

OCT 13 2016

NOT FOR PUBLICATION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. AZ-15-1375-FLJu  
 )  
 PATRICK LAZZARI, ) Bk. No. 2:10-bk-18314-BKM  
 )  
 Debtor. ) Adv. Pro. 2:14-ap-00725-BKM  
 )  
 )  
 PATRICK LAZZARI, )  
 )  
 Appellant, )  
 )  
 v. ) **MEMORANDUM\***  
 )  
 DANIEL LAZZARI, as Conservator )  
 for Michael Lazzari; SALLY )  
 MARTINEZ, as Conservator for )  
 Michael Lazzari, )  
 )  
 Appellees. )

Argued and Submitted on September 23, 2016  
at Phoenix, Arizona

Filed - October 13, 2016

Appeal from the United States Bankruptcy Court  
for the District of Arizona

Honorable Brenda K. Martin, Bankruptcy Judge, Presiding

Appearances: Dean W. O'Connor argued for Appellant Patrick Lazzari; Jenna Rose Swiren of Fennemore Craig, P.C. argued for Appellees Daniel Lazzari and Sally Martinez.

Before: FARIS, LAFFERTY, and JURY, 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 8024-1.



1 went to Arizona to live with Patrick.

2 After Michael's workplace injury, Patrick handled Michael's  
3 personal finances. Shortly after moving to Arizona, on March 4,  
4 2005, Michael signed a durable power of attorney appointing  
5 Patrick as his attorney-in-fact.

6 **B. The Bassillio Trust**

7 Michael and Patrick were beneficiaries of their aunt's  
8 trust, the Gloria Bassillio Revocable Trust, dated March 9, 2003,  
9 as amended and restated on December 26, 2003 (the "Bassillio  
10 Trust"). They were each to receive fifty percent of real  
11 property located on Naples Street in San Francisco (the "San  
12 Francisco Property").<sup>4</sup>

13 The Bassillio Trust provided that, upon Ms. Bassillio's  
14 death, Maurice Lazzari (Ms. Bassillio's brother and the siblings'  
15 father) would serve as successor trustee. Michael was named  
16 second successor trustee, and Patrick was named the third  
17 successor trustee.

18 Ms. Bassillio passed away in December 2005. In February  
19 2006, both Maurice<sup>5</sup> and Michael signed a notice stating that they  
20 were unwilling to serve as successor trustee. As such, Patrick  
21 became the trustee of the Bassillio Trust.

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22  
23 <sup>4</sup> The Bassillio Trust documents state that Michael and  
24 Patrick were to each receive a half interest in the San Francisco  
25 Property, while their father was to receive the other trust  
26 assets. However, the parties have stated throughout this  
litigation that Michael and Patrick were the only beneficiaries  
and were to receive a half interest in all trust property.

27 <sup>5</sup> A court investigator later found evidence that Patrick  
28 unduly influenced Maurice, who was in his eighties and suffered  
from alcohol-related dementia.

1 On March 9, 2006, Michael signed a Beneficiary Disclaimer  
2 and Renunciation ("Disclaimer") in which he disclaimed his entire  
3 interest in the Bassillio Trust to Patrick. The Disclaimer  
4 provided that Michael intended for the San Francisco Property to  
5 be distributed solely to Patrick.

6 That same day, Patrick executed a grant deed distributing  
7 the San Francisco Property from the Bassillio Trust to himself.  
8 He later took out a \$419,000 loan secured by the otherwise  
9 unencumbered San Francisco Property.

10 A day after Michael executed the Disclaimer, he apparently  
11 overdosed on prescription medication and suffered a severe anoxic  
12 brain injury while hospitalized. He spent months in the hospital  
13 and skilled nursing facility before returning to San Francisco to  
14 live with his parents and brother Steven. As a result of his  
15 brain injury, Michael now requires life-long medical and  
16 attendant care.

17 **C. The conservatorship proceedings**

18 In May 2008, appellees Daniel and Sally filed a petition for  
19 temporary conservatorship of Michael. The California superior  
20 court held a hearing on the petition and appointed Daniel and  
21 Sally as temporary conservators over Patrick's objections.

22 The parties engaged in legal wrangling over Michael's  
23 conservatorship for a number of years. Daniel and Sally alleged  
24 that Patrick acted unscrupulously to deprive Michael of his  
25 property. Among other things, in January 2009, they filed a  
26 petition to compel Patrick to account for his handling of  
27 Michael's finances. The superior court granted the petition and  
28 also ordered Patrick to pay attorneys' fees and costs totaling

1 \$17,768 and a surcharge of \$64,077.41 for violation of fiduciary  
2 duties as attorney-in-fact. Daniel and Sally also obtained a  
3 restraining order against Patrick.

4 Daniel and Sally took the position that Michael was entitled  
5 to possession of fifty percent of the personal and real property  
6 held by the Bassillio Trust at the time of Ms. Bassillio's death.  
7 Patrick opposed Daniel's and Sally's position and participated in  
8 the conservatorship proceedings between 2008 and 2010.

9 Thereafter, Patrick received notice of the proceedings but did  
10 not participate as vigorously. Daniel and Sally stated that  
11 Patrick engaged in the litigation on at least two occasions but  
12 chose not to file responses or objections to their filings.<sup>6</sup>

13 On May 17, 2010, Daniel and Sally filed an amended petition  
14 (the "Amended Petition") to, among other things, have the court  
15 declare the Disclaimer void; find that Patrick violated his  
16 duties to Michael; and transfer the San Francisco Property to  
17 Michael's conservatorship. Patrick did not respond to the  
18 Amended Petition.

19 **D. Patrick's bankruptcy proceedings**

20 On June 10, 2010, shortly after Daniel and Sally filed the  
21 Amended Petition, Patrick filed his chapter 13 petition in the  
22 United States Bankruptcy Court for the District of Arizona. As a  
23 part of Patrick's amended chapter 13 plan, he proposed to "sell  
24 [the San Francisco Property] and proceeds will be used to pay

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25  
26 <sup>6</sup> Patrick initially refused to provide the parties or the  
27 court with a copy of documents or other information related to  
28 the Bassillio Trust. However, by order dated January 21, 2011,  
the superior court required Patrick to produce that information  
for an accounting.

1 creditors." The bankruptcy court granted relief from the  
2 automatic stay so that the superior court proceedings could  
3 continue.

4 **E. The California Order**

5 By order dated March 10, 2011, the superior court held that  
6 the transfer of the San Francisco Property pursuant to the  
7 Disclaimer was void ab initio. The court found that: (1) the  
8 transfer of Michael's interest in the San Francisco Property to  
9 Patrick via the Disclaimer was void ab initio; (2) Patrick never  
10 rightfully held ownership of Michael's interest in the trust  
11 property; and (3) Patrick has been holding Michael's property as  
12 constructive trustee.

13 On August 8, 2011, the superior court issued an order  
14 ("California Order") on the Amended Petition that found that  
15 Patrick violated his duties, determined that the entire trust res  
16 should be vested in Michael's name, and required that Patrick be  
17 liable for any encumbrances on the San Francisco Property. The  
18 court held that Patrick violated his fiduciary duties as trustee  
19 by "acting in bad faith, wrongfully taking, concealing and  
20 disposing of property belonging to beneficiary Michael Lazzari,  
21 exerting undue influence over Michael Lazzari, and dealing with  
22 trust property for his own profit and in an interest [sic]  
23 directly adverse to beneficiary Michael Lazzari . . . ." It  
24 referenced the March 10, 2011 order and stated that "the transfer  
25 of Michael Lazzari's one-half interest in the [San Francisco  
26 Property] to Patrick Lazzari via Beneficiary Disclaimer and  
27 Renunciation was found void ab initio . . . ." The superior  
28 court held that "full ownership in the [San Francisco Property]

1 should be vested in Michael Lazzari, . . . that Patrick Lazzari  
2 is liable to Michael Lazzari for the amount of any encumbrances  
3 currently on the real property, and that the real property in its  
4 entirety is rightfully held by the conservatorship estate of  
5 Michael Lazzari." Patrick did not appear for the hearing on this  
6 matter, and he claimed that the California Order was entered by  
7 default.

8 In March 2012, the superior court awarded Daniel and Sally  
9 \$58,501 in attorneys' fees and costs in connection with the  
10 conservatorship litigation.

11 **F. The adversary proceeding**

12 In May 2014 (after the adverse superior court rulings), the  
13 bankruptcy court granted Patrick's request to convert his case to  
14 one under chapter 7. He received his discharge in January 2015.

15 On August 29, 2014, Daniel and Sally initiated an adversary  
16 proceeding against Patrick, seeking to except from discharge the  
17 debt for the encumbrance on the San Francisco Property, the  
18 surcharge, and the award of attorneys' fees and costs under  
19 § 523(a)(2), (a)(4), and (a)(6).

20 Daniel and Sally filed a motion for summary judgment  
21 ("Motion for Summary Judgment") seeking a determination of  
22 nondischargeability under § 523(a)(2), (a)(4), and (a)(6). Among  
23 other things, they requested that the bankruptcy court give the  
24 California Order issue preclusive effect.

25 After a hearing and supplemental briefing, the bankruptcy  
26 court issued its Memorandum Decision on Summary Judgment  
27 ("Memorandum Decision"). It stated that issue preclusion  
28 prevented relitigation of the findings in the California Order

1 and that those findings are binding on the bankruptcy court. It  
2 determined that Daniel and Sally met their burden with respect to  
3 defalcation under § 523(a)(4), but not as to the § 523(a)(2) and  
4 (a)(6) claims or the fraud element of § 523(a)(4).

5 The bankruptcy court concluded that issue preclusion applied  
6 under California law, because (1) although the California Order  
7 was obtained by default, it was decided on the merits (as opposed  
8 to a procedural ground); (2) although the California Order was a  
9 default judgment, the issues were actually litigated; (3) the  
10 elements of defalcation under § 523(a)(4) were identical to that  
11 decided by the California Order; and (4) Patrick had an incentive  
12 to participate in the conservatorship proceedings, since the  
13 San Francisco Property was crucial to his amended chapter 13  
14 plan. The bankruptcy court held that the nondischargeable debt  
15 was the claim "for the value of the mortgage lien on the trust  
16 property (\$419,000 at 3.5%; \$467,800.54 as of October 6, 2011),  
17 and the March 15, 2012 Order awarding attorney's fees and costs  
18 in the amount of approximately \$58,000 relating to the Amended  
19 Petition."

20 On October 14, 2015, the court issued its Judgment Excepting  
21 Debt from Discharge. Patrick timely filed his notice of appeal.<sup>7</sup>

## 22 JURISDICTION

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

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24  
25 <sup>7</sup> The BAP Clerk's Office notified the parties that the  
26 § 523(a)(2) and (a)(6) claims remained outstanding and neither  
27 the Memorandum Decision nor the judgment contained an express  
28 determination that there is no just reason for delay or a  
direction to enter final judgment on fewer than all claims. Patrick moved the court for Civil Rule 54(b) certification. The court issued an order for final judgment on February 22, 2016.



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

3 **ISSUE**

4 Whether the bankruptcy court erred in granting summary  
5 judgment in favor of Daniel and Sally under § 523(a)(4) by  
6 applying issue preclusion to the California Order.<sup>8</sup>

7 **STANDARDS OF REVIEW**

8 We review “the bankruptcy court’s interpretation of the  
9 Bankruptcy Code de novo and its factual findings for clear  
10 error[.]” Hedlund v. Educ. Res. Inst. Inc., 718 F.3d 848, 854  
11 (9th Cir. 2013) (quoting Miller v. Cardinale (In re DeVille),  
12 361 F.3d 539, 547 (9th Cir. 2004)).

13 “We review rulings regarding rules of res judicata,  
14 including claim and issue preclusion, de novo as mixed questions  
15 of law and fact in which legal questions predominate.” Khaligh  
16 v. Hadaegh (In re Khaligh), 338 B.R. 817, 823 (9th Cir. BAP  
17 2006), aff’d, 506 F.3d 956 (9th Cir. 2007) (citations omitted).  
18 “Once it is determined that preclusion doctrines are available to  
19 be applied, the actual decision to apply them is left to the  
20 trial court’s discretion.” Id. (citations omitted).

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21  
22  
23  
24  
25 <sup>8</sup> Daniel and Sally argue that nondischargeability is proper  
26 under § 523(a)(2) and (a)(6). However, the bankruptcy court held  
27 that the California Order did not satisfy the elements necessary  
28 for issue preclusion under those sections, and neither party  
appealed that portion of the Memorandum Decision. Accordingly,  
we do not address § 523(a)(2) or (a)(6).

1 DISCUSSION

2 **A. The superior court judgment cannot be discharged under**  
3 **§ 523(a)(4) if Patrick breached his fiduciary duty to**  
4 **Michael by committing fraud or defalcation.**

5 Section 523(a)(4) provides:

6 (a) A discharge under section 727 . . . of this title  
7 does not discharge an individual debtor from any debt -

8 . . .

9 (4) for fraud or defalcation while acting in a  
10 fiduciary capacity, embezzlement, or larceny[.]

11 § 523(a)(4).

12 Under Ninth Circuit law, “[t]o prevail on a  
13 nondischargeability claim under § 523(a)(4) the plaintiff must  
14 prove not only the debtor’s fraud or defalcation, but also that  
15 the debtor was acting in a fiduciary capacity when the debtor  
16 committed the fraud or defalcation.” Honkanen v. Hopper  
17 (In re Honkanen), 446 B.R. 373, 378 (9th Cir. BAP 2011); see  
18 Nahman v. Jacks (In re Jacks), 266 B.R. 728, 735 (9th Cir. BAP  
19 2001) (“The creditor must establish three elements for  
20 nondischargeability under this provision: (1) an express trust;  
21 (2) that the debt was caused by fraud or defalcation; and  
22 (3) that the debtor was a fiduciary to the creditor at the time  
23 the debt was created.”). The United States Supreme Court has  
24 held that defalcation has a specific meaning that requires “bad  
25 faith, moral turpitude, or other immoral conduct,” or “an  
26 intentional wrong.” Bullock v. BankChampaign, N.A., 133 S. Ct.  
27 1754, 1759-60 (2013).

28 **B. The bankruptcy court did not err in applying issue**  
**preclusion to the California Order.**

The question before the Panel is whether the California

1 Order can be given issue preclusive effect such that it precludes  
2 relitigation before the bankruptcy court of the issues pertinent  
3 to the § 523(a)(4) claim.

4 A bankruptcy court may rely on the issue preclusive effect  
5 of an existing state court judgment as the basis for granting  
6 summary judgment. See In re Khaligh, 338 B.R. at 831-32. The  
7 usual rules of issue preclusion apply in dischargeability  
8 litigation. Grogan v. Garner, 498 U.S. 279, 284-85 (1991).

9 Under the full faith and credit statute, federal courts must  
10 give state court judgments the same preclusive effect that a  
11 state court would. See 28 U.S.C. § 1738; Gayden v. Nourbakhsh  
12 (In re Nourbakhsh), 67 F.3d 798, 800 (9th Cir. 1995). To  
13 determine the preclusive effect of a state court judgment,  
14 federal courts apply the preclusion law of the state in which the  
15 judgment was entered. See Marrese v. Am. Acad. of Orthopaedic  
16 Surgeons, 470 U.S. 373, 380 (1985); DiRuzza v. Cty. of Tehama,  
17 323 F.3d 1147, 1152 (9th Cir. 2003).

18 Here, although the bankruptcy proceedings were held in  
19 Arizona, the conservatorship proceedings took place in  
20 California, and the California Order was issued by the California  
21 superior court. Therefore, California law on issue preclusion  
22 applies.

### 23 **1. California law on issue preclusion**

24 In California, issue preclusion prevents parties from  
25 relitigating issues already decided in prior proceedings. Lucido  
26 v. Super. Ct., 51 Cal. 3d 335, 341 (1990). The party asserting  
27 issue preclusion must prove five elements. First, the issues to  
28 be precluded must be identical to the ones decided in the prior

1 proceeding. Second, the issues must have been actually litigated  
2 in the prior proceeding. Third, the issues must have been  
3 necessarily decided. Fourth, the decision must have been final  
4 and on the merits. Finally, the party to be precluded must be  
5 identical to or in privity with a party to the prior proceeding.

6 Id.

7 The party asserting issue preclusion has the burden of  
8 establishing each element. "To sustain this burden, a party must  
9 introduce a record sufficient to reveal the controlling facts and  
10 the exact issues litigated in the prior action. Any reasonable  
11 doubt as to what was decided in the prior action will weigh  
12 against applying issue preclusion." Brandstetter v. Derebery  
13 (In re Derebery), 324 B.R. 349, 353 (Bankr. C.D. Cal. 2005)  
14 (citing Kelly v. Okoye (In re Kelly), 182 B.R. 255, 258 (9th Cir.  
15 BAP 1995)).

16 The doctrine of issue preclusion is not mechanically  
17 applied. Instead, the court must apply it when it advances three  
18 policies: "(1) to promote judicial economy by minimizing  
19 repetitive litigation; (2) to prevent inconsistent judgments  
20 which undermine the integrity of the judicial system; and (3) to  
21 provide repose by preventing a person from being harassed by  
22 vexatious litigation." Alpha Mech., Heating & Air Conditioning,  
23 Inc. v. Travelers Cas. & Sur. Co. of Am., 133 Cal. App. 4th 1319,  
24 1333 (2005).

25 **2. Preclusive effect of the California Order**

26 **a. Are the issues identical?**

27 The first prong of the issue preclusion test requires a  
28 comparison of the issues presented in the current case with the

1 issues presented in the prior case that resulted in the judgment.  
2 The bankruptcy court held that the California Order established  
3 the requisite elements of defalcation under § 523(a)(4). We find  
4 no error.

5 A debt is nondischargeable under § 523(a)(4) if the creditor  
6 establishes: (1) an express trust; (2) that the debt was caused  
7 by fraud or defalcation; and (3) that the debtor was a fiduciary  
8 to the creditor at the time the debt was created. In re Jacks,  
9 266 B.R. at 735. The relevant terms have specific meanings and  
10 are narrowly construed. “[T]he fiduciary relationship must be  
11 one arising from an express or technical trust that was imposed  
12 before and without reference to the wrongdoing that caused the  
13 debt.” Lewis v. Scott (In re Lewis), 97 F.3d 1182, 1185 (9th  
14 Cir. 1996). Additionally, defalcation requires “bad faith, moral  
15 turpitude, or other immoral conduct,” or “an intentional wrong.”  
16 Bullock, 133 S. Ct. at 1759-60.

17 The bankruptcy court engaged in a thorough comparison of the  
18 California Order and the elements of § 523(a)(4). It concluded  
19 that the California Order established the necessary elements for  
20 defalcation under § 523(a)(4). It said:

21 all three of the elements of § 523(a)(4) have been  
22 ruled upon by the State Court: there is an express  
23 trust; the Debtor was trustee of the trust; the Debtor  
24 committed defalcation when, acting in bad faith, he  
took, concealed and disposed of trust property for his  
own benefit and profit and to the detriment of Michael  
as beneficiary.

25 We agree with the court’s analysis. Patrick does not challenge  
26 this aspect of the bankruptcy court’s ruling.

27 Rather, Patrick argues that issue preclusion is inapplicable  
28 because the superior court did not make a determination of

1 nondischargeability. This argument is nonsensical. The superior  
2 court had no reason to consider and rule on whether its ruling  
3 would result in a nondischargeable debt in bankruptcy. Rather,  
4 issue preclusion concerns whether the elements of the claims  
5 decided by the state court are the same as the elements of the  
6 claims to be decided by the bankruptcy court.

7 Accordingly, the issues are identical, and the first prong  
8 is satisfied.

9 **b. Were the issues actually litigated?**

10 An issue is "actually litigated" when the issue was raised,  
11 actually submitted for determination, and determined. Baker v.  
12 Hull, 191 Cal. App. 3d 221, 226 (1987). Courts also consider  
13 whether the party to be estopped had a "full and fair  
14 opportunity" to litigate the issue. Gottlieb v. Kest, 141 Cal.  
15 App. 4th 110, 148 (2006).

16 Patrick argued to the bankruptcy court that the California  
17 Order was not actually litigated, because he largely did not  
18 participate in the conservatorship proceedings after 2010 and did  
19 not answer the Amended Petition or appear at the hearing on the  
20 Amended Petition. The court held that, even though the  
21 California Order was a default judgment, the issues were actually  
22 litigated.<sup>9</sup>

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23  
24 <sup>9</sup> Patrick makes only a passing argument that a default  
25 judgment is not afforded issue preclusive effect. It is not  
26 clear whether he is challenging the bankruptcy court's ruling in  
27 this respect. In any event, California law is clear that, unlike  
28 the majority rule, it "accords collateral estoppel effect to  
default judgments, at least where the judgment contains an  
express finding on the allegations." Gottlieb, 141 Cal. App. 4th  
(continued...)

1                   **i. Defective service**

2           On appeal, Patrick merely argues in passing that there is no  
3 evidence that he was personally served with the Amended Petition.  
4 However, he did not identify where he made this argument before  
5 the bankruptcy court. We will not consider issues raised for the  
6 first time on appeal. See Ezra v. Seror (In re Ezra), 537 B.R.  
7 924, 932 (9th Cir. BAP 2015) (“Ordinarily, federal appellate  
8 courts will not consider issues not properly raised in the trial  
9 courts.”).

10           Moreover, he fails to provide any legal authority or  
11 citation to the record substantiating his claim that he was not  
12 properly served with the Amended Petition. See Christian Legal  
13 Soc. Chapter of Univ. of Cal. v. Wu, 626 F.3d 483, 487 (9th Cir.  
14 2010) (An appellate court “won’t consider matters on appeal that  
15 are not specifically and distinctly argued in appellant’s opening  
16 brief. Applying this standard, we’ve refused to address claims  
17 that were only argue[d] in passing, or that were bare  
18 assertion[s] . . . with no supporting argument.”).

19           Even if this issue was properly before us on appeal, we  
20 would find no error. Patrick does not deny that the original  
21 petition was properly served on him. Nor does he offer any  
22 authority that service by mail is ineffective for an amended  
23 petition. Cf. Cal. Civ. Proc. Code § 471.5(a) (“If the complaint  
24 is amended, a copy of the amendments shall be filed, or the court  
25 may, in its discretion, require the complaint as amended to be  
26

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27                   <sup>9</sup>(...continued)  
28 at 149.

1 filed, and a copy of the amendments or amended complaint must be  
2 served upon the defendants affected thereby."); Student A. ex  
3 rel. Mother of Student A. v. Metcho, 710 F. Supp. 267, 268-69  
4 (N.D. Cal. 1989) (Under California Code of Civil Procedure  
5 § 1013(a), service is complete "upon deposit of the amended  
6 complaint in the mail . . . ."). We discern no error concerning  
7 the service of the Amended Petition.

8 **ii. Fraud and fiduciary obligations**

9 Patrick also baldly argues that "the issue of whether  
10 Patrick Lazzari committed fraud or otherwise breached his  
11 fiduciary obligation was never actually litigated or decided in  
12 the California State Court actions." He again fails to expand on  
13 this argument or cite any evidence or authority. To the  
14 contrary, the bankruptcy court engaged in a detailed analysis of  
15 the elements of § 523(a)(4) and concluded that the defalcation  
16 element was satisfied by the California Order, while the fraud  
17 element was not.

18 **iii. Validity of the Disclaimer**

19 Patrick further contends that the superior court did not  
20 determine Michael's competency at the time that he signed the  
21 Disclaimer or the validity of the Disclaimer itself. He argues  
22 that if Michael were competent and the Disclaimer were valid,  
23 then he did not owe Michael a fiduciary duty and could not have  
24 breached that duty as required by § 523(a)(4).

25 Patrick is mistaken on a basic level. The superior court  
26 did not need to make an explicit finding as to Michael's  
27 competence; even if Michael were competent, Patrick was not free  
28 to injure him or act against his interests. Moreover, the



1 superior court did determine that the Disclaimer was invalid in  
2 its March 10, 2011 order. It held that the transfer of Michael's  
3 interest in the Bassillio Trust "via Beneficiary Disclaimer and  
4 Renunciation was void ab initio, that Patrick Lazzari never  
5 rightfully held ownership of Michael Lazzari's interest and  
6 personal property, and that Patrick Lazzari has been holding  
7 Michael Lazzari's one-half of the property as constructive  
8 trustee." The superior court recognized and reaffirmed its  
9 March 10, 2011 order in the California Order, stating that the  
10 transfer via the Disclaimer "was found void ab initio . . . ."  
11 Thus, the superior court made an express determination that the  
12 Disclaimer and transfer of the San Francisco Property were  
13 invalid.

14 Accordingly, the second requirement is satisfied.

15 **c. Were the issues necessarily decided?**

16 An issue was "necessarily decided" if the issue was not  
17 "entirely unnecessary" to the judgment in the prior proceeding.  
18 Lucido, 51 Cal. 3d at 342. The parties do not dispute that the  
19 issues before the superior court were necessarily decided.  
20 Accordingly, the third prong is satisfied.

21 **d. Is the judgment final and on the merits?**

22 A judgment is the final determination of the rights of the  
23 parties in an action. Cal. Code Civ. P. § 577. In California, a  
24 judgment is "final" when it terminates the litigation between the  
25 parties on the merits and leaves nothing else to do except  
26 enforce the judgment. Sullivan v. Delta Air Lines, Inc., 15 Cal.  
27 4th 288, 304 (1997). The parties here do not dispute that the  
28 California Order was a final judgment.

1 To the extent Patrick is arguing that the California Order  
2 was a default judgment and therefore not decided on the merits,  
3 we reject this argument for the reasons stated above. The  
4 superior court engaged in a detailed analysis of the alleged  
5 breach of fiduciary duty. As the bankruptcy court noted, the  
6 decision was made on the merits, because “[n]othing in the record  
7 suggests that the State Court decided the matter solely on  
8 procedural grounds.” We agree. The fourth requirement is thus  
9 satisfied.

10 **e. Were the parties identical?**

11 The parties to this appeal were parties to the  
12 conservatorship proceeding before the superior court. As such,  
13 the fifth requirement is satisfied.

14 **3. Incentive to litigate**

15 Finally, Patrick argues that issue preclusion is  
16 inappropriate and the California Order cannot be used against  
17 him, because he lacked an incentive to litigate in the superior  
18 court. We reject this argument.

19 “At its heart, the decision to apply issue preclusion  
20 entails a measure of discretion and flexibility.” Lopez v.  
21 Emergency Serv. Restoration, Inc. (In re Lopez), 367 B.R. 99, 107  
22 (9th Cir. BAP 2007). A court can refuse to apply issue  
23 preclusion when there are “unfair circumstances” concerning the  
24 full and fair opportunity to litigate, including when “the  
25 defendant had no incentive to vigorously litigate the issue in  
26 the prior action, particularly if the second action is not  
27 foreseeable.” Roos v. Red, 130 Cal. App. 4th 870, 880 (2005)  
28 (citation and internal quotation marks omitted); see Shawhan v.

1 Shawhan (In re Shawhan), BAP No. NV-08-1049-JuKuK, 2008 WL  
2 8462964, at \*6 (9th Cir. BAP July 7, 2008) ("Equitable  
3 circumstances may justify not applying the doctrine. Such  
4 circumstances may occur . . . when there is an inadequate  
5 opportunity or incentive to obtain a full and fair adjudication  
6 in the initial action.").

7 Here, Patrick claimed that he had no incentive to litigate  
8 in the superior court because he assumed that he could discharge  
9 his debt through bankruptcy. However, as the bankruptcy court  
10 pointed out, his incentive to litigate was evident: his amended  
11 chapter 13 plan called for the sale of the San Francisco Property  
12 to pay his creditors. He should have known that, if he lost the  
13 superior court litigation, he would have no assets with which to  
14 fund his chapter 13 plan. He could not merely assume that he  
15 would prevail in the superior court litigation (or that the  
16 superior court decision would not affect his bankruptcy case),  
17 especially given the years of contentious litigation.

18 Similarly, Patrick should have known that Daniel and Sally  
19 were asking the superior court to rule that Patrick had breached  
20 his fiduciary duties and that, if Daniel and Sally prevailed in  
21 the superior court, a § 523(a)(4) adversary proceeding would  
22 ensue. Cf. In re Palombo, 456 B.R. 48, 59 (Bankr. C.D. Cal.  
23 2011) (holding that the debtor had incentive to litigate the  
24 earlier action, because "the importance of the facts to this  
25 litigation was clearly foreseeable at the time of the earlier  
26 action which was ongoing, not years earlier. . . . [A]pplication  
27 of issue preclusion [to the § 523(a)(4) claim] was plainly  
28 foreseeable"). Thus, it is disingenuous to claim that he did not

1 have any incentive to litigate the conservatorship proceedings.

2 Patrick cites only Harner v. Carlson (In re Carlson),  
3 156 B.R. 582 (Bankr. S.D. Ind. 1992), for the proposition that,  
4 when a debtor chooses not to actually litigate factual issues in  
5 a prebankruptcy case, collateral estoppel should not bar  
6 relitigation. But Carlson does not help Patrick's case. The  
7 Indiana bankruptcy court merely acknowledged the general rule  
8 that, when a party lacked a similar incentive to defend in the  
9 earlier case, it cannot be said that the party had a "full and  
10 fair opportunity" to litigate the issue. See id. at 584.

11 Accordingly, Patrick had incentive to participate in the  
12 superior court case and had a full and fair opportunity to  
13 litigate. It is not inequitable to apply issue preclusion to the  
14 California Order.

#### 15 **CONCLUSION**

16 For the reasons set forth above, the bankruptcy court did  
17 not err in affording issue preclusive effect to the California  
18 Order and holding Patrick's debt to Daniel and Sally (as  
19 Michael's conservators) nondischargeable under § 523(a)(4).  
20 Therefore, we AFFIRM.