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8 **UNITED STATES BANKRUPTCY COURT**
9 **CENTRAL DISTRICT OF CALIFORNIA**

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12 In re WINSTON PING-YAU KO and
13 DOROTHY PUI-YUK KO,
14 Debtors.

15
16 ASPACE AMERICA, INC., a California
17 corporation,

18 Plaintiff

19 v.

20
21 WINSTON PING-YAU KO, an individual,
22 and DOROTHY PUI-YUK KO, an
23 individual,

24 Defendants.

Case No. LA 03-30636 TD

Adv. No. LA 03-02694 TD

Chapter 7

AMENDED MEMORANDUM
OF DECISION

DATE: August 30, 2006

TIME: 10:30 a.m.

PLACE: Courtroom 1345

25 In this adversary, Plaintiff seeks a judgment of nondischargeability against
26 Defendants of a final state court judgment awarding damages. The parties have filed

1 cross motions for summary judgment. I have considered the pleadings, evidence, and
2 arguments advanced.

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

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

23 The unmistakable focus of the allegations of the 10-page amended complaint
24 was fraud and Defendants’ intent to deceive. The case was tried to a jury. After
25 seven days of testimony, each side offered proposed jury instructions, and the court
26 gave its instructions to the jury accompanied by a form of General Verdict with Special

1 Findings for the jury's consideration. The jury returned the verdict with special findings
2 (1) in favor of Defendants on the "First Cause of Action for Fraud in the Concealment
3 or Suppression of Facts"; (2) in favor of Plaintiff "On the Second Cause of Action for
4 Negligent Representation"; and (3) awarding damages in favor of Plaintiff in the
5 amount of \$1,201,900.00. Judgment was entered on the jury's verdict against the
6 Defendants, jointly and severally, for (1) the principal amount of \$1,201,900.00; (2)
7 prejudgment interest of \$1,312,840.00; and (3) costs in the amount of \$12,149.68.

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

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

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

15 **2.60**

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

18 Aespace has the burden of proving by a preponderance of the evidence all of
19 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.

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

23 "Preponderance of the evidence" means evidence that has more convincing
24 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.

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

1 **12.30**

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

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

5 **12.35**

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

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

15 **12.45**

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

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

28 **12.50.1**

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

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

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

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

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

8 In California, “[c]ollateral estoppel precludes relitigation of issues argued
9 and decided in prior proceedings.” Lucido v. Superior Court, 51 Cal.3d
10 335, 272 Cal. Rptr. 767, 795 P.2d 1223, 1225 (1990) (in bank).
11 California courts will apply collateral estoppel only if certain threshold
12 requirements are met, and then only if application of preclusion furthers
13 the public policies underlying the doctrine. See id. at 1225, 1226. There
14 are five threshold requirements:

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

23 Id. at 1225. ‘The party asserting collateral estoppel bears the burden of
24 establishing those requirements.’ Id.

25 In re Harmon (Harmon v. Kobrin), 250 F.3d 1240, 1245 (9th Cir. 2001). Collateral
26 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

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

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

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

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

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

12 The jury was given BAJs 12.45 and 12.50.1 which recited the findings
13 necessary for a verdict of "fraud by a negligent misrepresentation," but the jury
14 returned a special verdict for "negligent misrepresentation" only. Neither party has
15 furnished me with a transcript of the proceedings before the state trial court or the
16 remarks of the trial judge that may have shed more light on the ambiguity created. To
17 the extent that ambiguity works against the Plaintiff here, it was the Plaintiff's burden to
18 prove its case here by a preponderance of the evidence. Thus, I must assume that
19 any missing information from the state court trial record would not have aided the
20 Plaintiff in its pursuit of nondischargeability here, or that if Plaintiff had been aggrieved
21 by the procedures employed by the state court trial judge, Plaintiff would have
22 addressed those concerns on appeal. Accordingly, I conclude that Plaintiff proved
23 only "ordinary negligent misrepresentation" in the state court, not "fraud."

24 While California law also requires consideration of the question whether
25 preclusion furthers the public policies underlying the doctrine, it would appear here that
26 is does. In their brief, the Defendants quote In re Baldwin, 249 F.3d 912, 919-20 (9th

1 Cir. 2001), as follows:

2 The California Supreme Court has identified three policies underlying the
3 doctrine of collateral estoppel: preservation of the integrity of the judicial
4 system, promotion of judicial economy, and protection of litigants from
5 harassment by vexatious litigation. With regard to the integrity of the
6 judicial system, the California Supreme Court directs us to inquire
7 whether eliminating the possibility of inconsistent verdicts - - which would
8 follow from the application of collateral estoppel - - would undermine or
9 enhance the public's confidence in the judicial system. Where . . . the
10 state court was fully capable of adjudicating the issue subsequently
11 presented to the bankruptcy court, we conclude that the public's
12 confidence in the state judicial system would be undermined should the
13 bankruptcy court relitigate the question. In re Baldwin, 249 F.3d 912,
14 919-20 (9th Cir. 2001) (internal citations and quotation marks omitted).

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

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

25 Under the federal full faith and credit statute, federal courts must give state
26 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. §

1 1738. As a result, the district court should have applied Florida law in
2 determining whether to give preclusive effect to the Florida judgment.

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

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

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

12 A discharge under section 727 . . . does not discharge an individual
13 debtor from any debt – –

14 * * *

15 (2) for money, property, services, or an extension, renewal, or
16 refinancing of credit, to the extent obtained by – –

17 (A) false pretenses, a false representation, or actual fraud,
18 other than a statement respecting the debtor’s or an
19 insider’s financial condition

20 11 U.S.C. § 523(a)(2)(A).

21 To establish that Plaintiff’s state court judgment is nondischargeable under §
22 523(a)(2)(A), Ninth Circuit case law states, generally, that Plaintiff must establish by a
23 preponderance of the evidence the following:

- 24 (1) misrepresentation, fraudulent omission or deceptive conduct by a debtor;
25 (2) [Debtor’s] knowledge of the falsity or deceptiveness of his [or her]
statement or conduct;
26 (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-

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

9 While the state court judgment established that Defendants are liable for
10 negligent misrepresentation, neither the judgment nor the verdict employed the word
11 “fraud” or found the Defendants liable for “fraud.” Moreover, the state trial court’s
12 instructional basis for the jury’s special verdict of negligent misrepresentation
13 (including BAJs 12.30, 12.45, and 12.50.1) did not require the jury to determine that
14 the Defendants acted with “knowledge of falsity” or an “intent to deceive,” both of
15 which are required for nondischargeability under § 523(a)(2)(A). Harmon, at 1246.
16 Compare In re Gertsch (Gertsch v. Johnson & Johnson Fin. Corp.), 237 B.R. 160, 167-
17 68 (9th Cir. BAP 1999) (the scienter requirement for fraudulent representation is
18 established in a 523(a)(2)(B) context by proving “either actual knowledge of the falsity
19 of a statement, or reckless disregard for the truth”) Therefore, Plaintiff’s “negligent
20 misrepresentation” state court judgment falls short of meeting the Ninth Circuit
21 standard for nondischargeability under § 523(a)(2)(A), or otherwise.

22 Having said that, I believe it is important to go one step further in this
23 memorandum. The rubrics “collateral estoppel” or “issue preclusion” are insufficient to
24 fully dispose of the disputes in this litigation. A discussion of “claim preclusion” is in
25 order. Thus, in In re Cogliano (Cogliano v. Anderson), Nos. CC-05-1061-BMOT, CC-
26 05-1202-BMOT, RS 96-28188 MG, 2006 WL 2884100 (9th Cir. BAP Sept. 12, 2006),

1 the Panel reviewed preclusion concepts involving issues of “property of the estate” and
2 “exemption” in a bankruptcy court context, as follows:

3 The Ninth Circuit has concisely framed the preclusion concepts:

4 Generally, the preclusive effect of a former adjudication is referred to as
5 “res judicata.” The doctrine of res judicata includes two distinct types of
6 preclusion, claim preclusion and issue preclusion. Claim preclusion treats
7 a judgment, once rendered, as the full measure of relief to be accorded
8 between the same parties on the same claim or cause of action. Claim
9 preclusion prevents litigation of all grounds for, or defenses to, recovery
10 that were previously available to the parties, regardless of whether they
11 were asserted or determined in the prior proceeding.

12 Robi v. Five Platters, Inc., 838 F.2d 318, 321-322 (9th Cir.1988) [internal
13 quotation marks, citations, and footnote omitted].

14 The burden is on the [party], who asserts preclusion, to establish the
15 necessary elements. In re Khaligh, 338 B.R. 817, 825 (9th Cir. BAP
16 2006).

17 1. Issue Preclusion

18 . . .

19 [P]revents relitigation of all “issues of fact or law that were actually
20 litigated and necessarily decided” in a prior proceeding. . . . The issue
21 must have been “actually decided” after a “full and fair opportunity” for
22 litigation.

23 Robi, 838 F.2d at 322 (citations omitted); see also Christopher Klein et
24 al., Principles of Preclusion and Estoppel in Bankruptcy Cases, 79 Am.
25 Bankr.L.J. 839, 852-58 (2005) (“Klein et al., Principles”).

26 * * *

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 Sept. 12, 2006).

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

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

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

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

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

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

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

12 SO ORDERED.

13
14 DATE: October 30, 2006

15
16 _____
 /s/

17 THOMAS B. DONOVAN
18 United States Bankruptcy Judge
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1 NOTICE OF ENTRY OF JUDGMENT OR ORDER
2 AND CERTIFICATE OF MAILING
3

4 TO ALL PARTIES IN INTEREST LISTED BELOW:

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

6 **AMENDED MEMORANDUM OF DECISION**

7 was entered on _____.

8 2. I hereby certify that I mailed a true copy of the order or judgment to the persons
9 and entities listed below on _____.

10 Debtors/Defendants
11 Wiston Ping-Yau and
12 Pui-Yuk Dorothy Ko
13 1030 De La Fuente Street
14 Monterey Park, CA 91754

Attorney for Plaintiff
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14 Attorney for Debtors
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16 Attorney for Plaintiff
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Ernst & Young Plaza
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21
22
23 Dated:

24 _____
25 Clerk
26