaint, she
15 and Seaboard entered into a stipulation. Pursuant to the
16 stipulation, the bankruptcy court lifted the automatic stay to
17 allow Seaboard to file and prosecute an action against
18 Mrs. Tolotti in state court relating to the claims raised in the
19 Adversary Complaint.

20 Seaboard filed its complaint for waste and conversion
21 against Mrs. Tolotti and her husband in Ventura Superior Court
22 ("State Court Complaint"). As its first cause of action, titled
23 "Waste, Damage, and Destruction," Seaboard alleged that the
24 Tolottis improperly delayed turnover of the property. It listed
25 the litigation steps taken by the Tolottis in and connected to

26
27 ² Mrs. Tolotti initially filed a chapter 13 petition that
28 she subsequently dismissed; and her husband filed a separate
chapter 13 petition, which was subsequently dismissed.

1 the unlawful detainer proceeding and the multiple bankruptcy
2 filings. Seaboard also alleged that the Tolottis knowingly
3 destroyed and damaged the property and recklessly failed to
4 maintain and care for it. Further, Seaboard alleged that these
5 "actions caused [Seaboard] to suffer financial injury without
6 cause or excuse . . .; were deliberate and intentional . . .;"
7 and the "willful and malicious actions" caused damages of not
8 less than \$250,000. Request for Judicial Notice, Ex. A at
9 ¶¶ 16-17 (Adv. Pro. ECF No. 40).

10 In Seaboard's second cause of action, for conversion, it
11 alleged that the Tolottis knew that Seaboard owned the property
12 and had right to its possession, yet "willfully and intentionally
13 took unreasonable and unsuccessful steps that obstructed and
14 thwarted" such rights. Id. at ¶¶ 19-20. In addition, Seaboard
15 alleged that the Tolottis "knowingly stole fixtures belonging to
16 [Seaboard]." Id. at ¶ 21.

17 Seaboard titled its third cause of action as one for "Waste,
18 Destruction, and Damage to Avocado Orchard." Seaboard alleged
19 that the Tolottis damaged the avocado trees through neglect and
20 lack of watering, and that such lack of care was willful and
21 intentional. Id. at ¶¶ 23-24. It specifically alleged that
22 "[the Tolottis'] actions, were deliberate and intentional" (id.
23 at ¶ 25); they "intentionally and recklessly failed to perform
24 adequate maintenance to preserve" the trees (id. at ¶ 26); and
25 their "willful and malicious actions" (id. at ¶ 27) caused
26 Seaboard damages of not less than \$300,000.

27 Approximately fifteen months later, Seaboard moved for and
28 obtained terminating sanctions against the Tolottis in the state

1 court action based on discovery abuses and failure to obey court
2 orders. The state court vacated trial and entered an order
3 striking the answer and entering default against the Tolottis in
4 favor of Seaboard. Thereafter, the state court entered a default
5 judgment against the Tolottis for a total of \$660,511.85
6 (hereinafter, the "Default Judgment").³

7 The Default Judgment, prepared by Seaboard's counsel,
8 substantially mirrored the State Court Complaint, with findings
9 that the Tolottis committed the actions alleged therein. In
10 addition, it contained detailed findings describing the physical
11 damage to the residence and the avocado trees caused by such
12 actions and omissions. It also included the following express
13 findings:

14 7. The Court finds that [the Tolottis] committed each
15 of the acts referenced in this Judgment and caused the
16 damage referenced in this Judgment without
17 justification, just cause, or excuse. In taking the
18 above actions, the Court finds that [the Tolottis]
acted deliberately, willfully, and intended to cause
injury to [Seaboard's] security and impede [Seaboard]
from obtaining physical possession of the property.

19 8. The Court finds that [the Tolottis] acted with
malice in taking the above actions and that the [the
Tolottis'] actions described herein caused [Seaboard]
20 to suffer and incur damages of \$300,000, for the
destruction caused to the avocados, and \$250,000 for
21 the damage caused to the Property due to removal of the
fixtures, plus interest of \$105,327.12 and costs of
22 \$5,184.73 for a total judgment of \$660,511.85 together
with interest on the judgment as provided by law.

23
24 Request for Judicial Notice, Ex. D (Adv. Pro. ECF No. 40). No

25
26 ³ The Default Judgment appears to have been entered based
on a default prove-up conducted by the state court without a
27 hearing. The record on appeal, however, does not contain copies
of any documents or evidence considered by the state court for
the default prove-up. Therefore, our review is limited to the
28 State Court Complaint and the Default Judgment.

1 appeal was filed.

2 Seaboard thereafter filed a motion for summary judgment
3 (hereinafter, "MSJ") requesting that the bankruptcy court give
4 preclusive effect to the Default Judgment. Mrs. Tolotti opposed
5 the MSJ on the grounds that Mrs. Tolotti's state of mind, as
6 required to establish nondischargeability under § 523(a)(6), was
7 not decided by the state court, thus creating a disputed issue of
8 fact that could not be determined by the bankruptcy court on
9 summary judgment.⁴ Mrs. Tolotti also argued that the issue of
10 dischargeability was not litigated in the state court and could
11 only be determined in the bankruptcy court.

12 The bankruptcy court held a hearing on the MSJ and stated
13 its findings and conclusions on the record. The bankruptcy court
14 found that the Default Judgment was entitled to preclusive effect
15 and that the findings contained therein conclusively established
16 nondischargeability of the judgment amount under § 523(a)(6).
17 The bankruptcy court entered its order granting summary judgment
18 and a separate judgment of nondischargeability thereon (the
19 "Judgment"), and Mrs. Tolotti timely appealed.

20 JURISDICTION

21 The bankruptcy court had jurisdiction pursuant to 28 U.S.C.
22

23 ⁴ In her opposing papers, Mrs. Tolotti argued and stated by
24 declaration that she removed the items from the property because
25 she believed them to belong to her; her court filings were made
26 to protect her rights; and she stopped watering the avocados
27 months before foreclosure because she could not afford the bills
28 and the trees were dying by the time Seaboard offered to
reimburse her for watering. Such alleged "factual disputes are
irrelevant here where the court's task is to determine whether
the Default Judgment will support a summary judgment for
nondischargeability in this court." Newsom v. Moore
(In re Moore), 186 B.R. 962, 966 n.3 (Bankr. N.D. Cal. 1995).

1 §§ 1334 and 157(b)(2)(I). We have jurisdiction under 28 U.S.C.
2 § 158.

3 **ISSUE⁵**

4 Did the bankruptcy court err when it determined that the
5 state court's state of mind findings in the Default Judgment were
6 entitled to issue-preclusive effect as to Seaboard's § 523(a)(6)
7 nondischargeability claim against Mrs. Tolotti?

8 **STANDARD OF REVIEW**

9 We review decisions on summary judgment de novo. Bamonte v.
10 City of Mesa, 598 F.3d 1217, 1220 (9th Cir. 2010). We also
11 review de novo whether a debt is excepted from discharge as a
12 willful and malicious injury under § 523(a)(6). Black v. Bonnie
13 Springs Family Ltd. P'ship (In re Black), 487 B.R. 202, 210 (9th
14 Cir. BAP 2013); see also Carrillo v. Su (In re Su), 290 F.3d
15 1140, 1142 (9th Cir. 2002) (nondischargeability presents mixed
16 issues of law and fact and is reviewed de novo).

17 Our review of the bankruptcy court's determination that
18 issue preclusion was available is also de novo. In re Black,
19 487 B.R. at 210. If issue preclusion was available, we then
20 review the bankruptcy court's application of issue preclusion for
21 an abuse of discretion. Id. The bankruptcy court abused its
22 discretion only if it applied the incorrect legal rule or its
23 application of the correct legal rule was illogical, implausible,
24 or without support in the record. See United States v. Hinkson,

25
26 ⁵ On appeal, Mrs. Tolotti states the issue more broadly,
27 but only one of her arguments addresses the bankruptcy court's
28 issue preclusion determination. Mrs. Tolotti does not dispute
the finality of the Default Judgment; nor question the identity
of the parties involved. We, therefore, do not address these
elements.

1 585 F.3d 1247, 1261-62 (9th Cir. 2009) (en banc).

2 **DISCUSSION AND ANALYSIS**

3 **A. Standards and burdens.**

4 **1. Summary judgment**

5 A bankruptcy court may grant summary judgment when the
6 pleadings and evidence demonstrate "that there is no genuine
7 issue as to any material fact and that the moving party is
8 entitled to a judgment as a matter of law." Celotex Corp. v.
9 Catrett, 477 U.S. 317, 322 (1986). The movant has the burden of
10 proof. See N. Slope Borough v. Rogstad (In re Rogstad), 126 F.3d
11 1224, 1227 (9th Cir. 1997) (It is error to grant summary judgment
12 simply because the opponent failed to oppose.).

13 The issue preclusive effect of a prior state court judgment
14 may serve as the basis for granting summary judgment. See
15 Khaligh v. Hadaegh (In re Khaligh), 338 B.R. 817, 832 (9th Cir.
16 BAP 2006); see also Grogan v. Garner, 498 U.S. 279, 284 (1991)
17 (holding that the doctrine of issue preclusion applies in
18 bankruptcy court proceedings seeking to except debts from
19 discharge). Federal courts must give "full faith and credit" to
20 the judgments of state courts. 28 U.S.C. § 1738.

21 **2. Issue preclusion**

22 The party asserting preclusion bears the burden of
23 establishing the threshold requirements. Harmon v. Kobrin
24 (In re Harmon), 250 F.3d 1240, 1245 (9th Cir. 2001). This means
25 providing "a record sufficient to reveal the controlling facts
26 and pinpoint the exact issues litigated in the prior action."
27 Kelly v. Okoye (In re Kelly), 182 B.R. 255, 258 (9th Cir. BAP
28 1995), aff'd, 100 F.3d 110 (9th Cir. 1996). "Any reasonable

1 doubt as to what was decided by a prior judgment should be
2 resolved against allowing the [issue preclusive] effect." Id.

3 In determining whether a state court judgment is entitled to
4 preclusive effect in a bankruptcy proceeding, the bankruptcy
5 court must apply the forum state's law of issue preclusion.
6 In re Harmon, 250 F.3d at 1245. Since the question here involves
7 the preclusive effect of a California state court judgment, we
8 apply California preclusion law. See id.

9 Under California issue preclusion law, the proponent must
10 establish the following:

- 11 1) the issue sought to be precluded . . . must be
- 12 identical to that decided in the former proceeding;
- 13 2) the issue must have been actually litigated in the
- 14 former proceeding; 3) it must have been necessarily
- 15 decided in the former proceeding; 4) the decision in
- the former proceeding must be final and on the merits;
- and 5) the party against whom preclusion is being
- sought must be the same as the party to the former
- proceeding.

16 Honkanen v. Hopper (In re Honkanen), 446 B.R. 373, 382 (9th Cir.
17 BAP 2011); Lucido v. Super. Ct., 51 Cal. 3d 335, 341 (1990).

18 Even if all five requirements are satisfied, however,
19 California places an additional limitation on issue preclusion;
20 courts may give preclusive effect to a judgment "only if
21 application of preclusion furthers the public policies underlying
22 the doctrine." In re Harmon, 250 F.3d at 1245 (citing Lucido,
23 51 Cal. 3d at 342).

24 **3. Issue preclusive effect of default judgments**

25 Most jurisdictions do not consider a default judgment to be
26 capable of satisfying the requirements for the application of
27 issue preclusion. See Murray v. Alaska Airlines, Inc., 522 F.3d
28 920, 924 (9th Cir. 2008) (citing Restatement (Second) Judgments

1 § 27, cmt. E). In California, however, issue preclusion may
2 apply to a default judgment; the issue to be precluded, however,
3 "must have been necessarily litigated in the action resulting in
4 the default judgment." In re Harmon, 250 F.3d at 1246 n.5
5 (internal quotation and citation omitted).

6 The "'necessarily litigated' requirement imposes two
7 separate conditions: the issue must have been 'actually
8 litigated' and it must have been 'necessarily decided' by the
9 default judgment." Id. The defendant must have had "actual
10 notice of the proceedings and a 'full and fair opportunity to
11 litigate,'" Cal-Micro, Inc. V. Cantrell (In re Cantrell),
12 329 F.3d 1119, 1123-24 (9th Cir. 2003) (citing In re Harmon,
13 250 F.3d at 1247 n.6); and the material factual issues must have
14 been raised in the pleadings and must have been necessary to
15 sustain the judgment. Id. at 1247.

16 "[A] default judgment conclusively establishes, between the
17 parties so far as subsequent proceedings on a different cause of
18 action are concerned, the truth of all material allegations
19 contained in the complaint in the first action, and every fact
20 necessary to uphold the default judgment; but such judgment is
21 not conclusive as to any defense or issue which was not raised
22 and is not necessary to uphold the judgment." Mitchell v. Jones,
23 172 Cal. App. 2d 580, 586-587 (1959). In default situations, the
24 defendant generally has a right to depend upon the pleadings to
25 determine whether or not to appear and litigate the matter. It
26 is ordinarily held that it would be doing a defendant serious
27 wrong and injustice to uphold a judgment that gives relief beyond
28 that asked for in the complaint. Thus, "[a] default judgment

1 will have a[n issue preclusive] effect only as to material issues
2 actually raised in the pleadings.” Heiser, California Civil
3 Procedure § 9.03 (Matthew Bender & Co. 2nd ed. 2005) (citing
4 English v. English, 9 Cal. 2d 358 (1937); Four Star Elec. Inc. v.
5 Feh Constr., 7 Cal. App. 4th 1375 (1992)).

6 **4. Section 523(a) (6) state of mind requirements.**

7 A creditor objecting to the dischargeability of its claim
8 bears the burden of proving, by a preponderance of the evidence,
9 that the particular debt falls within one of the exceptions to
10 discharge enumerated in section 523(a). Grogan v. Garner,
11 498 U.S. at 286-91. Section 523(a) (6) excepts from discharge
12 debts arising from a debtor’s “willful and malicious injury” to
13 another person or to the property of another. Barboza v. New
14 Form, Inc. (In re Barboza), 545 F.3d 702, 706 (9th Cir. 2008).
15 “The word ‘willful’ in (a) (6) modifies the word ‘injury,’
16 indicating that nondischargeability takes a deliberate or
17 intentional injury, not merely a deliberate or intentional act
18 that leads to injury.” Kawaauhau v. Geiger, 523 U.S. 57, 61
19 (1998). In the Ninth Circuit, “§ 523(a)6)’s willful injury
20 requirement is met only when the debtor has a subjective motive
21 to inflict injury or when the debtor believes that injury is
22 substantially certain to result from his own conduct.” Ormsby v.
23 First Am. Title Co. (In re Ormsby), 591 F.3d 1199, 1206 (9th Cir.
24 2010). This standard is an exacting one under any circumstance.
25 “A malicious injury involves (1) a wrongful act, (2) done
26 intentionally, (3) which necessarily causes injury, and (4) is
27 done without just cause or excuse. Malice may be inferred based
28 on the nature of the wrongful act.” Id. at 1207. The willful

1 injury must be established, however, before malice may be
2 inferred. See id. (citing Thiara v. Spycher Bros.
3 (In re Thiara), 285 B.R. 420, 434 (9th Cir. BAP 2002) (“the ‘done
4 intentionally’ element of a ‘malicious’ injury brings into play
5 the same subjective standard of intent which focuses on . . .
6 knowledge of harm to the creditor.”)).

7
8 **B. Mrs. Tolotti’s subjective state of mind was not actually
9 litigated in the state court action.**

10 Here, Seaboard appropriately argued below, and repeats on
11 appeal, that default judgments in California are entitled to
12 issue preclusive effect. And Seaboard also correctly argues that
13 the Default Judgment contains findings that would support
14 nondischargeability under § 523(a)(6). The state court expressly
15 found that Mrs. Tolotti “caused the damage referenced in this
16 Judgment without justification, just cause, or excuse.” Request
17 for Judicial Notice, Ex. D at ¶ 7 (Adv. Pro. ECF No. 40). It
18 found that Mrs. Tolotti “acted deliberately, willfully, and
19 intended to cause injury” Id. In addition, it found
20 that Mrs. Tolotti “acted with malice in taking the . . . actions
21 and . . . the actions . . . caused [Seaboard] to suffer and incur
22 damages” Id. at ¶ 8. These words and phrases appear
23 facially to satisfy the state of mind requirements. But the
24 problem with this view is that these words and phrases when used
25 in the context of state court causes of action for waste and
26 conversion do not comport with the very particular definitions in
27 the Ninth Circuit for bankruptcy nondischargeability purposes.

28 Moreover, nowhere in the state court complaint did Seaboard
allege that Mrs. Tolotti intended to cause injury to Seaboard, a

1 critical element of the subjective state of mind required to
2 support a § 523(a)(6) claim. This material factual issue was
3 neither raised by Seaboard in the State Court Complaint nor
4 necessary to support a state court judgment based on waste and
5 conversion.

6 Thus, prior to her default, Mrs. Tolotti could not know that
7 intent to injure would be litigated in the state court action.
8 This determination arose for the first time in the context of
9 Default Judgment and was not a required determination for
10 liability in connection with the state court waste and conversion
11 claims.

12
13 **1. Mrs. Tolotti's "intent to cause injury" was not raised
in the State Court Complaint.**

14 In the State Court Complaint, Seaboard pled that
15 Mrs. Tolotti's actions and omissions, labeled waste and
16 conversion, were intentional and deliberate. It also summarily
17 alleged that such "willful and malicious actions" caused Seaboard
18 to incur damages. Willful and intentional actions, however, are
19 not synonymous with willful or intentional injury. See Geiger,
20 523 U.S. at 61; and see Dominguez v. Elias (In re Elias),
21 302 B.R. 900, 909 (Bankr. D. Idaho 2003) (emphasis on the
22 importance of the debtor's subjective intent under § 523(a)(6)
23 required denial of issue preclusive effect of a criminal
24 judgment). As Mrs. Tolotti argues on appeal, willful, as used in
25 state court tort actions, is not synonymous with willful under
26 § 523(a)(6).

27 **2. California "willfulness" vs. § 523(a)(6) "willfulness."**

28 California law recognizes "willful" misconduct as a type of

1 misconduct that is more culpable than negligence but falls short
2 of intentional wrong. New v. Consol. Rock Prods. Co., 171 Cal.
3 App. 3d 681, 689 (1985). "Wilful or wanton misconduct is
4 intentional wrongful conduct, done either with a knowledge that
5 serious injury to another will probably result, or with a wanton
6 and reckless disregard of the possible result." Id. Such
7 willful misconduct is known under several other names: "serious
8 and wilful misconduct," "wanton misconduct," "reckless
9 disregard," "recklessness" - an aggravated form of negligence.
10 Id.; and see Carlsen v. Koivumaki, 227 Cal. App. 4th 879, 895
11 (2014). But negligence, even aggravated negligence, is
12 insufficient to support a nondischargeable claim under
13 § 523(a)(6). See Petralia v. Jercich (In re Jercich), 238 F.3d
14 1202, 1207 (9th Cir. 2001) ("[I]t must be shown not only that the
15 debtor acted willfully, but also that the debtor inflicted the
16 injury willfully and maliciously rather than recklessly or
17 negligently."). Nonetheless, Seaboard incorporated in its
18 allegations of waste and conversion such descriptors as "willful
19 and malicious actions," "deliberate," and "intentional." Having
20 done so, however, Seaboard did not place at issue Mrs. Tolotti's
21 subjective state of mind. In a default situation, if a material
22 fact was not raised in the pleadings, unless it was necessarily
23 decided, the issue was not actually litigated. See In re Harmon,
24 250 F.3d at 1248.

25 "Whether an issue was necessarily decided has been
26 interpreted to mean that the issue was not entirely unnecessary
27 to the judgment in the prior proceeding." Murphy v. Murphy,
28 164 Cal. App. 4th 376, 400 (2008) (internal quotation and

1 citation omitted). Here, Seaboard was not required to prove
2 Mrs. Tolotti's subjective intent to injure in order to prove her
3 liability for waste or conversion.

4
5 **3. Section 523(a)(6) willfulness was not necessary for
Seaboard's judgment for waste.**

6 In California, waste is an unlawful act or omission of duty
7 by a person in possession of real property that results in an
8 injury to that property. S. Pac. Land Co. v. Kiggins, 110 Cal.
9 App. 56, 60-61 (1930). "Proof of conduct which has resulted in
10 substantial depreciation of the market value of the land
11 establishes waste." Smith v. Cap Concrete Inc., 133 Cal. App. 3d
12 769, 776 (1982). Thus, liability based on this property tort
13 does not require a showing of a subjective motive to injure.

14
15 **4. Section 523(a)(6) willfulness was not necessary for
Seaboard's judgment for conversion.**

16 Conversion is "the wrongful exercise of dominion over
17 another's personal property in denial of or inconsistent with his
18 rights in the property." In re Emery, 317 F.3d 1064, 1069 (9th
19 Cir. 2003). To succeed on a claim of conversion, the plaintiff
20 must show: (1) a present right to possess the property, (2) the
21 defendant's conversion by a wrongful act or disposition of
22 property, and (3) damages. Hernandez v. Lopez, 180 Cal. App. 4th
23 932, 939-40 (2009). A cause of action for conversion does not
24 require a showing that the "defendant did the act in question
25 from wrongful motives, or generally speaking, even
26 intentionally." Henderson v. Sec. Nat'l Bank, 72 Cal. App. 3d
27 764, 771 (1977). In fact, "a want of such motives, or of
28 intention, is no defense." Id.

1 Thus, the finding that Mrs. Tolotti intended to cause injury
2 to Seaboard,⁶ was unnecessary and immaterial to establish
3 Seaboard's right to recover its claimed damages.⁷ As such,
4 Mrs. Tolotti's § 523(a)(6) subjective state of mind was not
5 necessarily decided by the state court.⁸

6 **5. Seaboard did not seek or obtain punitive damages.**

7 Arguably, if Seaboard sought and obtained a ruling in the
8 state court awarding punitive damages against Mrs. Tolotti, the
9 findings necessary to support such damages might be sufficient to
10 satisfy the state of mind requirement under § 523(a)(6). See
11 In re Jercich, 238 F.3d at 1209 (a finding of substantial
12 oppression under Cal. Civ. Code § 3294, for punitive damages,
13 held to be sufficient to show malicious injury under
14 § 523(a)(6)). Seaboard did not pray for punitive damages,
15 however, in its State Court Complaint; thus, no related findings
16 were necessary to support the decision.

17
18
19 ⁶ We reiterate that the record on appeal fails to establish
20 that the state court had anything more than the State Court
Complaint on which to base its decision.

21 ⁷ In oral argument, Seaboard's counsel argued that the
22 state court read between the lines to find Mrs. Tolotti's intent
23 to injure. The record here does not support Seaboard's
24 contention that the state court consciously and appropriately
25 made such inferences unless we also read between the lines.
Issue preclusion analysis does not permit us to do so.
26 Mrs. Tolotti's counsel conceded that Mrs. Tolotti's conduct might
appear "outrageous" but that in Mrs. Tolotti's mind she was
legitimately entitled to do as she had done. Seaboard had the
burden, and on this point, failed to carry it.

27 ⁸ Seaboard's recitation of the elements required for issue
28 preclusion in California omitted the word "necessarily" in the
third factor: "necessarily decided." And on appeal Seaboard does
no more than state that all the issues were decided.

1 **6. A § 523(a)(6) "malice" finding necessarily requires**
2 **intentional injury.**

3 As discussed earlier, Mrs. Tolotti's intent to cause injury
4 was not actually litigated. Even assuming the state court based
5 its "malice" finding on inferences from Mrs. Tolotti's actions,
6 without having appropriately first determined the "intentional
7 injury," such an inference was premature, at best. And because
8 the application of issue preclusion as to the intentional injury
9 finding was not appropriate, we determine that application of
10 issue preclusion to the finding of malice is likewise not
11 appropriate.⁹

12 **7. Public policy considerations**

13 Seaboard argues that the bankruptcy court held that public
14 policy considerations favored application of issue preclusion.
15 We determine that policy considerations favor application of
16 issue preclusion to the findings regarding Mrs. Tolotti's actions
17 and the damages caused thereby. To give preclusive effect to the
18 facial § 523(a)(6) state of mind findings included in the Default
19 Judgment, however, is inconsistent with fairness and public
20 policy. The State Court Complaint failed to provide notice to
21 Mrs. Tolotti that her § 523(a)(6) state of mind would be

22
23 ⁹ As to the "malice" finding by the state court,
24 Mrs. Tolotti argues on appeal that the state court erred in
25 relying on allegations that she employed improper litigation
26 tactics to prevent Seaboard's possession of the property -
27 because she had a legal right to litigate. Thus, Mrs. Tolotti
28 argues, the bankruptcy court erred by giving the malice finding
preclusive effect. Mrs. Tolotti asks the bankruptcy court and
this Panel to sit as reviewing courts with respect to the Default
Judgment - in effect a de facto appeal of a state court decision
that is barred by the Rooker-Feldman doctrine. See Exxon Mobil
Corp. v. Saudi Basic Indust. Corp., 544 U.S. 280, 284 (2005). We
appropriately decline to do so.

1 presented to the state court for decision. Her failure to defend
2 against that material factual issue, thus, cannot appropriately
3 be considered an admission of its truth.¹⁰ The fact that the
4 state court action involved terminating sanctions does not change
5 this conclusion. The resulting Default Judgment was broader than
6 the State Court Complaint and arguably conflated tortious conduct
7 with the "intent to injure" necessary to support
8 nondischargeability under § 523(a)(6). Here, the ultimate
9 determination of Mrs. Tolotti's § 523(a)(6) state of mind must
10 remain a finding to be made by the bankruptcy court.¹¹ We
11 reiterate that only Mrs. Tolotti's state of mind remains to be
12 determined.

13 **CONCLUSION**

14 Based on the foregoing, we VACATE the bankruptcy court's
15 summary judgment and REMAND this matter for further proceedings.
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19

20 ¹⁰ Seaboard argued that Mrs. Tolotti admitted willful and
21 malicious injury when she did not dispute Seaboard's statement of
22 undisputed facts and conclusions of law filed in support of the
23 MSJ. We agree with Mrs. Tolotti's assertion, however, that
24 Mrs. Tolotti only agreed that such findings were contained in the
25 Default Judgment. She did not agree that the findings themselves
26 were undisputed.

27 ¹¹ Mrs. Tolotti also contends that the bankruptcy court
28 improperly weighed evidence by disregarding Mrs. Tolotti's
declaration in opposition to the MSJ to the effect that she did
not intend to harm Seaboard. Mrs. Tolotti does not cite to any
point in the record to support the contention that the bankruptcy
court weighed the evidence, and, as noted earlier, the contention
is inconsistent facially with the bankruptcy court's analysis and
ruling based solely on its application of issue preclusion to the
Default Judgment.