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

NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT

In re:) BAP No. AZ-17-1071-FSKu
)
 PATRICIA MARCELLO ANDERSON) Bk. No. 14-bk-12221-GBN
 and ANTHONY MARCUS ANDERSON,)
) Adv. Pro. 14-ap-00927-GBN
 Debtors.)
 _____)
)
 CWB HOLDINGS, LLC,)
)
 Appellant,)
)
 v.) **MEMORANDUM***
)
 PATRICIA MARCELLO ANDERSON;)
 ANTHONY MARCUS ANDERSON,)
)
 Appellees.)
 _____)

Argued and Submitted on October 26, 2017
at Phoenix, Arizona

Filed - November 7, 2017

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

Honorable George B. Nielsen, Jr., Bankruptcy Judge, Presiding

Appearances: Patrick J. Davis of Fidelity National Law Group
 argued on behalf of appellant CWB Holdings, LLC;
 Amy Sells of Tiffany & Bosco, P.A. argued on
 behalf of appellees Patricia Marcello Anderson and
 Anthony Marcus Anderson.

Before: FARIS, SPRAKER, and KURTZ, 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 **INTRODUCTION**

2 CWB Holdings, LLC ("CWB") recovered a judgment in state
3 court against Patricia Marcello Anderson and Anthony Marcus
4 Anderson for their wrongful recordation and refusal to remove two
5 lis pendens against CWB's property. After the Andersons filed a
6 chapter 7¹ bankruptcy petition, CWB argued that the judgment debt
7 is not dischargeable under § 523(a)(6). The bankruptcy court
8 ruled that the state court judgment precluded relitigation of all
9 issues other than the Andersons' mental state; more precisely,
10 the court ruled that a trial was necessary to decide whether they
11 had relied on the advice of counsel.

12 After the trial, the court found that CWB did not establish
13 the Andersons' scienter, because the Andersons' reliance on the
14 advice of counsel negated the requisite mental state. Although
15 other courts may have found differently, we cannot say that the
16 bankruptcy court committed clear error when it found that the
17 Andersons relied on their attorneys' advice.

18 We AFFIRM.

19 **FACTUAL BACKGROUND²**

20 **A. Prepetition events**

21 **1. The real property sale**

23 ¹ Unless specified otherwise, all chapter and section
24 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532.

25 ² We exercise our discretion to review the documents on the
26 bankruptcy court's electronic docket. See Woods & Erickson, LLP
27 v. Leonard (In re AVI, Inc.), 389 B.R. 721, 725 n.2 (9th Cir. BAP
28 2008). We additionally rely on the Arizona appellate court's
factual recitation in CWB Holdings, LLC v. Anderson, No. 1 CA-CV
10-0791, 2011 WL 6210526 (Ariz. Ct. App. Dec. 13, 2011).

1 Mr. Anderson is a sophisticated entrepreneur in the business
2 of mergers and acquisitions. In 2002, he set up a wealth
3 protection plan for the benefit of his children. Property in the
4 plan included two parcels of real property located at 8723 E. Via
5 de Commercio, Scottsdale, Arizona.

6 In 2005, Mr. Anderson sought to acquire the adjacent real
7 property located at 8727 E. Via de Commercio (the "Property"),
8 then owned by Frederick and Barbara Dettmann, for inclusion in
9 the wealth protection plan. According to Mr. Anderson, he
10 reached an oral agreement to purchase the Property for \$625,000
11 and established 8727 E. Via de Commercio, LLC ("8727 LLC") for
12 this purpose. However, the Andersons did not have a written
13 purchase agreement with the Dettmanns.

14 The Dettmanns instead agreed to sell the Property to CWB for
15 \$660,000. They conveyed the Property to CWB via special warranty
16 deed recorded on February 8, 2006.

17 **2. The specific performance action**

18 Earlier that day, the Andersons filed a complaint against
19 the Dettmanns in Arizona state court, seeking specific
20 performance of the alleged contract to buy the Property for
21 \$625,000 (the "Specific Performance Action"). About twenty
22 minutes before the deed from the Dettmanns to CWB was recorded,
23 the Andersons filed and recorded a lis pendens against the
24 Property (the "2006 lis pendens").

25 By letter dated February 10, 2006, CWB's attorneys demanded
26 that Mr. Anderson release the 2006 lis pendens. By a second
27 letter dated February 16, 2006, CWB requested that the Andersons
28 execute a quitclaim deed. Mr. Anderson did not comply.

1 With the state court's permission, the Andersons filed an
2 amended complaint, substituting 8727 LLC as the plaintiff in
3 place of the Andersons personally and adding CWB as a defendant.
4 The amended complaint alleged breach of contract against the
5 Dettmanns and constructive trust against CWB and dropped the
6 prayer for specific performance.

7 In January 2007, the court dismissed the Specific
8 Performance Action for lack of prosecution. CWB requested again
9 that Mr. Anderson remove the 2006 lis pendens. The Andersons did
10 not comply. Instead, 8727 LLC successfully moved the court to
11 reinstate the case.

12 **3. The wrongful recordation action**

13 On May 31, 2007, CWB again requested in writing that
14 Mr. Anderson remove the 2006 lis pendens and execute a quitclaim
15 deed. When Mr. Anderson did not comply, CWB filed a state-court
16 complaint against the Andersons for wrongful recordation and
17 quiet title (the "Wrongful Recordation Action").

18 In response, the Andersons, acting through their counsel
19 Wilenchik & Bartness, recorded a second notice of lis pendens in
20 October 2007 (the "2007 lis pendens"). Although the Andersons
21 had been prepared to release the 2006 lis pendens and "go home,"
22 they changed their mind when CWB personally named them in the
23 Wrongful Recordation Action.³

24
25
26 ³ Mr. Anderson said that he was prepared to release the 2006
27 lis pendens because of the expense of litigation but changed his
28 mind when CWB sued him. Mr. Anderson claimed that he viewed the
suit against him personally as an attempt to "punch through my
kids['] trust and take their assets."

1 **4. Summary judgment in the specific performance action**

2 In November 2007, the Dettmanns moved for summary judgment
3 in the Specific Performance Action, arguing that the Andersons
4 and 8727 LLC could not establish the existence of a contract with
5 the Dettmanns. The court granted the motion by minute order.

6 In March 2008, the state court consolidated the Specific
7 Performance Action with the Wrongful Recordation Action.

8 On April 1, 2008, the court entered judgment against the
9 Andersons in the Specific Performance Action and ordered the
10 Andersons to remove the lis pendens within ten days:

11 CWB is the lawful owner of the [Property] . . . [the
12 Andersons and 8727] have no right, title or interest in
13 the Property. The Court hereby quashes and renders
14 null and void any and all lis pendens recorded by [the
15 Andersons and 8727] against the Property.
16 Notwithstanding the foregoing, the Court orders [the
17 Andersons and 8727] to remove any and all lis pendens
18 any of them have filed against the Property by filing
19 and recording sufficient Notices of Removal of Lis
20 Pendens with the Maricopa County Recorder within ten
21 (10) days of the date of this Judgment.

22 CWB sent the Andersons' counsel another letter on April 8,
23 2008 demanding removal of the lis pendens. The Andersons did not
24 comply with either the letter or the court order. Mr. Anderson
25 and his attorneys - at that time, Dennis Wilenchik and Amy Sells
26 (nee Reyes) - decided that they did not need to comply with the
27 order and remove the two lis pendens because the judgment was not
28 final. Rather than comply, the Andersons filed a motion to amend
the judgment. The court denied that motion in June 2008.

 On June 20, 2008, CWB sent another letter to the Andersons
asking that they remove the lis pendens. The Andersons did not
comply.

1 **5. The order to show cause and release of the lis pendens**

2 On July 1, 2008, the court issued an order to show cause
3 (the "OSC") why 8727 LLC and the Andersons should not be held in
4 contempt for failing to remove the lis pendens. The hearing date
5 on the OSC was August 7.

6 On July 31, the Andersons and 8727 LLC filed releases of the
7 lis pendens. Mr. Anderson claimed that he still did not believe
8 that he needed to release the lis pendens and that he did so as
9 "a courtesy."

10 The Andersons and 8727 LLC also filed a notice of appeal in
11 the Specific Performance Action. They challenged only the entry
12 of judgment against them personally and did not attack the
13 portion of the judgment requiring them to release the lis
14 pendens. In November 2009, the Arizona appeals court vacated the
15 judgment as to the Andersons; as such, the Andersons were not
16 personally liable on the judgment.

17 **6. Summary judgment in the wrongful recordation action**

18 In December 2008, CWB filed a motion for partial summary
19 judgment on liability as to the wrongful recordation. CWB argued
20 that, in light of the court's grant of summary judgment in the
21 Specific Performance Action and the finding that no agreement
22 existed between the parties, the Andersons must have known that
23 the lis pendens were groundless or otherwise invalid.

24 Following a hearing, the court granted the motion for
25 partial summary judgment, holding the Andersons liable for
26 wrongfully recording the lis pendens. After a trial, a jury
27 awarded actual damages of \$180,000 to CWB and against the
28 Andersons. The court awarded CWB treble damages under Arizona

1 Revised Statutes section 33-420(A) and (C), for a total of
2 \$540,000 plus fees and costs (the "Judgment").

3 The Andersons appealed the Judgment, but the Arizona court
4 of appeals affirmed it in its entirety.

5 **B. Bankruptcy events**

6 **1. CWB's § 523(a) (6) claim**

7 In August 2014, the Andersons filed a chapter 7 petition in
8 the United States Bankruptcy Court for the District of Arizona.
9 CWB filed an adversary proceeding seeking a determination of
10 nondischargeability of the Judgment under §§ 523(a) (2) (A) and (6)
11 and denial of discharge under § 727(a) (2) (A).

12 **2. Motion for summary judgment**

13 CWB filed a motion for partial summary judgment on its
14 § 523(a) (6) claim ("Motion for Summary Judgment"). It argued
15 that the Judgment precluded the Andersons from relitigating the
16 same issues raised in the Wrongful Recordation Action, including
17 willful and malicious injury, and that, regardless of issue
18 preclusion, the Andersons' actions were willful and malicious.

19 As to the application of issue preclusion, CWB argued that
20 the Judgment established all of the elements of § 523(a) (6).
21 Liability under section 33-420(C) of the Arizona Revised Statutes
22 requires that a person "wilfully refuses to release or correct" a
23 recorded document that encumbers real property "when that person
24 knows that the document is forged, groundless, contains a
25 material misstatement or false claim or is otherwise invalid."
26 CWB argued that "the Andersons willfully refused to release the
27 lis pendens even after the State Court ordered them to do so.
28 Only when faced with a show cause hearing did the Andersons

1 finally release the lis pendens – 29 months after the first
2 demand to release had been made.” It also argued that the
3 Andersons acted maliciously because they wrongfully recorded the
4 lis pendens; they intentionally refused to release the lis
5 pendens, even though the state court said it was groundless;
6 there was no just cause or excuse; and the state court determined
7 that CWB suffered actual damages.

8 CWB alternatively argued that, even if the court did not
9 apply issue preclusion, the undisputed facts demonstrated that
10 the Andersons’ actions resulted in willful and malicious injury.

11 In opposition, the Andersons argued that “[t]here was no
12 discussion by the Court or by the jury as to the issue of
13 ‘willful and malicious’ actions by the Defendants.” They also
14 claimed that section 33-420 required only a willful act, not a
15 malicious act. They asserted that their actions were not
16 malicious and argued that they acted on the advice of their
17 attorneys: “Upon advice of counsel, we did not release the Notice
18 of Lis Pendens based upon his recommendation that we appeal the
19 judgment”

20 At the hearing on the Motion for Summary Judgment, the
21 bankruptcy court granted the motion in part, holding that CWB had
22 established all elements of § 523(a)(6) except the issue of the
23 Andersons’ scienter. It recited the extensive facts of the case
24 and stated:

25 Under these facts I have little difficulty in
26 concluding that the Plaintiff has established
27 sufficient evidence here for a finding of summary
28 judgment, but there’s a nagging problem here that’s
loose and that is the advice of counsel defense.
Again, the Plaintiff has established a strong record
for granting summary judgment, but as noted by the

1 State Court of Appeals and interpreting A.R.S. 33-420
2 liability is imposed only if the person causing the
3 filing of the invalid document knows or has reason to
4 know the document is invalid, thereby mandating the
5 finding of scienter on the part of the person causing
6 the filing.

7 The court expressed skepticism that the Andersons could
8 establish that they relied on the advice of their counsel, but it
9 nevertheless determined that a trial was necessary.

10 **3. Trial**

11 Only Mr. Anderson and attorney Dennis Wilenchik (who
12 represented the Andersons between late 2007 and July of 2008)
13 testified at trial.

14 Mr. Wilenchik's representation spanned the period including
15 the filing of the 2007 lis pendens, the state court's January 25,
16 2008 minute order dismissing the Andersons' Specific Performance
17 Action, the April 1, 2008 judgment ordering the Andersons to
18 remove the lis pendens within ten days, the July 2008 OSC, and
19 the eventual removal of the lis pendens in July 2008.

20 Mr. Wilenchik testified that he had no recollection of any
21 discussion with the Andersons about removing the lis pendens, nor
22 did he recall ever advising the Andersons not to release the
23 lis pendens. Rather, he testified that the decision to remove
24 the lis pendens was up to the attorney - not the clients - and
25 that he would not have removed the lis pendens, even if

26 Mr. Anderson had instructed him to do so:

27 I don't believe I would have gone to the Andersons and
28 consulted them as to whether it should be released or
not. I would have probably, if anything, told them
this is the way I see it, if it came up. I don't
recall it coming up quite honestly and I certainly
don't recall them dictating to me nor would I listen
to it as to what I should do with it.

1 Mr. Wilenchik testified that he did not believe that he had
2 to remove the lis pendens - even in the face of the state court's
3 order - because he had filed a postjudgment motion to amend. He
4 thus thought that it was not necessary to either remove the lis
5 pendens within ten days or seek a motion to stay pending appeal.

6 Mr. Anderson gave somewhat shifting testimony. He stated
7 that he could not recall any specific conversation with
8 Mr. Wilenchik about removing the lis pendens, but he recalled
9 discussing the matter with Mr. Wilenchik's then-associate,
10 Amy Sells.⁴ He could not remember any specific conversations or
11 advice, but testified that they determined that they would not
12 release the lis pendens. He said that the attorneys conveyed
13 "[t]hat it would be a mistake" to do so.

14 Regarding advice by other attorneys, Mr. Anderson gave
15 ambiguous testimony about whether any of his prior attorneys had
16 advised him not to release the lis pendens earlier: "it wasn't
17 nice, neat conversations where they said, I advise you this, it
18 was merely you handled the case as the attorneys, you know, you
19 did what you think is right, that really was the nature of the
20 advice or the guidance. It wasn't conversations where they say,
21 I advise you. It wasn't that nice and convenient."

22 After the parties submitted written closing briefs and oral
23 closing argument, the court announced its findings of fact and
24 conclusions of law. While the court did not agree with
25 Mr. Wilenchik's legal views, it found his testimony credible and

26
27 ⁴ Counsel for CWB pointed out that Mr. Anderson had
28 previously testified at his deposition that there were no
conversations between April 1, 2008 and July 31, 2008.

1 410 B.R. 19, 28 (9th Cir. BAP 2009), aff'd, 407 F. App'x 176 (9th
2 Cir. 2010) (citation omitted). De novo review requires that we
3 consider a matter anew, as if no decision had been rendered
4 previously. United States v. Silverman, 861 F.2d 571, 576 (9th
5 Cir. 1988).

6 A factual finding is clearly erroneous if, after examining
7 the evidence, the reviewing court "is left with the definite and
8 firm conviction that a mistake has been committed." Anderson v.
9 City of Bessemer City, 470 U.S. 564, 573 (1985). "To be clearly
10 erroneous, a decision must strike us as more than just maybe or
11 probably wrong; it must . . . strike us as wrong with the force
12 of a five-week-old, unrefrigerated dead fish." Papio Keno Club,
13 Inc. v. City of Papillion (In re Papio Keno Club, Inc.), 262 F.3d
14 725, 729 (8th Cir. 2001) (quoting Parts & Elec. Motors, Inc. v.
15 Sterling Elec., Inc., 866 F.2d 228, 233 (7th Cir. 1988)). The
16 bankruptcy court's choice among multiple plausible views of the
17 evidence cannot be clear error. United States v. Elliott,
18 322 F.3d 710, 714 (9th Cir. 2003).

19 The availability of issue preclusion is reviewed de novo,
20 but "[i]f issue preclusion is available, the decision to apply it
21 is reviewed for abuse of discretion." Lopez v. Emergency Serv.
22 Restoration, Inc. (In re Lopez), 367 B.R. 99, 103 (9th Cir. BAP
23 2007) (citations omitted). To determine whether the bankruptcy
24 court has abused its discretion, we conduct a two-step inquiry:
25 (1) we review de novo whether the bankruptcy court "identified
26 the correct legal rule to apply to the relief requested" and
27 (2) if it did, whether the bankruptcy court's application of the
28 legal standard was illogical, implausible, or without support in

1 inferences that may be drawn from the facts in the record.
2 United States v. Hinkson, 585 F.3d 1247, 1262-63 & n.21 (9th Cir.
3 2009) (en banc).

4 DISCUSSION

5 **A. The bankruptcy court did not err in declining to apply issue** 6 **preclusion to the question of the Andersons' scienter.**

7 CWB argues that the bankruptcy court erred in refusing to
8 apply issue preclusion to the question of the Andersons' scienter
9 because the state court had already determined their willful and
10 malicious intent. We disagree.

11 The doctrine of issue preclusion prohibits relitigation of
12 issues that have been adjudicated in a prior action.

13 In re Lopez, 367 B.R. at 104. The party asserting issue
14 preclusion bears the burden of proof as to all elements and must
15 introduce a sufficient record to reveal the controlling facts and
16 the exact issues litigated. Kelly v. Okoye (In re Kelly),
17 182 B.R. 255, 258 (9th Cir. BAP 1995), aff'd, 100 F.3d 110
18 (9th Cir. 1996). "Any reasonable doubt as to what was decided by
19 a prior judgment should be resolved against allowing the [issue
20 preclusive] effect." Id.

21 Issue preclusion applies in nondischargeability litigation.
22 Grogan v. Garner, 498 U.S. 279, 284-285 (1991). A bankruptcy
23 court may rely on the issue preclusive effect of an existing
24 state court judgment as the basis for granting summary judgment.
25 See Khaligh v. Hadaegh (In re Khaligh), 338 B.R. 817, 831-32 (9th
26 Cir. BAP 2006). In so doing, the bankruptcy court must apply the
27 forum state's law of issue preclusion. Harmon v. Kobrin
28 (In re Harmon), 250 F.3d 1240, 1245 (9th Cir. 2001); see

1 28 U.S.C. § 1738 (federal courts must give “full faith and
2 credit” to state court judgments). Accordingly, we apply
3 Arizona’s law of issue preclusion.

4 In Arizona, “issue preclusion is applicable when the issue
5 or fact to be litigated was actually litigated in a previous
6 suit, a final judgment was entered, and the party against whom
7 the doctrine is to be invoked had a full opportunity to litigate
8 the matter and actually did litigate it, provided such issue or
9 fact was essential to the prior judgment.” Chaney Bldg. Co. v.
10 City of Tucson, 148 Ariz. 571, 573, 716 P.2d 28, 30 (1986) (en
11 banc).

12 However, Arizona recognizes that, “even in cases in which
13 the technical requirements for the application of collateral
14 estoppel are met, courts do not preclude issues when special
15 circumstances exist.” Hullett v. Cousin, 204 Ariz. 292, 298,
16 63 P.3d 1029, 1035 (2003) (en banc) (citing Ferris v. Hawkins,
17 135 Ariz. 329, 331, 660 P.2d 1256, 1258 (App. 1983) (“Principles
18 of issue preclusion should not be applied . . . where ‘there is
19 some overriding consideration of fairness to a litigant, which
20 the circumstances of the particular case would dictate.’”)); see
21 Kirkland v. Barnes (In re Kirkland), BAP No. AZ-08-1143-EMoMk,
22 2008 WL 8444824, at *7-8 (9th Cir. BAP Nov. 26, 2008) (“Even when
23 the threshold requirements for issue preclusion are met, its
24 application may not be appropriate when the policies of judicial
25 economy and avoidance of inconsistent results are outweighed by
26 other substantive policies[.]”).

27 In the present case, CWB sought to give issue preclusive
28 effect to the state court’s Judgment against the Andersons under

1 section 33-420, in order to avoid relitigation of its § 523(a)(6)
2 claim. We must compare the elements of § 523(a)(6) with the
3 state court's rulings under section 33-420.

4 Section 523(a)(6) renders nondischargeable any debt arising
5 from "willful and malicious injury by the debtor to another
6 entity or to the property of another entity." § 523(a)(6). The
7 "willful" and "malicious" requirements are conjunctive and
8 subject to separate analysis. Barboza v. New Form, Inc.
9 (In re Barboza), 545 F.3d 702, 706 (9th Cir. 2008).

10 Regarding the "willful" prong, we have stated:

11 The willful injury requirement speaks to the state
12 of mind necessary for nondischargeability. An exacting
13 requirement, it is satisfied when a debtor harbors
14 either a subjective intent to harm, or a subjective
15 belief that harm is substantially certain. The injury
16 must be deliberate or intentional, not merely a
17 deliberate or intentional **act** that leads to injury.
18 Thus, debts arising from recklessly or negligently
19 inflicted injuries do not fall within the compass of
20 § 523(a)(6).

21 Plyam v. Precision Dev., LLC (In re Plyam), 530 B.R. 456, 463
22 (9th Cir. BAP 2015) (internal citations and quotation marks
23 omitted).

24 In contrast, "a 'malicious' injury involves '(1) a wrongful
25 act, (2) done intentionally, (3) which necessarily causes injury,
26 and (4) is done without just cause or excuse.'" Petralia v.
27 Jercich (In re Jercich), 238 F.3d 1202, 1209 (9th Cir. 2001)
28 (citation omitted).

The Arizona state court held that the Anderson were liable
to CWB under section 33-420:

A. A person purporting to claim an interest in, or a
lien or encumbrance against, real property, who causes
a document asserting such claim to be recorded in the

1 office of the county recorder, knowing or having reason
2 to know that the document is forged, groundless,
3 contains a material misstatement or false claim or is
4 otherwise invalid is liable to the owner or beneficial
5 title holder of the real property for the sum of not
6 less than five thousand dollars, or for treble the
7 actual damages caused by the recording, whichever is
8 greater, and reasonable attorney fees and costs of the
9 action.

6 . . .

7 C. A person who is named in a document which purports
8 to create an interest in, or a lien or encumbrance
9 against, real property and who knows that the document
10 is forged, groundless, contains a material misstatement
11 or false claim or is otherwise invalid shall be liable
12 to the owner or title holder for the sum of not less
13 than one thousand dollars, or for treble actual
14 damages, whichever is greater, and reasonable attorney
15 fees and costs as provided in this section, if he
16 wilfully refuses to release or correct such document of
17 record within twenty days from the date of a written
18 request from the owner or beneficial title holder of
19 the real property.

14 Ariz. Rev. Stat. § 33-420(A), (C). Subsection (A) deals with the
15 recordation of the document, while subsection (C) concerns the
16 failure to remove the document.

17 We have previously held (in an unpublished disposition) that
18 a finding of liability under section 33-420 satisfies the willful
19 and malicious elements of § 523(a)(6). In Bosworth v. TEM
20 Holdings, LLC (In re Bosworth), BAP No. AZ-11-1157-JuKiWi, 2012
21 WL 603715 (9th Cir. BAP Feb. 2, 2012), we considered whether a
22 judgment against the debtors for wrongful recordation of a
23 fraudulent power of attorney was sufficient to establish willful
24 and malicious injury for issue preclusion purposes. We held that
25 "the liability imposed for a knowing violation of the statute is
26 the equivalent of an intentional injury under § 523(a)(6)" and
27 "that the conduct proscribed by ARS § 33-420 required TEM to
28 prove the classic elements of a malicious injury under

1 § 523(a)(6).” 2012 WL 603715, at *6.

2 Bosworth is not binding precedent and is factually
3 distinguishable. First, the Andersons claim that they filed and
4 refused to release the lis pendens based on the advice of
5 counsel; the debtor in Bosworth made no such claim. Second, the
6 state court in Bosworth found that the debtors knew their filing
7 was improper; the Bosworth panel declined to address the question
8 whether issue preclusion would apply if the state court had found
9 that the debtors only “ha[d] reason to know” that the filing was
10 improper. Id. at *6 n.10. In this case, as far as we can tell
11 from the record on appeal, the state court did not explicitly
12 find that the Andersons knew (rather than had reason to know)
13 that the lis pendens were improper. Third, Arizona law provides
14 that courts have discretion to decline to apply issue preclusion
15 in exceptional circumstances, even when all of the minimum
16 requirements are met. See Hullett, 204 Ariz. at 298, 63 P.3d at
17 1035. So the bankruptcy court was not compelled to apply issue
18 preclusion in any event.

19 Therefore, the bankruptcy court did not abuse its discretion
20 in declining to give issue preclusive effect to the state court
21 Judgment as to the Andersons’ scienter.

22 **B. The bankruptcy court’s consideration of the effect of advice
23 of counsel on the Andersons’ scienter was not clear error.**

24 CWB argues that the bankruptcy court erred in finding that
25 the Andersons relied on the advice of their counsel when they
26 refused to release the lis pendens. We conclude that the
27 bankruptcy court did not clearly err in finding that the
28 Andersons lacked the necessary scienter under § 523(a)(6).

1 In the context of bankruptcy and dischargeability, the Ninth
2 Circuit has stated:

3 It is true that “[g]enerally, a debtor who acts in
4 reliance on the advice of his attorney lacks the intent
5 required to deny him a discharge of his debts.” That
6 reliance, however, must be “in good faith.” This court
7 has held that the advice of counsel claim is not a
8 separate defense, but rather “a circumstance indicating
9 good faith which the trier of fact is entitled to
10 consider on the issue of fraudulent intent.”

11 Maring v. PG Alaska Crab Inv. Co. LLC (In re Maring), 338 F.
12 App’x 655, 658 (9th Cir. 2009) (internal citations and emphasis
13 omitted). “[T]he debtor’s reliance must be in good faith.”
14 First Beverly Bank v. Adeb, 787 F.2d 1339, 1343
15 (9th Cir. 1986) (internal citations omitted). The defendant has
16 the burden of proving the requisite elements of advice of
17 counsel. See Bisno v. United States, 299 F.2d 711, 720 (9th Cir.
18 1961) (declining to give an advice of counsel instruction when
19 the defendant did not testify and establish each element);
20 Stephens v. Stinson, 292 F.2d 838, 838 (9th Cir. 1961) (“Of
21 course, it is usually a question of fact whether clients
22 implicitly relied on advice of counsel. . . . And, clearly, here
23 the burden of proof shifted to the bankrupts.”).

24 In other words, advice of counsel can negate the mental
25 state required by § 523(a)(6) only if the debtor establishes that
26 counsel actually gave advice and that the debtor acted in good
27 faith reliance on that advice.

28 In the present case, the bankruptcy court found that
Mr. Anderson relied on the advice of Mr. Wilenchik and his
associate when he refused to remove the lis pendens after the
state court ordered the Andersons to do so within ten days of the

1 April 1, 2008 judgment. The bankruptcy court recognized that the
2 evidence on this point was thin. Mr. Wilenchik testified that he
3 could not remember specifically advising Mr. Anderson not to
4 release the lis pendens, but he would not have released it,
5 regardless of what the Andersons instructed him to do, because
6 the judgment was not final. The bankruptcy court did not agree
7 with Mr. Wilenchik's legal analysis, but it nevertheless found
8 his testimony credible and determined that Mr. Wilenchik or his
9 associate must have communicated that advice to Mr. Anderson.

10 Although other judges might reach the opposite conclusion on
11 the same or similar facts, we cannot say that the bankruptcy
12 court clearly erred. See Anderson, 470 U.S. at 573 (requiring
13 "the definite and firm conviction that a mistake has been
14 committed"). If the bankruptcy court is faced with multiple
15 plausible views of the evidence, its choice among them cannot be
16 clear error. See Elliott, 322 F.3d at 714. There was evidence
17 to support the bankruptcy court's inference that Mr. Wilenchik or
18 his associate did advise Mr. Anderson not to remove the lis
19 pendens.

20 CWB argues that the Andersons could not have relied on this
21 advice in good faith, because Mr. Anderson was a sophisticated
22 businessman and knew he should not defy a court order. But the
23 bankruptcy court cited the correct legal standard and carefully
24 weighed the evidence. It heard testimony that Mr. Anderson
25 relied on the legal advice of Mr. Wilenchik (and his prior
26 attorneys), and Mr. Wilenchik held a very strong belief (correct
27 or not) that he did not need to release the lis pendens. It was
28 not clear error for the court to conclude that the Andersons

1 relied on the advice in good faith.

2 CWB argues that the bankruptcy court erred because the
3 Andersons could not have acted on the advice of counsel when they
4 initially filed the lis pendens in 2006 and 2007 and repeatedly
5 refused to release them. Specifically, CWB twice demanded that
6 the Andersons remove the lis pendens in February 2006 and May
7 2007, and the Andersons rejected or ignored both demands. Both
8 of these instances predate Mr. Wilenchik's representation of the
9 Andersons, so he could not have advised the Andersons to decline
10 CWB's written requests. Although the bankruptcy court did not
11 make any explicit findings as to advice by any attorney other
12 than Mr. Wilenchik, it took evidence concerning Mr. Anderson's
13 pre-2008 interaction with counsel and their litigation
14 decisions.⁵ The court could have logically concluded that the
15 Andersons' actions were pursuant to counsels' advice. We cannot
16 say that the bankruptcy court clearly erred.

17 Although we may not have made the same findings as the
18 bankruptcy court, we note that the bankruptcy court carefully
19 considered all of the evidence, extensively examined the
20 witnesses itself, and made logical inferences from the evidence.
21 We must defer to the court's factual findings.

22 **CONCLUSION**

23 For the foregoing reasons, we AFFIRM.
24
25

26 ⁵ Mr. Anderson testified that it was the idea of his then-
27 attorney, E.J. Peskind, to file the 2006 lis pendens. He also
28 testified that his attorneys never advised him to release the
lis pendens.