

FEB 26 2015

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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NOT FOR PUBLICATION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

1 In re:) BAP No. NC-13-1616-PaJuTa
2)
3 IZZUDDIN AHMED,) Bankr. No. 10-47690
4)
5 Debtor.) Adv. Proc. 11-04115
6)
7 _____)
8 IZZUDDIN AHMED,)
9)
10 Appellant,)
11 v.) **MEMORANDUM**¹
12)
13 AMJAD SILMI; ALEX PREIGER,)
14)
15 Appellees.)
16 _____)

Submitted Without Argument
on February 19, 2015²

Filed - February 26, 2015

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

Honorable Roger L. Efremsky, Chief Bankruptcy Judge, Presiding

Appearances: Raymond R. Miller on the brief for appellant
Izzuddin Ahmed; Yosef Peretz and Emily Knowles of
Peretz & Associates on the brief for appellee Amjad
Silmi.

Before: PAPPAS, JURY, and TAYLOR, 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 8024-1.

² After examination of the briefs and record, and after
notice to the parties, in an order entered December 31, 2014, the
Panel unanimously determined that oral argument was not needed for
this appeal. 9th Cir. BAP Rule 8019-1.

1 Chapter 7³ debtor Izzuddin Ahmed ("Ahmed") appeals the
2 amended judgment of the bankruptcy court adding attorney's fees to
3 an earlier judgment excepting his debt to creditor Amjad Silmi
4 ("Silmi") from discharge under § 523(a)(2)(A) and excepting his
5 debt to creditor Alex Preiger ("Preiger") from discharge under
6 § 523(a)(6). We AFFIRM.

7 I. FACTS

8 A. Background

9 Preiger owns Food King, a commercial complex in Oakland,
10 California. In 1998, Preiger leased a large area to Ahmed for
11 operation of a grocery store (the "Grocery Store" and "Grocery
12 Store Lease"). On June 28, 2001, the parties executed an addendum
13 to the Grocery Store Lease (the "Lease Addendum") allowing Ahmed
14 to use a small space next to the grocery store for a store selling
15 sundries ("Sundries Space") and to install a booth to operate a
16 check-cashing business. In September 2004, Preiger leased Ahmed
17 another area for a retail meat market (the "Meat Market" and "Meat
18 Market Lease").

19 In 2001, Ahmed executed a sublease to Silmi (the "2001
20 Lease"), apparently in violation of the Lease Addendum that
21 prohibited subleasing. Based on this arrangement, Silmi has
22 consistently argued that he was the proprietor of the check-
23 cashing business, not an employee of Ahmed. Preiger believed,
24 however, that Silmi was an employee of Ahmed and never recognized

25
26 ³ Unless otherwise indicated, all chapter and section
27 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532, all
28 Rule references are to the Federal Rules of Bankruptcy Procedure,
Rules 1001-9037, all Civil Rule references are to the Federal
Rules of Civil Procedure 1-86, and all Appellate Rule references
are to the Federal Rules of Appellate Procedure 1-48.

1 Silmi as a sublessee.

2 Ahmed sold all of his businesses, including the grocery
3 store, meat market, and the check-cashing operation, to Nagi
4 Homran, his cousin, on June 5, 2005. Silmi had no knowledge of
5 this transaction; when he discovered it, he confronted Ahmed, who
6 allegedly told Silmi that Homran was merely purchasing the right
7 to become Silma's landlord, not ownership of Silma's check-cashing
8 business.

9 Beginning in March 2005, Silmi discovered that his check-
10 cashing business was regularly losing money. Silmi confronted
11 Guprin Faisal ("Faisal"), Ahmed's brother, who worked for Silmi.
12 Faisal admitted stealing \$50,000 from the business and giving that
13 money to Ahmed at Ahmed's direction. Ahmed repaid Silmi the
14 \$50,000 on July 14, 2005.

15 At some point not clear in the record, Silmi loaned Ahmed
16 money; the loan balance in July 2005 was \$31,000. Ahmed informed
17 Silmi that he would repay the \$31,000 if Silmi agreed to void the
18 2001 Lease. Silmi refused.

19 On November 15, 2005, Silmi filed a civil suit in state court
20 against Ahmed and Faisal, alleging breach of the 2001 Lease,
21 conversion, and intentional misrepresentation. Ahmed cross-
22 complained, alleging that Silmi had intentionally interfered with
23 Ahmed's contract with Preiger and seeking rescission of the 2001
24 Lease.

25 Preiger discovered that Hamron had purchased Ahmed's
26 properties and that Silmi owned the check-cashing business in July
27 2005; both of these transactions violated Ahmed's lease. Preiger
28 served a three-day notice to cure breaches of the leases, or to

1 quit the premises, on Ahmed. Ahmed apparently ignored the notice.
2 Preiger sued Ahmed in state court on January 10, 2006, alleging
3 breach of the leases and seeking relief under this and other
4 theories. Ahmed cross-complained for breach of contract and
5 intentional interference with contracts and business relations.

6 On May 26, 2006, Preiger informed Ahmed that he would not
7 renew the Lease Addendum for the Sundries Area adjacent to the
8 Grocery Area when the term expired in June 2006. After expiration
9 of the lease term, Preiger retook possession of the Sundries Area
10 and cleaned it.

11 At some point in July 2006, Ahmed allegedly unloaded several
12 pallets of toilet tissue in the Sundries Area and left it there.
13 On August 17, 2006, Preiger moved the toilet tissue to a storage
14 area. That afternoon, Ahmed returned and Preiger called the
15 police. Then, Ahmed allegedly rammed an industrial cart into
16 Preiger's leg. On May 7, 2007, Preiger amended his state court
17 pleadings to assert causes of action for trespass, assault, and
18 battery.

19 The state court consolidated the actions and conducted a jury
20 trial in February and March, 2010. The jury returned a special
21 verdict in favor of Simli and Preiger and against Ahmed. The jury
22 found in favor of Simli on his causes of action for conversion,
23 misrepresentation, and fraud, awarded him \$46,376 in compensatory
24 damages and \$67,500 in punitive damages against Ahmed, and found
25 that Simli was the owner of the check-cashing operation. As to
26 Preiger's claims, the jury found that Ahmed had committed a
27 trespass and that Ahmed intentionally or negligently entered upon
28 Preiger's property, without Preiger's consent. The jury awarded

1 Preiger compensatory damages of \$7,500 and punitive damages of
2 \$70,000 against Ahmed.

3 The state court then awarded attorney's fees to both Silmi
4 and Preiger as prevailing parties. The state court's judgment
5 incorporating the damage and attorney's fee awards was entered on
6 July 7, 2010 ("State Court Judgment"); Ahmed filed a chapter 11
7 petition the same day.

8 Ahmed voluntarily converted the case to chapter 7 on
9 January 31, 2011. On April 4, 2011, Silmi and Preiger filed an
10 adversary complaint which asked the bankruptcy court to declare
11 that their claims against Ahmed under the State Court Judgment
12 were excepted from discharge under § 523(a)(2)(A) and (a)(6) and
13 sought a denial of Ahmed's discharge under § 727(a)(3), (a)(4),
14 and (a)(5).⁴

15 Silmi and Preiger filed a motion for summary judgment on
16 August 4, 2012, and an amended motion on January 8, 2013,
17 generally arguing that the jury verdicts and State Court Judgment
18 were entitled to preclusive effect and established the exceptions
19 to discharge under § 523(a)(2)(A) and (a)(6). Ahmed filed a brief
20 response on February 1, 2013, asserting that the first element
21 required for application of issue preclusion, identity of issues,
22 was lacking for any exception to discharge under § 523(a)(6);
23 Ahmed's response did not address the motion's request for an
24 exception under § 523(a)(2)(A).

25 The bankruptcy court conducted a hearing on the amended
26

27 ⁴ At the request of Silmi and Preiger, on November 4, 2011,
28 the bankruptcy court dismissed the claims seeking to deny Ahmed's
discharge under § 727(a).

1 motion for summary judgment on March 14, 2013. At the conclusion
2 of argument, the bankruptcy court granted a partial summary
3 judgment in favor of Silmi and Preiger on the basis of the issue
4 preclusive effect of the State Court Judgment. In reciting its
5 ruling, the court engaged in a detailed analysis of the summary
6 judgment and preclusion standards, compared the elements required
7 for discharge exceptions with the findings in the state court's
8 jury verdict, and decided that, applying issue preclusion, Preiger
9 was entitled to a summary judgment for a discharge exception under
10 § 523(a)(6), and that Silmi was entitled to a summary judgment for
11 a discharge exception under § 523(a)(2)(A).

12 After a second hearing to consider supplementary briefs, the
13 court entered an order granting the amended summary judgment
14 motion on June 17, 2013 (the "Summary Judgment Order"). The Order
15 provided: (1) Silmi's claim against Ahmed for economic damages,
16 noneconomic and punitive damages in the amount of \$113,636, and
17 for attorney's fees of \$235,922, was excepted from discharge under
18 § 523(a)(2)(A); (2) Preiger's claim against Ahmed for economic
19 damages, noneconomic and punitive damages in the amount of \$77,500
20 and for attorney's fees of \$306,644 was excepted from discharge
21 under § 523(a)(6); and (3) Silmi and Preiger were awarded
22 litigation costs for the state court proceedings of \$38,384, to be
23 split between Silmi and Preiger as they decided.⁵

24 Ahmed filed an appeal of the Summary Judgment Order on
25 June 27, 2013. BAP no. 13-1306. The bankruptcy court entered a
26 Final Judgment, incorporating verbatim the contents of its Summary

27 ⁵ The court did not indicate if these litigation costs were
28 excepted from discharge.

1 Judgment Order, on July 9, 2013. See Rule 8002(2) (an appeal
2 filed after the bankruptcy court announces its decision, but
3 before entry of final judgment, is treated as filed on the date or
4 after entry of the final judgment.).

5 Ahmed failed to file an opening brief in that appeal, and
6 after several notices were given to him concerning the possible
7 consequences of failing to file the brief and pursue the appeal,
8 the Panel dismissed the appeal for failure to prosecute on
9 September 6, 2013. Ahmed did not appeal the BAP's decision.

10 In the meantime, on July 3, 2013, Silmi and Preiger filed a
11 motion in the bankruptcy court seeking an award of the attorney's
12 fees they had incurred in prosecuting the adversary proceeding.
13 Ahmed did not respond to this motion, nor did he appear at the
14 November 7, 2013 hearing held by the bankruptcy court. The
15 bankruptcy court entered an order granting the motion and awarding
16 Silmi and Preiger \$29,500 in attorney's fees (the "Bankruptcy
17 Attorney's Fees") on November 27, 2013. The court entered an
18 Amended Judgment Finding Debtor's Obliga[tions] to Plaintiffs to
19 be Nondischargeable Debt on December 10, 2013 (the "Amended
20 Judgment"). The Amended Judgment duplicated verbatim the Summary
21 Judgment Order and Final Judgment and added a paragraph awarding
22 the Bankruptcy Attorney's Fees.

23 Ahmed filed a timely appeal of the Amended Judgment on
24 December 20, 2013.

25 **II. JURISDICTION**

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

28

1 challenge propriety of attorney's fees award in appeal brief
2 waives the issue).

3 Instead of targeting all aspects of the Amended Judgment in
4 his brief, Ahmed focuses exclusively on the bankruptcy court's
5 decision to deem Ahmed's debt to Preiger excepted from discharge.
6 Ahmed makes it clear in his brief that he is appealing the Amended
7 Judgment as a vehicle to seek review of the Summary Judgment Order
8 and Final Judgment. The issues he raises in the brief are exactly
9 the same as those framed in the bankruptcy court at the time he
10 objected to the Summary Judgment Motion, as evidenced by the text
11 of the conclusion in his brief:

12 In order to give Appellant an appropriate opportunity to
13 be heard on the matter of dischargeability of the debt
14 [to Preiger], the summary judgment of the Bankruptcy
15 Court should be set aside and the matter set for trial.

16 Ahmed Br. at 4.

17 The obvious problem with Ahmed's tactic is that this
18 discharge exception, originally granted in the Summary Judgment
19 Order, then incorporated verbatim into the Final Judgment, was the
20 subject of the prior appeal to this Panel, which was dismissed for
21 Ahmed's failure to prosecute. Because all provisions of the Final
22 Judgment, including the exception to discharge for Ahmed's debt to
23 Preiger under § 523(a)(6), are final now, Ahmed is foreclosed from
24 challenging the Preiger discharge exception in this appeal.

25 Under 28 U.S.C. § 158(c), appeals from the final orders of
26 the bankruptcy court must be filed within the time limits set in
27 Rule 8002. Under Rule 8002(a), a "notice of appeal shall be filed
28 with the clerk within 14 days of the date of entry of the
judgment, order, or decree appealed from." Failure to timely file

1 the notice deprives the Panel of any jurisdiction over the appeal.
2 Anderson v. Kalashian (In re Mouradick), 13 F.3d 326, 327 (9th
3 Cir. 1994) ("The provisions of Bankruptcy Rule 8002 are
4 jurisdictional; the untimely filing of a notice of appeal deprives
5 the appellate court of jurisdiction to review the bankruptcy
6 court's order."); see also Bowles v. Russell, 551 U.S. 205, 214
7 (2007) ("The timely filing of a notice of appeal in a civil case
8 is a jurisdictional requirement.").

9 The bankruptcy court's Final Judgment was a final order on
10 July 9, 2013. A final order is effective when entered. Rules
11 5003, 9021. Although Ahmed timely appealed the Final Judgment,
12 that appeal was later dismissed when Ahmed elected not to
13 diligently pursue it. Ahmed sought no further review of the BAP's
14 decision dismissing his appeal of the Final Judgment. The Ninth
15 Circuit has observed that where an "appellant has by his own act
16 caused the dismissal of the appeal [appellant] is in no position
17 to complain that his right of review of an adverse lower court
18 judgment has been lost[.]" Ringsby Truck Lines, Inc. v.
19 W. Conference of Teamsters, 686 F.2d 720, 722 (9th Cir. 1982).

20 Implicit within Ahmed's appeal is the suggestion that the
21 Amended Judgment somehow supersedes the Summary Judgment Order and
22 Final Judgment with respect to the issues settled in those orders,
23 such that those issues can be raised again in an appeal of the
24 Amended Judgment. We reject this implication. Entry of an
25 amended judgment with only immaterial revisions to an original
26 judgment does not affect the finality of the original judgment.
27 Federal Trade Comm'n v. Minneapolis-Honeywell Regulator Co.,
28 344 U.S. 206, 211 (1952). The Final Judgment was final and

1 effective on entry and was not overturned by the Panel when it was
2 appealed. Ahmed's appeal of the Amended Judgment, in which he
3 only attacks the determination of exception to discharge for
4 Preiger's claim, is a collateral attack on that provision in the
5 Final Judgment. A final order of a federal court may not be
6 collaterally attacked under these circumstances. Watts v.
7 Pinckney, 752 F.2d 406, 410 (9th Cir. 1985); Heritage Pac. Fin.,
8 LLC v. Machuca (In re Machuca), 483 B.R. 726, 733 (9th Cir. BAP
9 2012).

10 The sole difference between the Summary Judgment Order, the
11 Final Judgment, and the Amended Judgment is the latter's addition
12 of attorney's fees. However, the addition of attorney's fees is
13 an immaterial addition and does not affect the finality of the
14 Final Judgment. Budinich v. Becton Dickinson & Co., 486 U.S. 196,
15 200-01 (1988) (Awards of costs and fees do not affect the finality
16 of judgment because they do not reflect on the merits of a case.).
17 As relevant here, the time for appeal is generally not extended
18 "in order to tax costs or award fees." Civil Rule 58(c)(1),
19 incorporated in Rule 7058. In addition, an unpublished decision
20 of the Ninth Circuit held consistent with Budinich that an amended
21 judgment that only adds attorney's fees does not affect the
22 finality of the original judgment. Hrabko v. Provident Life &
23 Acc. Ins. Co., 2007 WL 1112618 (9th Cir. April 12, 2007).

24 The motion for attorney's fees was also not a tolling motion
25 and, as a result, the filing of the attorney's fee motion on
26 July 3, 2013, did not toll the time when Ahmed could appeal.
27 Rule 8002(b)(1) does not list an attorney's fee motion as a
28 tolling motion. However, it does list motions under Civil

1 Rule 59(e). At one time, motions for attorney's fees were
2 considered a form of Civil Rule 59(e) motion. However, the
3 Supreme Court ended that practice: White v. H.H. Dep't of
4 Employment Servs., 455 U.S. 445, 452 (1982) ("A motion for
5 attorney's fees is unlike a motion to alter or amend a judgment.
6 It does not imply a change in the judgment, but merely seeks what
7 is due because of the judgment. It is, therefore, not governed by
8 the provisions of Rule 59(e).").

9 The federal appellate rule is similar to Rule 8002(b).
10 Appellate Rule 4(a)(4)(A)(iii) provides that an attorney's fee
11 motion operates as a tolling motion only when the district court
12 "extends the time to appeal under [Civil] Rule 58 [incorporated by
13 Rule 7058]." Ahmed neither requested nor obtained such an
14 extension. Indeed, he could not appropriately do so as Appellate
15 Rule 4 is not applicable in a bankruptcy appeal.

16 For all the above reasons, we conclude that the Final
17 Judgment was final and effective when entered, was not overturned
18 on appeal, the mere addition of attorney's fees in the Amended
19 Judgment did not affect the finality of the provisions of the
20 Final Judgment, and, thus, the provisions regarding the exception
21 to discharge for Preiger's claim were not affected by the filing
22 of the Amended Judgment. Ahmed's attempt to use the Amended
23 Judgment as a vehicle to appeal the Final Judgment's provisions
24 was a transparent attempt to re-appeal the Summary Judgment Order
25 and Final Judgment, not the Amended Judgment.

26 VI. CONCLUSION

27 We AFFIRM the bankruptcy court's Amended Judgment.

28