

1 **WRITTEN DECISION - NOT FOR PUBLICATION**

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5 CLERK, U.S. BANKRUPTCY COURT
6 SOUTHERN DISTRICT OF CALIFORNIA
7 BY _____ DEPUTY

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SOUTHERN DISTRICT OF CALIFORNIA
BY _____ DEPUTY

8 UNITED STATES BANKRUPTCY COURT
9 SOUTHERN DISTRICT OF CALIFORNIA

10 In re:) ADVERSARY CASE NO. 05-90027-H7
11 DAVID KIM AND CALMA KIM,) CASE NO. 04-09892-H7
12)
13 Debtors.) MEMORANDUM DECISION
14)
15 CARL MICHEL AND SYDNE MICHEL,)
16 Plaintiffs,)
17 v.)
18 DAVID KIM AND CALMA KIM,)
19 Defendants.)

20 Carl Michel and Sydne Michel (the "Plaintiffs") filed their
21 amended complaint on March 15, 2005, alleging claims for relief
22 under 11 U.S.C. § 523(a)(2)(A) and (a)(6). Before the Court is
23 Plaintiffs' Motion for Summary Judgment which is based on the
24 doctrine of collateral estoppel. David and Calma Kim (the
25 "Defendants") objected. The matter came on for hearing on July 28,
26 2005. After considering the pleadings and hearing oral argument,
27 the Court issued its decision which is set forth herein.

28 At issue is whether the doctrine of collateral estoppel

1 applies when issues of fact and law in the underlying arbitration
2 proceeding are not incorporated into a confirmed judgment.

3 This Court has jurisdiction to determine this matter pursuant
4 to 28 U.S.C. §§ 1334 and 157(b) (1) and General Order No. 312-D of
5 the United States District Court for the Southern District of
6 California. This is a core proceeding pursuant to 28 U.S.C.
7 § 157(b) (2) (I).

8 I.

9 FACTS

10 On or about July 27, 2000, Plaintiffs purchased a single
11 family residence from the Defendants for \$895,000. As part of the
12 transaction, Defendants were required to provide the Plaintiffs
13 with a Real Estate Transfer Disclosure Form ("RTDS") setting forth
14 Defendants' awareness of matter concerning the property. In the
15 RTDS, Defendants represented that they were unaware that any
16 improvements had been constructed on the property without permits,
17 that they were not aware of any soil problems, including settling or
18 slipping, that they were not aware of any easements on the
19 property, that the property was not subject to a homeowner's
20 association ("HOA") and that they were aware of no defects except
21 that a portion of the floor in one of the bedrooms was uneven.

22 Shortly after obtaining occupancy, the Plaintiffs began
23 experiencing numerous cracks in the ceiling, walls of the home, and
24 separation of the frames around some doors and windows. The
25 Plaintiffs subsequently learned that the property was on adobe soil
26 which had a tendency to expand and contract based upon the amount
27 of moisture or lack thereof that may be present in the soil from
28 time to time.

1 The Plaintiffs later learned that the Defendants had
2 experienced cracks that they had patched without disclosure.
3 Plaintiffs also learned that the Defendants had replaced a balcony
4 without permits, that the property was subject to a HOA and that an
5 easement existed along the rear of the property that was used as a
6 horse trail.

7 Plaintiffs demanded arbitration pursuant to the sale contract.
8 Plaintiffs demand for arbitration was based on four separate causes
9 of action - breach of contract, violation of § 1102 of the
10 California Civil Code, fraudulent concealment of defects and
11 negligent non-disclosure of defects. The arbitration was
12 bifurcated so that the arbitrator could first determine liability
13 on the part of the Defendants for any of the problems the
14 Plaintiffs experienced with the property, and then, if so, to
15 determine the damages that should be awarded to the Plaintiffs.

16 During the first stage of the arbitration, the arbitrator
17 found the Defendants liable to Plaintiffs under either California
18 Civil Code § 1102¹ or common law for 1) any damages which may be
19 compensable; 2) as a result of the Defendants' intentional failure
20 to disclose a past history of cracks; and 3) damages that flowed
21 from Defendants' failure to disclose that the proper was subject to
22 a HOA. The arbitrator found no liability for Defendants' failure
23 to disclose a lack of a permit to reconstruct a deck, nor for
24 failing to disclose the easement.

25 During the damage phase, the arbitrator awarded \$501,285.95 to
26 the Plaintiffs as follows: Compensatory Damages - \$150,000;

27
28 ¹ Civil Code § 1102 applies to the written disclosure requirements in
connection with the sale of real property.

1 Consequential Damages - \$89,746.14; Cost of Arbitration -
2 \$58,783.68; Attorneys Fees - \$234,057.50; Punitive Damages -
3 \$10,000; Interest \$39,698.63 from 9/1/00 to 6/13/04 plus \$28.78 per
4 day under an award is reduced to judgment; AAA administrative fees
5 payable to Plaintiffs - \$7,600.

6 On or about October 15, 2004, the arbitration award was
7 confirmed and reduced to judgment in the total amount of
8 \$525,856.90 by the California Superior Court, County of Los
9 Angeles. The state judgment is final.

10 II.

11 DISCUSSION

12 A. COLLATERAL ESTOPPEL

13 Plaintiffs seek summary judgment based upon the doctrine of
14 collateral estoppel. Principles of collateral estoppel apply to
15 proceedings in bankruptcy court seeking exceptions to discharge
16 under § 523(a). In re Harmon, 250 F.3d 1240, 1245 (9th Cir. 2001)
17 citing Grogan v. Garner, 498 U.S. 279, 285 n.11 (1991). When
18 examining state court judgments from California, the Court looks to
19 California law regarding the application of the doctrine of
20 collateral estoppel. The party asserting collateral estoppel must
21 meet five requirements under California law:

- 22 1) the issue sought to be precluded from relitigation must
23 be identical to that decided in a former proceeding;
- 24 2) the issue must have been actually litigated in the former
25 proceeding;
- 26 3) it must have been necessarily decided in the former
27 proceeding;
- 28 4) the decision in the former proceeding must be final and
on the merits; and
- 5) the party against whom preclusion is sought must be the
same as, or in privity with, the party to the former
proceeding.

28 Harmon, 250 F.3d at 1245. Under California law, a confirmed

1 arbitration award has the same force and effect as a state court
2 judgment. In re Molina, 228 B.R. 248, 250 (B.A.P. 9th Cir. 1998)
3 (citations omitted); See also Calderira v. County of Kauai, 866
4 F.2d 1175 (9th Cir. 1989).

5 A party seeking the application of collateral estoppel has the
6 burden of proof, and must introduce a record sufficient to
7 establish that the controlling facts and exact issues were
8 litigated in the prior action. In re Tobin, 258 B.R. at 202
9 (citation omitted). Plaintiffs submitted various documents in
10 support of their request for summary judgment: 1) Interim
11 Memorandum Decision of the Arbitrator; 2) Award of Arbitrator; 3)
12 Memorandum Decision in Support of Award of Damages; 4) Petition to
13 Confirm Arbitration Award; and 5) Judgment on Arbitration Award.

14 B. DEFENDANTS' PRIMARY OBJECTION

15 The Defendants' primary objection to Plaintiffs' motion is
16 that collateral estoppel cannot be applied to a judgment that does
17 not contain findings that Defendants' engaged in fraud or willful
18 and malicious conduct. The Defendants contend, without citing to
19 any authority, that the issues and facts are not part of the
20 judgment and, therefore, it cannot be relied upon for collateral
21 estoppel purposes. Thus, according to Defendants, they are
22 entitled to a trial.

23 To properly apply collateral estoppel, however, a bankruptcy
24 court must look at the entire record of a prior proceeding and not
25 just the judgment. See In re Silva, 190 B.R. 889, 892 (B.A.P. 9th
26 Cir. 1995) (federal judgment); In re Ross, 602 F.2d 604, 608 (3d
27 Cir. 1979) (state court judgment); In re Tapper, 123 B.R. 594, 600
28 (Bankr. N.D. Ill. 1991) (bankruptcy court must usually look to the

1 entire record of the proceeding, not just the judgment); accord
2 Pitzen v. Superior Court, 120 Cal.App.4th 1374, 1384 (2004) ("[A]
3 primary factor in determining whether to give collateral estoppel
4 effect to a prior final judgment is whether the record in the
5 former proceeding adequately reflects the issues actually litigated
6 and decided in that proceeding."); see also Molina, 228 B.R. at 250
7 (noting that no finding of fact or conclusion of law is necessary
8 to determine that the issue of defendant's fraud was raised and
9 decided by the arbitrator and the state court). Therefore, it is
10 proper for the Court to consider the record before it in deciding
11 whether the doctrine of collateral estoppel applies.

12 C. APPLICATION OF THE ELEMENTS UNDER SECTION 523(a)(2)(A)

13 A debt is nondischargeable under this section if the debt is
14 for money, property, services, or an extension, renewal or
15 refinancing of credit, to the extent obtained, by (A) false
16 pretenses, a false representation, or actual fraud, other than a
17 statement respecting the debtor's or an insider's financial
18 condition. See § 523(a)(2)(A). There are five elements to prove:
19 1) misrepresentation, fraudulent omission or deceptive conduct by
20 the debtor; 2) knowledge of the falsity or deceptiveness of his
21 statement or conduct; 3) an intent to deceive; 4) justifiable
22 reliance by the creditor on the debtor's statement or conduct; and
23 5) damage to the creditor proximately caused by its reliance on the
24 debtor's statement or conduct. Harmon, 250 F.3d at 1245 (citation
25 omitted). The elements of common law fraud are essentially
26 identical to those required to establish nondischargeability under
27 § 523(a)(2)(A). In re Nourbakhsh, 67 F.3d 798, 800 (9th Cir.
28 1995).

1 The arbitrator made extensive findings that meet the elements
2 for common law fraud in his Interim Memorandum Decision. The
3 findings establish that the Defendants failed to disclose existing
4 defects and failed to disclose that the property was subject to a
5 HOA. The findings also establish that the concealment was done
6 with the intent and knowledge of Mr. Kim. The findings further
7 explain in great detail that Plaintiffs' reliance on Kim that there
8 were no defects was justifiable. Finally, the arbitrator's
9 findings establish that the damage to the Plaintiffs' was
10 proximately caused by their reliance on Mr. Kim's statements.

11 Based upon this Court's review of the Interim Memorandum
12 Decision and other documents presented by the Plaintiffs, the
13 Court finds that the issues with respect to each element of
14 § 523(a)(2)(A) are identical to those decided in the arbitration.
15 Those issues were actually litigated and necessarily decided. The
16 Court further finds that the remaining elements for collateral
17 estoppel have been met. Once the Court has determined that
18 collateral estoppel applies, the entire award is a nondischargeable
19 debt. See In re Roussos, 251 B.R. 86, 94 (B.A.P. 9th Cir. 2000)
20 (citations omitted) (finding that "a nondischargeable 'debt' may
21 include prejudgment interest, attorneys' fees and costs, and
22 punitive damages, not all of which are actual out-of-pocket losses
23 of the creditor due to the fraud, but all of which arise from the
24 debtor's liability for the fraudulent conduct.").

25 **D. APPLICATION OF THE ELEMENTS UNDER SECTION 523(a)(6)**

26 A debt is nondischargeable under § 523(a)(6) if it is incurred
27 by a willful and malicious injury by the debtor to another person
28 or to the property of another person. The willful injury

1 requirement is separate from the malicious injury requirement. In
2 re Su, 259 B.R. 909, 912 (B.A.P. 9th Cir. 2001) aff'd 290 F.3d 1140
3 (9th Cir. 2002). Under the willful prong, the Court must examine
4 the debtor's state of mind from a subjective point of view: i.e.,
5 that the debtor had a subjective intent to harm or a subjective
6 belief that harm was substantially certain. Id. On the other
7 hand, the malicious requirement has the following elements: (1) a
8 wrongful act, (2) done intentionally, (3) which necessarily causes
9 injury, and (4) is done without just cause or excuse. In re
10 Cecchini, 780 F.2d 1440, 1442 (9th Cir. 1986).

11 Although the record does not contain any explicit findings
12 using the words willful and malicious, the Defendants "committed a
13 'willful and malicious injury' under § 523(a)(6) if they
14 intentionally injured the [Plaintiffs]." In re Diamond, 285 F.3d
15 822, 828 (9th Cir. 2002) citing Kawaauhau v. Geiger, 523 U.S. 57,
16 51, 119 S.Ct. 974 (1998). Section 523(a)(6) applies to
17 "intentional torts" which "generally require that the actor intend
18 the consequences of an act, not simply the act itself." Id. at 828
19 (citation omitted). "When an 'intentional breach of contract is
20 accompanied by tortious conduct which results in willful and
21 malicious injury, the resulting debt is excepted from discharge
22 under § 523(a)(6)." Id. (citations omitted).

23 The Court finds that the state court judgment included the
24 elements of § 523(a)(6), those issues were actually litigated, and
25 necessarily decided. The Arbitrator found that there was a
26 "sufficient pattern to conclude that the concealment of the prior
27 cracks was done with the intent and knowledge of Mr. Kim."
28 Further, punitive damages were awarded because the "Kims

1 intentionally failed to disclose the cracking problems to the
2 buyers." Thus, these explicit findings are sufficient to find that
3 Kims engaged in intentional tortious conduct. The Court also finds
4 that the remaining elements for collateral estoppel have been met -
5 - the judgment is final and the parties are the same. Once the
6 Court has determined that collateral estoppel applies, the entire
7 award is a nondischargeable debt. Roussos, 251 B.R. at 93-94.

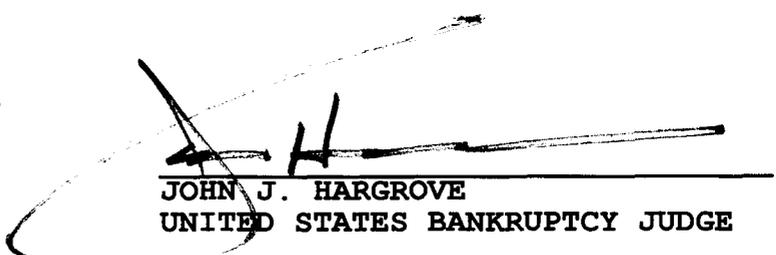
8 IV.

9 CONCLUSION

10 For the reasons stated herein, the Court grants Plaintiffs'
11 motion for summary judgment.

12 This Memorandum Decision constitutes findings of fact and
13 conclusions of law pursuant to Federal Rule of Bankruptcy Procedure
14 7052. Attorney for the Plaintiffs are directed to file with this
15 Court an order in conformance with this Memorandum Decision within
16 ten (10) days from the date of entry thereof.

17
18 Dated: August 1, 2005.

19 
20 _____
21 JOHN J. HARGROVE
22 UNITED STATES BANKRUPTCY JUDGE
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26

27 S:\KIM summary judgment.wpd
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