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FILED & ENTERED
JUL 21 2020
CLERK U.S. BANKRUPTCY COURT
Central District of California
BY **handy** DEPUTY CLERK

**UNITED STATES BANKRUPTCY COURT
CENTRAL DISTRICT OF CALIFORNIA
NORTHERN DIVISION**

In re:
BERND SCHAEFERS,

Debtor.

BERND SCHAEFERS,

Plaintiff,

vs.
FRANZISKA SHEPARD; DAVID BASKETT;
and DOES 1-5,

Defendants.

Case No.: 9:19-bk-11163-MB
Chapter 7
Adv. Proc. No. 9:19-ap-01040-MB
**REPORT AND RECOMMENDATION
TO THE DISTRICT COURT
REGARDING DEFENDANTS' MOTIONS
FOR SUMMARY JUDGMENT**

1 **TO THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF**
2 **CALIFORNIA ("DISTRICT COURT"):**

3
4 By the complaint in this adversary proceeding, pro se Plaintiff Bernd Schaefer, the chapter
5 7 debtor herein, seeks a money judgment against Defendants Franziska Shepard and David Baskett,
6 for alleged wrongdoing in connection with a Kansas civil action in which judgment was entered in
7 2017 against Schaefer. Defendants Franziska Shepard and David Baskett have each filed a motion
8 for summary judgment on the complaint. The claims asserted in the complaint, however, are not
9 constitutionally "core" bankruptcy claims. They purport to be state law claims pursuant to which
10 the chapter 7 debtor seeks a money judgment, as well as unspecified injunctive relief. Absent
11 consent of the parties, the bankruptcy court does not have authority to enter final judgment on those
12 claims. *See Executive Benefits Ins. Agency v. Arkison*, 573 U.S. 25 (2014); *Stern v. Marshall*, 564
13 U.S. 462 (2011). Schaefer does not consent. After considering the submissions of the parties in
14 favor and in opposition to the Defendants' motions, and conducting several hearings on those
15 motions, the bankruptcy court has prepared the attached Report and Recommendation. The
16 bankruptcy court respectfully submits that there is cause for the District Court to withdraw the
17 reference of this adversary proceeding for purposes of considering the Report and
18 Recommendation. *See* 28 U.S.C. § 157(d). Further, for the reasons set forth below, the bankruptcy
19 court respectfully recommends the District Court enter summary judgment in favor of the
20 Defendants on all claims in this adversary proceeding.

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REPORT AND RECOMMENDATION

I. INTRODUCTION

On November 13, 2019, Defendant Franziska Shepard ("Shepard") filed a *Motion for Summary Judgment* in this adversary proceeding, together with declaration evidence in support thereof. Adv. Dkt. 13. On the same date, Defendant David Baskett ("Baskett") filed his own *Motion for Summary Judgment*, together with declaration evidence in support thereof. Adv. Dkt. 15. Together, these motions are referred to herein as the "Motions." On January 8, 2020, Plaintiff Bernd Schaefers ("Schaefers") filed his opposition to the Motions, together with declaration evidence in support thereof. Adv. Dkt. 26, 27, (the "Opposition"). On January 15, 2020, Shepard filed a reply to Schaefers' opposition, together with evidentiary objections to his declaration evidence and to the opposition.¹ Adv. Dkts. 30-32.

On March 25, 2020, the bankruptcy court conducted a hearing on the Motions. Schaefers appeared on behalf of himself. Attorney William Beall appeared on behalf of Shepard. Attorney Christian Younger appeared on behalf of Baskett. After hearing argument from all parties, the bankruptcy court continued the hearing. At the hearing on June 17, 2020, the bankruptcy court questioned the parties on whether it had the constitutional authority to enter a final order on the Motions or a final judgment on the complaint. The parties agreed that it did not. The bankruptcy court announced at that hearing its intention to submit a report and recommendation on the Motions to the District Court.

Having considered the Motions, the parties' submissions, the summary judgment record, and oral arguments of the parties, the bankruptcy court recommends that summary judgment be entered in favor of Shepard and Baskett (collectively, the "Defendants") based upon the following findings of fact and conclusions of law.

¹ The bankruptcy court finds it unnecessary to rule on the evidentiary objections filed by Shepard as none of the evidence, even assuming its admissibility, creates a genuine issue of material fact.

1 **II. FACTS AND PROCEDURAL HISTORY**

2 In 2015, Schaefers filed a state court action against Shepard and Blizzard Energy, Inc., a
3 Kansas Corporation ("Blizzard"), in the California Superior Court for Santa Barbara County in
4 connection with a business investment project (the "California Action"). The business sought to
5 build a plant in California to process scrap or waste tires – using a process called pyrolysis – to
6 convert those tires into other products, such as gasoline, diesel fuel and heating oil. The California
7 Action was dismissed.

8 Blizzard thereafter filed a fraud complaint against Schaefers in Kansas. On July 31, 2017,
9 following a seven-day jury trial (the "Kansas Trial"), the District Court for Barton County, Kansas
10 (the "Kansas Court") entered a judgment in favor of Blizzard, and its principal Shepard (together
11 with Blizzard, the "Judgment Creditors"), against Schaefers, among other defendants (the "Kansas
12 Judgment").

13 As reflected in the Kansas Judgment, the jury found that Schaefers committed fraudulent
14 acts, either by concealment or misrepresentation, against the Judgment Creditors, causing
15 \$3,825,000 in actual damages as the proximate result of those fraudulent acts. Schaefers
16 unsuccessfully appealed the judgment in the Kansas appellate courts, and the judgment is now
17 final. The Kansas Judgment has since been domesticated in California in an action commenced by
18 the Judgment Creditors in the California Superior Court (the "California Domestication
19 Proceedings").

20 Schaefers' fraudulent acts related to the pyrolysis business enterprise in which the Judgment
21 Creditors had invested. Shepard was introduced to Schaefers by a business associate of Schaefers
22 named Baskett.

23 Schaefers is now the debtor in a chapter 7 bankruptcy case pending in this bankruptcy court,
24 where he is representing himself without an attorney. Schaefers commenced this adversary
25 proceeding against Shepard and Baskett, alleging wrongdoing in connection with the Kansas Trial.
26 *See* Adv. Dkt. 1 (the "Complaint"). Schaefers alleges (i) Shepard perjured herself in the California
27 Action, resulting in its dismissal, (ii) Baskett—whose testimony Schaefers asserts would have
28 vindicated him—failed to appear at the Kansas Trial, in disobedience of a subpoena from the

1 Kansas Court, and (iii) Shepard instructed Baskett not to appear as part of a conspiracy against
2 Schaefer. Schaefer also alleges that Blizzard was formed as a Kansas corporation – despite the
3 fact that all business operations were conducted in California – as part of a fraudulent scheme to
4 sue Schaefer in Kansas, where he would be at a disadvantage in defending himself.

5 Based on these and other allegations, Schaefer contends that Shepard and Baskett are liable
6 on three claims: (1) conspiracy to commit perjury (based on the alleged perjury of Shepard in the
7 California Action), (2) conspiracy to violate due process (based on Baskett's failure to comply with
8 the subpoena in connection with the Kansas Trial and Shepard's alleged instruction to him not to do
9 so), and (3) conspiracy to commit extrinsic fraud (based on the allegation that Shepard wrongfully
10 formed Blizzard as a Kansas corporation in order to sue Schaefer in Kansas and put him at a
11 disadvantage in any future litigation).

12 Schaefer contends in his Complaint that he is entitled to damages on all three counts, as
13 well as "an injunction and Temporary Restraining Order," although he does not specify what he
14 seeks to enjoin or temporarily restrain.

15 On August 28, 2019, Shepard filed her answer to the Complaint. Adv. Dkt. 6. On
16 September 10, 2019, Baskett filed his answer to the Complaint. Adv. Dkt. 7. On October 2, 2019
17 and on October 4, 2019, Schaefer filed joint status reports. Adv. Dkt. 8 and Adv. Dkt. 9. In the
18 joint status reports, Schaefer asserts he does not consent to the bankruptcy court's entry of final
19 judgment and/or orders in this adversary proceeding.

20 III. DISCUSSION

21 A. The Standard for Summary Judgment

22 A party is entitled to summary judgment when "the pleadings, depositions, answers to
23 interrogatories, and admissions on file, together with the affidavits, if any, show that there is no
24 genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of
25 law." *See* Fed. R. Civ. P. 56(c); Fed. R. Bankr. P. 7056. In determining whether a genuine issue of
26 material fact exists, evidence must be viewed in the light most favorable to the opposing party; the
27 evidence of the non-moving party is to be believed, and all justifiable inferences are to be drawn in
28 his or her favor. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986); *Avalos v. Baca*,

1 596 F.3d 583, 587 (9th Cir. 2010). "[T]he substantive law will identify which facts are material."
2 *Anderson v. Liberty Lobby, Inc.*, 477 U.S. at 248. "Only disputes over facts that might affect the
3 outcome of the suit under the governing law will properly preclude the entry of summary
4 judgment." *Id.* A factual dispute is genuine where the evidence is such that a reasonable factfinder
5 could return a verdict for the nonmoving party. *Id.*

6 When the nonmoving party has the burden of proof at trial, the moving party need only
7 point out "that there is an absence of evidence to support the nonmoving party's case." *Celotex v.*
8 *Catrett*, 477 U.S. 317, 325 (1986); *see also Fairbank v. Wunderman Cato Johnson*, 212 F.3d 528,
9 532 (9th Cir. 2000) (stating that the *Celotex* showing can be made by "pointing out through
10 argument-the absence of evidence to support plaintiff's claim"). "The non-moving party must make
11 an affirmative showing on all matters placed in issue by the motion as to which it has the burden of
12 proof at trial." *Celotex*, 477 U.S. at 322. If the nonmoving party fails to establish a triable issue
13 "on an essential element of her case with respect to which she has the burden of proof," the moving
14 party is entitled to judgment as a matter of law. *Celotex*, 477 U.S. at 323.

15 **B. Conspiracy to Commit Perjury.**

16 Schaefer's first claim for relief seeks damages against the Defendants based on an alleged
17 "conspiracy to commit perjury." Schaefer contends that Shepard perjured herself in declarations
18 filed in the California Action alleging that Blizzard had no offices and no business in California,
19 and that the material witnesses in the parties' dispute were all located in Kansas. Complaint, 6:14-
20 17. As a result of Shepard's alleged perjury, Schaefer contends that the California Action was
21 dismissed, clearing the way for a suit against him in Kansas. Schaefer alleges that Baskett
22 somehow conspired with Shepard in connection with her testimony in the California Action, but
23 does not identify any act of Baskett in furtherance of such a conspiracy. *Id.*

24 The claim fails. Under California law, although perjury is a criminal offense, there is no
25 civil cause of action for perjury. *Temple Cmty Hosp v. Superior Court*, 20 Cal.4th 464, 472 (1999);
26 *Taylor v. Bidwell* 65 Cal. 489, 490 (1884); *Pollock v. University of S. Cal.*, 112 Cal. App. 4th 1416,
27 1429 (2003); *see also; Kappel v. Bartlett*, 200 Cal. App. 3d 1457, 1463 (1988). Where there is no
28 civil cause of action for perjury, there can be no civil cause of action for conspiracy to commit

1 perjury. See *Qwest Commc'ns Corp. v. Weisz*, 278 F.Supp.2d 1188, 1191 (S.D. Cal. 2003) (quoting
2 *Applied Equip. Corp. v. Litton Saudi Arabia Ltd.*, 7 Cal.4th 503, 510–511 (1994)) ("Standing alone,
3 'a conspiracy does no harm and engenders no tort liability. It must be activated by the commission
4 of the actual tort.')

5 Like California law, there is "no civil cause of action ... for perjury" under Kansas
6 law. *Droge v. Rempel*, 39 Kan. App. 2d 455, 458 (2008) (quoting, *Hokanson v. Lichtor*, 5 Kan.
7 App. 2d 802 (1981). Rather, the remedy for perjury is criminal punishment or an action to set aside
8 the judgment rather than a civil action for damages. *Id.*; (quoting, *Hokanson*, 5 Kan App. 2d at
9 805).

10 For these reasons, there is no genuine issue of material fact and the Defendants are entitled
11 to summary judgment as a matter of law on this claim.

12 **C. Conspiracy to Violate Due Process.**

13 Schaefer's second claim for relief seeks damages for an alleged violation of his due process
14 rights during the Kansas Trial. Specifically, Schaefer contends that Baskett, a resident of
15 California, violated Schaefer's due process rights by failing to comply with a subpoena issued by
16 the Kansas Court ordering Baskett to appear and testify at the Kansas Trial. Schaefer contends
17 that if Baskett had appeared at the Kansas Trial, the Judgment Creditors would not have obtained
18 their jury verdict and judgment against Schaefer. Further, Schaefer contends that Shepard
19 instructed Baskett not to appear at the Kansas trial, and that, in so doing, she and Baskett were part
20 of a conspiracy to violate his due process rights.

21 This claim also fails. Schaefer fails to provide any legal authority to support his contention
22 that he has a due process right—under the United States Constitution, the Kansas Constitution or
23 any other legal authority—to the attendance of a non-party witness at a civil trial in Kansas, where
24 the witness is an individual residing in California. Further, he does not provide any legal authority
25 or evidence establishing that Baskett's failure to travel from California to comply with the Kansas
26 subpoena was wrongful, that Schaefer did not have alternative procedural options to obtain
27 Baskett's testimony under the circumstances (e.g., by deposition in California), that Schaefer was
28

1 unable to raise these issues and seek redress from the Kansas courts, or that he would be entitled to
2 a civil claim for damages as a result of Baskett's non-attendance at the Kansas Trial.

3 As the plaintiff in this adversary proceeding, Schaefer bears the burden of proof on these
4 matters at trial; he has failed to meet his burden on the Motions to show a legal and factual
5 entitlement to relief.

6 The bankruptcy court's research reveals that this claim is based on a faulty legal premise:
7 that Schaefer could compel Baskett's attendance at the Kansas Trial by serving a Kansas trial
8 subpoena on Baskett in California. The Kansas Code of Civil Procedure authorizes the service of a
9 subpoena only in Kansas. K.S.A. § 60-245(b) (2010) ("Service of a subpoena may be made
10 anywhere within this state. . . .") Where a party to a civil action in Kansas seeks the testimony of a
11 nonparty witness located in California, the party may obtain the deposition testimony of that
12 witness and then offer the deposition testimony at trial. K.S.A. § 60-232(a)(4)(B) (2010) (a party
13 may use the deposition of a witness at trial if the witness "is outside this state, unless it appears that
14 the witness' absence was procured by the party offering the deposition"). A party to a civil action
15 in another state may obtain the deposition of a witness located in California by applying for the
16 issuance of a California subpoena directing the witness to appear for deposition in California. *See*
17 Cal. Civ. Pro. Code § 2029.300 (2010).

18 Based on the evidence offered by Schaefer, it appears that he did not follow the procedures
19 available to him to obtain Baskett's testimony for use at the Kansas Trial. Where it was clear that
20 Baskett was outside the subpoena power of the Kansas Court, Schaefer should have obtained the
21 deposition of Baskett and offered it at the Kansas Trial. Instead, in contravention of the Kansas
22 Code of Civil Procedure, Schaefer simply served a Kansas trial subpoena on Baskett in California.
23 *See* Opposition at 14-16. Under these circumstances, Schaefer's assumption that he was *entitled* to
24 Baskett's attendance at the Kansas Trial is incorrect. It therefore cannot be the case that Baskett's
25 failure to appear violated Schaefer's due process rights or that there was a conspiracy that resulted
26 in the violation of those rights.

27 For these reasons, there is no genuine issue of material fact and the Defendants are entitled
28 to summary judgment as a matter of law on this claim.

1 **D. Conspiracy to Commit Extrinsic Fraud**

2 Schaefer's third claim for relief seeks damages for alleged extrinsic fraud in connection with
3 the Kansas Trial. Extrinsic fraud is that "which prevents a party from having a trial or from
4 presenting all of his case to the court, or where it operates upon matters pertaining, not to the
5 judgment itself, but to the manner in which it is procured, so that there is not a fair submission of
6 the controversy." *Mathey v. Mathey*, 179 Kan. 284, 289 (1956) (*quoting* 31 Am. Jur., Judgments, §
7 654 at 230); *see also Stafford v. Stafford*, 163 Kan. 162, 169 (1947). For instance, in *Stafford*, the
8 Kansas Supreme Court found extrinsic fraud where the defendant engaged in a "plan on his part to
9 prevent the plaintiff by one means or another from presenting her side of the controversy to the
10 court." *Stafford*, 163 Kan. at 169.

11 The third claim for relief does not squarely allege an extrinsic fraud. The Complaint alleges
12 that Baskett introduced Shepard to Schaefer's and that Shepard and Baskett thereafter conspired to
13 exclude Schaefer's and other business associates from the pyrolysis business enterprise they had
14 been developing. The Complaint alleges that they did this by, among other things, forming
15 Blizzard as a Kansas corporation, excluding Schaefer's and his associates from any ownership or
16 management position in Blizzard, and, thereafter, by commencing the civil action in Kansas that
17 resulted in the Kansas Judgment. Complaint at 8-10. These allegations sound more like arguments
18 on the merits of the Kansas Trial, rather than fraudulent conduct undermining the integrity of the
19 trial. Even if they are assumed to be true, and even if Schaefer's had provided evidence to establish
20 their veracity (which he did not), they do not describe fraudulent conduct that prevented Schaefer's
21 from presenting a defense at the Kansas Trial.

22 The only allegations going to the fairness of the trial go to Baskett's failure to appear as a
23 witness. In addition to Schaefer's contention that Baskett was obligated to appear because he was
24 served with a Kansas subpoena in California—an argument dispensed with in Section III.C.
25 above—Schaefer's suggests he was misled by the listing of Baskett as a potential witness in
26 connection with the Kansas Trial. Schaefer's fails to provide any evidence, however, to
27 demonstrate that Shepard's designation of Baskett as a potential witness, and her subsequent
28 decision not to call him at the Kansas Trial, were fraudulent or wrongful. If Schaefer's sought to

1 introduce the testimony of Baskett, he could have listed Baskett as a witness himself and taken the
2 steps (discussed above) to obtain and introduce Baskett's deposition testimony—irrespective of
3 whether Shepard suggested to Baskett that he should not attend the trial in Kansas.

4 Perhaps the biggest problem with this claim for relief is that extrinsic fraud is not a basis for
5 a damage claim.² Kansas law historically has recognized extrinsic fraud as a basis to vacate a
6 court's judgment. *See, e.g., Mathey*, 179 Kan. at 285-87; *Stafford*, 163 Kan. at 165-66. The current
7 Kansas Code of Civil Procedure—like the Federal Rules of Civil Procedure—has abolished the
8 distinction between extrinsic and intrinsic fraud. But the remedy for fraud in the procurement of a
9 judgment remains relief from the judgment itself. *See* K.S.A. § 60-260(b)(3) (relief from a
10 judgment available for "fraud, whether previously called intrinsic or extrinsic"); Fed. R. Civ. P.
11 60(b)(3) (same). Schaefer's has not identified, and the bankruptcy court's independent research has
12 not discovered, any applicable legal authority recognizing a cause of action for damages arising
13 from extrinsic fraud in procuring a judgment.

14 To the contrary, the Kansas Court of Appeals has held that extrinsic fraud in the
15 procurement of a judgment does not result in the kind of damage compensable through a tort claim.
16 *See Stange v. Stange*, 1995 Kan. App. Unpub. LEXIS 379, *10 (Kan. Ct. App. Feb. 17, 1995); *cf.*
17 *Atkins v. Heavy Petroleum Partners, LLC*, 2014 U.S. Dist. LEXIS 129788, *37 (D. Kan. Sep. 17,
18 2014) (holding that although K.S.A. § 60-260(b) authorizes relief from a judgment procured by a
19 fraud on the court, but a Kansas court would reject a claim for damages based on such conduct).
20 Decisions applying non-Kansas law are in accord. *See, e.g., Siddiqi v. JPMorgan Chase Bank,*
21 *N.A.*, No. CV 18-2856-DMG (AFMx), 2019 U.S. Dist. LEXIS 227981, at *5 (C.D. Cal. Feb. 19,
22 2019) ("damages are not available for an extrinsic fraud cause of action. The remedy for such a
23 claim is an order setting aside an adverse judgment procured via extrinsic fraud"); *Chewing v.*
24 *Ford Motor Co.*, 35 F. Supp. 2d 487, 487-92 (D.S.C. 1998) (no damage claim available for fraud in
25 procuring state court judgment; exclusive remedy is equitable relief from the court that issued the

26 _____
27 ² At the initial hearing on the Motions, Schaefer's made clear that he is not seeking relief from the
28 Kansas judgment itself, but instead seeking damages based on conduct of the Defendants in respect
of the Kansas Trial.

1 judgment); *Parker v. Parker*, 950 So. 2d 388, 395 (Fla. 2007) ("a civil suit for compensatory
2 damages based on fraud is not the proper vehicle for attacking a final judgment based on alleged
3 extrinsic fraud").

4 For these reasons, there is no genuine issue of material fact and the Defendants are entitled
5 to summary judgment as a matter of law on this claim.

6
7 **IV. RECOMMENDATION**

8 In accordance with 28 U.S.C. § 157(a), the District Court has issued a standing order
9 generally referring all cases under title 11 and all proceedings arising under, arising in or related to
10 cases under title 11 to the bankruptcy judges for the Central District of California. However, the
11 District Court is authorized by 28 U.S.C. § 157(d) to withdraw the reference, in whole or in part, as
12 to any case or controversy "for cause shown." *See* Fed. R. Bankr. P. 5011(a). The bankruptcy
13 court respectfully submits that based on its determination that the Complaint in this adversary
14 proceeding presents claims that are not constitutionally core, and Schaefer's lack of consent to the
15 bankruptcy court's entry of a final judgment, the bankruptcy court is without authority to enter a
16 final judgment on those claims. *See Executive Benefits Ins. Agency v. Arkison*, 573 U.S. 25 (2014);
17 *Stern v. Marshall*, 564 U.S. 462 (2011). The bankruptcy court respectfully submits this constitutes
18 cause to withdraw the reference of this adversary proceeding from the bankruptcy court pursuant to
19 section 157(d). Further, based on the foregoing analysis and the summary judgment record, the
20 bankruptcy court respectfully recommends that the District Court grant the Motions and enter
21 judgment in favor of the Defendants on all three counts in this adversary proceeding.

22
23 Date: July 21, 2020



24 _____
Martin R Barash
United States Bankruptcy Judge