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NOT FOR PUBLICATION

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

UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT

In re:)	BAP No. SC-15-1335-YJuF
)	
STEPHEN F. LOPEZ,)	Bk. No. 12-00796-CL7
)	
Debtor.)	Adv. No. 12-90127-CL
)	
STEPHEN F. LOPEZ,)	
)	
Appellant,)	
v.)	MEMORANDUM*
)	
VLADIMIR RAICEVIC, Trustee;)	
IMELDA RAICEVIC,)	
)	
Appellees.)	

Argued and Submitted on January 19, 2017
at San Diego, California

Filed - February 1, 2017

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

Honorable Christopher B. Latham, Bankruptcy Judge, Presiding

Appearances: Richard R. Roy argued on behalf of Appellant
Stephen F. Lopez; Jerry D. Cluff argued on behalf
of Appellees Vladimir Raicevic, Trustee, and
Imelda Raicevic.

Before: YUN**, JURY, and FARIS, 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.

** Hon. Scott H. Yun, United States Bankruptcy Judge for the
Central District of California, sitting by designation.

1 **I. INTRODUCTION**

2 This appeal stems from a transaction in which debtor Stephen
3 F. Lopez ("Lopez") represented Hardy Matthew Travis
4 ("Mr. Travis") and Launi Travis ("Mrs. Travis") (collectively,
5 the "Travises") as their attorney. Vladimir Raicevic and Imelda
6 Raicevic¹ (collectively, the "Raicevics") obtained a fraud
7 judgment in state court against Lopez and his law firm based on
8 the circumstances of that transaction. The Raicevics then brought
9 an adversary proceeding against Lopez in his bankruptcy case
10 seeking to have their debt excepted from discharge under
11 § 523(a)(2)(A).² They filed a motion for summary judgment based
12 on their fraud judgment and the doctrine of issue preclusion³.
13 Lopez objected to the motion for summary judgment and brought his
14 own cross-motion for summary judgment. The bankruptcy court

15
16 ¹ Andjelka Raicevic and Vojo Raicevic initially made the
17 loans in question and entered into the agreement that is the
18 subject of their fraud claims. Vojo Raicevic subsequently passed
19 away and Imelda Raicevic pursued the state court action on his
20 behalf, along with Andjelka Raicevic on her own behalf. They then
21 initiated the adversary proceeding. Andjelka Raicevic
22 subsequently passed away and Vladimir Raicevic substituted into
23 the adversary proceeding on her behalf. In order to reduce
24 confusion, and because their interests were aligned during the
25 different stages of litigation, we will sometimes refer
26 collectively to all four Raicevic family members as the
27 "Raicevics."

28 ² Unless specified otherwise, all chapter and section
references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532, and
all "Rule" references are to the Federal Rules of Bankruptcy
Procedure, Rules 1001-9037.

³ The parties use the term collateral estoppel, which is
interchangeable with issue preclusion. We use the more modern
terminology of issue preclusion.

1 granted the Raicevics' motion, finding their debt
2 nondischargeable under § 523(a)(2)(A), and denied Lopez's motion.
3 Lopez appealed both rulings, and we AFFIRM.

4 **II. FACTS AND PROCEDURAL HISTORY**

5 **A. Prepetition Events**

6 1. The Underlying Transactions

7 Andjelka Raicevic and Vojo Raicevic sold real property to
8 Mr. Travis as trustee of a family trust in 1998, and took back a
9 \$1.45 million promissory note secured by that real property.⁴ The
10 Travises later substituted their residence as collateral for the
11 loan instead of the original real property. They also pledged
12 their residence as collateral for an additional loan of \$100,000
13 made in 2003. The Travises began to have difficulty keeping the
14 payments current on the two loans in April 2004.

15 2. Lopez's Involvement

16 In an attempt to deal with their financial difficulties, the
17 Travises engaged Lopez to seek a further substitution of
18 collateral on the two notes. Lopez sent a May 27, 2004
19 transmittal letter to Andjelka Raicevic and Vojo Raicevic, along
20 with a proposed pledge agreement in which the Travises would
21 substitute all of their personal property assets as collateral in
22 place of their residence. Lopez represented in the transmittal
23 letter that, in exchange for the collateral swap, the Travises
24 would keep the note current, personally guarantee the note,

25
26 ⁴ This factual summary is taken in part from the opinion of
27 the California Court of Appeal, Fourth Appellate District, which
28 in turn was derived from the undisputed facts in the summary
judgment proceedings in the parties' underlying state court
litigation.

1 pledge all personal assets, and obtain permanent financing for
2 the shopping center that would provide for either continuing
3 payments or full payoff of the note. The Raicevics executed the
4 proposed pledge agreement and reconveyed their security interest
5 in the residence in reliance on the representations in Lopez's
6 letter. Lopez did not prepare a UCC-1 statement that would have
7 perfected the security interest in the Travises' personal
8 property. Around the same time, the Travises separated and sold
9 their residence. But for the reconveyance, the Raicevics would
10 have received \$588,000 from the proceeds of the sale. In April
11 2005, the Travises also sold the shopping center for more than
12 \$40 million, netting \$3.5 million, but they did not repay the
13 Raicevics.

14 3. Ensuing Litigation

15 The Raicevics filed a state court action against Lopez,
16 Mr. Travis, and Mrs. Travis, among others, in March 2007.
17 Mr. Travis passed away on May 29, 2007, and his estate entered
18 into a settlement with the Raicevics on July 30, 2009. On July 9,
19 2009, Mrs. Travis stipulated to a judgment in the amount of
20 \$1.5 million. Mrs. Travis filed a bankruptcy petition under
21 chapter 7 on April 8, 2010, and the Raicevics filed a complaint
22 to have her debt under the stipulated judgment declared
23 nondischargeable.

24 The state court case against Lopez and his law firm went to
25 trial between October 25 and November 3, 2011, on intentional
26 misrepresentation, negligent misrepresentation, and financial
27 elder abuse causes of action. The jury trial involved 13
28 witnesses and more than 60 exhibits. On November 10, 2011, the

1 Superior Court for the State of California, County of San Diego
2 ("Superior Court") entered a Joint and Several Judgment against
3 Stephen F. Lopez and Geraci & Lopez after Trial by Jury (the
4 "Special Verdict"). The Special Verdict contains the following
5 specific findings against Lopez regarding the elements of a claim
6 for intentional misrepresentation:

- 7 • He intentionally made a false representation of an
8 important fact or facts to Vojo and Andjelka
9 Raicevic;
- 10 • He knew that the representation was false or made
11 the representation recklessly and without regard
12 for its truth;
- 13 • He intended that Vojo and Andjelka Raicevic rely
14 on the representation;
- 15 • Vojo and Andjelka Raicevic reasonably relied on
16 the representation;
- 17 • Vojo and Andjelka Raicevic's reliance on Lopez's
18 representation was a substantial factor in causing
19 damage to them; and
- 20 • Vojo and Andjelka each suffered economic damages
21 of \$294,000 for a total of \$588,000.

22 Lopez sought a new trial and judgment notwithstanding the
23 verdict, which the Superior Court denied by minute order entered
24 on January 9, 2012. Lopez filed a bankruptcy petition under
25 chapter 7 on January 23, 2012.

26 **B. Postpetition Events**

27 On February 1, 2012, the bankruptcy court in Mrs. Travis's
28 case entered its Findings of Fact and Conclusions of Law re

1 Complaint for Nondischargeability (the "Travis Findings") after
2 trial. The bankruptcy court in that case determined that
3 Mrs. Travis's stipulated judgment was dischargeable.

4 On April 13, 2012, the Raicevics filed an adversary
5 complaint against Lopez seeking to except his debt to them from
6 discharge under § 523(a)(2)(A). The complaint was amended twice,
7 but continued to contain a single cause of action under
8 § 523(a)(2)(A).

9 The Superior Court's judgment was subsequently amended on
10 December 20, 2013, to add Lopez's law firm partner, Alan L.
11 Geraci, as a judgment debtor and to reflect the addition of
12 costs, pre-judgment interest, and attorneys' fees. Lopez appealed
13 the judgment and the amended judgment of the Superior Court. The
14 California Court of Appeal, Fourth Appellate District, entered an
15 opinion on January 23, 2015, affirming in part and reversing in
16 part. It struck the award of attorneys' fees, but affirmed the
17 judgment in all other respects. Lopez then filed a petition for
18 review with the Supreme Court of California, which was denied on
19 April 15, 2015.

20 On June 11, 2015, the Superior Court entered its Amended
21 Judgement against Stephen F. Lopez, Alan L. Geraci, and Geraci &
22 Lopez after Trial by Jury and After Decision on Appeal ("Final
23 Amended Judgment"). The Final Amended Judgment left undisturbed
24 the jury's findings in the Special Verdict, but removed the award
25 of attorneys' fees as directed by the final ruling of the Court
26 of Appeal.

27 The Raicevics and Lopez then brought cross-motions for
28 summary judgment in the adversary proceeding on July 31, 2015.

1 The bankruptcy court denied Lopez's motion, and granted the
2 Raicevics' motion and entered judgment on September 17, 2015.
3 This timely appeal followed.

4 **III. JURISDICTION**

5 The bankruptcy court had jurisdiction under 28 U.S.C.
6 §§ 1334 and 157(b) (2) (I). We have jurisdiction under 28 U.S.C.
7 § 158.

8 **IV. ISSUES**

9 1. Whether the bankruptcy court properly applied the doctrine of
10 issue preclusion in granting the Raicevic's motion for summary
11 judgment and denying Lopez's motion for summary judgment.

12 2. Whether the bankruptcy court erred in its application of the
13 "last in time" rule for applying issue preclusion.

14 3. Whether the bankruptcy court erred when it ruled on summary
15 judgment based on the record before it.

16 **V. STANDARDS OF REVIEW**

17 We review de novo the bankruptcy court's summary judgment
18 rulings and its determination to except a debt from discharge.
19 Ilko v. Cal. St. Bd. of Equalization (In re Ilko), 651 F.3d 1049,
20 1052 (9th Cir. 2011); Su v. Su (In re Su), 290 F.3d 1140, 1142
21 (9th Cir. 2002). When we review a ruling de novo, we give no
22 deference to the bankruptcy court's decision. Univ. of Wash. Med.
23 Ctr. v. Sebelius, 634 F.3d 1029, 1033 (9th Cir. 2011).

24 We also review de novo the bankruptcy court's determination
25 that issue preclusion is available. Miller v. Cty. of Santa Cruz,
26 39 F.3d 1030, 1032 (9th Cir. 1994). If issue preclusion is
27 available, we then review the bankruptcy court's application of
28 the doctrine for an abuse of discretion. Id. A bankruptcy court

1 abuses its discretion if it applies the wrong legal standard, or
2 if it misapplies the correct legal standard by making factual
3 findings that are illogical, implausible, or without support from
4 inferences that may be drawn from the facts in the record. U.S.
5 v. Hinkson, 585 F.3d 1247, 1261-62 (9th Cir. 2009) (en banc).

6 VI. DISCUSSION

7 A. Summary Judgment

8 The bankruptcy court's grant of summary judgment is proper
9 "if the movant shows that there is no genuine dispute as to any
10 material fact and the movant is entitled to judgment as a matter
11 of law." Fed. R. Civ. P. 56(a); Fed. R. Bankr. P. 7056. A party
12 seeking summary judgment bears the initial responsibility of
13 demonstrating the absence of a genuine issue of material fact,
14 and establishing that it is entitled to judgment as a matter of
15 law as to those matters upon which it has the burden of proof.
16 Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). The court
17 must view the evidence presented on the motion in the light most
18 favorable to the opposing party. Avalos v. Baca, 596 F.3d 583,
19 587 (9th Cir. 2010) (citing Adickes v. S.H. Kress & Co., 398 U.S.
20 144, 157 (1970)). The opposing party must then make a sufficient
21 showing on all matters placed in issue by the motion as to which
22 it has the burden of proof at trial. Celotex Corp. at 323-24.

23 "[T]he substantive law will identify which facts are
24 material." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248
25 (1986). "Only disputes over facts that might affect the outcome
26 of the suit under the governing law will properly preclude the
27 entry of summary judgment." Id. A factual dispute is genuine
28 where the evidence is such that a reasonable jury could return a

1 verdict for the nonmoving party. Id. In this case, the bankruptcy
2 court granted the Raicevics' motion for summary judgment after
3 applying issue preclusion to the Final Amended Judgment, and
4 denied Lopez's motion for summary judgment after declining to
5 apply issue preclusion to the Travis Findings.

6 **B. Issue Preclusion as Applied to the Final Amended Judgment**

7 1. Availability of Issue Preclusion

8 Issue preclusion⁵ applies in proceedings to except a debt
9 from discharge under § 523(a). Grogan v. Garner, 498 U.S. 279,
10 285 n.11 (1991); Harmon v. Kobrin (In re Harmon), 250 F.3d 1240,
11 1245 (9th Cir. 2001). It bars successive litigation of an issue
12 or fact that was actually litigated and resolved in a prior
13 judgment. Grogan at 284-85.

14 A federal court must give a state court judgment the same
15 preclusive effect that it would receive in that state. Marrese v.
16 Am. Acad. of Orthopaedic Surgeons, 470 U.S. 373, 380 (1985). In
17 California, the requirements for issue preclusion are that
18 (1) the issue must be identical to that decided in the former
19 proceeding, (2) the issue must have actually been litigated in
20 the prior proceeding, (3) the issue must have been necessarily
21 decided, (4) the decision in the prior proceeding must be final
22 and on the merits, and (5) the party against whom preclusion is
23

24 ⁵ In his brief and statement of issues, Lopez repeatedly
25 refers to the doctrine of res judicata. Although he appears to
26 use res judicata and issue preclusion interchangeably, these are
27 actually two related but distinct doctrines. Because the
28 bankruptcy court's order granting the Raicevics' motion for
summary judgment is based on issue preclusion, we limit our
analysis to that doctrine.

1 sought must be the same. Cal-Micro, Inc. v. Cantrell
2 (In re Cantrell), 329 F.3d 1119, 1123 (9th Cir. 2003).

3 a. Identical Issues

4 The first element of issue preclusion requires that
5 identical issues were decided in the former proceeding. This
6 element is satisfied because the Superior Court rendered judgment
7 on the Raicevics' causes of action for intentional
8 misrepresentation, or fraud, which requires findings that are the
9 same as those needed for a cause of action under § 523(a)(2)(A).

10 Section 523(a)(2)(A) excepts from discharge debts that are
11 the result of "false pretenses, false representation, or actual
12 fraud," other than a statement respecting the debtor's financial
13 condition. To prevail under § 523(a)(2)(A), a plaintiff must
14 prove that:

- 15 (1) The debtor made a representation;
- 16 (2) The debtor knew the representation was false at the
17 time it was made;
- 18 (3) The debtor made the representation with the intent to
19 deceive the plaintiff;
- 20 (4) The plaintiff relied on the representation; and
- 21 (5) The plaintiff sustained a loss as the proximate result
22 of the misrepresentation.

23 Ghomeshi v. Sabban (In re Sabban), 600 F.3d 1219, 1222 (9th Cir.
24 2010). A plaintiff's reliance under § 523(a)(2)(A) must be
25 justifiable. Field v. Mans, 516 U.S. 59, 73-75 (1995). A finding
26 of fraud under California law requires:

- 27 (1) A misrepresentation;
- 28 (2) Knowledge of falsity;

1 (3) Intent to defraud, i.e. to induce reliance;

2 (4) Justifiable reliance; and

3 (5) Resulting damage.

4 Engalla v. Permanente Med. Grp., Inc., 15 Cal.4th 951, 973-74
5 (1997). The elements for fraud under § 523(a)(2)(A) and
6 California law are the same. A finding of fraud under California
7 law therefore is identical to a finding of nondischargeability
8 under § 523(a)(2)(A) for issue preclusion purposes in a
9 nondischargeability action.

10 b. Actually Litigated in the Prior Proceeding

11 The issue of Lopez's fraud was also actually litigated
12 before the Superior Court. The Final Amended Judgment contains
13 specific findings that Lopez intentionally made false
14 representations to Vojo Raicevic and Andjelka Raicevic. It also
15 states that Lopez knew the representations were false, or acted
16 recklessly without regard for the truth,⁶ and he intended Vojo
17 Raicevic and Andjelka Raicevic to rely on them. Finally, the
18 Final Amended Judgment relates that Vojo Raicevic and Anjelka
19 Raicevic relied on the representations and their reliance was a
20 substantial factor in causing their damages. Each of the elements
21 for a claim of fraud under § 523(a)(2)(A) and California law were
22 actually litigated in the Superior Court because the Final
23 Amended Judgment contains specific findings as to each.

24
25
26 ⁶ Reckless disregard for the truth of a statement can
27 satisfy the requirement for fraudulent intent under
28 § 523(a)(2)(A). Household Credit Servs., Inc. v. Ettell
(In re Ettell), 188 F.3d 1141, 1145 n.4 (9th Cir. 1999).

1 c. Necessarily Decided

2 The issue of fraud was also necessarily decided in the Final
3 Amended Judgment because the jury only awarded compensatory
4 damages on the two causes of action for intentional
5 misrepresentation. The jury found in Lopez's favor on the causes
6 of action for financial elder abuse and found against him on the
7 causes of action for negligent misrepresentation but awarded no
8 additional damages on account of those claims. The damages
9 awarded are therefore premised on the intentional
10 misrepresentation causes of action and those issues were
11 necessarily decided. The third element for issue preclusion is
12 satisfied.

13 d. Final Decision on the Merits

14 The fourth element for issue preclusion is also satisfied
15 because the Final Amended Judgment is a final decision on the
16 merits. It is a judgment on the merits because it followed after
17 an extensive jury trial. It has also now become final. Under
18 California law, a judgment is not final for preclusion purposes
19 while it is still open to attack through appeal. Geographic
20 Expeditions, Inc. v. Estate of Lhotka, 599 F.3d 1102, 1105 n.3
21 (9th Cir. 2010) (citing Abelson v. Nat'l Union Fire Ins. Co.,
22 28 Cal.App.4th 776, 787 (1st Dist. 1994)); Nat. Union Fire Ins.
23 Co. of Pittsburgh, PA v. Stites Prof. Law Corp., 235 Cal. App. 3d
24 1718, 1726 (2nd Dist. 1991); Eichman v. Fotomat Corp., 759 F.2d
25 1434, 1439 (9th Cir. 1985). Lopez's petition for review with the
26 Supreme Court of California was denied on April 15, 2015. The
27 Superior Court then entered its Final Amended Judgment on
28 June 11, 2015. There has been no further appeal of the Final

1 Amended Judgment and that decision is now final and on the
2 merits.

3 e. Against the Same Party

4 The final threshold element for issue preclusion requires
5 that the party against whom issue preclusion is sought is the
6 same as the party in the prior litigation. The Raicevics sought
7 to apply issue preclusion against Lopez through their summary
8 judgment motion. Lopez was named as a defendant and held jointly
9 and severally liable for the Raicevics' damages in the Final
10 Amended Judgment. He is also the defendant in the § 523(a)(2)(A)
11 nondischargeability action that is the subject of this appeal.
12 Therefore, this element is satisfied. All five of the threshold
13 elements for the application of issue preclusion under California
14 law are satisfied and the doctrine was available to the
15 bankruptcy court.

16 2. Application of Issue Preclusion

17 Having determined de novo that issue preclusion is
18 available, we now review the bankruptcy court's decision to apply
19 the doctrine under an abuse of discretion standard. Miller,
20 39 F.3d at 1032.

21 a. Public Policy

22 After all of the threshold elements of issue preclusion are
23 satisfied, the court then looks to the public policies underlying
24 the doctrine to determine whether it should be applied in a
25 particular circumstance. Lucido v. Superior Court, 51 Cal. 3d
26 335, 344-45 (1990). The public policies underlying the doctrine
27 are "preservation of the integrity of the judicial system,
28 promotion of judicial economy, and protection of litigants from

1 harassment by vexatious litigation.” Id. at 345. The bankruptcy
2 court concluded that the public policies underlying issue
3 preclusion were furthered because application of the doctrine
4 would prevent re-litigation of the same issues between the same
5 individuals and would put an end to an exhaustive legal battle
6 between the parties. Therefore, application of the doctrine
7 protected the integrity of the judicial system’s prior decisions,
8 promoted judicial economy in reducing further litigation, and
9 protected the Raicevics from harassment by vexatious re-
10 litigation of the same issues.

11 We do not blindly or mechanically apply the doctrine of
12 issue preclusion, but rather look to the same underlying policies
13 considered by the bankruptcy court. Lopez had ample opportunity
14 to litigate the issue of his fraud before the Superior Court in a
15 multi-day jury trial with more than a dozen witnesses and over
16 60 exhibits. He then appealed the entire judgment, resulting in a
17 detailed and lengthy opinion from the appellate court. The
18 appellate court affirmed the judgment in all respects except for
19 the award of attorneys’ fees. Lopez then sought review by the
20 California Supreme Court, which was denied. Lopez does not
21 dispute any of these facts - his arguments are instead
22 essentially that it is unfair that the jury and two courts have
23 not believed his version of the underlying events. However, Lopez
24 has had an ample opportunity to litigate the issue of his fraud
25 in multiple forums; and applying issue preclusion in this
26 instance furthers the public policies of preservation of the
27 integrity of the judicial system and promotion of judicial
28 economy and protects the Raicevics from harassment by vexatious

1 litigation. The bankruptcy court did not abuse its discretion
2 when it determined that the public policies behind issue
3 preclusion warranted its application in this case.

4 b. Manifest Injustice

5 Lopez also argues that the application of issue preclusion
6 is discretionary and the bankruptcy court should have declined to
7 apply it to prevent manifest injustice. He asserts that he was
8 only acting on behalf of his clients and had no knowledge of the
9 clients' fraudulent intent. Lopez states that there is no
10 evidence of his fraudulent intent and attorneys must look out for
11 the interests of their clients.

12 However, the bankruptcy court did in fact consider Lopez's
13 arguments regarding the fairness of his situation and expressed
14 sympathy, but exercised its discretion and decided to apply
15 preclusive effect to the Final Amended Judgment. The jury in the
16 Superior Court trial also found that Lopez went beyond the
17 actions of an attorney representing his clients when it found him
18 liable for making an intentional misrepresentation. We review the
19 bankruptcy court's exercise of its discretion in applying the
20 doctrine of issue preclusion under an abuse of discretion
21 standard. Miller, 39 F.3d at 1032. Lopez's arguments are contrary
22 to the specific findings of the Superior Court and the appellate
23 court, which determined that Lopez did go beyond the normal
24 advocacy on behalf of a client and commit fraud against the
25 Raicevics. The record before the court supports those
26 conclusions. The bankruptcy court did not abuse its discretion
27 when it applied issue preclusion to the Final Amended Judgment.

1 **C. "Last in Time" Rule and the Travis Findings**

2 Lopez argues that the bankruptcy court erred when it
3 declined to apply issue preclusion to the Travis Findings,
4 instead of the Final Amended Judgment, because the Travis
5 Findings were actually "last in time" and preclusive effect
6 should have been given to that decision. The "last in time" rule
7 states that where there are inconsistent opinions from different
8 courts, preclusive effect will generally be given to the ruling
9 that is last in time. Robi v. Five Platters, Inc., 838 F.2d 318,
10 322-23 (9th Cir. 1988). This argument fails for several reasons.

11 1. Determination of the "Last in Time" Ruling

12 First, the Travis Findings are not actually last in time to
13 the Final Amended Judgment. As noted above, a judgment under
14 California law is not final for preclusion purposes until all
15 opportunities for appeal have been exhausted. Geographic
16 Expeditions, Inc., 599 F.3d at 1105 n.3. The Special Verdict
17 entered after the jury trial and the first amended judgment never
18 became final because they were subject to Lopez's appeal. The
19 Final Amended Judgment was entered on June 11, 2015. An appeal
20 from a California trial court must be noticed within 60 days
21 after the superior court clerk serves the notice of entry of the
22 judgment or an endorsed copy of the judgment. Ca. R. Ct. 8.104.
23 Presuming the Final Amended Judgment was noticed out to Lopez
24 within the next few days, the time to appeal would have expired
25 around mid-August 2015. It was only at that time that the Final
26 Amended Judgment became final for preclusion purposes.

27 The Travis Findings were entered on February 1, 2012. Unlike
28

1 California law, the finality and preclusive effect of a judgment⁷
2 in the federal courts is not affected by appeal rights. Hawkins
3 v. Risley, 984 F.2d 321, 324 (9th Cir. 1993). The Travis Findings
4 were therefore final for preclusion purposes when they were
5 entered on February 1, 2012. The date of judgment of the Travis
6 Findings predated the Final Amended Judgment by over three years,
7 and the Travis Findings are not actually last in time.

8 2. Rationale Behind the "Last in Time" Rule

9 Second, the rationale behind the "last in time" rule does
10 not apply to the facts of this case. The rationale behind the
11 rule is that by giving effect to the most recent judgment, right
12 or wrong, finality will be achieved and parties will be
13 encouraged to appeal an inconsistent judgment rather than
14 collaterally attack it before a different court. Robi, 838 F.2d
15 at 323. This is because the parties had the opportunity to
16 litigate the issues and to appeal the inconsistent ruling.
17 In re Marriage of Hanley, 199 Cal. App. 3d 1109, 1118 (1st Dist.
18 1988); see also Treinies v. Sunshine Mining Co., 308 U.S. 66, 77
19 (1939).

20 In the present case, Lopez did exercise his right to appeal
21 the Superior Court judgment against him. The Travis case was not
22 an inconsistent ruling on the same issues, but rather a separate
23 determination of nondischargeability against Mrs. Travis, who had
24 stipulated to a judgment without any findings in the Superior
25 Court proceeding. Lopez could not have appealed the Travis

26
27 ⁷ "The date of judgment, not the date of filing" controls in
28 preclusion determinations. Guild Wineries & Distilleries v.
Whitehall Co., 853 F.2d 755, 761 (9th Cir. 1988).

1 Findings, as application of the "last in time" rule would
2 encourage, because he was not a party to that matter and had no
3 rights regarding it. Therefore, application of the "last in time"
4 rule to the Travis Findings would not serve one of its primary
5 purposes.

6 The bedrock of the "last in time" rule is finality and the
7 prevention of further litigation of matters where ample
8 opportunity has been provided. Contrary to this purpose, Lopez is
9 asking for application of the "last in time" rule so that he can
10 pursue further litigation in the form of a trial before the
11 bankruptcy court on the Raicevics' adversary complaint. This
12 contravenes the rationale behind the rule. Application of the
13 "last in time" rule as urged by Lopez would serve none of its
14 stated purposes and would actually run contrary to them.

15 3. Application of Issue Preclusion to the Travis Findings

16 Finally, even if the "last in time rule" were applicable,
17 the bankruptcy court was correct in declining to afford
18 preclusive effect to the Travis Findings and denying Lopez's
19 motion for summary judgment. The court concluded that the
20 elements for issue preclusion were not met because the Travis
21 adversary concerned different issues - Mrs. Travis's fraudulent
22 representations and omissions rather than Lopez's. The issue of
23 Lopez's independent conduct was not before that court and was not
24 actually litigated or necessarily decided. We review the
25 availability of issue preclusion as to the Travis Findings de
26 novo and agree.

27 "The preclusive effect of a federal-court judgment is
28 determined by federal common law." Taylor v. Sturgell, 553 U.S.

1 880, 891 (2008) (citing Semtek Int'l Inc. v. Lockheed Martin
2 Corp., 531 U.S. 497, 507-508 (2001)). Issue preclusion will be
3 applied to federal court judgments where:

- 4 (1) there was a full and fair opportunity to litigate the
issue in the previous action;
- 5 (2) the issue was actually litigated in that action;
- 6 (3) the issue was lost as a result of a final judgment in
that action; and
- 7 (4) the person against whom issue preclusion is asserted in
the present action was a party or in privity with a party in
the previous action.

8
9 U. S. Internal Revenue Serv. v. Palmer (In re Palmer), 207 F.3d
10 566, 568 (9th Cir. 2000). At least three of the four elements for
11 federal issue preclusion are not met by the Travis Findings, and
12 the bankruptcy court did not err when it declined to afford those
13 findings preclusive effect.

14 First, there was not a full and fair opportunity to litigate
15 the issue of Lopez's conduct in the Travis nondischargeability
16 proceeding because Lopez was not a party to that proceeding. "A
17 person who was not a party to a suit generally has not had a
18 'full and fair opportunity to litigate' the claims and issues
19 settled in that suit." Taylor, at 892. There was also no
20 opportunity to litigate Lopez's fraud because the only issue
21 before the court in the Travis proceeding was Mrs. Travis's
22 conduct. The case concerned only the nondischargeability of the
23 debt she owed on the stipulated judgment under § 523(a)(2)(A) and
24 (a)(6).

25 Second, and most importantly, there is no evidence that the
26 issue of Lopez's conduct was actually litigated in the Travis
27 nondischargeability action. The Travis Findings acknowledge that
28 the Raicevics hold a fraud judgment against Lopez and note that

1 this judgment may be available to satisfy their debt. The
2 findings of fact also relate that Lopez prepared all of the
3 documents for the pledge of personal property collateral and
4 release of the real property liens (which is consistent with the
5 judgment against Lopez and related appellate opinion). Out of
6 26 paragraphs of factual findings, these are the only two
7 mentions of Lopez in the Travis Findings. In contrast, there are
8 extensive factual findings regarding the relative actions and
9 culpability of Mr. Travis and Mrs. Travis. Many of the
10 conclusions of law also appear to be focused on apportioning
11 relative fault, knowledge, and intent between Mr. Travis and
12 Mrs. Travis, with no mention of Lopez. The bankruptcy court in
13 the Travis case was not focused on Lopez's independent actions in
14 making its ruling, and the issue of his fraud was not actually
15 litigated in that proceeding.

16 Finally, the parties in the Travis case and this case are
17 not the same or in privity. Lopez was not named as a defendant in
18 the Travis case and there is no evidence that he participated in
19 that case. Privity exists where a person's interests are so
20 aligned with a party to litigation that they represent the same
21 rights with respect to the matter being litigated. U.S. v.
22 Bhatia, 545 F.3d 757, 759 (9th Cir. 2008). A nonparty may be
23 bound under federal preclusion law where (1) they enter into an
24 agreement to be bound, (2) there is a pre-existing substantive
25 legal relationship such as successive owners of property or
26 assignee and assignor, (3) the nonparty was adequately
27 represented by a party with the same interests in the suit,
28 (4) the nonparty assumes control over the litigation, (5) the

1 nonparty is a proxy for the party, or (6) there is a special
2 statutory scheme that bars successive litigation by different
3 parties. Taylor, 553 U.S. at 893-95. Four of the exceptions for
4 non-party preclusion do not apply. There is no evidence that
5 Lopez entered into an agreement to be bound by the Travis
6 litigation, that he has a legal relationship with Mrs. Travis,
7 that he and Mrs. Travis have a proxy relationship, or that any
8 special statutory scheme is applicable.

9 The other two exceptions - control over the litigation and
10 unity of interests - also do not apply based on the record in
11 this case. Lopez did previously represent Mrs. Travis, but there
12 is no indication that he continued to represent her during her
13 own nondischargeability proceeding or that he was otherwise
14 exercising control over that litigation. Instead, Mrs. Travis
15 represented herself in pro per. There is also no indication that
16 Lopez's interests were adequately represented by Mrs. Travis's
17 pro se litigation. It would seem that her interests actually lay
18 in favor of shifting blame to Lopez and Mr. Travis in order to
19 clear herself of wrongdoing. While their interests may have been
20 united during the arrangement of the pledge agreement and
21 proposed collateral exchange, all indications are that those
22 interests diverged when the Raicevics filed suit against Lopez
23 and the Travises in the Superior Court. Lopez was not in privity
24 with Mrs. Travis and none of the exceptions that might bind him
25 to the Travis Findings as a nonparty are present.

26 Issue preclusion in this case is an affirmative defense and
27 the party asserting it bears the burden of establishing the
28 necessary elements. Taylor at 907. Lopez has failed to do so in

1 regard to the Travis Findings and the bankruptcy court did not
2 err when it declined to afford preclusive effect to that ruling.

3 **D. The Record Before the Bankruptcy Court**

4 Lopez also argues that the bankruptcy court erred when it
5 made its summary judgment determination based solely on the Final
6 Amended Judgment and asserts that it should have instead required
7 or reviewed additional supporting evidence - such as transcripts
8 from the trial.⁸ In considering a similar argument regarding
9 declarations, the Supreme Court has previously stated that
10 plaintiffs and defendants may move for summary judgment with **or**
11 **without** supporting affidavits or similar materials. Celotex
12 Corp., 477 U.S. at 323-24. "[T]he motion may, and should, be
13 granted so long as whatever is before the [trial court]
14 demonstrates that the standard for the entry of summary judgment,
15 as set forth in" Federal Rule of Civil Procedure 56(c), is
16 satisfied. Id.

17 Further, the bankruptcy court did in fact have evidence in
18 addition to the Final Amended Judgment. The bankruptcy court's
19 order specifically references the Superior Court's docket sheet,
20 the jury's special verdict and factual findings, and the Superior
21 Court's minute order denying Lopez's motion for a new trial and
22 judgment notwithstanding the verdict. The record in this appeal
23 also indicates that the bankruptcy court had before it the
24 opinion from the California Court of Appeal, Fourth Appellate

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26 ⁸ The specific request for trial transcripts appears unduly
27 burdensome in light of the detailed rulings that were provided by
28 the jury and the appellate court. The trial lasted more than a
week and the resulting transcripts would likely number thousands
of pages.

1 District, in which the Superior Court's judgment was upheld with
2 the exception of the award of attorneys' fees. In the unlikely
3 event that there was any doubt as to what the trial court had
4 decided, the appellate decision discusses the events of the trial
5 in great detail. For example, the appellate court remarks that
6 the opening statements of the parties' counsel correctly
7 indicated to the jury that this was a fraud case based on Lopez's
8 misrepresentations in the May 2004 transmittal letter, and that
9 the trial court instructed the jury on the law governing the
10 causes of action for intentional and negligent misrepresentation.

11 It is true that the party seeking preclusion must introduce
12 a sufficient record of the prior proceeding to allow the court to
13 determine the exact issues previously litigated. Clark v. Bear
14 Sterns & Co., Inc., 966 F.2d 1318, 1321 (9th Cir. 1992). The
15 bankruptcy court in this case acknowledged that requirement and
16 then concluded that it had a sufficient record of the fraud
17 findings against Lopez because they were detailed and they
18 specifically addressed each of the elements required to prove a
19 fraud cause of action. Lopez claims that the Raicevics have
20 failed to provide **any** evidence of his fraudulent intent, or that
21 he knew Mr. Travis did not intend to pay the Raicevics, but the
22 record of the Superior Court case and its appeal and the jury's
23 findings on intentional misrepresentation provide precisely that
24 - evidence of Lopez's fraud.

25 VII. CONCLUSION

26 For all of the reasons set forth above, we AFFIRM the
27 bankruptcy court's orders granting the Raicevics' motion for
28 summary judgment, entering judgment of nondischargeability

1 against Lopez, and denying Lopez's motion for summary judgment.

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