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Honorable Mike K. Nakagawa
United States Bankruptcy Judge

Entered on Docket
April 03, 2020

UNITED STATES BANKRUPTCY COURT

DISTRICT OF NEVADA

* * * * *

In re: EZEKIEL MICHAEL PEREZ, Debtor.	Case No. 19-12284-MKN Chapter 7
ALICE FABRIZIUS, Plaintiff, v. EZEKIEL MICHAEL PEREZ aka VICTORIA SUSAN PEREZ, Defendant.	Adv. Proc. No. 19-01040-MKN Date: March 27, 2020 Time: 9:30 a.m.

ORDER ON PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT OR, IN THE ALTERNATIVE, SUMMARY ADJUDICATION OF ISSUES[1]

On March 27, 2020, the Motion for Summary Judgment or, in the Alternative, Summary Adjudication of Issues ("MSJ"), brought by plaintiff Alice Fabrizius ("Plaintiff"), was heard by the court. The appearances of counsel were noted on the record. After arguments were

[1] In this Order, all references to "ECF No." are to the number assigned to the documents filed in the relevant bankruptcy case, as they appear on the docket maintained by the clerk of court. All references to "AECF No." are to the documents filed in the above-captioned adversary proceeding. All references to "Section" are to the provisions of the Bankruptcy Code, 11 U.S.C. §§ 101-1532. All references to "FRBP" are to the provisions of the Federal Rules of Bankruptcy Procedure. All references to "FRCP" are to the Federal Rules of Civil Procedure. All references to "FRE" are to the Federal Rules of Evidence.

presented, the matter was taken under submission.

BACKGROUND

On April 15, 2019, Ezekiel Michael Perez ("Debtor") filed a voluntary Chapter 7 petition. (ECF No. 1). On the same date, a Notice of Chapter 7 Bankruptcy Case was issued by the court clerk that specified a deadline of July 15, 2019, for creditors to object to discharge under Section 727(a), or to seek a determination of dischargeability of debt under Section 523(a).[2]

On April 29, 2019, Plaintiff commenced the above-captioned adversary proceeding against the Debtor by filing an adversary complaint ("Complaint") seeking a determination of nondischargeability under Section 523(a)(6). (AECF No. 1). Among other things, the Complaint alleges that Plaintiff previously obtained a default judgment for damages in California on a claim for malicious prosecution. Plaintiff maintains that the judgment for malicious prosecution constitutes a determination of willful and malicious injury within the meaning of Section 523(a)(6).

On July 16, 2019, Debtor received a Chapter 7 discharge of his prepetition debts, except for debts that were the subject of a pending objection under Section 523(a). (ECF No. 35).

On July 18, 2019, Debtor filed an answer to the Complaint ("Answer"). (AECF No. 7).

On September 12, 2019, an initial scheduling conference was conducted. The parties committed to filing motions for summary judgment.

On December 11, 2019, Debtor filed his motion for summary judgment ("Debtor MSJ") and statement of undisputed facts, that was noticed to be heard on February 18, 2020. (AECF Nos. 10, 11, and 12).

On January 31, 2020, Plaintiff filed her opposition, supporting declaration, and statement of disputed facts. (AECF Nos. 15, 16, and 17).

[2] On August 29, 2018, Debtor filed a prior voluntary Chapter 7 petition, Case No. 18-15136-MKN, as Victoria Susan Perez which disclosed that the Debtor also used the name Ezekiel Michael Perez within the last eight years. On November 1, 2018, creditor Alice Fabrizius commenced Adversary Proceeding No. 18-01120-MKN, seeking a determination under Section 523(a)(6) that a previous claim against the Debtor for malicious prosecution is nondischargeable. On November 16, 2018, an order was entered granting Debtor's ex parte motion to voluntarily dismiss the Chapter 7 proceeding.

On February 5, 2020, Plaintiff filed the instant MSJ that was noticed to be heard on March 27, 2020. (AECF Nos. 19 and 21). The MSJ was accompanied by Plaintiff's supporting declaration and statement of undisputed facts. (AECF Nos. 20 and 22).

On February 11, 2020, an order was entered scheduling both summary judgment motions to be heard on March 27, 2020. (AECF No. 27).[3]

On March 6, 2020, Debtor filed a reply in support of his summary judgment motion. (AECF No. 31). On the same date, Debtor filed his opposition to the MSJ. (AECF No. 32).

On March 10, 2020, Plaintiff filed a reply in support of her MSJ. (AECF No. 33).

SUMMARY JUDGMENT STANDARDS

A motion for summary judgment filed in an adversary proceeding is governed by FRCP 56 and made applicable by FRBP 7056. See Silva v. Smith's Pac. Shrimp, Inc. (In re Silva), 190 B.R. 889, 891 (B.A.P. 9th Cir. 1995). A motion for summary judgment should be granted if "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." FED.R.CIV.P. 56(a). The party moving for summary judgment bears the burden of demonstrating the absence of any genuine dispute of material fact. See Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). For summary judgment purposes, a fact is "material" if it might affect the result of the suit under the governing substantive law. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1985). If the moving party satisfies its initial burden, the burden of proof shifts to the non-moving party to designate specific facts demonstrating the existence of genuine issues for trial. See Celotex Corp. v. Catrett, 477 U.S. at 324. This burden requires more than mere denials or allegations in pleadings, more than the "existence of a scintilla of evidence," see Anderson, 477 U.S. at 252, or "more than simply show[ing] that there is some metaphysical doubt as to the material facts." Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986). The non-moving party must present evidence that a jury could reasonably render a verdict in the non-moving party's favor. See Anderson, 477 U.S. at 252. A

[3] Apparently because both parties seek summary judgment, neither side has objected to the exhibits accompanying the summary judgment motions.

preponderance of the evidence standard applies to all Section 523(a) and Section 727 dischargeability proceedings. See Grogan v. Garner, 498 U.S. 279, 286 (1991).

DISCUSSION

There is no dispute that on December 11, 2011, Plaintiff filed a first amended complaint ("FAC") against the Debtor in Case No. BC464924, in the California Superior Court for Los Angeles County ("California Court"). (Exhibit "4" to MSJ). There is no dispute that the FAC alleges a single cause of action under California law for malicious prosecution. There is no dispute that the malicious prosecution cause of action was based on a previous lawsuit brought on Debtor's behalf against the Plaintiff and her husband in October 2009, alleging childhood sexual abuse, sexual assault, forcible rape, intentional infliction of emotional distress, and negligence ("Sex Abuse Lawsuit"). (Exhibit "1" to Debtor MSJ). There is no dispute the Debtor subsequently dismissed his Sex Abuse Lawsuit in July 2010. (Exhibit "6" to Debtor MSJ). There is no dispute that on June 4, 2012, the California Court conducted a "prove up" hearing (Exhibit "7" to MSJ) after which it entered a judgment by default in favor of the Plaintiff and against the Debtor ("California Default Judgment"). (Exhibit "7" to Debtor MSJ).[4] There is no dispute that the FAC sought recovery of general damages in the sum of $5,000,000, attorney's fees in the amount of $45,000, lost earnings according to proof at trial, and punitive damages in an amount to be determined. There is no dispute that the California Default Judgment awarded damages on the malicious prosecution claim in the total amount of $75,606.00.[5] There is no

[4] Counsel agreed at the hearing to permit Debtor's counsel to provide a complete copy of the California Default Judgment. On March 27, 2020, a supplement to the record was filed by the Debtor (AECF No. 35), but the supplement appears to be nothing more than a copy of the docket of the California Court rather than a copy of the actual judgment. The entries on the docket for June 4, 2012, reflect both the judgment and a Minute Order. On March 30, 2020, at the court's direction, a complete copy of the California Default Judgment was filed by Plaintiff's counsel. (AECF No. 36).

[5] The Minute Order memorialized the prove up hearing that was conducted by the California Court on June 4, 2012. According to the Minute Order, the total amount of the judgment awarded in favor of the Plaintiff and against the Debtor was $75,606.00. The court takes judicial notice of both the complete copy of the California Default Judgment as well as the Minute Order of the California Court pursuant to FRE 201. See Burbank-Glendale-Pasadena Airport Auth. v. City of Burbank, 136 F.3d 1360, 1364 (9th Cir. 1998) (taking judicial notice of

dispute that the California Default Judgment is final.[6]

A bankruptcy court is permitted to give preclusive effect to a State court judgment, see Grogan v. Garner, 498 U.S. 279, 280 (1991), but must apply the preclusion rules of the State that entered the judgment. See Bugna v. McArthur (In re Bugna), 33 F.3d 1054, 1057 (9th Cir. 1994). California courts generally apply issue preclusion if several threshold requirements are met. See Lucido v. Super. Ct., 51 Cal.3d 335, 341-42 (Cal. 1990). The five threshold requirements include:

> (1) whether the factual issue sought to be precluded from re-litigation is identical to that decided in a former proceeding;
> (2) whether the issue was actually litigated in the former proceeding;
> (3) whether the issue was necessarily decided in the former proceeding;
> (4) whether the decision in the former proceeding is final and on the merits; and
> (5) whether the party against whom preclusion is sought was the same as, or in privity with, the party to the former proceeding.

Id. Even if all these requirements are met, to apply issue preclusion, a California court must consider whether any overriding concerns about the fairness of the former proceeding are present, and whether application of the doctrine is consistent with sound public policy. Id. at 342-43. See also Khaligh v. Hadegh (In re Khaligh), 338 B.R. 817, 824 (B.A.P. 9th Cir. 2006).

Under California law, a default judgment also may be conclusive as to the matters determined by the court. See O'Brien v. Appling,133 Cal.App.2d 40, 42 (2nd Dist. 1955).[7] A

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court filings in a state court case). See also Bank of Am., N.A. v. CD-04, Inc. (In re Owner Mgmt. Serv., LLC Trustee Corps.), 530 B.R. 711, 717 (Bankr. C.D. Cal. 2015) ("The Court may consider the records in this case, the underlying bankruptcy case and public records.").

[6] Plaintiff's adversary complaint specifically alleges that the California Default Judgment was entered on June 4, 2012, in the amount of $75,606. See Complaint at ¶ 26. Debtor's answer to the Complaint bizarrely includes duplicate responses to multiple paragraphs of the Complaint, but no response whatsoever to Paragraph 26. See generally Answer. The adversary complaint also specifically alleges that the California Default Judgment has been registered in Nevada in the Eighth Judicial District Court, Clark County, and a wage garnishment order was issued on November 27, 2018. See Complaint at ¶ 27. Again, Debtor's answer includes no response whatsoever to Paragraph 27 of the Complaint. See generally Answer.

[7] Compare Howard v. Sandoval (In re Sandoval), 232 P.3d 422 (Nev. 2010) (prior default judgment under Nevada law is not entitled to preclusive effect in dischargeability proceeding brought under Section 523(a)(6) because the factual issues were not actually or necessarily litigated), with Wilson v. Gabell (In re Gabell), 2008 Bankr. LEXIS 5171 (Bankr. D.Nev. April

default judgment is given issue preclusive effect under California law if the issues "must have been necessarily litigated in the action resulting in the default judgment." Harmon v. Kobrin (In re Harmon), 250 F.3d 1240, 1246 n.5 (9th Cir. 2001), citing Williams v. Williams (In re Williams' Estate), 223 P.2d 248 (Cal.1950). A default judgment, however, cannot grant relief beyond that demanded in the complaint. Id. at 252.

Under California law, there are three elements that must be proven in an action for malicious prosecution. The defendant's prior action must have been (1) commenced by or at the direction of the defendant and pursued to a legal termination in plaintiff's favor, (2) brought without probable cause, and (3) initiated with malice. See Sheldon Appel Co. v. Albert & Oliker, 47 Cal.3d 863, 871 (1989); Wolf v. Kupetz (In re Wolf & Vine, Inc.), 118 B.R. 761, 769 (Bankr. C.D. Cal. 1990). The "malice" element of the malicious prosecution tort relates to the subjective intent or purpose with which the defendant acted in initiating the prior action, and past cases establish that the defendant's motivation is a question of fact to be determined by the jury. See Sheldon Appel Co., 47 Cal.3d. at 874.

The Complaint in the instant adversary proceeding seeks a determination that the damages awarded by the California Court are nondischargeable under Section 523(a)(6). Under Section 523(a)(6), a debtor may not receive a discharge under Section 727(b) of any debt "for willful and malicious injury by the debtor to another entity or to the property of another entity." 11 U.S.C. § 523(a)(6). In determining whether an act is willful within the meaning of Section 523(a)(6), ". . . a two-pronged test is used . . . . The test is subjective . . . . The court must determine that: (1) the act that resulted in the creditor's injury was intentional, and (2) the debtor actually intended the injury to occur or, at least, was substantially certain that it would occur." In re Qari, 357 B.R. 793, 798 (Bankr. N.D. Cal. 2006), citing In re Su, 290 F.3d 1140, 1143-44 (9th Cir. 2002) and In re Sicroff, 401 F.3d 1101, 1106 (9th Cir. 2005). Under Section 523(a)(6), a "willful injury" is a deliberate or intentional injury, not merely a deliberate or intentional act that leads to injury. See In re Barboza, 545 F.3d 702, 707 (9th Cir. 2008), citing Kawaauhau v.

11, 2008) (summary judgment granted in nondischargeability proceeding under Section 523(a)(6) based on state court default judgment entered in Tennessee).

1 Geiger, 523 U.S. 57, 61 (1998). A "malicious injury" involves: (1) a wrongful act, (2) done
2 intentionally, (3) which necessarily causes injury, and (4) is done without just cause or excuse.
3 See Barboza, 545 F.3d at 707, citing Carrillo v. Su (In re Su), 290 F.3d 1140, 1146-47 (9th Cir.
4 2002).

5 In the instant case, the FAC only alleged a claim for malicious prosecution under
6 California law and no other legal theories. As a result, the California Court was required to find
7 all of the elements necessary for a malicious prosecution claim to enter judgment in favor of the
8 Plaintiff. In other words, for the California Default Judgment to have been entered, the
9 California Court had to find that the Sex Abuse Lawsuit was (1) commenced by or at the
10 direction of the Debtor and pursued to a legal termination in the Plaintiff's favor, (2) brought by
11 the Debtor without probable cause, and (3) initiated by the Debtor with malice. The California
12 Default Judgment did not grant any relief beyond what was requested by the Plaintiff in the
13 FAC. Debtor has never appealed the California Default Judgment and the bankruptcy court has
14 no authority to review the findings of the California Court[8] or to rule upon their sufficiency.[9]

15 Applying those necessary findings to Plaintiff's claim under Section 523(a)(6), the court
16 concludes that Plaintiff is entitled to judgment as a matter of law. Because the California Court
17 found that the Debtor initiated the Sex Abuse Lawsuit with malice, its findings are sufficient to

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19 [8] See Henrichs v. Valley View Dev., 474 F.3d 609, 614 (9th Cir. 2007) ("The *Rooker-Feldman* doctrine provides that federal district [and bankruptcy] courts lack jurisdiction to
20 exercise appellate review over final state court judgments .… Essentially, the doctrine bars state-court losers complaining of injuries caused by state-court judgments rendered before the district
21 [or bankruptcy] court proceedings commenced from asking district [or bankruptcy] courts to review and reject those judgments.") (quotations and citations omitted); Ryan v. Loui (In re
22 Corey), 892 F.2d 829, 834 (9th Cir. 1989) ("Appellants raise a number of objections to the state
23 court's decision based on the Constitution and state and federal law. Appellants' claims thus represent a collateral attack upon the judgment of a state court. This attack is beyond the
24 jurisdiction of federal courts to consider, even though it purports to raise constitutional issues.").

25 [9] Whether the Debtor can seek appropriate relief from the California Default Judgment
26 after more than seven years is not before this court. Moreover, even in connection with the two summary judgment motions, Debtor has never filed an affidavit or declaration under penalty of
27 perjury disputing the factual determinations that were necessary to entry of the California Default Judgment. Thus, from an evidentiary standpoint, Debtor has failed to meet his burden of
28 demonstrating a genuine issue of material fact.

conclude that Debtor intentionally commenced the previous lawsuit and intended to cause injury to the Plaintiff. For the same reason, the findings also are sufficient to conclude that the Debtor's commencement of the Sex Abuse Lawsuit was wrongful, done intentionally, necessarily caused injury, and was without just cause or excuse.

Under these circumstances, the court concludes that there is no genuine issue of fact that the California Default Judgment is a final determination of the Plaintiff's malicious prosecution claim under California law. Because the California Default Judgment necessarily required the California Court to find the elements of a malicious prosecution claim, the findings of those elements are entitled to preclusive effect under California law.[10] Applying those findings to Plaintiff's claim under Section 523(a)(6), the court concludes that the Debtor's debt to the Plaintiff constitutes willful and malicious injury. Accordingly, the amount awarded by the California Default Judgment, as well as any interest accrued thereon, is excepted from the Debtor's discharge in Chapter 7.[11]

IT IS THEREFORE ORDERED that Plaintiff's Motion for Summary Judgment or, in the Alternative, Summary Adjudication of Issues, Adversary Docket No. 19, be, and the same hereby is, **GRANTED.**

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[10] Public policy supports the application of issue preclusion in this case. The policy underlying a claim for malicious prosecution is to discourage excessive litigation. See Sheldon Appel Co., 47 Cal.3d at 871-874. There is no affidavit or declaration submitted by the Debtor under penalty of perjury, by the Debtor's then-guardian ad litem, or by the Debtor's then-attorney, even attempting to explain the factual basis for filing the Sexual Abuse Complaint. Likewise, there is no affidavit or declaration even attempting to explain the Debtor's failure to respond to the FAC. Additionally, there is no affidavit or declaration even attempting to explain the Debtor's failure to seek relief from the California Default Judgment.

[11] Plaintiff's request for entry of a monetary judgment in a specific amount is denied because there are no "unusual circumstances" and no necessity to enter a monetary judgment in this adversary proceeding. See Sasson v. Sokloff (In re Sasson), 424 F.3d 864, 874 (9th Cir. 2005), cert. denied, 547 U.S. 1206 (2006). See also JH Inc. v. Morabito (In re Morabito), 2019 WL 4450431, at *3 (D.Nev. Sep. 17, 2019). There is no dispute that prior to the commencement of this bankruptcy case, Plaintiff registered the California Default Judgment in the State of Nevada and took steps to execute upon the judgment. See discussion at note 6, supra. There is no reason why collection of the existing monetary judgment cannot proceed once judgment is entered in this adversary proceeding determining that the obligation under the California Default Judgment is excepted from the Chapter 7 discharge that the Debtor received on July 16, 2019.

IT IS FURTHER ORDERED that the debt encompassed by the judgment entered on June 4, 2012, by the Superior Court for the State of California, in and for the County of Los Angeles, in Case No. BC464924, entitled Alice Fabrizius v. Victoria Perez, is determined to be excepted from discharge pursuant to 11 U.S.C. § 523(a)(6).

IT IS FURTHER ORDERED that a separate judgment of such determination shall be entered contemporaneously herewith.

Copies sent via CM/ECF ELECTRONIC FILING

Copies sent via BNC to:
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