

DEC 11 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NOT FOR PUBLICATION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 Nos.	CC-14-1202-TaKuPa
6	CATHERINE OLSEN,)		CC-14-1203-TaKuPa
7	Debtor.)	Bk. No.	12-27849
8	_____)	Adv. No.	12-01420
9	CATHERINE OLSEN,)		
10	Appellant,)		
11	v.)	MEMORANDUM*	
12	THE BLOOMFIELD GROUP, INC.,)		
13	Appellee.)		

Argued and Submitted on November 20, 2014
at Los Angeles, California

Filed - December 11, 2014

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

Honorable Wayne E. Johnson, Bankruptcy Judge, Presiding

Appearances: Lenore L. Albert for appellant Catherine Olsen;
John Ott for appellee The Bloomfield Group, Inc.

Before: TAYLOR, KURTZ 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 The Bloomfield Group, Inc. ("TBG") filed a
2 nondischargeability complaint against debtor Catherine Olsen,
3 seeking to determine a debt nondischargeable under
4 § 523(a)(2)(A), (a)(4), and (a)(6).¹ The debt was based on a
5 state court judgment against the Debtor for breach of contract,
6 conversion, and fraud. In response, the Debtor counterclaimed
7 against TBG, alleging theories of tort and violations of federal
8 law. The bankruptcy court granted summary judgment in favor of
9 TBG on both the nondischargeability complaint and the
10 counterclaims. The Debtor appeals from the bankruptcy court's
11 judgments.

12 We AFFIRM.

13 **FACTS**

14 The Debtor owned and operated Animal Chat, Inc., dba Royal
15 Hound Pet Products, a distributor of pet products. TBG is in the
16 business of graphic design and marketing. In 2007, the Debtor
17 hired TBG to create a website and other marketing materials for
18 the Royal Hound business. The business relationship quickly
19 soured, resulting in ownership disputes as to the Royal Hound
20 website and related intellectual property issues.

21 In December 2008, TBG filed a complaint against the Debtor
22 and Animal Chat in California state court for, among other
23 things, breach of contract, conversion, fraud and deceit, and
24

25 ¹ Unless otherwise indicated, all chapter and section
26 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532.
27 All "CCP" references are to the California Code of Civil
28 Procedure and all "LBR" references are to the Local Bankruptcy
Rules for the United States Bankruptcy Court for the Central
District of California.

1 negligent misrepresentation. Although she filed initial
2 demurrers and, eventually, an answer to the state court
3 complaint, the Debtor did not file any counterclaims against TBG.
4 The Debtor was at first represented in the state court action but
5 apparently became self-represented just before trial. She did
6 not appear at trial.

7 In mid-2010, the state court entered a judgment against the
8 Debtor and Animal Chat based on breach of contract, fraud, and
9 conversion. As to fraud, it determined that the Debtor and
10 Animal Chat engaged in intricate fraud and deceitful actions,
11 intending never to pay TBG and, instead, to steal information
12 from it. The state court awarded TBG \$31,044.70 in actual
13 damages for fraud. Finding that the conduct was egregious, it
14 further awarded punitive damages, for a cumulative total award of
15 \$93,134.10 for fraud. The state court also awarded actual
16 damages based on an alternative theory of conversion. The Debtor
17 did not appeal from the judgment and it is now final.

18 Approximately two years later, in mid-2012, the Debtor filed
19 a chapter 7 petition. TBG thereafter commenced an adversary
20 proceeding against the Debtor, seeking a determination that the
21 state court judgment was nondischargeable under § 523(a)(2),
22 (a)(4), and (a)(6). In response, the Debtor pled six
23 counterclaims against TBG: (1) violation of 18 U.S.C. § 1030;
24 (2) violation of 18 U.S.C. § 2701; (3) interference with a
25 prospective economic advantage; (4) invasion of privacy;
26 (5) conversion and infringement; and (6) negligent
27 misrepresentation and set-off.

28 TBG moved for summary judgment on both its

1 nondischargeability complaint and the Debtor's counterclaims.
2 After a hearing, the bankruptcy court granted summary judgment in
3 TBG's favor on both motions. It determined that the state court
4 judgment was nondischargeable under § 523(a)(2)(A), (a)(4), and
5 (a)(6). It further determined that the Debtor's counterclaims
6 were barred by principles of claim preclusion or, in the
7 alternative, that the various statutes of limitations barred the
8 claims.

9 The Debtor timely appealed from the judgments.

10 JURISDICTION

11 The bankruptcy court had jurisdiction pursuant to 28 U.S.C.
12 §§ 1334 and 157(b)(2)(I). We have jurisdiction under 28 U.S.C.
13 § 158.

14 ISSUES

- 15 1. Did the bankruptcy court err when it granted TBG summary
16 judgment on its nondischargeability claims by applying issue
17 preclusion to the state court judgment?
- 18 2. Did the bankruptcy court err when it granted TBG summary
19 judgment on the Debtor's counterclaims?

20 STANDARDS OF REVIEW

21 We review de novo the bankruptcy court's grant of summary
22 judgments. Shahrestani v. Alazzeah (In re Alazzeah), 509 B.R. 689,
23 692-93 (9th Cir. BAP 2014).

24 DISCUSSION

25 Summary judgment is appropriate where the movant shows that
26 there is no genuine dispute of material fact and the movant is
27 entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a)
28 (applicable in adversary proceedings under Fed. R. Bankr. P.

1 7056). The bankruptcy court views the evidence in the light most
2 favorable to the non-moving party in determining whether there
3 exists any genuine disputes of material fact and the movant is
4 entitled to judgment as a matter of law. See Fresno Motors, LLC
5 v. Mercedes Benz USA, LLC, --- F.3d ----, 2014 WL 5651930, at *3
6 (9th Cir. Nov. 5, 2014). And, it draws all justifiable
7 inferences in favor of the non-moving party. See id. (citing
8 Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986)). "A
9 fact is 'material' only if it might affect the outcome of the
10 case, and a dispute is 'genuine' only if a reasonable trier of
11 fact could resolve the issue in the non-movant's favor." Id.

12 **A. The bankruptcy court did not err in granting summary**
13 **judgment to TBG on its nondischargeability complaint based**
14 **on the issue preclusive effect of the state court fraud**
15 **judgment.**

16 The issue preclusive effect of an existing state court
17 judgment may serve as the basis for granting summary judgment.
18 See Khaligh v. Hadaegh (In re Khaligh), 338 B.R. 817, 831-32 (9th
19 Cir. BAP 2006). In determining the issue preclusive effect of a
20 state court judgment, the bankruptcy court must apply the forum
21 state's law of issue preclusion. Harmon v. Kobrin
22 (In re Harmon), 250 F.3d 1240, 1245 (9th Cir. 2001); see also
23 28 U.S.C. § 1738 (federal courts must give "full faith and
24 credit" to state court judgments). As the question here involves
25 the preclusive effect of a California state court judgment, we
26 apply California preclusion law.

27 In California, application of issue preclusion requires
28 that: (1) the issue sought to be precluded from re-litigation is

1 identical to that decided in a former proceeding; (2) the issue
2 was actually litigated in the former proceeding; (3) the issue
3 was necessarily decided in the former proceeding; (4) the
4 decision in the former proceeding is final and on the merits; and
5 (5) the party against whom preclusion is sought was the same as,
6 or in privity with, the party to the former proceeding. Lucido
7 v. Super. Ct., 51 Cal. 3d 335, 341 (1990).

8 Even if all five requirements are satisfied, however,
9 California places an additional limitation on issue preclusion:
10 courts may give preclusive effect to a judgment "only if
11 application of preclusion furthers the public policies underlying
12 the doctrine." In re Harmon, 250 F.3d at 1245 (citing Lucido,
13 51 Cal. 3d at 342); see also In re Khaligh, 338 B.R. at 824-25.

14 The party asserting preclusion bears the burden of
15 establishing the threshold requirements. In re Harmon, 250 F.3d
16 at 1245. This means providing "a record sufficient to reveal the
17 controlling facts and pinpoint the exact issues litigated in the
18 prior action." Kelly v. Okoye (In re Kelly), 182 B.R. 255, 258
19 (9th Cir. BAP 1995), aff'd, 100 F.3d 110 (9th Cir. 1996). And,
20 ultimately, "[a]ny reasonable doubt as to what was decided by a
21 prior judgment should be resolved against allowing the [issue
22 preclusive] effect." Id.

23 **1. The bankruptcy court applied issue preclusion, not**
24 **claim preclusion, to the state court judgment.**

25 The Debtor's principal argument with respect to the summary
26 judgment on nondischargeability - truly, her only substantive
27 argument on that appeal - is that the bankruptcy court improperly
28 applied claim preclusion to the state court judgment, rather than

1 issue preclusion. We disagree.

2 It is well established that claim preclusion does not apply
3 in a § 523(a) nondischargeability proceeding. Brown v. Felsen,
4 442 U.S. 127, 138-39 & n.10 (1979) (Act case); Seven Elves, Inc.
5 v. Eskenazi (In re Eskenazi), 6 B.R. 366, 368 (9th Cir. BAP 1980)
6 (same under the Bankruptcy Code). But, conversely, issue
7 preclusion is applicable in a nondischargeability context.
8 Grogan v. Garner, 498 U.S. 279, 285 (1991).

9 Here, the record reflects that the bankruptcy court
10 correctly applied issue preclusion, rather than claim preclusion,
11 to the state court judgment. In its memorandum decision, the
12 bankruptcy court correctly identified the elements of each
13 § 523(a) claim and the elements for issue preclusion under
14 California law. It then applied issue preclusion, element by
15 element, to the state court judgment.

16 The Debtor contends erroneously that the bankruptcy court's
17 memorandum decision evidences its application of claim
18 preclusion. She bases this assertion on the following
19 statements: "federal courts must give a state court judgment the
20 same preclusive effect as would be given that judgment under the
21 law of the state in which the judgment was rendered" and "the
22 issue of fraud sought to be precluded from relitigation in this
23 action is identical to that decided in the State Court Action."
24 14-1202 Aplt's Op. Br. at 3, 4 (emphasis in original). Neither
25 statement is problematic.

26 Federal courts routinely employ the first statement with
27 respect to the requirement that, in accordance with 28 U.S.C.
28 § 1738, they give "full faith and credit" to the judgments of

1 state courts. Most cases involving issue preclusion of a state
2 court judgment include a reference to this exact statement of
3 law. See, e.g., Gayden v. Nourbakhsh (In re Nourbakhsh), 67 F.3d
4 798, 800 (9th Cir. 1995). It is not per se indicative of claim
5 preclusion application.

6 The second statement accurately reflects that the elements
7 of fraud under § 523(a)(2)(A) "mirror the elements of common law
8 fraud and match those for actual fraud under California law
9" Tobin v. Sans Souci Ltd. P'ship (In re Tobin), 258 B.R.
10 199, 203 (9th Cir. BAP 2001) (citation and internal quotation
11 marks omitted). The fact that the elements of both claims
12 correspond, however, does not make claim preclusion the exclusive
13 doctrine available with respect to preclusion analysis in a
14 nondischargeability proceeding. Instead, the second statement
15 merely reflects the bankruptcy court's appropriate identification
16 of the state court fraud judgment as the relevant basis for issue
17 preclusion.²

18 We also reject the Debtor's argument that this Panel must
19 follow Brown rather than Grogan and, thus, reverse. We - along
20

21 ² Issue preclusion and claim preclusion also are not
22 mutually exclusive doctrines. "Issue preclusion overlaps claim
23 preclusion in the sense that actual litigation of an issue
24 ordinarily qualifies for application of both claim and issue
25 preclusion." Christopher Klein et al., Principles of Preclusion
26 and Estoppel in Bankruptcy Cases, 79 Am. Bankr. L.J. 839, 852
27 (2005). Thus, to the extent that an issue is "part of the
28 original claim, then claim preclusion is also available. If the
actually litigated issue falls outside the limits of the
transaction that determines the dimensions of the claim and,
hence, applies to a different claim, then issue preclusion
assumes greater importance." Id.

1 with every federal court - are bound by these Supreme Court
2 decisions. Contrary to the Debtor's suggestion, however, these
3 case holdings are not mutually exclusive and our conclusion here
4 is consistent with both.

5 **2. Section 523(a) (2) (A) exception to discharge.**

6 Given the Debtor's misguided focus on claim preclusion, she
7 fails to adequately challenge the bankruptcy court's application
8 of issue preclusion to the state court judgment. At best, with
9 respect to § 523(a) (2) (A), the Debtor challenges the bankruptcy
10 court's application of the first and last elements of issue
11 preclusion when she notes that intent is not the same under the
12 Bankruptcy Code and California law and that the state court
13 judgment did not separate her liability from that of Animal Chat.
14 Neither argument is persuasive.

15 A debtor is not discharged in bankruptcy from any debt
16 obtained by "false pretenses, a false representation, or actual
17 fraud." 11 U.S.C. § 523(a) (2) (A). The creditor bears the burden
18 of demonstrating, by a preponderance of the evidence, each of the
19 following five elements: (1) misrepresentation, fraudulent
20 omission or deceptive conduct by the debtor; (2) knowledge of the
21 falsity or deceptiveness of the representation or omission;
22 (3) an intent to deceive; (4) the creditor's justifiable reliance
23 on the representation or conduct; and (5) damage to the creditor
24 proximately caused by reliance on the debtor's representations or
25 conduct. Ghomeshi v. Sabban (In re Sabban), 600 F.3d 1219, 1222
26 (9th Cir. 2010).

27 As stated, the elements of fraud under § 523(a) (2) (A) are
28 equivalent to the elements of actual fraud under California law.

1 See In re Tobin, 258 B.R. at 203. To establish actual fraud in
2 California, "the plaintiff [must] show: (1) misrepresentation;
3 (2) knowledge of the falsity of the representation; (3) intent to
4 induce reliance; (4) justifiable reliance; and (5) damages." Id.
5 (emphasis added) (citation omitted). Contrary to the Debtor's
6 argument, a negligent misrepresentation is not sufficient to
7 establish actual fraud under California law. We, thus, reject
8 the notion that § 523(a)(2)(A)'s requirement of intent to deceive
9 does not correlate to California's requirement of intent to
10 induce reliance.

11 The Debtor's argument regarding liability and apportionment
12 of the state court judgment is similarly unavailing. There is no
13 dispute that the state court entered its fraud judgment against
14 the Debtor in her personal capacity. That the state court
15 judgment did not provide for joint and several liability is
16 irrelevant under these circumstances.

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

23 At oral argument, the parties confirmed that the state court
24 awarded actual damages in the amount of \$31,044.70 for fraud and,
25 in the alternative, for conversion. Thus, there is no dispute
26 that the judgment amount subject to nondischargeability is
27 limited to \$93,134.10 (\$31,044.70 in actual damages under either
28 theory and \$62,089.40 in punitive damages in connection with the

1 fraud determination). Because we affirm the bankruptcy court's
2 determination that the state court fraud judgment for \$93,134.10
3 was excepted from discharge under § 523(a)(2)(A), we need not -
4 and do not - review the bankruptcy court's grant of summary
5 judgment on the § 523(a)(4) or (a)(6) claims.

6 **B. The bankruptcy court did not err in granting summary**
7 **judgment in favor of TBG on the Debtor's counterclaims.**

8 In her second related appeal, the Debtor argues that the
9 bankruptcy court committed reversible error in granting summary
10 judgment to TBG on her counterclaims. She primarily asserts
11 error in three of the bankruptcy court's determinations: (1) that
12 the statutes of limitations ran on her counterclaims; (2) that
13 her counterclaims were compulsory and, therefore, waived when she
14 failed to raise them in the state court action; and (3) that her
15 violation of the local bankruptcy rules supported summary
16 judgment in TBG's favor. It appears that the Debtor muddles and
17 improperly conflates, the first two arguments. She also fails to
18 specifically and distinctly address a number of determinations
19 made by the bankruptcy court and, consequently, waives those
20 issues. See Padgett v. Wright, 587 F.3d 983, 986 n.2 (9th Cir.
21 2009) (per curiam) (appellate court "will not ordinarily consider
22 matters on appeal that are not specifically and distinctly raised
23 and argued in appellant's opening brief."). In any event, we
24 reject her arguments.

25 **1. Statute of limitations.**

26 As a preliminary matter, we note that the Debtor fails to
27 specifically or appropriately address the bankruptcy court's
28 federal law based statutes of limitations determinations as to

1 the first, second, and half of the fifth (infringement)
2 counterclaims. Her general reliance on CCP § 426.30 and
3 California case law on statute of limitations is inapposite. As
4 a result, these issues on appeal are deemed waived. See Padgett,
5 587 F.3d at 985 n.2.

6 Similarly, the Debtor fails to specifically and distinctly
7 address the statute of limitations determinations relating to
8 interference with a prospective economic advantage or invasion of
9 privacy. As a result, those issues also are deemed waived. See
10 id.

11 **a. Conversion.**

12 The bankruptcy court determined that the Debtor's conversion
13 counterclaim - based on TBG's alleged conversion of trademarks,
14 copyrighted text, and logos - was barred by the three-year
15 statute of limitations under CCP § 338(c). Based on the evidence
16 before it, the bankruptcy court noted that the events supporting
17 the Debtor's allegations of conversion occurred no later than
18 September 2008. Given the applicable three-year statute of
19 limitations period, it concluded that the statute of limitations
20 ran in 2011 and that the statute of limitations barred the Debtor
21 from bringing the conversion counterclaim in 2013.

22 The counterclaim pleading itself expressly provides that the
23 alleged conversion took place prior to October 23, 2008. The
24 evidence before the bankruptcy court, including exhibits attached
25 to the Debtor's supplemental declaration, do not allege
26 conversion occurring after October 2008. That the Debtor
27 provided in declaratory evidence that "[t]he things I have
28 complained of in my counter-claims continued beyond 2008" is not

1 sufficient to create a genuine dispute as to whether new acts of
2 conversion occurred after October 2008.

3 **b. Negligent misrepresentation.**

4 The bankruptcy court similarly determined that the Debtor
5 was aware of TBG's alleged misrepresentation regarding the
6 website in December 2008. It also determined that the two-year
7 statute of limitations for negligent misrepresentation ran in
8 December 2010 and barred the Debtor's claim for negligent
9 misrepresentation in 2013.

10 In her 2008 state court declaration, the Debtor attested
11 that she became aware in mid-September 2008 that the website was
12 "completely inaccurate," contained incorrect content, and was
13 "full of typos and errors." She also attested that she hired a
14 new company to build and host the website. Again, the evidence
15 before the bankruptcy court does not reflect that TBG made or had
16 the opportunity to make additional representations regarding the
17 website after December 2008. Again, the Debtor's general
18 allegation that the events supporting the counterclaims continued
19 beyond 2008 does not save this counterclaim.

20 To the extent the Debtor contends that each new breach
21 restarts the clock on the statute of limitations, we reject her
22 argument under these facts. California recognizes
23 continuing-wrong accrual principles, which act as an exception to
24 the limitations period. See Aryeh v. Canon Bus. Solutions, Inc.,
25 55 Cal. 4th 1185, 1197 (2013) (discussing the continuing
26 violation doctrine and the theory of continuous accrual).
27 Neither principle, however, applies to these circumstances.

28 The continuing violation doctrine "applies where there is no

1 single incident that can fairly or realistically be identified as
2 the cause of significant harm." Flowers v. Carville, 310 F.3d
3 1118, 1126 (9th Cir. 2002) (citation and internal quotation marks
4 omitted); Aryeh, 55 Cal. 4th at 1197 ("Some injuries are the
5 product of a series of small harms, any one of which may not be
6 actionable on its own."). That is not the case here; the
7 Debtor's alleged harm was complete and actionable in 2008.

8 Conversely, the theory of continuous accrual "applies
9 whenever there is a continuing or recurring obligation: [w]hen an
10 obligation or liability arises on a recurring basis, a cause of
11 action accrues each time a wrongful act occurs, triggering a new
12 limitations period." Aryeh, 55 Cal. 4th at 1199 (citation and
13 internal quotation marks omitted). Here, pursuant to the
14 Debtor's 2008 state court declaration, she terminated TBG's
15 services on October 10, 2008. As a result, no continuing or
16 recurring obligation existed between the parties after that date.

17 The Debtor never provided any evidence to the bankruptcy
18 court showing the existence or even the possibility of a new
19 breach or violation after 2008. Once again, stating vaguely that
20 violative events continued to occur after 2008 is insufficient to
21 create a genuine factual dispute for trial. And, insofar as she
22 contends that TBG breached an oral agreement by filing an action
23 against her, in addition to the fact that she raises this
24 argument for the first time on appeal, the Debtor fails to
25 explain how or why that tolled the time to bring her
26 counterclaims based on tort theories.

27 **c. Equitable tolling.**

28 The Debtor also continues to argue that the doctrine of

1 equitable tolling applies to her counterclaims based on her
2 attempt to seek relief from GoDaddy, the continuing nature of the
3 torts, and her bankruptcy case. As recognized by the bankruptcy
4 court, equitable tolling enables the bankruptcy court to "toll a
5 period if it concludes that equitable considerations excuse a
6 plaintiff's failure to take the required action within the time
7 period." DeNoce v. Neff (In re Neff), 505 B.R. 255, 263-64 (9th
8 Cir. BAP 2014). We, once again, are unpersuaded by the Debtor's
9 argument.

10 The Debtor raises her argument as to GoDaddy, at least in
11 connection with equitable tolling, for the first time on appeal.
12 As a result, she waives that aspect of her argument. See
13 Padgett, 587 F.3d at 986 n.2. Even if we considered it, however,
14 the Debtor fails to explain how seeking relief from the GoDaddy
15 company - admittedly, a nonjudicial process - supports her
16 position.

17 The Debtor also fails to explain or support the "continuing
18 nature of the torts." In her opposition to the summary judgment
19 motion on TBG's adversary complaint, she repeatedly refers to the
20 continuing nature of the torts, but never explains what this
21 means. Once again, simply stating that torts continued to happen
22 after 2008 is not enough to create a genuine factual dispute for
23 trial.

24 Finally, the Debtor's bankruptcy case did not toll the time
25 for the counterclaims. As noted by the bankruptcy court, the
26 Bankruptcy Code provides a statutory provision that extends the
27 time to file claims, but that statutory extension does not
28 constitute equitable tolling. See 11 U.S.C. § 108. Section 108

1 only provides for potential claims where the appropriate statute
2 of limitations did not expire prior to the date of petition. As
3 previously stated, the relevant statutes of limitations on all of
4 the Debtor's counterclaims ran well prior to the petition date.
5 The Debtor provides no other authority to support her position
6 that the claims were tolled when she filed bankruptcy.

7 **d. "Offset."**

8 The Debtor also contends that the statute of limitations was
9 not tolled because a claim for offset existed and that she, thus,
10 possessed an affirmative defense. Once again, her argument
11 fails.

12 As the bankruptcy court noted in its memorandum decision,
13 the Debtor failed to properly allege an offset claim in her
14 counterclaims. The counterclaims twice refer to the term "set-
15 off": in the title of the sixth claim for relief for negligent
16 misrepresentation and in the prayer for relief. Other than those
17 summary references, however, the Debtor did not provide any
18 statutory or case law authority for offset or otherwise discuss
19 offset in the counterclaim pleading. And, in opposing TBG's
20 motions for summary judgment, there is no reference to, let alone
21 discussion of, offset.

22 Instead, it appears that the Debtor first raised offset as a
23 stand-alone counterclaim at the hearing before the bankruptcy
24 court; a transcript of that hearing, however, was not included on
25 the record on appeal and we have no way of knowing what was said
26 or exchanged. But, given that there is no basis for the Debtor's
27 alleged offset claim, there is no factual dispute suggesting

1 reversal.³

2 In sum, the Debtor has not shown that the bankruptcy court
3 committed reversible error in determining that her counterclaims
4 were barred by statutes of limitations.

5 **2. The adversary counterclaims were barred by the Debtor's**
6 **failure to raise them in the state court action.**

7 The Debtor next argues that the bankruptcy court erred in
8 determining that the counterclaims were barred in the adversary
9 proceeding. In particular, she argues that, under California
10 law, claim preclusion does not serve as a bar to a subsequent
11 action where litigation was terminated by demurrer or a statute
12 of limitations determination. Here, the state court judgment
13 followed a trial on the merits, so this point is inapt.

14 The bankruptcy court further determined that the
15 counterclaims were compulsory pursuant to CCP § 426.30 and that
16 the Debtor should have raised them in the state court action. As
17 she failed to do so, the Debtor waived the ability to raise the
18 counterclaims in the adversary proceeding.

19 The Debtor contends, however, that CCP § 426.30 contains
20 limitations and cites Russo v. Scrambler Motorcycles, 56 Cal.

21

22

23

24 ³ The Debtor also summarily refers to the sale of real
25 property located in Big Bear, California. It appears that this
26 aspect of her argument relates to now-final orders entered by the
27 bankruptcy court granting stay relief as to the property, denying
28 the Debtor's reconsideration motion thereto, and denying her
emergency motion to stay execution of a sheriff's sale. To the
extent we are correct in our assumption, those issues are not
properly before us on appeal and we do not consider them.

1 App. 3d 112 (1976)⁴ in support of her position. Contrary to the
2 Debtor's belief, the limitations to CCP § 426.30 do not aid her.
3 In pertinent part, CCP § 426.30(b) provides for exceptions to the
4 waiver of a related cause of action not properly raised. The
5 exception applies if the state court lacks personal jurisdiction
6 over a person or if the party who failed to plead the compulsory
7 cause of action also failed to file an answer. Neither instance
8 applies to this case as there is no dispute that the state court
9 had personal jurisdiction over the Debtor during the state court
10 action or that she filed an answer in that case.

11 The Debtor also cites with enthusiastic approval Keidatz v.
12 Albany, 39 Cal. 2d 826 (1952), for the proposition that "if new
13 or additional facts are alleged that cure the defects in the
14 original pleading, it is settled that the former judgment is not
15 a bar to the subsequent action whether or not plaintiff had an
16 opportunity to amend his complaint." The Keidatz decision,
17 however, is distinguishable.

18 In Keidatz, the plaintiffs' first action was for rescission
19 of contract; a demurrer to the complaint was sustained with leave
20 to amend, but when the plaintiffs failed to amend, a judgment was
21 entered for the defendant for costs. 39 Cal. 2d at 827. The
22 plaintiffs then commenced a second action based on fraud in the
23 inducement. Id. at 827-28. On appeal, the California Supreme
24 Court determined that additional facts not plead in the initial
25

26 ⁴ The Debtor improperly cut and pasted a "headnote" from the
27 decision in Russo v. Scrambler Motorcycles into her opening
28 brief. She provides no analysis as to why or how this decision
supports her position.

1 defective complaint meant that the judgment in the first action
2 was not a bar to the second action. Id. at 828-29. Here,
3 however, there is no allegation that the Debtor filed a defective
4 cause of action in the state court action; the record is clear
5 that she never filed any counterclaim in the state court action.

6 The only counterclaim that the Debtor specifically addresses
7 on appeal is conversion; she argues that her conversion
8 counterclaim was not compulsory. The conversion counterclaim
9 related to TBG's alleged theft of the Royal Hound domain name and
10 its alleged conversion of the Debtor's trademarks, copyrights,
11 and logos. The Debtor, however, asserted the facts supporting
12 TBG's alleged conversion in the state court action. In her 2008
13 state court declaration, the Debtor attested that she owned the
14 Royal Hound domain name, as well as related pending patents and
15 trademarks, and that she hired a third party to design business
16 logos, business cards, banners, letterhead, and envelopes. It is
17 clear that the alleged conversion claim arose from the same
18 transactions or occurrences as TBG's claims against the Debtor in
19 the state court action.

20 The Debtor has not shown that the bankruptcy court committed
21 reversible error in determining that her counterclaims were
22 barred in the adversary proceeding.

23 **3. Failure to comply with the local rules.**

24 And, finally, the Debtor argues prejudicial, reversible
25 error when, based on her failure to file a separate statement
26 under the local rules, the bankruptcy court deemed all facts
27 admitted. She erroneously asserts that TBG also failed to file a
28 separate statement. The record evidences that TBG filed the

1 required separate statement.

2 In closing, the bankruptcy court noted that the Debtor
3 failed to controvert any of the facts and evidence offered by TBG
4 under LBR 7056-1(c)(2)(B). Thus, pursuant to LBR 7056-1(f),⁵ the
5 bankruptcy court was entitled to "assume[] that the material
6 facts asserted by TBG [were] admitted to exist without
7 controversy." We see no error in the bankruptcy court's reliance
8 on the local bankruptcy rules. Any prejudice to the Debtor was
9 the result of her own inaction.

10 **CONCLUSION**

11 Based on the foregoing, we AFFIRM the bankruptcy court.
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24 ⁵ LBR 7056-1(f) provides that, in determining a motion for
25 summary judgment, the bankruptcy "court may assume that the
26 material facts as claimed and adequately supported by the movant
27 are admitted to exist without controversy, except to the extent
28 that such facts are: (1) included in the 'statement of genuine
issues,' and (2) adequately controverted by declaration or other
evidence filed in opposition to the motion."