

JUN 11 2015

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U.S. BKCY. APP. PANEL
OF THE NINTH CIRCUIT

NOT FOR PUBLICATION

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UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT

In re:)	BAP No. CC-14-1397-PaKiTa
)	
NARINDER SANGHA,)	Bankr. No. 13-16964-MH
)	
Debtor.)	Adv. Proc. 13-01171-MH
)	
_____)	
NARINDER SANGHA,)	
)	
Appellant,)	
)	
v.)	MEMORANDUM¹
)	
)	
CHARLES EDWARD SCHRADER,)	
)	
Appellee.)	
)	
_____)	

Argued and Submitted on March 19, 2015
at Pasadena, California

Filed - June 11, 2015

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

Honorable Mark D. Houle, Bankruptcy Judge, Presiding

Appearances: Deepalie Milie Joshi argued for Appellant Narinder Sangha; Appellee Charles Edward Schrader argued pro se.

Before: PAPPAS, KIRSCHER, 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.

1 Chapter 7² debtor Narinder Sangha ("Sangha") appeals the
2 judgment of the bankruptcy court declaring that his debt to
3 creditor Charles Edward Schrader ("Schrader") is excepted from
4 discharge under § 523(a)(6). We VACATE and REMAND.

5 **I. FACTS**

6 On October 13, 2009, Schrader filed a complaint against
7 Sangha for defamation (slander per se) in San Francisco Superior
8 Court, alleging that Sangha had made false statements³ about
9 Schrader in the course of an employment background investigation.
10 On November 17, 2009, Sangha filed an answer and general denial.
11 The state court granted Schrader leave to file a second amended
12 complaint⁴ on February 14, 2011. In the second amended complaint,
13 all fourteen causes of action alleged that Sangha made the
14 defamatory statements with malice; the prayer sought an award of
15 exemplary damages.

16 Schrader, on March 4, 2011, filed a motion for terminating
17 sanctions against Sangha for engaging in discovery abuses. The
18 state court granted Schrader's sanctions motion and struck
19 Sangha's answer to the second amended complaint, commenting: "The
20 Court finds that Defendant's failure to respond to the Court's
21

22 ² Unless otherwise indicated, all chapter and section
23 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532, all
24 Rule references are to the Federal Rules of Bankruptcy Procedure,
25 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.

26 ³ In sum, the allegedly defamatory statements were that
27 Schrader had verbally, physically, and emotionally abused Sangha.

28 ⁴ Our record does not include copies of the original
complaints.

1 orders compelling a response to interrogatory is willful." Sangha
2 then dismissed his attorney Christopher Leuterio and filed a
3 substitution of attorney showing Christopher N. Mandarano was to
4 be his counsel. On April 8, 2011, Sangha terminated Mandarano,
5 and substituted Robert D. Finkle as his attorney.

6 On April 18, 2011, the state court entered a default against
7 Sangha. It conducted a prove-up hearing on Schrader's motion for
8 entry of default judgment on June 2, 2011, and entered a judgment
9 the same day (the "State Court Judgment") awarding Schrader
10 \$1,369,633.40, comprised of \$1,000,000 for general damages,
11 \$368,535.40 for "Special/Punitive Damages,"⁵ and \$1,098.00 for
12 costs.

13 On November 14, 2011, the state court denied Sangha's motion
14 to vacate the State Court Judgment. Sangha did not appeal the
15 State Court Judgment.⁶

16 Sangha filed a chapter 7 bankruptcy petition on April 18,
17 2013. In his schedules, he listed a disputed debt owed to
18 Schrader of \$1,369,634.00 for the State Court Judgment.

19 On April 23, 2013, Schrader filed an adversary complaint
20 against Sangha seeking an exception to discharge under § 523(a)(6)
21 for the debt evidenced by the State Court Judgment. Sangha filed
22 an answer on August 21, 2013, generally denying the complaint's
23

24
25 ⁵ Of this sum, \$6,000 was for punitive damages. See
discussion below in footnote 7.

26 ⁶ Sangha later obtained a malpractice judgment in the same
27 state court against Leuterio in the amount of \$1,370,349.85 based
upon Leuterio's negligence in representing Sangha in the Schrader
28 suit. Sangha alleges that he has been unable to collect the
malpractice judgment.

1 allegations and stating three affirmative defenses: that the
2 purported false statements were privileged; that Schrader had
3 engaged in fraud by concealment of material facts from the state
4 court; and that Schrader had unclean hands.

5 Schrader filed a motion for summary judgment on April 24,
6 2014, arguing that there were no disputed material facts and that
7 the State Court Judgment was preclusive as to all of the elements
8 required for an exception to discharge under § 523(a)(6).

9 Responding to the summary judgment motion on June 4, 2014,
10 Sangha asserted that triable issues of fact remained concerning
11 Schrader's unclean hands, fraud, the damage award, and Sangha's
12 intent. Sangha also argued that he was entitled to conduct
13 discovery. Schrader filed a reply on June 12, 2014, which
14 included various documents in opposition to Sangha's allegations.

15 Before the motion hearing on July 8, 2014, the bankruptcy
16 court posted a detailed Tentative Decision. Among the
17 conclusions in the Tentative Decision of the bankruptcy court were
18 that:

- 19 - There was no genuine dispute that the State Court Judgment
- 20 included \$6,000 in punitive damages.⁷
- 21 - All elements of issue preclusion were satisfied.
- 22 - None of Sangha's arguments supported the extrinsic fraud

23
24 ⁷ As noted above, the State Court Judgment awarded Schrader
25 \$368,535.40 in "Special/Punitive Damages." That \$6,000 of that
26 sum was for punitive damages was hotly contested by the parties in
27 the bankruptcy court. The bankruptcy court ultimately concluded
28 that \$6,000 represented punitive damages after subtracting the
amounts awarded to Schrader for his lost wages and the costs of an
unsuccessful appeal. Sangha has not continued his argument on
appeal, and indeed, his counsel conceded at oral argument before
the Panel that the damages awarded in the State Court Judgment
included a punitive damages component.

1 exception to issue preclusion.

2 - The evidence reflected that all damages awarded were
3 attributable to Sangha's malicious conduct.

4 - Sangha was seeking discovery in order to relitigate the
5 State Court Judgment findings. The information he sought would
6 not prevent summary judgment.

7 After hearing from the parties at the hearing, the bankruptcy
8 court decided to grant summary judgment, and adopted its Tentative
9 Decision, which it incorporated in a judgment (the "Bankruptcy
10 Judgment") entered on August 7, 2014, that declared the State
11 Court Judgment in the amount of \$1,369,633.40 was excepted from
12 discharge under § 523(a)(6).

13 Sangha filed a timely appeal of the Bankruptcy Judgment on
14 August 18, 2014.

15 **II. JURISDICTION**

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

18 **III. ISSUES**

19 Whether the bankruptcy court erred in granting Schrader a
20 summary judgment determining that the State Court Judgment was
21 excepted from discharge under § 523(a)(6) based on issue
22 preclusion.

23 **IV. STANDARDS OF REVIEW**

24 We review the grant of summary judgment de novo. Omega S.A.
25 v. Costco Wholesale Corp., 776 F.3d 692, 695 (9th Cir. 2015);
26 Expeditors Int'l v. Official Comm. of CFLC, Inc. (In re CFLC,
27 Inc.), 209 B.R. 508, 512 (9th Cir. BAP 1997). De novo review
28 requires the Panel to independently review an issue, without

1 giving deference to the bankruptcy court's conclusions. First
2 Ave. W. Bldg., LLC v. James (In re Onecast Media, Inc.), 439 F.3d
3 558, 561 (9th Cir. 2006). Summary judgment is appropriate "if the
4 pleadings, the discovery and disclosure materials on file, and any
5 affidavits show that there is no genuine dispute as to any
6 material fact and that the movant is entitled to judgment as a
7 matter of law." Civil Rule 56(a), incorporated by Rule 7056;
8 Barboza v. New Form, Inc. (In re Barboza), 545 F.3d 702, 707 (9th
9 Cir. 2008). In making this determination, the trial court must
10 view all facts and reasonable inferences in the light most
11 favorable to the non-moving party. Olsen v. Idaho St. Bd. of
12 Med., 363 F.3d 916, 922 (9th Cir. 2004).

13 **IV. DISCUSSION**

14 Issue preclusion may provide a proper basis for granting
15 summary judgment. San Remo Hotel, L.P. v. San Francisco City and
16 Cnty., 364 F.3d 1088, 1094 (9th Cir. 2004). To meet its burden on
17 a motion for summary judgment based on issue preclusion, the
18 proponent must have pinpointed the exact issues litigated in the
19 prior action and introduced a record establishing the controlling
20 facts. Honkanen v. Hopper (In re Honkanen), 446 B.R. 373, 382
21 (9th Cir. BAP 2011); Kelly v. Okoye (In re Kelly), 182 B.R. 255,
22 258 (9th Cir. BAP 1995).

23 Issue preclusion may apply in bankruptcy discharge
24 proceedings. Grogan v. Garner, 498 U.S. 279, 284 (1991). The
25 preclusive effect of a state court judgment in a subsequent
26 federal lawsuit generally is determined by the Full Faith and
27 Credit Act, 28 U.S.C. § 1738, which provides that state judicial
28 proceedings "shall have the same full faith and credit in every

1 court within the United States . . . as they have by law or usage
2 in the courts of such State . . . from which they are taken."
3 Marrese v. Am. Academy of Orthopaedic Surgeons, 470 U.S. 373, 380
4 (1985). When state preclusion law controls, the decision to apply
5 the doctrine is made in accordance with state law. Khaligh v.
6 Hadegh (In re Khaligh), 338 B.R. 817, 823 (9th Cir. BAP 2006),
7 aff'd, 506 F.3d 956 (9th Cir. 2007).

8 Under California law, the party asserting issue preclusion
9 has the burden of establishing the following threshold
10 requirements:

11 First, the issue sought to be precluded from
12 relitigation must be identical to that decided in a
13 former proceeding. Second, this issue must have been
14 actually litigated in the former proceeding. Third, it
15 must have been necessarily decided in the former
16 proceeding. Fourth, the decision in the former
17 proceeding must be final and on the merits. Finally,
18 the party against whom preclusion is sought must be the
19 same as, or in privity with, the party to the former
20 proceeding.

21 Harmon v. Kobrin (In re Harmon), 250 F.3d 1240, 1245 (9th Cir.
22 2001) (citing Lucindo v. Super. Ct., 795 P.2d 1223, 1225 (Cal.
23 1990)). These are known as the "Harmon" factors. But even if
24 these five requirements are met, application of issue preclusion
25 under California law requires a "mandatory 'additional' inquiry
26 into whether imposition of issue preclusion would be fair and
27 consistent with sound public policy." Khaligh, 338 B.R. at
28 824-25. "The purposes of the doctrine are to promote judicial
economy by minimizing repetitive litigation, preventing
inconsistent judgments which undermine the integrity of the
judicial system and to protect against vexatious litigation."
Younan v. Caruso, 51 Cal. App. 4th 401, 407 (1996).

1 In this appeal, we must decide if a critical issue – whether
2 Sangha committed willful and malicious injuries to Schrader – was
3 actually litigated (Harmon factor 2) in the state court. The
4 bankruptcy court concluded it was, but we disagree. However,
5 before we reach the merits of that question, we examine Sangha’s
6 arguments in this appeal that lack merit.

7 **A. Default judgments may be preclusive under both**
8 **California and federal law.**

9 In Gayden v. Nourbakhsh (In re Nourbakhsh), 67 F.3d 798 (9th
10 Cir. 1995), the Ninth Circuit held that the preclusive effect of a
11 state court judgment is determined by reference to the preclusion
12 law of the state in which the judgment was entered, and that if
13 applicable state law affords preclusive effect to the issues
14 decided in a default judgment, so will the federal courts of this
15 circuit. The rules announced in this published Opinion are
16 binding on all the courts of the Ninth Circuit, including this
17 Panel. Miranda B. v. Kitzhaber, 328 F.3d 1181, 1186 (9th Cir.
18 2003) (“[W]here a panel confronts an issue germane to the eventual
19 resolution of the case, and resolves it after reasoned
20 consideration in a published opinion, that ruling becomes the law
21 of the circuit,” binding on all lower courts.).⁸

22 While not the law in all states, California affords
23 preclusive effect to the default judgments entered by its courts.
24 Gottlieb v. Kest, 141 Cal. App. 4th 110, 149 (2006). As the
25 Gottlieb court explained, a default judgment, under California

26
27 ⁸ The Ninth Circuit’s Nourbakhsh decision affirmed the
28 published decision of this Panel in Nourbakhsh v. Gayden
(In re Nourbakhsh), 162 B.R. 841 (9th Cir. BAP 1994).

1 law,

2 conclusively establishes, between the parties so far as
3 subsequent proceedings on a different cause of action
4 are concerned, the truth of all material allegations
5 contained in the complaint in the first action, and
6 every fact necessary to uphold the default judgment.

7 Id. at 149.

8 Sangha's brief in this appeal attempts the same frontal
9 attack on Nourbakhsh that he offered to the bankruptcy court:

10 The Ninth Circuit's position [giving preclusive effect
11 to state court default judgments when authorized by
12 state law] is the minority view By utilizing a
13 blanket application of collateral estoppel to default
14 judgments, without considering why the default issues,
15 the Ninth Circuit and other similarly-holding courts
16 have, in essence, created a new exception that is not
17 based on any malicious wrongdoing, but may simply be the
18 result of "neglect, substance abuse, emotional turmoil,
19 or simple inability to afford a lawyer. . . . The rule
20 results in increased litigation and a lack of uniformity
21 in the results. . . . Because the [Nourbakhsh] rule
22 violates public policy and the rationale underlying
23 issue preclusion, this Court should deign [sic] to
24 follow it.

25 Sangha Op. Br. at 12-15. For support, Sangha cites to several
26 bankruptcy and district court decisions within the Ninth Circuit,
27 including the bankruptcy court in this appeal, that express
28 dissatisfaction with the Nourbakhsh rule. However, none of those
29 courts refused to follow the rule. Nor will we. Simply put, we
30 have no authority to ignore binding circuit precedent:

31 Binding authority within this regime cannot be
32 considered and cast aside; it is not merely evidence of
33 what the law is. Rather, case law on point is the law.
34 If a court must decide an issue governed by a prior
35 opinion that constitutes binding authority, the later
36 court is bound to reach the same result, even if it
37 considers the rule unwise or incorrect. Binding
38 authority must be followed unless and until overruled by
39 a body competent to do so.

40 Hart v. Massanari, 266 F.3d 1155, 1171 (9th Cir. 2001).

41 Because we can not presume to overrule the Ninth Circuit,

1 even were we to disagree with the rule it announced, we must
2 reject all of Sangha's arguments suggesting that we should ignore
3 the preclusive effect of a California default judgment in federal
4 bankruptcy proceedings in this circuit.

5 **B. The bankruptcy court erred in inferring that Sangha**
6 **committed willful injury to Schrader based solely on the**
6 **State Court Judgment awarding punitive damages.**

7 Section 523(a)(6) provides that: "(a) A discharge under 727
8 . . . of this title does not discharge an individual debtor from
9 any debt - . . . (6) for willful and malicious injury by the
10 debtor to another entity or to the property of another entity."
11 Whether a particular debt is for willful and malicious injury by
12 the debtor to another or the property of another under § 523(a)(6)
13 requires application of a two-pronged test to the conduct giving
14 rise to the injury. In other words, the creditor must prove that
15 the debtor's conduct in causing the injuries was both willful and
16 malicious. Barboza v. New Form, Inc. (In re Barboza), 545 F.3d
17 702,711 (9th Cir. 2008) (citing Carrillo v. Su (In re Su), 290 F.3d
18 1140, 1146-47 (9th Cir. 2002) and requiring the application of a
19 separate analysis of each prong of "willful" and "malicious").

20 In this context, to show that a debtor's conduct is willful
21 requires proof that the debtor deliberately or intentionally
22 injured the creditor, and that in doing so, the debtor intended
23 the consequences of his act, not just the act itself. Kawaauhau
24 v. Geiger, 523 U.S. 57, 60-61 (1998); In re Su, 290 F.3d at 1143.
25 The debtor must act with a subjective motive to inflict injury, or
26 with a belief that injury is substantially certain to result from
27 the conduct. In re Su, 290 F.3d at 1143.

28 For conduct to be malicious, the creditor must prove that

1 the debtor: (1) committed a wrongful act; (2) done intentionally;
2 (3) which necessarily causes injury; and (4) was done without
3 just cause or excuse. Id.⁹

4 The "identical issue" requirement addresses whether
5 "identical factual allegations" are at stake in the two
6 proceedings. Murphy v. Murphy, 164 Cal. App. 4th 376, 400 (2008).
7 Here, the bankruptcy court found that the issue examined, and the
8 findings made in the state court, that Sangha acted with malice in
9 fact in connection with each of the fourteen causes of action
10 stated in Schrader's complaint, were identical to the issue raised
11 in the adversary proceeding, whether Sangha had inflicted willful
12 injury on Schrader. We disagree.

13 The bankruptcy court reasoned that the state court had
14 awarded Schrader punitive damages of \$6,000. We find no error in
15 that determination. In order to recover punitive damages in a
16 defamation lawsuit, the state court had to find that Sangha
17 committed slander with malice. DiGiorgio Corp. v. Valley Labor
18 Citizen, 260 Cal. App. 2d 268, 277 (1968). That malice must be
19 "malice in fact" in every case to support an award of punitive
20 damages. Davis v. Hearst, 160 Cal. 143, 164 (1911).

21
22 ⁹ Because we find that the bankruptcy court erred in
23 determining that there was a willful injury, we do not reach the
24 issue of whether the State Court Judgment preclusively establishes
25 that Sangha acted maliciously for purposes of § 523(a)(6). We
26 note that the bankruptcy court simply ruled that because the
27 injury was the result of malice in fact, the first two elements
28 for malicious injury, that the individual committed a wrongful act
and it was done intentionally, were satisfied. However, the Panel
in Plyam v. Precision Dev., LLC (In re Plyam), _____ B.R. _____,
No. CC-14-1362, 2015 WL 2124780 (9th Cir. BAP May 5, 2015),
discussed below, noted that the maliciousness prong was partially
satisfied by a finding of malice in law, not malice in fact. On
remand, the bankruptcy court may review its finding on the
maliciousness prong.

1 The bankruptcy court next examined the characteristics of
2 "malice in fact" required to recover in defamation actions under
3 California law. California defines malice in fact as "a state of
4 mind arising from hatred or ill will, evidencing a willingness to
5 vex, annoy, or injure another person." Davis, 160 Cal. at 160;
6 see also In re V.V., 51 Cal. 4th 1020, 1028 (1966) ("Malice in fact
7 – defined as 'a wish to vex, annoy, or injure' . . . – consists of
8 actual ill will or intent to injure."). From these legal
9 premises, the bankruptcy court inferred:

10 Malice in fact is defined as having ill-will or an
11 attempt to injure. Malice in fact contemplates that
12 defendant's conduct is intended to specifically injure
13 Plaintiff, not just an intentional act that leads to
injury. Thus, the Court finds that the issues set forth
under malice in fact are the same as those for willful
injury under § 523(a)(6)."

14 Tentative Decision at 8, July 8, 2014. Therefore, the bankruptcy
15 court reasoned that: (1) The state court awarded punitive damages
16 to Schrader in the State Court Judgment; (2) Punitive damages in a
17 California defamation suit must be founded upon the trial court's
18 finding that, in making the defamatory statements, the defendant
19 acted with malice in fact; (3) Applying the state case law
20 standard for malice in fact, the bankruptcy court could infer that
21 Sangha had acted with an intent to injure Schrader.

22 The bankruptcy court then rounded out its reasoning with a
23 citation to the Panel's unpublished memorandum in In re Emmerson,
24 2011 WL 3299852, at * 9 (9th Cir. BAP March 25, 2011) ("We have
25 therefore concluded that an award of punitive damages, even absent
26 specific findings of malice or oppression or fraud is entitled to
27 preclusive effect in a nondischargeability action."). Based on
28 its own reasoning, and with the apparent blessing of

1 In re Emmerson, the bankruptcy court concluded that issue
2 preclusion satisfied the willfulness component for an exception to
3 discharge under § 523(a)(6).

4 While otherwise sound, we find the third step in the
5 bankruptcy court's analysis and its reliance upon In re Emmerson
6 problematic.¹⁰ According to the cases cited by the bankruptcy
7 court, "malice in fact" exists when an act is committed with "ill
8 will **or** intent to injure." Davis, 160 Cal. at 160 (emphasis
9 added). Ill will is manifested as a "willingness to vex, annoy,
10 **or** injure another person." Id. (emphasis added). Because these
11 standards are stated in the disjunctive, the bankruptcy court
12 could not assume that Sangha's acts were committed with an intent
13 to injure as the only possible inference from malice in fact.
14 There are other possible inferences, including that ill will may
15 not manifest itself in injury, or an intent to vex or annoy.
16 While it may be possible to infer an actor's intent to injure from
17 a finding that the actor committed malice in fact when supported
18 by other facts in the record, that is not the case here. The
19 bankruptcy court concluded that, in defaming Schrader, Sangha

21 ¹⁰ The bankruptcy court may have assigned too much weight to
22 the Panel's decision In re Emmerson. That case dealt with a very
23 specific application of issue preclusion in a child abduction
24 case. The underlying state court action awarded punitive damages
25 against the debtor based on Cal. Civ. Code § 49, which provides a
26 cause of action for child abduction, and Cal. Civ. Code § 3294 for
27 punitive damages "where it is proven by clear and convincing
28 evidence that the defendant has been guilty of oppression, fraud,
or malice." Cal. Civ. Code § 3294(a). The state court in the
In re Emmerson case made specific findings supporting its award of
punitive damages under Cal. Civ. Code § 3294. The Panel's
decision should be viewed as endorsing an exception to discharge
under the facts of that case, not as a general ruling that an
award of punitive damages standing alone satisfies the willfulness
prong of § 523(a)(6).

1 acted with an intent to injure Schrader based solely on the State
2 Court Judgment. But that reasoning goes too far, since intent to
3 injure cannot be inferred from malice in fact under California
4 law.

5 Rather than In re Emmerson, for guidance, we look to the
6 Panel's recent discussion of punitive damages and malice in fact
7 under California law in Plyam v. Precision Dev., LLC
8 (In re Plyam), ___ B.R. ___, No. CC-14-1362, 2015 WL 2124780 (9th
9 Cir. BAP May 5, 2015). In In re Plyam, the Panel examined whether
10 a California jury's award of punitive damages to the creditor was
11 preclusive to show that the debtor had acted with the requisite
12 intent to injure required for an exception to discharge in
13 bankruptcy under § 523(a)(6). As relevant here, the Panel
14 concluded that an award of punitive damages based upon an actor's
15 malice in fact is "an insufficient basis for [application of]
16 issue preclusion" under the Supreme Court's decision in Geiger.
17 As the Panel explained,

18 [B]y holding that the requisite state of mind was an
19 actual intent to injure (or substantial certainty
20 regarding injury), the Supreme Court in Geiger
21 effectively adopted a narrow construction and the most
22 blameworthy state of mind included within the common
understanding of malice in fact. As relevant here,
under California law, the general definition of malice
in fact encompasses less reprehensible states of mind.

23 Id. at *5.

24 As can be seen, the In re Plyam opinion explores those "less
25 reprehensible states of mind" that, while they support an award of
26 punitive damages under California law, may not be adequate to
27 support a discharge exception under the Bankruptcy Code. Id. The
28 Panel discussed the case law in both California and federal

