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UNITED STATES BANKRUPTCY COURT

CENTRAL DISTRICT OF CALIFORNIA

In re WINSTON PING-YAU KO and DOROTHY PUI-YUK KO, Debtors.	Case No. LA 03-30636 TD Adv. No. LA 03-02694 TD Chapter 7
AESPACE AMERICA, INC., a California corporation, Plaintiff v. WINSTON PING-YAU KO, an individual, and DOROTHY PUI-YUK KO, an individual, Defendants.	MEMORANDUM OF DECISION DATE: August 30, 2006 TIME: 10:30 a.m. PLACE: Courtroom 1345

This matter is here on cross motions for summary judgment filed by the above-named Plaintiff and Defendants. I have considered the pleadings, evidence, and

arguments advanced by each party.

Both sides claim the right to assert what they refer to as “collateral estoppel” principles. I prefer to use the phrase “issue preclusion” to refer to that concept but will have to employ both terms to avoid ambiguity. Each side challenges the other side’s entitlement to summary judgment. Plaintiff asserts that in pursuit of its nondischargability claim in the bankruptcy court, it should be allowed to pursue in its motion the issues of “intent to deceive” and “knowledge of falsity” that Plaintiff urges were not addressed or resolved in the state court litigation.

That litigation began with Plaintiff’s Los Angeles Superior Court lawsuit filed in 2000. Plaintiff’s second amended state court complaint (amended complaint) asserted claims against Defendants based on allegations of fraudulent concealment, fraudulent non-disclosure, knowing and intentional misrepresentation, and deliberate concealment, all with an intent to deceive and defraud Plaintiff and to induce Plaintiff to purchase from Defendants for about $25 million a five-building commercial property known as MP Mall, located in Monterey Park, California. The amended complaint outlined a 20-year history, including construction by Defendants and their corporate entities, sale of the property to Plaintiff eight years later, and events leading to Plaintiff’s lawsuit filed some 12 years after the Plaintiff’s purchase. The amended complaint outlined specific allegations discussing several years of allegedly troubling pre-sale technical reports concerning the condition of the mall and its structures and parking lot and problems with the improvements.

The unmistakable focus of the allegations of the 10-page amended complaint was fraud and Defendants’ intent to deceive. The case was tried to a jury. After seven days of testimony, each side offered proposed jury instructions, and the court gave its instructions to the jury accompanied by a form of General Verdict with Special Findings for the jury’s consideration. The jury returned the verdict with special findings

(a) in favor of Defendants on the "First Cause of Action for Fraud in the Concealment or Suppression of Facts"; (b) in favor of Plaintiff "On the Second Cause of Action for Negligent Representation"; and (3) awarding damages in favor of Plaintiff in the amount of $1,201,900.00. Judgment was entered on the jury's verdict against the Defendants, jointly and severally, for (a) the principal amount of $1,201,900.00; (b) prejudgment interest of $1,312,840.00; and (c) costs in the amount of $12,149.68.

The Defendants filed their chapter 7 bankruptcy case shortly after the jury verdict was announced.

After an appeal by the Defendants, the judgment for the Plaintiff was affirmed. The judgment is now final.

The state trial court gave the jury, prior to its deliberations, the following BAJI jury instructions (among others), some of which were modified from the original BAJI form:

2.60

Aespace America, Inc. is seeking damages based upon claims of fraud and negligent misrepresentation against the defendants.

Aespace has the burden of proving by a preponderance of the evidence all of the facts necessary to establish the essential elements of each separate claim. The essential elements of each separate claim are set forth elsewhere in these instructions.

In addition to these essential elements, Aespace has the burden of proving by a preponderance of the evidence all of the facts necessary to establish the nature and extent of the damages claimed to have been suffered, the elements of Aespace's damage and the amount thereof.

"Preponderance of the evidence" means evidence that has more convincing force than that opposed to it. If the evidence is so evenly balanced that you are unable to say that the evidence on either side of an issue preponderates, your finding on that issue must be against the party who had the burden of proving it.

You should consider all of the evidence bearing upon every issue regardless of who produced it.

12.30

Aespace America, Inc. seeks to recover damages based upon a claim of fraud.

Conduct may be fraudulent because of concealment, or a negligent misrepresentation.

12.35

The essential elements of a claim of fraud by concealment are:

1. The defendant concealed or suppressed a material fact;
2. The defendant was under a duty to disclose the fact to the plaintiff;
3. The defendant intentionally concealed or suppressed the fact with the intent to defraud the plaintiff;
4. The plaintiff was unaware of the fact and would not have acted as if it did if it had known of the concealed or suppressed fact;
5. And, finally, the concealment or suppression of the fact caused the plaintiff to sustain damage.

12.45

The essential elements of a claim of fraud by a negligent misrepresentation are:

1. The defendant made a representation as to a past or existing material fact;
2. The representation was untrue;
3. Regardless of his or her actual belief the defendant made the representation without any reasonable ground for believing it to be true;
4. The representation was made with the intent to induce plaintiff to rely upon it;
5. The plaintiff was unaware of the falsity of the representation; must have acted in reliance upon the truth of the representation and was justified in relying upon the representation;
6. And, finally, as a result of the reliance upon the truth of the representation, the plaintiff sustained damage.

12.50.1

The alleged negligent misrepresentations must have been made with the intent to induce plaintiff, or a particular class of persons to which plaintiff belongs, to act in reliance upon the representation in a specific transaction, or a specific type of transaction, that defendant intended to influence.

Defendant is deemed to have intended to influence his or her transaction with plaintiff whenever defendant knows with substantial certainty that plaintiff, or the particular class of persons to which plaintiff belongs, will rely on the representation in the course of the transaction.

The alleged intentional misrepresentations must have been made with the intent to defraud plaintiff, or a particular class of persons to which plaintiff belongs,

whom defendant intended or reasonably should have for foreseen would rely upon the representation.

Both parties now assert in their motions the right to preclude further litigation here on issues that were actually litigated and necessarily decided in the state court. The rubric employed by the parties in their motions was "collateral estoppel." The Ninth Circuit, in In re Harmon discussed collateral estoppel in a California context, as follows:

> In California, "[c]ollateral estoppel precludes relitigation of issues argued and decided in prior proceedings." Lucido v. Superior Court, 51 Cal.3d 335, 272 Cal. Rptr. 767, 795 P.2d 1223, 1225 (1990) (in bank). California courts will apply collateral estoppel only if certain threshold requirements are met, and then only if application of preclusion furthers the public policies underlying the doctrine. See id. at 1225, 1226. There are five threshold requirements:
>
>> First, the issue sought to be precluded from relitigation must be identical to that decided in a former proceeding. Second, this issue must have been actually litigated in the former proceeding. Third, it must have been necessarily decided in the former proceeding. Fourth, the decision in the former proceeding must be final on the merits. Finally, the party against whom preclusion is sought must be the same as, or in privity with, the party to the former proceeding.
>
> Id. at 1225. 'The party asserting collateral estoppel bears the burden of establishing those requirements.' Id.

In re Harmon (Harmon v. Kobrin), 250 F.3d 1240, 1245 (9th Cir. 2001). Collateral estoppel is referred to frequently as "issue preclusion."

By its state court verdict and judgment, and by application of the principles of collateral estoppel or issue preclusion, I conclude that Plaintiff has established all of the following, but nothing more:

(1) Defendants, and each of them, made a representation as to past or existing material fact;

(2) The representation made by each Defendant was untrue;

(3) Regardless of his or her actual belief, each Defendant made the untrue

representation without any reasonable ground for believing it to be true;

(4) Each such representation was made with the intent to induce Plaintiff to rely upon it;

(5) The Plaintiff (a) was unaware of the falsity of each such representation, (b) acted in reliance upon the truth of each such representation, and (c) was justified in relying on each such representation; and

(6) As a result of the Plaintiff's reliance upon the truth of each such representation, the Plaintiff sustained damage.

In short, the (1) Defendants made false representations (2) with no reasonable basis for believing them to be true (3) to induce Plaintiff's justifiable reliance, (4) as a direct result of which Plaintiff suffered damage.

The jury was given BAJI 12.45 which recited the findings necessary for a verdict of "fraud by a negligent misrepresentation," but the jury returned a special verdict for "negligent misrepresentation" only. Neither party has furnished me with a transcript of the proceedings before the state trial court or the remarks of the trial judge that may have shed more light on the ambiguity created. To the extent that ambiguity works against the Plaintiff here, it was the Plaintiff's burden to prove its case here by a preponderance of the evidence. Thus, I must assume that any missing information from the state court trial record would not have aided the Plaintiff in its pursuit of nondischargeability here, or that if Plaintiff had been aggrieved by the procedures employed by the state court trial judge, Plaintiff would have addressed those concerns on appeal. Accordingly, I conclude that Plaintiff proved only "ordinary negligent misrepresentation" in the state court, not "fraud."

While California law also requires consideration of the question whether preclusion furthers the public policies underlying the doctrine, it would appear here that is does. In their brief, the Defendants quote In re Baldwin, 249 F.3d 912, 919-20

(9th Cir. 2001), as follows:

> The California Supreme Court has identified three policies underlying the doctrine of collateral estoppel: preservation of the integrity of the judicial system, promotion of judicial economy, and protection of litigants from harassment by vexatious litigation. With regard to the integrity of the judicial system, the California Supreme Court directs us to inquire whether eliminating the possibility of inconsistent verdicts - - which would follow from the application of collateral estoppel - - would undermine or enhance the public's confidence in the judicial system. Where . . . the state court was fully capable of adjudicating the issue subsequently presented to the bankruptcy court, we conclude that the public's confidence in the state judicial system would be undermined should the bankruptcy court relitigate the question. In re Baldwin, 249 F.3d 912, 919-20 (9th Cir. 2001) (internal citations and quotation marks omitted).

Defendants' Notice of Motion and Countermotion, page 29. The Defendants cited Baldwin to support their view that collateral estoppel should be applied here to facilitate summary judgment in Defendants' favor and to bar relitigation of the questions of "intent" and "knowledge of falsity" which Defendants believe were fully and finally litigated in Defendants' favor in the state court. See also Defendants' Notice of Motion and Countermotion, pages 29-31. Thus, the principles of collateral estoppel or issue preclusion would seem to apply here.

Here, the California judgment establishes that the Defendants are liable to Plaintiff for "negligent misrepresentation" (under the principles of collateral estoppel or issue preclusion). By the same principles, collateral estoppel or issue preclusion establish that Defendants have been exonerated by the state court judgment of "fraud in the concealment or suppression of facts." Moreover, I am required to give "full faith and credit" to the California judgment under the requirements of 28 U.S.C. § 1738 which provides that the judicial proceedings of any court "shall have the same full faith and credit in every court of the United States . . . as they have by law or usage in the courts of such State." For example, the Ninth Circuit has commented:

> Under the federal full faith and credit statute, federal courts must give state court judgments the preclusive effect that those judgments would enjoy under the law of the state in which the judgment was rendered. See 28 U.S.C. §

> 1738. As a result to the district court should have applied Florida law in determining whether to give preclusive effect to a Florida judgment.

Far Out Productions, Inc. v. Oskar, 247 F.3d 986, 993 (9th Cir. 2001).

In doing so, Oskar quoted the Supreme Court as follows: "Section 1738 embodies concerns of comity and federalism that allow the States to determine, subject to the requirements of the statute and the Due Process Clause, the preclusive effect of judgments of their own courts." Id. (Citations omitted.)

On the other hand, the only new "claim" presented in this adversary proceeding is whether Defendants' liability to Plaintiff should be excepted from Defendants' chapter 7 discharge under 11 U.S.C. § 523(a)(2)(A). Section 523(a), provides as follows, in relevant part:

> A discharge under section 727 . . . does not discharge an individual debtor from any debt – –
>
> * * *
>
> (2) for money, property, services, or an extension, renewal, or refinancing of credit, to the extent obtained by – –
>
> (A) false pretenses, a false representation, or actual fraud, other than a statement respecting the debtor's or an insider's financial condition . . . .

11 U.S.C. § 523(a)(2)(A).

To establish that Plaintiff's state court judgment is nondischargeable under § 523(a)(2)(A), Ninth Circuit case law states, generally, that Plaintiff must establish by a preponderance of the evidence the following:

> (1) misrepresentation, fraudulent omission or deceptive conduct by a debtor;
> (2) [Debtor's] knowledge of the falsity or deceptiveness of his [or her] statement or conduct;
> (3) an intent to deceive [by each debtor];
> (4) justifiable reliance by the [Plaintiff, a] creditor, on [each] debtor's statement or conduct; and
> (5) damage to the [Plaintiff, a] creditor [,] proximately caused by [the creditor's] reliance on the statement or conduct of [each] debtor.

Harmon, at 1246; See In re Nourbakhsh (Gayden v. Nourbakhsh), 67 F.3d 798, 800-

01 (9th Cir. 1995) (affirming summary judgment in 523(a)(2)(A) action based on state court default judgment, the court held: (1) "default judgment conclusively establishes between the parties, so far as subsequent proceedings on a [523(a)(2)(A) action] are concerned, the truth of all material allegations contained in the complaint in the first action and every fact necessary to uphold the default judgment." (Citation omitted.) In Grogan v. Garner, 498 U.S. 279, 284-85 (1991), the Supreme Court held: "We now clarify that collateral estoppel [or issue preclusion] principles do indeed apply in discharge exception proceedings pursuant to § 523(a)."

While the state court judgment established that Defendants are liable for negligent misrepresentation, neither the judgment nor the verdict employed the word "fraud" or found the Defendants liable for "fraud." Moreover, the state trial court's instructional basis for the jury's special verdict of negligent misrepresentation did not require the jury to determine that the Defendants acted with "knowledge of falsity" or an "intent to deceive," both of which are required for nondischargeability under § 523(a)(2)(A). Harmon, at 1246. Compare In re Gertsch (Gertsch v. Johnson & Johnson Fin. Corp.), 237 B.R. 160, 167-68 (9th Cir. BAP 1999) (the scienter requirement for fraudulent representation is established in a 523(a)(2)(B) context by showing "either actual knowledge of the falsity of a statement, or reckless disregard for the truth . . . .") Therefore, Plaintiff's "negligent misrepresentation" state court judgment falls short of meeting the Ninth Circuit standard for nondischargeability under § 523(a)(2)(A), or otherwise.

Having said that, I believe it is important to go one step further in this memorandum. By themselves, the terms "collateral estoppel" or "issue preclusion" are insufficient to fully dispose of the disputes in this litigation. A discussion of "claim preclusion" is in order. Thus, in In re Cogliano (Cogliano v. Anderson), Nos. CC-05-1061-BMOT, CC-05-1202-BMOT, RS 96-28188 MG, 2006 WL 2884100 (9th Cir. BAP

Sept. 12, 2006), the Panel reviewed preclusion concepts involving issues of "property of the estate" and "exemption" in a bankruptcy court context, as follows:

> The Ninth Circuit has concisely framed the preclusion concepts:
>
> Generally, the preclusive effect of a former adjudication is referred to as "res judicata." The doctrine of res judicata includes two distinct types of preclusion, claim preclusion and issue preclusion. Claim preclusion treats a judgment, once rendered, as the full measure of relief to be accorded between the same parties on the same claim or cause of action. Claim preclusion prevents litigation of all grounds for, or defenses to, recovery that were previously available to the parties, regardless of whether they were asserted or determined in the prior proceeding.
>
> Robi v. Five Platters, Inc., 838 F.2d 318, 321-322 (9th Cir.1988) (internal quotation marks, citations, and footnote omitted).
>
> The burden is on the [party], who asserts preclusion, to establish the necessary elements. In re Khaligh, 338 B.R. 817, 825 (9th Cir. BAP 2006).
>
> 1. Issue Preclusion
>
> . . .
>
> [P]revents relitigation of all "issues of fact or law that were actually litigated and necessarily decided" in a prior proceeding. . . . The issue must have been "actually decided" after a "full and fair opportunity" for litigation.
>
> Robi, 838 F.2d at 322 (citations omitted); see also Christopher Klein et al., Principles of Preclusion and Estoppel in Bankruptcy Cases, 79 Am. Bankr.L.J. 839, 852-58 (2005) ("Klein et al., Principles ").
>
> * * *
>
> 2. Claim Preclusion
>
> But the doctrine of claim preclusion is distinct: "[i]ssue preclusion bars relitigation only of issues that have been actually litigated, while the broader brush of claim preclusion may also bar a cause of action that never has been litigated," George, 318 B .R. at 733, that is, another action on the same "claim." For these purposes, a "claim" is a plaintiff's right to pursue remedies "with respect to all or any part of the transaction, or series of connected transactions, out of which the action arose." Restatement (Second) of Judgments (" Restatement ") § 24(1) (1982). When there has been a final judgment on a part of a "claim," the right to obtain remedies against the estate respecting that claim is extinguished. See Klein et al., Principles, at 849, and George, 318 B.R. at 735-37.

Cogliano, 2006 WL 2884100, at * 7-8, (9th Cir. BAP 2006).

On the broader question of claim preclusion, where do we come out here? Plaintiff asserts that only limited issues of fraudulent concealment were presented to the state court jury. Thus, Plaintiff, in effect, contends it should be allowed to use issue preclusion as a sword to establish part of its claim to nondischargeability. Then, Plaintiff asserts that it should be allowed to introduce new evidence and argument here to address factual issues such as "knowledge of falsity" and "intent to deceive" that Plaintiff contends were not presented to the state court jury.

Meanwhile, Defendants contend that those elements of Plaintiff's nondischargeability case here were presented to the state court jury and were resolved against the Plaintiff.

I believe the principles of claim preclusion as annunciated by the Ninth Circuit in Robi v. Five Platters, Inc., 838 F.2d 318, 321-22 (9th Cir. 1988) and in the Restatement (Second) of Judgments (1982) §§ 17, 18, and 19, bar any further litigation of such factual issues in this court, as proposed by the Plaintiff. I also believe that Plaintiff has not and cannot successfully assert any exception to application of the general rule of "bar" under the provisions of § 20 of the Restatement; the principles of "merger or bar" under the provisions of § 24 of the Restatement; or for that matter, any exception to the general rules of issue preclusion under § 28 of the Restatement.

The record before me on the parties' cross motions establishes that Plaintiff fully litigated its claims against Defendants in the state court, including the claims of fraud, knowledge of falsity, and intent to deceive. Plaintiff had a full opportunity in state court to present any and all evidence it could muster to support its claims. The allegations asserted and evidence proffered related to the entire history of mall construction by Defendants, mall ownership and operation by the Defendants, the sale process between the Defendants and the Plaintiff, the technical property reports available pre-sale, and the condition of the improvements pre-sale and post-sale. I

conclude that as a result, Plaintiff asserted its claims in the state court with respect to all parts of the "transaction, or series of connected transactions, out of which" its action here for nondischargeability arose, to paraphrase the Restatement, § 24.

As such, the only issue that Plaintiff did not have a chance to litigate in the state court is Plaintiff's entitlement to a judgment against the Defendants from this court of nondischargeability of its state court judgment under § 523(a)(2)(A).

Accordingly, on the basis of the record on the parties' cross motions for summary judgment, Plaintiff's motion is denied. Plaintiff has failed to establish that it is entitled to summary judgment as a matter of law. Defendants' motion is granted because there is no genuine issue at to any material fact, and Defendants are entitled to summary judgment in their favor as a matter of law.

SO ORDERED.

DATE: October 27, 2006

/s/
THOMAS B. DONOVAN
United States Bankruptcy Judge

NOTICE OF ENTRY OF JUDGMENT OR ORDER

AND CERTIFICATE OF MAILING

TO ALL PARTIES IN INTEREST LISTED BELOW:

1. You are hereby notified that a judgment or order entitled:

MEMORANDUM OF DECISION

was entered on 10/27/06.

2. I hereby certify that I mailed a true copy of the order or judgment to the persons and entities listed below on 10/27/06.

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Dated: 10/27/06

Pat Lar
Clerk