UNITED STATES BANKRUPTCY COURT
Eastern District of California

Honorable Ronald H. Sargis
Bankruptcy Judge
Sacramento, California

August 28, 2014 at 1:30 p.m.

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1. 13-27293-E-7 CHRISTOPHER/TANA CROSBY
13-2306 SCR-3
SANDOVAL ET AL V. CROSBY

MOTION FOR JUDGMENT ON THE PLEADINGS AND/OR MOTION FOR SUMMARY JUDGMENT
7-31-14 [27]

Tentative Ruling: The Motion for Judgment on the Pleadings (Fed. R. Civ. P. 12(c)) or, Alternatively, for Summary Judgment (Fed. R. Civ. P. 56) has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). The failure of the respondent and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995).

Oral argument may be presented by the parties at the scheduled hearing, where the parties shall address the issues identified in this tentative ruling and such other issues as are necessary and appropriate to the court's resolution of the matter.

Below is the court's tentative ruling.

Local Rule 9014-1(f)(1) Motion - Hearing Required.

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Plaintiffs' attorney on July 31, 2014. By the court's calculation, 28 days' notice was provided. 28 days' notice is required.

The Motion for Judgment on the Pleadings (Fed. R. Civ. P. 12(c)) or, Alternatively, for Summary Judgment (Fed. R. Civ. P. 56) has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). The failure of the respondent and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995). The defaults of the non-responding parties and other parties in interest are entered.

The Motion for Judgment on the Pleadings for Defendant-Debtor is granted for the First and Second Causes of Action, and the Motion for Summary Judgment for Defendant is granted for the First Cause of Action and Denied for the Second Cause of Action.

INTRODUCTION

Jaime and Marie Sandoval ("Plaintiffs") filed the instant case on September 30, 2013, objecting to the discharge of debts incurred by Christopher Crosby ("Defendant-Debtor") from a construction contract between the Plaintiffs and Defendant-Debtor. Defendant-Debtor filed the instant motion seeking a judgment on the pleadings (Fed. R. Civ. P. 12(c), Fed. R. Bankr. P. 7012) or in the alternative summary judgment (Fed. R. Civ. P. 56, Fed. R. Bankr. P. 7056).

The motion states with particularity (Fed. R. Civ. P. 7(b), Fed. R. Bankr. P. 7007) the following grounds upon which the relief is based:

A. Complaint fails to state claims upon which relief can be granted.

B. Defendant is entitled to judgment as a matter of law.

C. Plaintiffs have failed to adequately plead their claim under 11 U.S.C. § 523(a)(2) as they have not alleged facts which, if true, would establish that Defendant-Debtor,

   1. Knowingly made a false statement of material fact and

   2. Such false statement was made with an intention to defraud the Plaintiff.

D. Plaintiffs have failed to adequately plead a claim under 11 U.S.C. § 523(a)(6) as they have not alleged facts which, if true, would establish that Defendant-Debtor,

   1. Willfully and maliciously injured Plaintiffs.

E. Plaintiffs have alleged claims which sound either in negligence or breach of contract.

F. It is further alleged that summary judgment is proper based on,

   1. The Plaintiffs and Defendant-Debtor participated in arbitration which has resolved all of the underlying non-bankruptcy law claims.

   2. The arbitrator determined that Plaintiffs failed to prove,

      a. That Defendant-Debtor knowingly made false representations,

      b. That Defendant-Debtor acted with "malice."

   3. Collateral Estoppel applies and these matters cannot be relitigated.

No opposition has been filed by Plaintiffs.

OVERVIEW OF LITIGATION

I. Underlying State Contract and Fraud Case

On or about June 26, 2007, Plaintiffs entered into a "Fixed Contract Amount" with Crosby Homes, Inc., a California Corporation, and Debtor for the construction of a single-family residence located at 4981 Breeze Circle, El Dorado Hills, California (the "Property"). Complaint ¶ 4.

On October 7, 2009, BMC West Corp., a subcontractor that had provided labor and/or materials for the Property, filed a Complaint to Foreclose on Mechanic's Lien in El Dorado County superior Court, No. PCL 20091195. The case named Plaintiffs and Defendant-Debtor as defendants. On February 23, 2010, the Plaintiffs filed a cross-complaint against Defendant-Debtor for breach of contract, fraud, and various violations of the California Business and Professions Code. Defendant-Debtor successfully compelled contractual arbitration of the cross-complaint. Complaint ¶ 5.

On October 2, 2009, Masters Wholesale Distributing and Manufacturing, Inc., a subcontractor that had provided labor and/or materials for the Property, filed a Complaint to Foreclose on Mechanic's Lien in el Dorado County Superior Court, No. PCL 20091175. The case named Plaintiffs and Defendant-Debtor as defendants. On March 24, 2010, Plaintiffs filed a cross-complaint against Defendant-Debtor for breach of contract, fraud, and various violations of the California Business and Professions Code. Thereafter, the Plaintiffs and Defendant-Debtor entered into a stipulation to resolve the cross-complaints through binding arbitration. Complaint ¶ 6.

On August 31, 2011, after arbitration, Judge Person, the arbitrator, issued a Final Award in favor of the Plaintiffs and against Defendant-Debtor and Crosby Homes, Inc., jointly and severally. Complaint ¶ 10.

Judge Person awarded Plaintiffs the sum of 1,114,462, plus interest and costs of $1,410, against Defendant-Debtor and Crosby Homes, Inc., jointly and severally for delay damages. Complaint ¶ 11.

Plaintiffs subsequently filed a Petition to Confirm Arbitration Award. On March 15, 2012, the El Dorado County Superior Court issued a judgment against Defendant-Debtor and Crosby Homes, Inc. Complaint ¶ 11. FN.1.

FN.1. Neither party, in the complaint, answer, nor any other pleading, provide the court with the judgment order from the El Dorado County Superior Court. However, because it is undisputed whether an order of judgment was ever entered, the court will consider it as fact.

II. Arbitration Final Award

The Arbitration Final Award, in relevant part, states:

> 1. "[Plaintiffs] contended that [Defendant-Debtor] knew when the contract was entered into and when he represented the construction schedule to [Plaintiffs], that the project would

not be completed on time. However, the evidence admitted by [Plaintiffs] relates to events that took place after those critical times and thus do not necessarily bear on [Defendant-Debtor]'s then present state of mind." Dckt. 28, at 8:25-9:5.

2. "[Plaintiffs] also claimed that [Defendant-Debtor] misrepresented the move in ready status of the project but they did not sufficiently prove what [Defendant-Debtor] did or did not know at the time." Dckt. 28, at 9:6-9:8.

3. "Finally, [Plaintiffs] contended that either or both Respondents diverted funds from the project. [Plaintiffs] did not submit sufficient evidence to sustain their burden of proof on this contention." Dckt. 28, at 9:9-9:12.

4. "[Plaintiffs] did not prove malice in fact necessary to justify an award of punitive damages." Dckt. 28, at 9:12-9:3.

III. Complaint for Declaratory Relief and Objecting to Dischargability of Debt

On September 30, 2013, Plaintiffs filed the instant Adversary Proceeding. Plaintiffs allege in their complaint two causes of action objecting to the discharge of debts incurred by Defendant-Debtor from the Underlying State Contract and Fraud Case. In the Complaint (Dckt. 1.), Plaintiff's allege the following causes of action:

A. Pursuant to 11 U.S.C. §523(a)(2) the debts referred to herein are not dischargeable, as said debts were:

1. incurred by false pretenses, a false representation or actual fraud.

a. The false pretenses and fraud of Defendant include making false representations to Plaintiffs about when construction on the house would be completed;

(1) whether Defendant would complete construction on the house at all;

(2) whether the work Defendant completed on the house would be of the quality originally promised; and

(3) whether Defendant would pay the subcontractors he hired for the construction.

b. Accordingly, Defendant is prevented from obtaining a discharge from the debt owed to creditor due to the false and fraudulent conduct.

B. 2. Pursuant to 11 U.S.C. §523(a)(6) the debts referred to herein are not dischargeable, as said debts were:

1. incurred through wilful and malicious conduct and caused willful and malicious injury to Plaintiffs.

2. Accordingly, Defendant is prevented from obtaining a discharge from the debt owed to creditor due to the false and fraudulent conduct.

Defendant-Debtor filed an answer on November 1, 2013, asserting thirteen separate affirmative defenses. Dckt. 8.

DISCUSSION

I. Motion for Judgment on the Pleadings Under Federal Rule of Civil Procedure 12(c)

A. Fed. R. Civ. P. 12(c) Standard

On a motion for judgment on the pleadings under Federal Rule of Civil Procedure 12(c), the allegations of the non-moving party must be accepted as true, while the allegations of the moving party which have been denied are assumed to be false. *Hal Roach Studios, Inc. v. Richard Feiner and Co., Inc.*, 896 F.2d 1542, 1548 (9th Cir. 1989). Judgment on the pleadings is proper when the moving party clearly establishes on the face of the pleadings that no material issue of fact remains to be resolved and that it is entitled to judgment as a matter of law. *Id.* Dismissal is proper only if it appears beyond a doubt that the plaintiff can prove no set of facts in support of its claim which would entitle him to relief. *New.Net, Inc. V. Lavasoft*, 356 F.Supp.2d 1090, 1115 (C.D. Cal. 2004). While the court must construe the complaint and resolve all doubts in the light most favorable to the plaintiff, the court does not need to accept as true conclusory allegations or legal characterizations. *Id.* (citing *General Conference corp. of Seventh-Day Adventists v. Seventh-Day Adventist Congretional Church*, 887 F.2d 228,230 (9th Cir. 1989); *McGlinchy v. Shell Chemical Co.*, 856 F.2d 802, 810 (9th Cir. 1988)).

A motion under Rule 12(c) is treated the same as a motion under Rule 12(b)(6) – the court asks: “If the plaintiff proved everything she has alleged here, would she win?”

A motion for judgment on the pleadings based on Federal Rule of Civil Procedure 12(c) is a functional equivalent of a motion to dismiss under Federal Rule of Civil Procedure 12(b), requiring the same underlying analysis. *Dworkin v. Hustler Magazine, Inc.*, 867 F.2d 1188, 1192 (9th Cir. 1989). Thus, for a complaint to withstand a Rule 12(c) motion for judgement on the pleadings, it must contain more detail than "bare assertions" that are "nothing more than a formulaic recitation of the elements" required for the claim. *Ashcroft v. Iqbal*, 556 U.S. 662, 681 (2009). Courts must draw upon their "experience and common sense" when evaluating the specific context of the complaint and whether it contains the necessary detail to state a plausible claim for relief. *Id.* at 679. The factual content on the face of the complaint — not conclusory statements in the pleading — and reasonable inferences drawn from those facts must plausibly suggest that the plaintiff could be entitled to relief for the pleading to survive a Rule 12(c) motion. *See id.* at 677.

In Adversary Proceedings Federal Rule of Civil Procedure 7(b) and Federal Rule of Bankruptcy Procedure 7007 govern law and motion practice. Rule 7(b) states:

> (b) Motions and Other Papers.
>
> (1) In General. A request for a court order must be made by motion. The motion must:
>
> (A) be in writing unless made during a hearing or trial;
>
> (B) state with particularity the grounds for seeking the order; and
>
> (C) state the relief sought.
>
> (2) Form. The rules governing captions and other matters of form in pleadings apply to motions and other papers.

Fed. R. Civ. P. 7(b), Fed. R. Bankr. P. 7007.

Federal Rule of Civil Procedure 8(a) requires that pleadings which include a claim for relief must contain "(1) a short and plain statement of the grounds for the court's jurisdiction... (2) a short and plain statement of the claim showing that the pleader is entitled to relief; and (3) a demand for the relief sought." Fed. R. Civ. P. 8(a). This rule expressly applies to adversary proceedings in bankruptcy court, as well as some additional requirements which are not relevant for the instant motion. Fed. R. Bankr. P. 7008(a).

The "notice pleading requirements" of Rule 8(a) apply to any cause of action in a complaint. *Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1104 (9th Cir. 2003). When certain claims – like fraud – are made, the required elements in Rule 8(a) must be plead with more specificity. *Id.* at 1105; Fed. R. Civ. P. 9. To properly plead a claim in which fraud is an essential element, the complaint "must state with particularity the circumstances constituting fraud or mistake." Fed. R. Civ. P. 9(b). "Particularity" can be satisfied by stating in the complaint "the who, what , when, where, and how" of the wrongful conduct. *Cooper v. Pickett*, 137 F.3d 616, 627 (9th Cir. 1997). The policy behind the heightened specificity is to allow defendants a better opportunity to defend themselves against specific fraud allegations, which can be harmful to a defendant's reputation if the charges are unsubstantiated. *Bly-Magee v. Cal.*, 236 F.3d 1014, 1018–1019 (9th Cir. 2001).

B. 11 U.S.C. § 523 Standard

11 U.S.C. § 523(a)(2) – Fraud

In order to prevail on § 523(a)(2)(A) exception to discharge claim, the moving party needs to prove by a preponderance of the evidence:

> (1) that the debtor made material misrepresentations;
>
> (2) that the debtor knew the misrepresentations were false at the time they were made;

(3) that the debtor made the misrepresentations with the intention and purpose of deceiving the creditor;

(4) that the creditor justifiably relied on such misrepresentations and

(5) that the creditor sustained a loss or injury as a proximate result of the misrepresentation having been made."

In re Vidov, No. CC-13-1421-KiBlPa, 2014 Bankr. LEXIS 3268, at *8 (B.A.P. 9th Cir. July 31, 2014). Fraud for purposes of § 523(a)(2)(A) includes actual fraud as well as false pretenses and representations. 4 COLLIER ON BANKRUPTCY ¶ 523.08 (Alan N. Resnick & Henry J. Sommer eds. 16th ed.)

11 U.S.C. § 523(a)(6) - Willful and Malicious Injury

Under § 523(a)(6), a debt will be excepted from discharge when it results from "willful and malicious injury by the debtor to another entity or to the property of another entity." 11 U.S.C. § 523(a)(6). "A simple breach of contract is not the type of injury addressed by § 523(a)(6)" but instead it must be "[a]n intentional breach. . . accompanied by malicious and willful *tortuous* conduct." *In re Riso*, 978 F.2d 1151, 1154 (9th Cir. 1992) (emphasis original). In order for § 523(a)(6) to apply, "a breach of contract must be accompanied by some form of tortuous conduct that gives rise to willful and malicious injury." *In re Jercich*, 238 F.3d 1202, 1206 (9th Cir. 2001)(internal quotations omitted).

For the underlying claim to be considered tortuous conduct for § 523(a)(6), California state tort law provides that "[c]onduct amounting to a breach of contract becomes tortuous only when it also violates an independent duty arising from principles." *Id.* (citing *Applied Equip. Corp. v. Litton Saudi Arabia Ltd.*, 7 Cal. 4th 503, 514 (1994)). Tort recovery for the bad faith breach of a contract is permitted only when, "in addition to the breach of the covenant [of good faith and fair dealing] a defendant's conduct violates a fundamental public policy of the state." *Id.* (citing *Rattan v. United Servs. Auto. Assoc.*, 84 Cal. App. 4th 715 (2001)).

The Supreme Court has clarified that "it is insufficient under §523(a)(6) to show that the debtor acted willfully and that the injury was negligently or recklessly inflicted; instead, it must be shown not only that the debtor acted willfully, but also that the debtor inflicted the injury willfully and maliciously rather than recklessly or negligently." *Id.* (citing *Kawaauhau v. Geiger*, 238 F.3d 1202, 1207 (1998)). To prove malicious injury, the party seeking to except a debt from being discharged must show that the debtor: (1) committed a wrongful act; (2) done intentionally; (3) which necessarily causes injury; and (4) was done without just cause or excuse. *Carrillo v. Su* (*In re Su*), 290 F.3d 1140, 1144-45 (9th Cir. 2002); Littleton v. Transamerica Commercial Finance, 942 F.2d 551, 554 (1991).

C. **Motion for Judgment on the Pleadings Under Federal Rule of Civil Procedure 12(c) is Proper for Each of the Two Claims Asserted in the Complaint**

Defendant-Debtor has clearly established on the face of the pleadings that no material issue of fact remains to be resolved and Defendant-Debtor is entitled to judgment as a matter of law. For Plaintiffs, even if they proved every allegation in the Complaint it would not establish a basis for the court determining the debt nondischargeable.

The cause of action under 523(a)(2) requires that the moving party to show an intentional and purposeful misrepresentation, among other elements. Here, Plaintiffs have only provided generalized facts to prove the elements of both causes of actions, without allegations on the issue of reliance and the damages flowing from such reliance. Plaintiffs provide a narrative of the past six years of interaction with Defendant-Debtor arising from the construction contract at the heart of the underlying state cause of action. It is alleged that the generally stated allegations assert that Defendant-Debtor:

A. Made a false representation about when construction would be completed;

B. Whether Defendant-Debtor would complete construction at all;

C. Whether the work by Defendant-Debtor on the house would be of the quality promised; and

D. Whether the Defendant-Debtor would payoff the subcontractors.

Complaint, Dckt. 1.

Nowhere do the Plaintiffs allege that (1) Defendant-Debtor knew that the misrepresentations were false at the time made by him, (2) Defendant-Debtor made such statements with the intention and purpose of deceiving the Plaintiffs, (3) that the alleged misrepresentations were made by Defendant-Debtor to induce reliance by Plaintiffs, (4) Plaintiff justifiably relied on any misrepresentations, (5) that Plaintiffs incurred damages which flowed from the alleged misrepresentations.

Plaintiffs fair no better in their Second Cause of Action. Plaintiffs simply state:

> Pursuant to 11 U.S.C. §523(a)(6) the debts referred to herein are not dischargeable, as said debts were incurred through wilful and malicious conduct and caused willful and malicious injury to Plaintiffs. Accordingly, Defendant is prevented from obtaining a discharge from the debt owed to creditor due to the false and fraudulent conduct.

Dckt. 1, pg. 11.

Nowhere do the Plaintiffs allege Defendant-Debtor was willful nor malicious. Plaintiffs do not allege that an Defendant-Debtor engaged in “a wrongful act done intentionally” which “necessary produces the harm” that is “without just cause or excuse.” *Littleton v. Transamerica*, 942 F.2d. 554.

Plaintiffs provide bare-bones causes of actions that simply restate the legal elements of the two causes of actions without providing any allegations

on how the factual circumstances of the underlying state court contract claim support or even relate to relief sought in the instant Adversary Proceeding.

> "While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, ibid.; *Sanjuan v. American Bd. of Psychiatry and Neurology, Inc.*, 40 F.3d 247, 251 (CA7 1994), a plaintiff's obligation to provide the "grounds" of his "entitle[ment] to relief" requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do,..."

Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555 (2007). See Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009),

> "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to "state a claim to relief that is plausible on its face." *Id.* [*Twombly*], at 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929. A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. *Id.*, at 556, 127 S. Ct. 1955, 167 L. Ed. 2d 929. The plausibility standard is not akin to a "probability requirement," but it asks for more than a sheer possibility that a defendant has acted unlawfully. Ibid. Where a complaint pleads facts that are "merely consistent with" a defendant's liability, it "stops short of the line between possibility and plausibility of 'entitlement to relief.'" *Id.*, at 557, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (brackets omitted)."

As the Complaint currently stands, even taking the Plaintiffs' allegations as true, does not provide sufficient information to find that either under 11 U.S.C. § 523(a)(2) or 11 U.S.C. § 523(a)(6) the judgment from the state court case is excepted from discharge. At best, the Complaint pleads that the Plaintiffs and Defendant-Debtor entered into a contract to build a home. The contract required that the home be built in a certain way and to be completed within a certain time period. It was not and Plaintiffs assert that they suffered damages because the contract was not performed fully and timely by Defendant-Debtor. Such a breach of contract claim does not nondischargeable fraud, or willful and malicious injury claim make. The court will not infer and construct for Plaintiffs essential allegations which are not stated in the Complaint.

Therefore, the court grants Defendant-Debtor's Motion for Judgment on the Pleadings (Fed. R. Civ. P. 12(c)).

II. Motion for Summary Judgment is Proper Based on Collateral Estoppel of the Arbitration and State Court Judgment For the First Cause of Action

A. Summary Judgment Standard

In an adversary proceeding, summary judgment is proper when "the movant shows that 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), Fed. R.

Bank. P. 7056. The key inquiry in a motion for summary judgment is whether a genuine issue of material fact remains for trial. Fed. R. Civ. P. 56(c), *incorporated by* Fed. R. Bankr. P. 7056; *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248-50 (1986); 11 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE § 56.11[1][b] (3d ed. 2000) ("Moore").

"[A dispute] is 'genuine' only if there is a sufficient evidentiary basis on which a reasonable fact finder could find for the nonmoving party, and a dispute [over a fact] is 'material' only if it could affect the outcome of the suit under the governing law." *Barboza v. New Form, Inc. (In re Barboza*), 545 F.3d 702, 707 (9th Cir. 2008) (*citing Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)).

The party moving for summary judgment bears the burden of showing the absence of a genuine dispute of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). To support the assertion that a fact cannot be genuinely disputed, the moving party must "cit[e] to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations . . . , admissions, interrogatory answers, or other materials." Fed. R. Civ. P. 56(c)(1)(A), *incorporated by* Fed. R. Bankr. P. 7056.

In response to a properly submitted motion for summary judgment, the burden shifts to the nonmoving party to set forth specific facts showing that there is a genuine dispute for trial. *Barboza*, 545 F.3d at 707 (*citing Henderson v. City of Simi Valley*, 305 F.3d 1052, 1055–56 (9th Cir. 2002)). The nonmoving party cannot rely on allegations or denials in the pleadings but must produce specific evidence, through affidavits or admissible discovery materials, to show that a dispute exists. *Id.* (*citing Bhan v. NME Hosps., Inc.*, 929 F.2d 1404, 1409 (9th Cir. 1991)). The nonmoving party "must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Electric Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986).

In ruling on a summary judgment motion, the court must view all of the evidence in the light most favorable to the nonmoving party. *Barboza*, 545 F.3d at 707 (*citing Cnty. of Tuolumne v. Sonora Cmty. Hosp.*, 236 F.3d 1148, 1154 (9th Cir. 2001)). The court "generally cannot grant summary judgment based on its assessment of the credibility of the evidence presented." *Agosto v. INS*, 436 U.S. 748, 756 (1978). "[A]t the summary judgment stage[,] the judge's function is not himself to weigh the evidence and determine the truth of the matter[,] but to determine whether there is a genuine issue for trial." *Anderson*, 477 U.S. at 249.

B. Application of Collateral Estoppel to the Factual Issues Underlying Plaintiffs Two Claims in the Complaint

The doctrine of collateral estoppel, commonly known as issue preclusion, prohibits the re-litigation of issues that had previously been adjudicated in a prior action. *Child v. Foxboro Ranch Estates, LLC (In re Child)*, 486 B.R. 168, 172 (B.A.P. 9th Cir. 2013). Collateral estoppel does apply to exceptions to discharge proceedings under 11 U.S.C. § *523. Gorgan v. Garner*, 498 U.S. 279, 284 n.11 (1991).

The Full Faith and Credit Act, 28 U.S.C. § 1738, requires that the court apply the collateral estoppel rules of the state that issued the judgment

in question - here, California. Under California law, collateral estoppel will bar relitigation of an issue if:

> (1) the issue sought to be precluded is identical to that decided in the prior proceeding;
>
> (2) the issue was actually litigated in the prior proceeding;
>
> (3) the issue was necessarily decided in the prior proceeding;
>
> (4) the judgment in the prior proceeding is final and on the merits;
>
> (5) the party against whom preclusion is sought is the same, or in privity with, the party to the prior proceeding; and
>
> (6) applying collateral estoppel furthers the underlying public policies of preservation of the integrity of the judicial system, promotion of judicial economy, and the protection of litigants from harassment by vexatious litigation.

Harmon v. Kobrin (In re Harmon), 250 F.3d 1240, 1245 (9th Cir. 2001); *Lucido v. Super. Ct.*, 51 Cal.3d 335, 342-43 (Cal. 1990).

The party seeking to assert collateral estoppel bears the burden of proving all the elements of collateral estoppel and must introduce a sufficient record to reveal the controlling facts and the exact issues litigated. *Kelly v. Okoye (In re Kelly)*, 182 B.R. 255, 258 (B.A.P. 9th Cir. 1995), aff'd, 100 F.3d 110 (9th Cir. 1996).

California Code of Civil Procedure § 1287 provides that an arbitration award, once confirmed by a court and a judgment is entered adopting the award, "has the same force and effect" as any other judgment in a civil action in the same jurisdiction. *Robi v. Five Platters, Inc.*, 838 F.2d 318, 322 (9th Cir. 1988). Under the same statute, the preclusive effect of an arbitration award is limited as between the parties to the arbitration. *Vandenberg v. Super. Ct.*, 21 Cal. 4th 815, 836–37 (Cal. 1999).

C. State Court Arbitration Award and Judgment

Though the parties have not provided the court with a copy of the State Court Judgment on the Arbitration Award, it is undisputed that it has been reduced to a judgment. Complaint ¶ 11, Alleging El Dorado County Superior Court Judgment in the amount of $1,114,462.00, plus interest and costs of $1,410.00, confirming the Arbitration Award. Answer ¶ 11, admitting allegations Complaint ¶ 11, Dckt. 8. A copy of the Arbitration Award has been filed as Exhibit A in support of the Motion, Dckt. 28.

The Arbitration Final Award and judgment thereon has preclusive effect with respect to essential factual determinations underlying the nondischargeability claims in the Complaint. For this Adversary Proceeding, the Arbitration Final Award satisfies each element based on collateral estoppel under California law.

First, the court considers the determinations made in the Arbitration Final Award. These are:

A. "[Plaintiffs] contended that [Defendant-Debtor] knew when the contract was entered into and when he represented the construction schedule to [Plaintiffs], that the project would not be completed on time. However, the evidence admitted by [Plaintiffs] relates to events that took place after those critical times and thus do not necessarily bear on [Defendant-Debtor]'s then present state of mind." Dckt. 28, at 8:25-9:5.

B. "[Plaintiffs] also claimed that [Defendant-Debtor] misrepresented the move in ready status of the project but they did not sufficiently prove what [Defendant-Debtor] did or did not know at the time." Dckt. 28, at 9:6-9:8.

C. "Finally, [Plaintiffs] contended that either or both Respondents diverted funds from the project. [Plaintiffs] did not submit sufficient evidence to sustain their burden of proof on this contention." Dckt. 28, at 9:9-9:12.

D. "[Plaintiffs] did not prove malice in fact necessary to justify an award of punitive damages." Dckt. 28, at 9:12-9:3.

For the first cause of action under 11 U.S.C. § 523(a)(2), collateral estoppel bars Plaintiffs because the issues litigated in the underlying state court case are identical to the ones in the instant Adversary Proceeding.

The burden of proof for a fraud and misrepresentation claim in California is by a preponderance of the evidence. *Barret v. Bank of America*, 183 Cal. App.3d 1362, 1364 (1986). To succeed on an 11 U.S.C. § 523 cause of action, the moving party has to prove the necessary elements by a preponderance of the evidence. *Grogan v. Garner*, 498 U.S. 279, 286 (1991).

In the Arbitration Final Award, the arbitrator found that Plaintiffs "also claimed [Defendant-Debtor] misrepresented the move in ready status of the project but they did not sufficiently prove what Defendant-Debtor] did or did not know at the time." Dckt. 28, at 9:6-9:8. The Arbitrator finding that Plaintiffs did not prove by a preponderance of the evidence that Defendant-Debtor knew or made misrepresentations at the time, that issue cannot be relitigaged in this federal court. This knowledge of the falsity of the statement is a necessary element of a nondischargeability cause of action under 11 U.S.C. § 523(a)(2) are the same

For the second cause of action under 11 U.S.C. § 523(a)(6) the findings stated in the Arbitration Final Award are not identical to the issues arising under the elements of § 523(a)(6). In California, before a plaintiff may recover under a claim for punitive damages, the plaintiff must first establish by clear and convincing evidence that the defendant acted with malice, oppression, or fraud. *Lunsford v. American Guarantee & Liability Ins. Co.*, 18 F.3d 653, 656 (9th Cir. 1994) (citation omitted). To succeed on an 11 U.S.C. § 523 cause of action, the moving party has to prove the necessary elements by a preponderance of the evidence. *Grogan v. Garner*, 498 U.S. 279, 286 (1991).

While the arbitrator found that Plaintiffs "did not prove malice in fact necessary to justify an award of punitive damages," it was under the

heightened clear and convincing evidence standard. Dckt. 28, Exhibit 1, pg. 9. Because it is possible that Plaintiffs have sufficiently shown malice on the lesser preponderance of the evidence standard for 11 U.S.C. § 523(a)(6), the "malice" issue for both the instant motion and the underlying state cause action are not identical and, thus, will not satisfy the identical issue requirement for collateral estoppel doctrine to apply.

Second, as discussed above, the issues was actually litigated in the underlying state court case and in the subsequent arbitration for the First Cause of Action on the issue of the Defendant-Debtor's knowledge of the falsity of the alleged statements.

Third, the issue of knowledge of falsity of the alleged misstatements were necessarily determined in the Arbitration Final Award as part of the asserted misrepresentation claim.

Fourth, pursuant to California Code of Civil Procedure § 1287, the Arbitration Final Award is final and on the merits because the state court adopted the final award in a judgment. Complaint ¶ 11, Dckt. 1.

Fifth, the parties are the same as they were in the underlying state court action.

Sixth, applying collateral estoppel here furthers preservation of the integrity of the judicial system, promotion of judicial economy, and the protection of litigants from harassment by vexatious litigation. Plaintiffs had the opportunity in the underlying case to present evidence and argument concerning the intent and actions of the Defendant-Debtor. As such, the arbitrator properly made findings and conclusions based on those issues presented by the Plaintiffs. Those findings, therefore, should have preclusive effect on the instant motion in order to preserve judicial economy and prevent re-litigation of issues already properly concluded.

Finding that the Arbitration Final Award has collateral estoppel effect in the instant Adversary Proceeding, the court now turns to the analysis of Defendant-Debtor's motion for summary judgment under Rule 56. Here, Plaintiffs' Complaint seeking to make the debt nondischargable is based upon issues that the Arbitration Final Award conclusively disposed of in a final judgment on the merits. The Arbitration Final Award found that Plaintiffs did not prove Defendant-Debtor held the Plaintiff failed to prove that Defendant-Debtor had knowledge that the alleged statements were false when made to Plaintiffs.

Following a showing by the moving party that no genuine issue of material fact remains as to the knowledge of the falsity of the statement, Defendant is entitled to Summary Judgment on the First Cause of Action.

The court grants the Motion for Judgment on the Pleadings for Defendant and against the Plaintiffs on the first cause of action (11 U.S.C. § 523(a)(2)(A) fraud) and second cause of action (11 U.S.C. § 523(a)(6) willful and malicious injury). The court grants the Motion for Summary Judgment on the First Cause of Action for Defendant and against Plaintiffs. The court denies the Motion for Summary Judgment for the second cause of action (11 U.S.C. § 523(a)(6) willful and malicious injury).

Request for Attorneys' Fees

The pray in the Answer includes the following requests as part of a judgment for Defendant-Debtor, "For costs and reasonable attorney's fees;...." Answer, pg. 8:27. No contractual or statutory basis is pleaded in the Answer for such an attorneys' fee prayer. Before determining an amount of attorneys' fee demanded in the prayer, the court first considers if a claim for such has been sufficiently pleaded by Defendant. The requirements for pleading a claim for attorneys' fees are set out in Federal Rule of Bankruptcy Procedure 7008(b), which provides (emphasis added) that,

> A request for an award of attorney's fees shall be pleaded as a claim in **a complaint**, cross-claim, third party complaint, **answer, or reply** as may be appropriate.

The express language of this Rule imposes the "pleaded as a claim" requirement all requests to attorneys' fees – whether by a plaintiff or defendant. Federal Rule of Bankruptcy Procedure 7008(a) also makes Federal Rule of Civil Procedure 8 applicable in Adversary Proceedings.

Federal Rule of Civil Procedure 8 specifies the requirements for pleadings in federal court. "A pleading that states a claim for relief must contain:...(2) a short plain statement of the claim showing that the pleader is entitled to relief; and (3) a demand for the relief sought, which may include relief in the alternative or different types of relief." Fed. R. Civ. P. 8(a)(2), (3). The definition of the term "pleading" is set forth in Federal Rule of Civil Procedure 7(a) includes an answer to a complaint. Fed. R. Civ. P. 7, Fed. R. Bankr. P. 7007.

This court applies a plain language reading of the requirements of Federal Rule of Bankruptcy Procedure 7008 (a) and (b), and Federal Rule of Civil Procedure 8(b). FN.1. [1] This is consistent with the holding of the Bankruptcy Appellate Panel in *In re Carey*, 446 B.R. 384 (B.A.P. 9th Cir. 2011). (Holding that stating the statutory or contractual basis for the attorneys' fees in the general allegations of the complaint was sufficient, not requiring that a separate cause of action for attorneys' fee.)

FN.2. The Supreme Court has been very clear in reading and applying the "plain language" stated by Congress in statutes. *Hartford Underwriters Insurance Company v. Union Planters Bank, N.A.*, 530 U.S. 1 (2000); *United States v. Ron Pair Enterprises, Inc., 489 U.S. 235, 241, 103 L. Ed. 2d 290, 109 S. Ct. 1026 (1989)*. The basic direction is that Congress says in a statute what it means and means in a statute what it says. *Connecticut Nat. Bank v. Germain, 503 U.S. 249, 254, 117 L. Ed. 2d 391, 112 S. Ct. 1146 (1992);* (quoting *Caminetti v. United States, 242 U.S. 470, 485, 61 L. Ed. 442, 37 S. Ct. 192 (1917)*; *United Savings Association of Texas v. Timbers of Inwood Forest Associates,*

[1]

LTD., 484 U.S. 365, 371 (1988). This court will not presuppose that the Supreme Court or Congress, in adopting the Federal Rules of Bankruptcy Procedure, did so expecting that the inferior court would not first look to the plain language meaning of the Rule.

Defendant-Debtor has not asserted any contractual or statutory basis for attorneys' fees for this Adversary Proceeding to determine the nondischargeablity of the state court judgment pursuant to 11 U.S.C. § 523(a)(2)(A) and (a)(6). No attorneys' fees are awarded as part of this motion for judgment on the pleadings and motion for summary judgment.

The court shall issue a minute order substantially in the following form holding that:

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion for Judgment on the Pleadings (Fed. R. Civ. P. 12(c)) or, Alternatively, for Summary Judgment (Fed. R. Civ. P. 56) filed by Christopher Beck Crosby ("Defendant-Debtor") for all claims asserted in the Complaint filed by Jaime Sandoval and Mary Sandoval ("Plaintiffs") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion For Judgment on the Pleadings is granted, with Judgment for the Defendant and against Plaintiffs, and each of them, on the First Cause of Action (11 U.S.C. § 523(a)(2)(A) fraud) and Second Cause of Action (11 U.S.C. § 523(a)(6) willful and malicious injury) in the Complaint.
>
> **IT IS FURTHER ORDERED** that the Motion for Summary Judgment is granted for Defendant-Debtor and against Plaintiffs, and each of them, on the First (11 U.S.C. § 523(a)(2)(A) fraud); and denied as to the Second Cause of Action (11 U.S.C. § 523(a)(6) willful and malicious injury).
>
> The Motion having fully resolved all claims asserted in the Complaint in favor of the Defendant-Debtor, Counsel for the Defendant-Debtor shall, on or before September 11, 2014, prepare and lodge with the court a proposed judgment consistent with this Order.
>
> On or before September 11, 2014, Defendant-Debtor shall file and serve a costs bill, if any. The judgment shall provide that any costs allowed shall be enforced as part of the judgment.

2. 13-27293-E-7 CHRISTOPHER/TANA CROSBY
13-2306
SANDOVAL ET AL V. CROSBY

APPLICATION FOR SUBSTITUTION OF ATTORNEY
8-21-14 [34]

Notice Provided: The Order Setting Hearing on Substitution of Attorney was served by the Clerk of the Court through the Bankruptcy Noticing Center on Debtors, Debtors' Attorney, parties requesting special notice, and Office of the United States Trustee on August 26, 2014. 2 days notice of the hearing was provided.

The court's decision is to xxxx the Application for Substitution of Attorney.

COMPLAINT SUMMARY

Jaime and Marie Sandoval ("Plaintiffs") filed the instant case on September 30, 2013, objecting to the discharge of debts incurred by Christopher Crosby ("Defendant-Debtor") from a construction contract between the Plaintiffs and Defendant-Debtor. Plaintiffs allege in their complaint two causes of action objecting to the discharge of debts incurred by Defendant-Debtor from the Underlying State Contract and Fraud Case. In the complaint, Plaintiff's allege the following causes of action:

1. Pursuant to 11 U.S.C. §523(a)(2) the debts referred to herein are not dischargeable, as said debts were incurred by false pretenses, a false representation or actual fraud. The false pretenses and fraud of Defendant include making false representations to Plaintiffs about when construction on the house would be completed; whether Defendant would complete construction on the house at all; whether the work Defendant completed on the house would be of the quality originally promised; and whether Defendant would pay the subcontractors he hired for the construction. Accordingly, Defendant is prevented from obtaining a discharge from the debt owed to creditor due to the false and fraudulent conduct.

2. Pursuant to 11 U.S.C. §523(a)(6) the debts referred to herein are not dischargeable, as said debts were incurred through wilful and malicious conduct and caused willful and malicious injury to Plaintiffs. Accordingly, Defendant is prevented from obtaining a discharge from the debt owed to creditor due to the false and fraudulent conduct.

Defendant-Debtor filed an answer on November 1, 2013, asserting thirteen separate affirmative defenses. Dckt. 8.

APPLICATION FOR SUBSTITUTION OF ATTORNEY

On July 31, 2014, Defendant-Debtor filed a Motion for Judgment on the Pleadings or, Alternatively, for Summary Judgment and Memorandum of Points and Authorities in Support. Dckt. 27 & 29.

On August 21, 2014, (seven days before the scheduled hearing on the Defendant-Debtor's Motion) an Application to substitute Plaintiff Jaime Sandoval, in *pro se*, in place of Robert C. Bowman, Jr., The Law Office of Bowman & Associates, was filed with the court.

District Court Rule 182(d) governs the withdrawal of counsel. Local Bankr. R. 1001-1(C). The District Court Rule prohibits the withdrawal of counsel leaving a party *in propria persona* unless by motion noticed upon the client and all other parties who have appeared in the case. E.D. Cal. L.R. 182(d). The attorney must provide an affidavit stating the current or last known address or addresses of the client and efforts made to notify the client of the motion to withdraw. *Id.* Leave to withdraw may be granted subject to such appropriate conditions as the Court deems fit. *Id.*

Withdrawal is only proper if the client's interest will not be unduly prejudiced or delayed. The court may consider the following factors to determine if withdrawal is appropriate: (1) the reasons why the withdrawal is sought; (2) the prejudice withdrawal may cause to other litigants; (3) the harm withdrawal might case to the administration of justice; and (4) the degree to which withdrawal will delay the resolution of the case. *Williams v. Troehler*, 2010 U.S. Dist. LEXIS 69757 (E.D. Cal. 2010). FN.1.

FN.1. While the decision in *Williams v. Troehler* is a District Court case and concerns Eastern District Court Local Rule 182(d), the language in 182(d) is identical to Local Bankruptcy Rule 2017-1.

It is unethical for an attorney to abandon a client or withdraw at a critical point and thereby prejudice the client's case. *Ramirez v. Sturdevant*, 21 Cal. App. 4th 904 (Cal. App. 1st Dist. 1994). An attorney is prohibited from withdrawing until appropriate steps have been taken to avoid reasonably foreseeable prejudice to the rights of the client. *Id.* at 915.

The District Court Rules incorporate the relevant provisions of the Rules of Professional Conduct of the State Bar of California ("Rules of Professional Conduct"). E.D. Cal. L.R. 180(e).

The termination of the attorney-client relationship under the Rules of Professional Conduct is governed by Rule 3-700. Counsel may not seek to withdrawal from employment until Counsel takes steps reasonably foreseeable to avoid prejudice to the rights of the client. Cal. R. Prof'l. Conduct 3-700(A)(2). The Rules of Professional Conduct establish two categories for withdrawal of Counsel: either Mandatory Withdrawal or Permissive Withdrawal.

Mandatory Withdrawal is limited to situations where Counsel (1) knows or should know that the client's behavior is taken without probably cause and for the purpose of harassing or maliciously injuring any person, (2) knows or should know that continued employment will result in violation of the Rules of Professional Conduct or the California State Bar Act, and (3) has a mental or

physical condition which makes Counsel's continued employment unreasonably difficult. Cal. R. Prof'l. Conduct 3-700(B).

Permissive Withdrawal is limited to when to situations where:

(1) Client:

(a) insists upon presenting a claim or defense that is not warranted under existing law and cannot be supported by good faith argument for an extension, modification, or reversal of existing law, or

(b) seeks to pursue an illegal course of conduct, or

(c) insists that the member pursue a course of conduct that is illegal or that is prohibited under these rules or the State Bar Act, or

(d) by other conduct renders it unreasonably difficult for the member to carry out the employment effectively, or

(e) insists, in a matter not pending before a tribunal, that the member engage in conduct that is contrary to the judgment and advice of the member but not prohibited under these rules or the State Bar Act, or

(f) breaches an agreement or obligation to the member as to expenses or fees.

(2) The continued employment is likely to result in a violation of these rules or of the State Bar Act; or

(3) The inability to work with co-counsel indicates that the best interests of the client likely will be served by withdrawal; or

(4) The member's mental or physical condition renders it difficult for the member to carry out the employment effectively; or

(5) The client knowingly and freely assents to termination of the employment; or

(6) The member believes in good faith, in a proceeding pending before a tribunal, that the tribunal will find the existence of other good cause for withdrawal.

Cal. R. Prof'l. Conduct 3-700(C).

AUGUST 28, 2014 HEARING

At the hearing, ----------