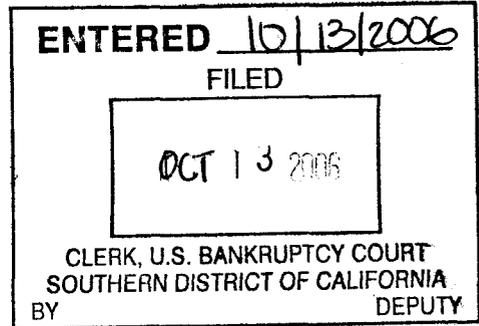


NOT FOR PUBLICATION



7 UNITED STATES BANKRUPTCY COURT
8 SOUTHERN DISTRICT OF CALIFORNIA
9

10 In re
11 BARKUT RUMJAHN and MARIA
12 RUMJAHN,
Debtor.

Bankruptcy No. 04-09362

Adversary No. 05-90044

13
14 MARIA DAVILA, et al.,
15 Plaintiffs,

MEMORANDUM DECISION

16 v.
17 BARKUT RUMJAHN and MARIA
18 RUMJAHN,
19 Defendants.

20
21 Michael Barraza ("Barraza") was injured during a construction
22 project. Daniel Davila ("Davila") died in the same accident.
23 Davila's parents, Maria Davila and Ricardo Davila ("Davila's
24 parents"), his children, Carla Esquer, Fernando Esquer and Frank
25 Esquer ("Davila children") and Barraza (collectively the "Plaintiffs")
26 brought suit in state court against multiple defendants. A jury
27 awarded compensatory and punitive damages in favor of the Plaintiffs
28 and against various defendants, including the debtor, Barkut Rumjahn

1 ("Rumjahn").

2 Rumjahn and his wife then filed for relief under Chapter 7 of the
3 Bankruptcy Code on October 29, 2004. The Plaintiffs filed this
4 nondischargeability action against Rumjahn and his wife. On April 6,
5 2006, the Court held a hearing on the Plaintiffs' motion for summary
6 judgment ("Motion"). Pursuant to an order of the Court entered on
7 July 27, 2006, the Plaintiffs supplemented the record by filing a copy
8 of the instructions provided to the state court jury.

9 In their Motion, the Plaintiffs contend that the debt owed by
10 Rumjahn is nondischargeable under Section 523(a)(2) or (a)(6). They
11 further argue that the principle of issue preclusion should apply to
12 the state court judgment such that summary judgment can be granted
13 based on the findings of the state court jury. Issue preclusion bars
14 re-litigation of an issue decided previously in a judicial or
15 administrative proceeding, provided there was a full and fair
16 opportunity to litigate the issues. Allen v. McCurry, 449 U.S. 90,
17 96 (1980). There are several difficulties with the Plaintiffs'
18 argument.

19 In determining the preclusive effect of a state court judgment,
20 federal courts must, as a matter of full faith and credit, apply the
21 forum state's law of issue preclusion. In re Nourbakhsh, 67 F.3d 798,
22 800 (9th Cir. 1995). Under California law, the application of issue
23 preclusion requires that the following elements be met:

24 (1) The issue sought to be precluded from re-litigation
25 must be identical to that decided in a former proceeding;

26 (2) The issue must have been actually litigated in the former
proceeding;

27 (3) It must have been necessarily decided in the former
28 proceeding;

1 (4) The decision in the former proceeding must be final and on
2 the merits; and

3 (5) The party against whom preclusion is sought must be the same
4 as, or in privity with, the party to the former proceeding.

5 In re Younie, 211 B.R. 367, 373 (9th Cir. BAP 1997), aff'd, 163 F.3d
6 609 (9th Cir. 1998).

7 The party seeking to apply issue preclusion has the burden of
8 proving that each element is satisfied. In re Kelly, 182 B.R., 255,
9 258 (9th Cir. BAP 1995). To sustain this burden, a party must
10 introduce a record sufficient to reveal the controlling facts and the
11 exact issues litigated in the prior action. Any reasonable doubt as
12 to what was decided in the prior action will weigh against applying
13 issue preclusion. 182 B.R. at 258.

14 Section 523(a)(2) applies to debts "for money, property,
15 services, extension, renewal, or refinancing of credit." Under this
16 Section, a plaintiff must establish that specific money or property
17 has been obtained by fraud before any debt arising out of the fraud
18 is declared nondischargeable. Cohen v. De La Cruz, 523 U.S. 213
19 (1998). In this case, the jury found the various state court
20 defendants, including Rumjahn, liable for compensatory damages based
21 on a finding of negligence. The Plaintiffs are not owed a debt "for
22 money, property, services, extension, renewal, or refinancing of
23 credit" arising out of the fraud found by the state court jury.
24 Therefore, Section 523(a)(2) is not applicable to this adversary
25 proceeding.

26 This leaves the claim under Section 523(a)(6). Under section
27 523(a)(6), the Plaintiffs must show that the debt owed was the result
28 of a willful and malicious injury. The "willful injury requirement
is met only when the debtor has a subjective motive to inflict injury

1 or when the debtor believes that injury is substantially certain to
2 result from his own conduct." In re Su, 290 F.3d 1140, 1142 (9th Cir.
3 2002). Debts arising from recklessly or negligently inflicted
4 injuries do not fall within the compass of Section 523(a)(6).
5 Kawaahau v. Geiger, 523 U.S. 57, 64 (1998). The state court jury's
6 finding of negligence does not satisfy this requirement, and
7 therefore, it cannot be given preclusive effect.

8 The next question is whether the jury's findings of oppression,
9 malice and fraud in awarding punitive damages can be given preclusive
10 effect. In In re Derebery, 324 B.R. 349 (C.Cal. 2005), the court
11 explored whether a jury finding of malice and oppression under
12 California Civil Code § 3294 could satisfy the requirements of
13 Bankruptcy Code Section 523(a)(6). The court concluded that the state
14 statute allowed the jury to apply an objective person standard in
15 determining whether a defendant committed his acts with malice or
16 oppression. The court stated that, on the other hand, Section
17 523(a)(6) required a showing of subjective intent. 324 B.R. at 355
18 (relying on In re Su, supra). The court ruled that issue preclusion
19 could not be applied because it was not clear whether the jury made
20 a determination that the debtor acted with a subjective intent to
21 cause harm to the plaintiffs.

22 The result in Derebery is consistent with the holding in In re
23 Su. In that case, a state court jury found that the debtor acted
24 negligently and with malice. In a subsequent nondischargeability
25 action, ruling on stipulated facts, the bankruptcy court applied an
26 objective standard in examining the issue of willfulness and declared
27 the debt nondischargeable. The Ninth Circuit Court of Appeals
28 reversed and held that courts must apply a subjective standard. The

1 Court stated that applying an objective standard would disregard the
2 debtor's state of mind. 290 F.3d at 1145.

3 The same issue arises in this case. The jury instruction in the
4 state court proceedings allowed for a finding of malice or oppression
5 based on "despicable conduct," and that term incorporates an objective
6 person standard. As a result, this Court cannot determine if the
7 state court jury based its finding of malice and oppression on
8 elements that would satisfy Section 523(a)(6).

9 The jury also found that Rumjahn participated in fraudulent
10 activity. The question is whether that finding of fraud could satisfy
11 the elements of a claim under Section 523(a)(6). In its argument
12 regarding Section 523(a)(2), the Plaintiffs contended that the
13 "Rumjahns willfully and maliciously perpetrated fraud on Plaintiffs
14 by fraudulently failing to provide safety devices/equipment per
15 California Labor Code section 3706." This statement is not consistent
16 with the opinion of the state appellate court. That court indicated
17 that the fraud was perpetrated after the accident at which time
18 various parties took actions to make it appear that another entity
19 owned the building under construction. They did this because they did
20 not have workers' compensation insurance.

21 Furthermore, the Plaintiffs' statement is confusing, whether it
22 is viewed with Section 523(a)(2) or (a)(6) in mind. California Labor
23 Code § 3706 simply provides that if an employer fails to obtain
24 workers' compensation insurance, then an injured employee can sue the
25 employer directly for damages without being limited to seeking
26 compensation under the workers' compensation statute. Section 3706
27 has nothing to do with safety equipment. Additionally, the failure
28 to obtain workers' compensation generally is not a basis for declaring

1 a resulting debt nondischargeable.

2 The failure to provide proper safety equipment can certainly be
3 viewed as despicable conduct for purposes of assessing punitive
4 damages. However, as far as the Court can determine, the actual fraud
5 involved in this case took place after the accident, and involved
6 attempts to make it appear as if there was workers' compensation
7 insurance available.

8 It is also unclear if the jury found that Rumjahn participated
9 directly in the fraud, or whether the fraud was imputed to him. The
10 Bankruptcy Appellate Panel has held that "vicarious liability" can be
11 the basis for a claim under Section 523(a)(2). In re Tsurukawa, 287
12 B.R. 515 (9th Cir. BAP 2002). On the other hand, in a case decided
13 under Section 523(a)(6), the Bankruptcy Appellate Panel questioned
14 whether nondischargeability of a debt should be imputed to a debtor
15 where there was no evidence that the debtor knowingly participated in
16 a fraudulent scheme. In re Tobin, 258 B.R. 199 (9th Cir. BAP 2001).
17 Although not discussed by the Panel in either decision, Section
18 523(a)(6), unlike Section 523(a)(2) makes specific reference to a
19 "willful and malicious injury by the debtor." This difference
20 arguably justifies a different application of imputed liability to
21 Sections 523(a)(2) and (a)(6). See, e.g., In re Austin, 36 B.R. 306
22 (M.Tenn. 1984) ("application of vicarious liability would effectively
23 vitiate the § 523(a)(6) requirement that only debts resulting from
24 *willful* acts committed by the debtor be nondischargeable").

25 Even assuming imputed or vicarious liability is still applicable
26 under Section 523(a)(6), a further difficulty in this case is that the
27 Court cannot determine how the Plaintiffs were harmed by the
28 fraudulent actions that were taken after the accident. The jury

1 awarded punitive damages, but it is impossible to determine how those
2 damages would apportioned. In other words, were the punitive damages
3 primarily awarded for the despicable conduct of not providing proper
4 safety equipment, or were punitive damages awarded for fraudulent
5 actions after the accident? Based on the record as it presently
6 stands, the Court cannot apply issue preclusion to the state court
7 judgment as to the claims of nondischargeability.

8 The Court also notes that the state appellate court determined
9 that the Davila Children were not entitled to punitive damages as part
10 of their wrongful death claim. The appellate court also stated that
11 the Davila children would need to establish their standing to sue.
12 Assuming they establish their standing, they still would not be able
13 to use the state court judgment for preclusive effects because as to
14 them, the finding of fraud, malice and oppression were not necessary
15 to their claims.

16 The Court recognizes that an argument was raised at the hearing
17 that the state court judgment was against Barkut Rumjahn personally
18 and his community property, and therefore, Mrs. Rumjahn should also
19 be liable for the debt in question. The Court does not reach that
20 question at this time.

21 The Court is mindful of the extent of harm that resulted from
22 this tragic accident. However, regardless of the extent of the
23 damages, the Court's task has been to determine if the findings of the
24 jury satisfy the elements of a claim for nondischargeability such that
25 summary judgment could be granted. On this record, the Court cannot
26 grant summary judgment in favor of the Plaintiffs.

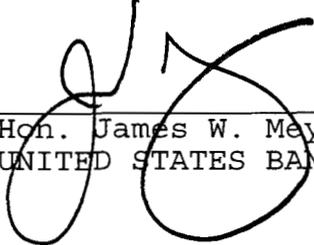
27 Furthermore, given how courts have interpreted Section 523(a)(6),
28 there is a question as to whether the Plaintiffs would be able to meet

1 their burden of proof at trial. As a result, the Court will require
2 the Plaintiffs to file points and authorities of no more than 20 pages
3 addressing the issue of whether granting summary judgment in favor of
4 the Rumjahns is appropriate. See Ramsey v. Coughlin, 94 F.3d 71, 74
5 (9th Cir. 1996) (court has authority to grant summary judgment in favor
6 of the nonmoving party, but the losing party must be given an
7 opportunity to demonstrate that there are genuine material issues for
8 trial.) In responding to this question, the Plaintiffs will need to
9 thoroughly examine the elements of a claim under Section 523(a)(6).
10 See Geiger, supra, 523 U.S. 57; In re Su, 290 F.3d 1140 (9th Cir.
11 2002); In re Jercich, 238 F.3d 1202 (9th Cir. 2001).

12 More specifically, the Plaintiffs will need to show that the
13 injury herein was willful and malicious. In order to meet the
14 willfulness requirement, the Plaintiffs must show that Rumjahn had a
15 subjective motive to inflict injury or that he believed injury was
16 substantially certain to result from his conduct. Maliciousness is
17 separate from the requirement of willfulness. A malicious injury
18 involves: 1) a wrongful act; 2) done intentionally; 3) which
19 necessarily causes injury; and 4) is done without just cause of
20 excuse. Su, 290 F.3d at 1146-47. Finally, if the Plaintiffs intend
21 to rely on imputing a third-party's action to Rumjahn, then they will
22 need to address whether that is allowed for purposes of Section
23 523(a)(6).

24 The Motion will be DENIED.

25
26
27 Date: OCT 13 2006

28 

Hon. James W. Meyers
UNITED STATES BANKRUPTCY JUDGE