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U.S. Bankruptcy Appellate Panel
of the Tenth Circuit
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Blaine F. Bates
Clerk

NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL

OF THE TENTH CIRCUIT

IN RE JOHN CHARLES NEUSCHAFER, doing business as Gridiron Consulting Inc., and AUDREY LANE NEUSCHAFER, also known as Audrey Lane Harwell, Debtors.	BAP No. KS-13-030 BAP No. KS-13-035
ANDREW CHERRY and PAMELA CHERRY, Plaintiffs – Appellants – Cross-Appellees, v. JOHN CHARLES NEUSCHAFER, Defendant – Appellee – Cross-Appellant.	Bankr. No. 11-10282 Adv. No. 11-05103 Chapter 7 OPINION*

Appeal from the United States Bankruptcy Court
for the District of Kansas

Before ROMERO, JACOBVITZ, and HALL,[1] Bankruptcy Judges.

ROMERO, Bankruptcy Judge.

These appeals arise from a split verdict of a nondischargeability complaint

* This unpublished opinion may be cited for its persuasive value, but is not precedential, except under the doctrines of law of the case, claim preclusion, and issue preclusion. 10th Cir. BAP L.R. 8018-6.

[1] Honorable Sarah A. Hall, United States Bankruptcy Judge, United States Bankruptcy Court for the Western District of Oklahoma, sitting by designation.

filed pursuant to 11 U.S.C. § 523(a)(2)(A) and (a)(6).[2] Andrew and Pamela Cherry (the "Cherrys") sought a determination that the debtor's obligations to them from a Georgia state court judgment for fraud-in-the-inducement and violation of Georgia's Racketeer Influenced and Corrupt Organization ("RICO") Act were nondischargeable in their entirety under the doctrine of issue preclusion. The Cherrys appeal the Bankruptcy Court's judgment to not except from discharge the portion of the Georgia Judgment for RICO damages, attorney's fees and costs, while the Debtor cross-appeals the portion of the judgment excepting from discharge the fraud-in-the-inducement debt.[3] After carefully reviewing the record, we AFFIRM.

Factual Background

In 2005, John C. Neuschafer (the "Debtor") and his companies, Integrity Funding Group, LLC ("Integrity") and Cornerstone Investment Funds, LLC ("Cornerstone"), advertised they assisted individuals with credit repair issues by buying their home and selling them a replacement home. In February 2005, the Cherrys entered into an agreement with Integrity to sell their home in Duluth, Georgia (the "Duluth Property") and to lease-purchase a replacement home in Buford, Georgia (the "Buford Property") (the "Agreement").[4] The purchase price of the Buford Property was to be determined by appraisal. The Cherrys were to receive a credit on the replacement home from Integrity of $30,300.00 for "an initial deposit" and an additional credit of $24,000.00 (for monthly lease

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[2] All future references to "Code," "Section," and "§" are to title 11, United States Code, unless otherwise specified.

[3] The Cherrys did not appeal the portion of the order denying relief under § 523(a)(6).

[4] Agreement, *in* Appellants' Appendix ("App.") at 194-96. The Duluth Property has also been referred to as the Tarva or Tarva Place Property or address. The Buford Property has also been referred to as the Democracy Property.

payments of $1,000 for twenty-four months).

Relying upon the Agreement, the Cherrys sold the Duluth Property to the Debtor individually because Integrity could not obtain financing. Debtor moved to the Duluth Property in early April 2005. The Cherrys moved into the Buford Property and paid $13,757 for improvements. When they attempted to purchase the Buford Property, they discovered Integrity never owned it. Rather, Andrew L. Taulbee ("Taulbee"), who was the managing member for Cornerstone, which in turn was a member of Integrity, had purchased the Buford Property from funds he received from the Debtor. When the Cherrys sought to purchase the home for the price they believed the Agreement provided ($303,000 less credits), Taulbee refused to sell it to them.[5]

State Court Proceedings

In May 2006, the Cherrys filed a complaint against the Debtor, Integrity, Cornerstone, and Taulbee (collectively the "Defendants") in the Superior Court of Gwinnet County, Georgia for breach of contract, fraud, specific performance, violation of the Georgia Fair Business Practice Act, and violation of the Georgia RICO Act (the "State Action").[6] The RICO claim alleged the misrepresentation of the purchase price to the lenders had caused the Buford property to be "encumbered . . . by amounts in excess of its value."[7] Further, "[t]he excessive loans on the property and the inflated sales price [were] conducted in part to deceive the [Cherrys] regarding the price in which they could purchase the

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[5] Complaint at 3, ¶ 15 (the estimated purchase price for the Plaintiffs was $303,000); 7, ¶ 41 ("The Defendants never intended to sell the [Buford] Property to the Plaintiffs for $303,000.00."), *in* App. at 48, 52.

[6] *Id.*, *in* App. at 46-55.

[7] *Id.* at 8, ¶ 51, *in* App. at 53.

[Buford] Property."[8]

The state complaint listed the Debtor's address as the Duluth Property, and he was personally served with the complaint at that address. The Debtor appeared in the State Action through attorney Benjamin L. Bagwell, filed an answer and a counterclaim, and participated in discovery.

On March 22, 2007, Bagwell, who also represented Integrity, Cornerstone, and Taulbee, filed a motion asking to withdraw as their attorney. On the same day, he also filed a Notice of Withdrawal, which listed the Debtor's address as 951 Fernbank Lane, Dacula, GA 30019 (this was the Debtor's address prior to moving to the Duluth Property), and stated that service of notices may be made upon his client at that address.[9] According to the Debtor, when he hired Bagwell, he had provided Bagwell with his current address – the Duluth Property.[10] In any event, the Debtor knew of his attorney's motion to withdraw because Bagwell had told him of it.[11] On March 30, 2007, the state court granted Bagwell's motion to withdraw.

Shortly thereafter, in April 2007, the Debtor moved from the Duluth Property to Jefferson, GA.[12] He then moved to Winder, GA in April 2009, and to Kansas in July 2009.[13] At no time did the Debtor contact the state court to provide it with his current address.

After his attorney's withdrawal, the Debtor testified he did not hire an attorney, but consulted with his brother-in-law, who is an attorney, and they

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8 *Id.* at 9, ¶ 52, *in* App. at 54.

9 Notice of Withdrawal at 2, ¶ 8, *in* App. at 219.

10 Feb. 19, 2013 Trial Tr. at 22, *in* Appellee's Appendix ("Supp.App.") at 22.

11 *Id.* at 17, *in* Supp.App. at 17.

12 *Id.* at 53-54, *in* Supp.App. at 53-54.

13 *Id.*

agreed the brother-in-law would not enter an appearance unless the Debtor received notice of a court hearing.[14] Not surprisingly, the Debtor received no mailings and no notices concerning the State Action after his former attorney's withdrawal. The Debtor monitored the State Action every month or two by reviewing the court's on-line system.[15] He stopped checking the case on-line after reading the docket entry for March 13, 2008, which stated "dismissal order."[16] He interpreted that entry to mean the case against him was dismissed but he took no steps to confirm his interpretation.[17]

During the time between Bagwell's withdrawal (March 2007) and the dismissal order docket entry (March 13, 2008), more discovery took place and various dispositive motions were filed and ruled on in the State Action. Also, because the Cherrys had demanded a jury trial in their complaint, the case was placed on the jury calendar. The scheduled events portion of the docket sheet indicated the case was placed on the "Calendar Call-Jury" on February 25, 2008, and then on April 21, 2008. The next entry showed the case set for a bench trial on July 22, 2008.

A hearing took place on July 22, 2008, and the state court heard testimony

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[14] *Id.* at 45, *in* Supp.App. at 45.

[15] It is unclear exactly what information was available online as the Debtor testified that it was not the same information as what was listed on the State Action docket sheet.

[16] It is unclear when he saw this entry or the last time he electronically checked the State Action. That dismissal order is not a part of the appellate record.

[17] Feb. 19, 2013 Trial Tr. at 46-48, *in* Supp.App. at 46-48. The Debtor's understanding of the March 13, 2008 entry was apparently incorrect as evidenced by: 1) the entry immediately preceding it, which states: "2/19/2008 - notice of stay in bankruptcy - re taulbee, andrew judgson & taulbee tiffany jones;" 2) the entry immediately after it, which states: "05/15/2008 - order - re bankruptcy/case reopened;" and 3) the resulting entry of Judgment.

from Andrew Cherry and received "submissions of fact,"[18] resulting in a judgment against the Debtor filed on July 25, 2008, which was amended on December 10, 2008 to correct a scrivener's error[19] (the "Georgia Judgment"). The Debtor did not appear for the trial, but testified he would have appeared had he received notice of the trial setting. The state court found:

> The Plaintiff (sic) presented evidence that the Defendants made material mistatements (sic) when entering into a lease purchase agreement to sell the Plaintiffs (sic) real property, and when entering into the agreement the Defendants had a present intention not to perform. The evidence presented supports a finding that Defendants Integrity and Neuschafer committed Fraud (sic) in the inducement. The facts relevant to this finding include that the Defendants made material representations to the Plaintiffs regarding the purchase of their home and the purchase of a replacement home. The Defendants stated that they would place the Plaintiffs in a home under a lease purchase agreement, that the Plaintiff (sic) would be provided a credit on the closing of the purchase of the replacement property in the amount of $30,300.00, plus $1000.00 (sic) for 24 months. In reliance on the statements by the Defendants, the Plaintiff (sic) sold Neuschafer the Plaintiffs' then current residence, and moved into the new home presented by the Defendants under the lease purchase agreement. In further reliance on the agreement to purchase the home, the Plaintiff's (sic) paid for improvements to be made on the leased property at the cost of $13,757.00. When the Plaintiff's (sic) attempted to purchase the new home pursuant to the agreement, it was discovered that the Defendant Neuschafer did not own the home and that the home was owned by Defendant Taulbee as a straw buyer. It is also shown by the record in this case that the Defendant Taulbee received payment from Defendant Neuschafer for the purchase of the home.
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> Based on these facts, Judgment in the amount of $67,757.00 in favor of the Plaintiff's (sic) and against Integrity Funding Group, LLC and Neuschafer, jointly and severally, for Fraud in the Inducement is hereby entered.[20]

The state court also found in favor of the Cherrys on the Fair Business Practice

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[18] Amended Order and Final Judgment at 1, *in* App. at 71. The submissions of fact were not provided to this Court.

[19] The post judgment interest rate was changed from 5% to 8%.

[20] Georgia Judgment at 1-2, *in* App. at 71-72. There is a $300 discrepancy between the total amount the state court awarded for Fraud-in-the-Inducement ($67,757) and the aggregate ($68,057) for itemized damages: closing credit ($30,300), rent credit ($24,000) and improvements ($13,757). Neither party has identifiedthis discrepancy.

Act claim and awarded them $54,300.00 in damages, but "merged [it] into the Fraud Judgment."[21]

Regarding the RICO claim, the state court concluded the Defendants had violated Georgia's RICO Act, stating:

> The facts support that the Defendants combined to arrange for the procurement of two separate loans to purchase real property, and that the Defendants participated in outside of closing transactions that were not disclosed to the lenders. This Court finds that the act of participating in a scheme to commit Mortgage Fraud in the procurement of two separate loans used to facilitate the purchase of the home that was to be sold to the Plaintiffs is a sufficient predicate act to constitute a violation of [Georgia's RICO Act]. As such the Defendants Integrity and Neuschafer are liable for all the damages proximately caused by the acts. Based on the entire transaction involving the sale of a principal residence at a discounted price on the promise and misstatements of Neuschafer, and the fact that Neuschafer had a present intention not to perform his obligations under the agreement, this Court finds that the actual damages caused to the Plaintiff (sic) by the Defendants (sic) actions is $355,000.00.[22]

The state court awarded punitive damages and trebled both actual and punitive damages, stating:

> Based on the specific finding of facts that the Defendants (sic) conduct was intentional and wanton, this Court further holds that the award of punitive damages in favor of the Plaintiffs and against Defendants Integrity and Neuschafer in the amount of $100,000.00 is appropriate. Moreover, as the Georgia RICO expressly provides that any person injured by reason of a violation of the Act shall have a cause of action for three times the actual damages sustained, and where appropriate, punitive damages. The facts clearly indicate that it is highly appropriate that the actual damages and punitive damages in this case be tripled. Therefore, Judgment is hereby entered in favor of the Plaintiffs and against Integrity Funding Group, LLC and Neuschafer for Violation of the [RICO] Act in the amount of $1,065,000.00, and Punitive (sic) damages in the amount of $300,000.[23]

Finally, the state court assessed $19,500.00 for attorney's fees, $130 for

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21 *Id.* at 2.

22 *Id.*

23 *Id.* at 2-3.

court cost,[24] and post judgment interest at 8% against the Defendants.

Bankruptcy Court Proceedings

The Debtor learned of the Georgia Judgment after he moved to Kansas. He filed for Chapter 7 relief in Kansas on February 14, 2011. The Cherrys filed their nondischargeability complaint in May 2011. The Bankruptcy Court denied the Cherrys' motion for summary judgment, finding a genuine issue of material fact existed precluding summary judgment, specifically whether the Debtor had been given a full and fair opportunity to litigate in the state court.

The Bankruptcy Court held a trial on the nondischargeability complaint on February 19, 2013. The Cherrys' Georgia counsel testified he received notice of the July 2008 trial setting by mail approximately 30 days before the trial date, and similar notice would have been sent to the Debtor at his address on file in the state court records. The Bankruptcy Court found "no evidence or other reason for this Court to conclude that notice was not attempted."[25] Thus, it implicitly found notice was sent to the Fernbank address, but the Debtor did not receive it because that was not his correct address at the time. It further found that the Debtor's failure to receive notice of the trial was the result of his own failure to advise the state court of his correct address, noting: 1) he made no inquiries when he received no notices and was not served with any court documents after the withdrawal of his attorney; 2) he made no attempt to ensure the state court had his correct address; and 3) he took no action to verify his understanding that he was no longer at risk of judgment after the March 13, 2008 dismissal order. The Bankruptcy Court concluded, under these circumstances, the Debtor's failure to

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[24] *Id.* at 3. The state court initially ordered costs in the amount of $446.00, but inexplicably changed it to $130.00.

[25] Memorandum Opinion and Order Granting in Part Plaintiffs' Complaint for Exception From Discharge ("Appealed Order") at 18, *in* App. at 128.

receive notice of the trial was not a basis to set aside the Georgia Judgment.[26] It granted preclusive effect to the fraud-in-the-inducement portion of the Georgia Judgment because the issues decided in a state claim for fraud-in-the-inducement are the same as those for a § 523(a)(2)(A) false representation claim.[27] It, however, denied preclusive effect to the RICO portion because the Debtor's liability under RICO was predicated upon misrepresentations made in the procurement of two separate loans and failure to make disclosures to the lenders rather than to the Cherrys.[28] It also declined to except from discharge the attorney's fees and court costs awarded in the State Action because there were "no findings that these amounts [were] recoverable as part of the liability for fraud in the inducement[.]"[29] These appeals followed.

Appellate Jurisdiction

This Court has jurisdiction over this case. The parties timely filed their Notices of Appeal from the bankruptcy court's final order, and they have consented to this Court's jurisdiction by not electing to have the appeals heard by the United States District Court for the District of Kansas.[30]

Standard of Review

We review the factual findings of the bankruptcy court for clear error and its legal findings *de novo*.[31] The determination of the nondischargeability of debt

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[26] *Id.* at 19, *in* App. at 129.

[27] *Id.* at 9-11, *in* App. at 119-21.

[28] *Id.* at 13, *in* App. at 123.

[29] *Id.* at 21, *in* App. at 131.

[30] 28 U.S.C. § 158(a)(1), (b)(1), and (c)(1); Fed. R. Bankr. P. 8002; (10th Cir. BAP L. R. 8001-3.

[31] *Fowler Bros. v. Young (In re Young)*, 91 F.3d 1367, 1370 (10th Cir. 1996).

is an issue of law that we review *de novo*.[32] But a bankruptcy court's findings regarding a requisite element of § 523(a)(2)(A) are factual determinations reviewed under the clearly erroneous standard.[33]

Issue preclusion (also known as collateral estoppel) presents mixed questions of law and fact.[34] The question of its availability is subject to *de novo* review.[35] If collateral estoppel is available, we review the decision to apply preclusive effect for abuse of discretion.[36]

Discussion

A. Exceptions to Discharge In General

Section 523(a) exceptions to discharge must be narrowly construed, and because of the fresh start objectives of bankruptcy, doubt is to be resolved in the

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[32] *Cousatte ex rel. Collier v. Lucas (In re Lucas)*, 300 B.R. 526, 530 (10th Cir. BAP 2003) (citing *United States v. Victor*, 121 F.3d 1383, 1386 (10th Cir. 1997)).

[33] *Copper v. Lemke (In re Lemke)*, 423 B.R. 917, 919-20 (10th Cir. BAP 2010).

[34] *United States v. Geophysical Corp. of Alaska*, 732 F.2d 693, 697 (9th Cir. 1984); *Dixie Nat'l Life Ins. Co. v. McWhorter (In re McWhorter)*, 887 F.2d 1564, 1566 (11th Cir. 1989); *Melnor, Inc. v. Corey (In re Corey)*, 394 B.R. 519, 522-23 (10th Cir. BAP 2008), *aff'd*, 583 F.3d 1249 (10th Cir. 2009) (bankruptcy court's grant of summary judgment based on finding that elements of issue preclusion were satisfied is reviewed *de novo*, under the same standards that bankruptcy court was required to apply; but if the elements of issue preclusion were established by the evidentiary record on summary judgment, then bankruptcy court's decision to invoke doctrine of issue preclusion is reviewed for an abuse of discretion).

[35] *Eilrich v. Remas*, 839 F.2d 630, 632 (9th Cir. 1988) (availability of collateral estoppel is a mixed question of law and fact which appellate courts review *de novo* but, if collateral estoppel is available, decision to give preclusive effect is reviewed for abuse of discretion).

[36] *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 331 (1979) (trial courts granted broad discretion to determine when collateral estoppel should be applied); *Arapahoe County Pub. Airport Auth. v. FAA*, 242 F.3d 1213, 1220 (10th Cir. 2001) (trial court has discretion over whether to apply issue preclusion in any particular case).

debtor's favor.[37] The creditor bears the burden of proving nondischargeability under § 523(a) by a preponderance of the evidence.[38] The issue of nondischargeability is a matter of federal law.[39]

To establish an exception to discharge for false representations or pretenses, the creditor must prove: 1) the debtor knowingly made false representations or misleading omissions, 2) knowledge of falsity; 3) intent to defraud; 4) justifiable reliance; and 5) resulting damage.[40] This Court recently determined that actual fraud is a separately recognized provision within § 523(a)(2)(A).[41] "Actual fraud occurs 'when a debtor intentionally engages in a scheme to deprive or cheat another of property or a legal right.'"[42] Thus, it requires proof of three elements: 1) fraudulent intent; 2) a fraudulent scheme; and 3) injury caused by the scheme.[43]

B. Issue Preclusion In General

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[37] *Okla. Dep't of Secs. ex rel. Faught v. Wilcox*, 691 F.3d 1171, 1174 (10th Cir. 2012) (internal quotation marks omitted).

[38] *Grogan v. Garner*, 498 U.S. 279, 290-91 (1991).

[39] *Id.* at 284.

[40] *See Fowler Bros. v. Young (In re Young)*, 91 F.3d 1367, 1373 (10th Cir. 1996) (identifying general elements that must be proved in order to establish a non-dischargeable claim under § 523(a)(2)(A)). *See also Field v. Mans*, 516 U.S. 59 (1995) (reliance need only be justifiable).

[41] *Diamond v. Vickery (In re Vickery)*, 488 B.R. 680, 691 (10th Cir. BAP 2013); *Bank of Cordell v. Sturgeon (In re Sturgeon)*, 496 B.R. 215, 223 (10th Cir. BAP 2013).

[42] *Sturgeon*, 488 B.R. at 223 (quoting *Mellon Bank, N.A. v. Vitanovich (In re Vitanovich)*, 259 B.R. 873, 877 (6th Cir. BAP 2001)). *See also McClellan v. Cantrell*, 217 F.3d 890, 893 (7th Cir. 2000) (actual fraud defined as "any deceit, artifice, trick, or design involving direct and active operation of the mind, used to circumvent and cheat another," and includes "all the multifarious means which human ingenuity can devise and which are resorted to by one individual to gain an advantage over another by false suggestions or by the suppression of truth.") (internal quotation marks omitted).

[43] *Vickery*, 488 B.R. at 691-92 (creditor must prove damages attributable to actual fraud).

"The doctrine of issue preclusion prevents a party that has lost the battle over an issue in one lawsuit from relitigating that same issue in another lawsuit."[44] It applies in discharge exception proceedings under § 523.[45] Federal courts apply state law in determining the preclusive effect of a judgment entered by a state court.[46]

Under Georgia law, issue preclusion applies when the following elements are present: 1) both proceedings involve the same parties or their privies; 2) the issue was actually litigated and determined in the first proceeding; 3) the determination was essential to the judgment in the first proceeding; and 4) the party against whom the doctrine is asserted had a full opportunity to litigate the issue in question.[47] There is some question as to whether a "full and fair opportunity to litigate" is a required element for issue preclusion under Georgia law.[48] Because the Bankruptcy Court implicitly determined the Debtor did have a full and fair opportunity to litigate, we need not decide whether it was a necessary finding, just whether there is support in the record for it.

C. The Debtor's Cross Appeal: The Bankruptcy Court did not abuse its discretion in applying the doctrine of issue preclusion to the fraud-in-the-inducement portion of the Georgia Judgment despite the Debtor not receiving notice of the trial.

The Debtor argues the Bankruptcy Court erred in granting preclusive effect

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44 *Melnor, Inc. v. Corey (In re Corey)*, 583 B.R. 1249, 1251 (10th Cir. 2009).

45 *Grogan v. Garner*, 498 U.S. 279, 284-85 (1991).

46 *Marrese v. Am. Acad. of Orthopaedic Surgeons*, 470 U.S. 373, 380 (1985) (holding that in cases exclusively within federal jurisdiction, state law determines the preclusive effect of a prior state court judgment unless an exception to the Full Faith and Credit statute applies); *Fowler Brothers v. Young (In re Young)*, 91 F.3d 1367, 1374 (10th Cir. 1996).

47 *Malloy v. State*, 744 S.E.2d 778, 783 (Ga. 2013).

48 *Hebbard v. Camacho (In re Camacho)*, 411 B.R. 496, 503 n.2 (Bankr. S.D. Ga. 2009) (questioning whether "full and fair opportunity" remains a factor to establish collateral estoppel under Georgia law).

to the fraud-in-the-inducement portion of the Georgia Judgment because he did not receive notice of the July 2008 trial setting. He claims, without notice of the trial, the Cherrys have failed to establish: 1) he had a full and fair opportunity to litigate the issues in question; and 2) the case was actually litigated. The Debtor's arguments are unpersuasive because the lack of notice was the result of the Debtor's own failure to advise the state court of his current address.

1. The Bankruptcy Court did not abuse its discretion in finding the Debtor had a full and fair opportunity to litigate.

The Debtor claims the evidence does not support the conclusion he was ever sent notice of the July 2008 trial setting (the "Trial Notice").[49] He points out the State Action docket sheet contains no mention of the Trial Notice being issued, and the Cherrys presented no evidence verifying the state judge's office ever mailed him the Trial Notice.[50] He argues the Cherrys failed to carry their burden and we must conclude not only that he did not receive the Trial Notice, but also that it was never sent to him.[51] We disagree.

Under Georgia law, public officials are presumed to perform their duties in a manner and to the extent required by law.[52] Ga. Code Ann. § 9-11-40(c) (2000) requires courts to place actions upon the trial calendar, whether or not by request of a party and upon notice to the parties. Uniform Rule 8.1 of the Superior Courts

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[49] Appellee's Brief at 11. Whether the Notice was sent is a factual determination for which we review for clear error. *Harris v. Boyd G. Montgomery Testamentary Trust*, 337 B.R. 921, 923 (8th Cir. BAP 2006), *aff'd*, 227 F. App'x 553 (8th Cir. 2007) (bankruptcy court's determination that the debtor had been provided with adequate notice was factual finding reviewed for clear error).

[50] Appellee's Brief at 10.

[51] *Id.* at 10.

[52] *Irvin v. Woodliff*, 186 S.E.2d 792, 796 (Ga. App. 1971) (noting the general rule that all public officials perform their duties in the manner and to the extent required by law; court will presume in favor of public officers in the absence of proof to the contrary).

of the State of Georgia provides the assigned judge has the sole responsibility for the scheduling of all trials and for the publication of all necessary calendars in advance of trial dates. Uniform Rule 8.3 requires the court, through its designated calendar clerk, to publish or distribute the trial calendar no less than 20 days prior to the session of court at which the actions listed thereon are to be tried. Under that rule, the calendar clerk must notify *pro se* parties by regular mail. Ga. Code Ann. § 9-11-5(b) (2009) provides that service upon a party shall be complete upon mailing to the person's last known address.

The evidence showed the Cherrys' Georgia counsel received notice of the trial setting by mail approximately 30 days before the trial date, which means the state court mailed the Trial Notice out on or about June 22, 2008. In the absence of proof to the contrary, the Bankruptcy Court may presume the state court sent the Trial Notice to the Debtor by regular mail to the Fernbank address – the Debtor's address on file.[53] Because the Debtor provided no evidence to rebut this presumption, the Bankruptcy Court's finding notice was attempted is not clearly erroneous.

The Debtor's nonreceipt of the Trial Notice resulted from the Fernbank address being incorrectly identified in the State Action as the Debtor's current address in June 2008, and the Debtor's repeated failure to provide the state court with a correct mailing address. The Debtor blamed his former attorney for the address error. He testified his former attorney inexplicably listed the Fernbank address on the Notice of Withdrawal when he knew the Debtor's then current address was the Duluth Property. But even if the state court had sent the Trial

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[53] *Sterling Motor Freight Co., Inc. v. Wendt*, 275 S.E.2d 101 (Ga. App. 1980) (affirming trial court's refusal to grant new trial based on defendant's claim his failure to appear at trial as a result of him not receiving actual or constructive notice of the trial date; held that in the absence of proof to the contrary, trial judge, as a public officer, presumed to have discharged his duty; any attempt at notification other than that made would obviously have been futile since defendant moved and left no forwarding address).

Notice to the Duluth address in June 2008, the Debtor would not have received it as he had moved from that address in April 2007 without informing the state court. After his attorney's withdrawal in March 2007, the Debtor had the duty to inform the court of his current address.[54]

Ultimately, the Debtor waived notice when he moved from the Duluth address in April 2007 and did not inform the state court of his new address. He knew he was not receiving any mailings or notices concerning the State Action after his attorney's withdrawal and admitted to "waiting in the weeds."[55] Under these circumstances, the Bankruptcy Court did not abuse its discretion in finding the Debtor had a full and fair opportunity to litigate.[56]

2. The Bankruptcy Court did not err in concluding the "actually litigated" requirement was satisfied, and thus, did not abuse its discretion in giving preclusive effect to the fraud-in-the-inducement portion of the Judgment.

The Debtor argues the entire Georgia Judgment should be denied preclusive effect because it was effectively a default judgment, and "[a] default judgment is not a judgment with preclusive effect" because a judgment entered by default was not "actually litigated," citing § 27 of the Restatement (Second) of Judgments.[57]

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[54] *See* Rule 2.1 of Uniform Rules of Superior Courts of the State of Georgia (the word "attorney" as used in these rules refers to any person proceeding pro se in an action pending in a superior court of this state); Rule 4.2 (attorney has duty to inform court of current address).

[55] *See* Feb. 19, 2013 Trial Tr. at 46, *in* Supp.App. at 46.

[56] *See Blonder-Tongue Labs., Inc. v. Univ. of Ill. Found.*, 402 U.S. 313, 333-34 (1971) (whether a party had a full and fair opportunity to litigate "will necessarily rest on the trial courts' sense of justice and equity"); *Sandberg v. Va. Bankshares, Inc.*, 979 F.2d 332, 344 (4th Cir. 1992) (Whether there was a full and fair opportunity to litigate relates to the fairness of preclusion, a matter of "applicability" that is reviewed for abuse of discretion.), *op. vacated on unopposed motion by appellees*, 91-1873, 1993 WL 524680 (4th Cir. Apr. 7, 1993).

[57] Appellee's Brief at 7. Section 27 of the Restatement of Judgment provides:

> A judgment is not conclusive in a subsequent action as to issues

(continued...)

He contends under the Restatement's approach, courts must ask why a defendant did not defend in determining whether to grant preclusive effect.[58] He explains he could not afford counsel or fund the litigation, neither of which should be grounds to conclusively presume the factual allegations in the underlying judgment are true.[59] These arguments are unpersuasive for various reasons.

First, Georgia courts have ruled default judgments may be given preclusive effect.[60] Although none of these cases are from the Georgia Supreme Court, they,

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[57] (...continued)
which might have been but were not litigated and determined in the prior action. There are many reasons why a party may choose not to raise an issue, or to contest an assertion, in a particular action. The action may involve so small an amount that litigation of the issue may cost more than the value of the lawsuit. Or the forum may be an inconvenient one in which to produce the necessary evidence or in which to litigate at all. The interests of conserving judicial resources, of maintaining consistency, and of avoiding oppression or harassment of the adverse party are less compelling when the issue on which preclusion is sought has not actually been litigated before. And if preclusive effect were given to issues not litigated, the result might serve to discourage compromise, to decrease the likelihood that the issues in an action would be narrowed by stipulation, and thus to intensify litigation.

> It is true that it is sometimes difficult to determine whether an issue was actually litigated; even if it was not litigated, the party's reasons for not litigating in the prior action may be such that preclusion would be appropriate. But the policy considerations outlined above weigh strongly in favor of nonpreclusion, and it is in the interest of predictability and simplicity for such a result to obtain uniformly.
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> . . . .
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> In the case of a judgment entered by . . . default, none of the issues is actually litigated. Therefore [issue preclusion] does not apply with respect to any issue in a subsequent action.

Restatement (Second) of Judgments §27 cmt. e (1982).

[58] Appellee's Brief at 9.

[59] *Id.*

[60] *Fierer v. Ashe*, 249 S.E.2d 270, 272 (Ga. App. 1978) (even judgment obtained by outright default have preclusive effect); *Spooner v. Deere Credit, Inc.*, 536 S.E.2d 581, 582 (Ga. App. 2000) (a judgment by default properly entered against parties is one on the merits for purposes of the collateral estoppel (continued...)

nonetheless, have persuasive value. Moreover, the Georgia Judgment was not an ordinary default judgment.[61] The Georgia Judgment was based on findings after a trial.[62] The Debtor's "lack of trial notice" argument is unavailing because the lack of notice was the result of the Debtor's own failure to advise the state court of his current address.

Second, there is no error in the Bankruptcy Court's conclusion the "actually litigated" requirement was satisfied with respect to the fraud-in-the-inducement judgment. Numerous courts hold the actual litigation requirement may be satisfied by substantial participation in the adversary contest in which the party is afforded a reasonable opportunity to defend himself on the merits but chooses not to do so.[63] "A party who deliberately precludes resolution of factual issues through normal adjudicative procedures may be bound, in subsequent, related proceedings involving the same parties and issues, by a prior judicial determination reached without completion of the usual process of adjudication."[64] Here, the Debtor actively participated in the State Action for a year – he answered the complaint, filed a counterclaim, and participated in discovery. After his

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[60] (...continued)
doctrine).

[61] Black's Law Dictionary defines default judgment as "[a] judgment entered against a defendant who has failed to plead or otherwise defend against the plaintiff's claim, often by failing to appear at trial." Black's Law Dictionary 428 (7th ed. 1999). Here, the Debtor had answered the complaint and filed a counterclaim.

[62] *See United Maint., Inc. v. Wilson*, 595 S.E.2d 376 (Ga. App. 2004) (judgment entered after a defendant filed an answer and after a trial on the merits is not a default judgment).

[63] *FDIC v. Daily (In re Daily)*, 47 F.3d 365, 368 (9th Cir. 1995); *Bush v. Balfour Beatty Bahamas, Ltd. (In re Bush)*, 62 F.3d 1319, 1323-25 (11th Cir. 1995); *In re Docteroff*, 133 F.3d 210, 215-16 (3d Cir. 1997); *Hebbard v. Camacho (In re Camacho)*, 411 B.R. 496, 501-04 (Bankr. S.D. Ga. 2009).

[64] *Melnor, Inc. v. Corey (In re Corey)*, 583 F.3d 1249, 1253 (10th Cir. 2009) quoting *In re Daily*, 47 F.3d at 368.

attorney's withdrawal, the Debtor chose not to participate in the state trial by failing to keep the state court informed of his current address and his decision to stop monitoring the State Action.

Third, even if we applied the Restatement's approach as urged by the Debtor, the Bankruptcy Court did not abuse its discretion in giving preclusive effect to the fraud-in-the-inducement portion of the Georgia Judgment. None of the factors that might counsel a court not to apply issue preclusion in a particular case was present here. For example, it cannot be said the State Action involved so small an amount or was brought in such an inconvenient forum that the costs of litigation outweighed the burden of a default judgment.

Finally, the Debtor's *pro se* status and his inability to fund litigation expenses do not bar application of issue preclusion.[65] In sum, we agree with the Bankruptcy Court's determination that the doctrine of issue preclusion was available to the Cherrys with respect to the fraud-in-the-inducement judgment.[66] In these circumstances, the Bankruptcy Court did not abuse its discretion in applying the doctrine to preclude further litigation of the fraud-in-the-inducement issues determined in the State Action.[67]

D. The Cherrys' Appeal: The Bankruptcy Court did not abuse its discretion in denying preclusive effect to the portion of the Georgia Judgment for RICO damages, punitive damages, and attorney's fees and costs.

The Cherrys argue the Bankruptcy Court erred in not excepting from

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[65] *Nelson v. Tsamasfyros (In re Tsamasfyros)*, 940 F.2d 605, 607 (10th Cir. 1991) (the fact that a debtor appeared *pro se* in the state court action does not lessen the collateral effect of the state court judgment).

[66] *Robi v. Five Platters, Inc.*, 838 F.2d 318, 321 (9th Cir. 1988) (noting while the availability of collateral estoppel in a particular case is a question of law, the decision to apply the doctrine is vested in the trial court's discretion).

[67] *Daily*, 47 F.3d at 368-69 (holding the district court did not abuse its discretion by applying the doctrine to preclude further litigation of issues determined in the RICO action).

discharge the portion of the Georgia Judgment for RICO damages, punitive damages, and attorney's fees and costs because it viewed those debts and § 523(a)(2)(A) too narrowly.[68] They contend any debt obtained by or arising from actual fraud, including treble damages, punitive damages, attorney's fees, and costs, should be excepted from discharge, citing *Cohen v. De La Cruz*.[69] The Cherrys' arguments are unavailing because the Georgia Judgment was vague regarding the factual basis for these debts.

1. The Bankruptcy Court did not err in denying preclusive effect to the RICO judgment.[70]

The Bankruptcy Court concluded issue preclusion was not available to the RICO judgment because the misrepresentations that were the basis for it were not made to the Cherrys, and there were no findings the Cherrys relied upon these misrepresentations or that these misrepresentations proximately caused the RICO damages.[71] The Cherrys argue the Bankruptcy Court erred in failing to give preclusive effect to the RICO judgment because "actual fraud" under § 523(a)(2)(A) does not require they be the recipients of the misrepresentations or that they relied upon said misrepresentation, but simply that the misrepresentations were a part of the scheme to defraud them. They claim the state court made all the requisite findings for actual fraud under § 523(a)(2)(A): 1) the misrepresentations were in furtherance of the fraud against the Cherrys; and 2) the misrepresentations caused the Cherrys actual damages of $355,000. We disagree as the state court did not make all the requisite findings; namely it did not make sufficient findings as to damages. In cases where the state court

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68 Appellants' Brief at 9-13.

69 523 U.S. 213 (1998).

70 The RICO judgment or debt includes actual damages of $355,000 trebled and punitive damages of $100,000 trebled.

71 Appealed Order at 13-14, *in* App. at 123-24.

judgment does not contain detailed facts sufficient as findings to meet the federal test of nondischargeability under § 523(a)(2)(A), a bankruptcy court may properly refuse to accord collateral estoppel effect to the state court judgment.[72]

In *Shuler*, the plaintiff sought a determination of nondischargeability based on a particular state court judgment rendered by default against the debtor. The plaintiff contended the judgment should have been accorded collateral estoppel effect by the bankruptcy court. The only evidence produced in the state court to support the request for default was the plaintiff's complaint and an affidavit verifying invoices for the services that formed the basis of the complaint. The bankruptcy court ruled the default judgment did not collaterally estop the debtor from litigating the dischargeability of the underlying debt in bankruptcy. The Court of Appeals for the Fifth Circuit affirmed, concluding the bankruptcy court did not err in failing to accord collateral estoppel effect, for bankruptcy dischargeability purposes, to the alleged false-pretense determination in the state court judgment because the state court's determination of fraud was not supported by any factual findings or facts which could be discerned from the state court record.[73]

Like the *Shuler* state court judgment, the RICO judgment contains no factual determinations whatsoever to support its conclusion regarding the amount damages the Cherrys incurred. Nothing in the state court record explains how the state court arrived at the $355,000 figure. The Cherrys claimed RICO damages based on the Debtor encumbering the Buford Property by amounts in excess of its value.[74] But the state court made no specific findings regarding the value of the

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[72] *Harold V. Simpson & Co. v. Shuler (In re Shuler)*, 722 F.2d 1253 (5th Cir. 1984).

[73] *Id.* at 1257-58.

[74] Complaint at 8, ¶51, *in* App. at 53. The state complaint alleged Taulbee (continued...)

Buford Property or the amount of the alleged excess liens.

The state court's only indication for the basis of the $355,000 damages award was the vague statement that it was "[b]ased on the entire transaction involving the sale of [the Duluth Property] at a discounted price . . ., and the fact that Neuschafer had a present intention not to perform his obligation under the agreement[.]" The state court, however, made no specific damages findings relating to the discount or the breach of the agreement. It appears the state court awarded damages to the Cherrys for injuries suffered by the banks.

The state court's factual findings do not support its conclusion that the Cherrys actually suffered damages in the amount of $355,000. Under the facts, we do not see how the Cherrys could have suffered more damages from the fraudulent scheme than from the fraudulent inducement claim.

Nothing in the RICO judgment indicates the state court necessarily determined the Cherrys actually suffered damages in the amount of $355,000. Treble or punitive damages are only nondischargeable if the underlying compensatory damages are nondischargeable.[75] Thus, the Bankruptcy Court did not err in concluding issue preclusion was not available to bar discharge of the RICO debt. In so holding, we recognize our analysis differs somewhat from that of the bankruptcy court.[76] An appellate court, however, is "free to affirm . . . on

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[74] (...continued)
purchased the Buford Property for $303,000 but reported to his lenders that he purchased the property for $330,000. The Debtor's interrogatory responses referenced appraisals valuing the Buford Property at $333,000 (as of March 3, 2005) and $315,000 (as of March 27, 2006). Even under the most favorable findings, damages based on excessive liens would be approximately $27,000 ($330,000 less $303,000); nowhere near the $300,000 range.

[75] *Aspect Tech. v. Simpson (In re Simpson)*, EO-97-050, 1998 WL 296331, at *4 (10th Cir. BAP 1998); *St. Laurent v. Ambrose (In re St. Laurent)*, 991 F.2d 672 (11th Cir. 1993); *Coen v. Zick*, 458 F.2d 326 (9th Cir. 1972).

[76] The Bankruptcy Court concluded that issue preclusion was not available as to the RICO judgment because the issues decided in the RICO claim were not
(continued...)

any grounds for which there is a record sufficient to permit conclusions of law, even grounds not relied upon" by the trial court.[77]

2. The Bankruptcy Court did not err in excluding the debt for attorney's fees and costs from the amount excepted from discharge.

The Bankruptcy Court held "because there [were] no findings [attorney's fees and court costs were] recoverable as part of the liability for fraud in the inducement, they are not included in the amount excepted from discharge."[78] The Cherrys argue under *Cohen v. De La Cruz*,[79] attorney's fees and court costs are part of the debt which is nondischargeable under § 523(a)(2)(A). They also argue attorney's fees and costs are recoverable in Georgia as separate damages flowing from the underlying tort. These arguments, however, assume the debt for attorney's fees and costs flowed or arose from nondischargeable conduct.

The debt for attorney's fees and costs were authorized by Ga. Code Ann. § 13-6-11 (1984), which states:

> The expenses of litigation generally shall not be allowed as a part of the damages; but where the plaintiff has specially pleaded and has made prayer therefor and where the defendant has acted in bad faith, has been stubbornly litigious, or has caused the plaintiff unnecessary trouble and expense, the jury may allow them.

The Cherrys specifically pleaded the Debtor acted in bad faith, had been stubbornly litigious, and had caused them unnecessary trouble and expense. With

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[76] (...continued)
identical to the nondischargeability claim. Given our holding, we need not decide whether the bankruptcy court erred in finding a lack of identity of issues.

[77] *Griess v. Colo.*, 841 F.2d 1042, 1047 (10th Cir. 1988) (internal quotation marks omitted).

[78] Appealed Order at 21, *in* App. at 131.

[79] 523 U.S. 213 (1998) (once it is established debt was obtained by fraud, then any debt arising therefrom, including attorney's fees, are nondischargeable). *See also Janes v. Lyons (In re Lyons)*, 454 B.R. 174, 178 (Bankr. D. Kan. 2011) ("All facets of the judgment are not dischargeable, for the law provides '[i]f a debt is found nondischargeable under [§ 523(a)(2)], all parts of the debt, including punitive damages and previously awarded attorney fees are nondischargeable[.]").

respect to attorney's fees and costs, the state court simply stated that based on the evidence presented, the Cherrys were entitled to recover them. Because it is unclear whether the debt for attorney's fees and costs was assessed on account of the nondischargeable fraud-in-the-inducement claim or the dischargeable RICO claim, we cannot say the bankruptcy court erred in excluding the debt for attorney's fees and costs from discharge. The Bankruptcy Court was within its discretion in choosing not to apply preclusive effect as to the debt for attorney's fees and costs.[80]

Conclusion

The Debtor provided no evidence to rebut the presumption public officials are presumed to perform their duties in a manner and to the extent required by law; thus, the Bankruptcy Court's finding notice was attempted is not clearly erroneous. Additionally, the Debtor's lack of notice was the result of his own failure to advise the state court of his current address. Thus, the Bankruptcy Court did not abuse its discretion in finding he had a full and fair opportunity to litigate in the State Action. The Debtor's substantial participation in the State Action satisfied the "actually litigated" requirement; thus, the Bankruptcy Court correctly determined the doctrine of issue preclusion was available to the Cherrys with respect to the fraud-in-the-inducement judgment. Under these circumstances, the Bankruptcy Court did not abuse its discretion in applying the doctrine to preclude further litigation of the fraud-in-the-inducement issues determined in the State Action.

Regarding the RICO judgment, we conclude the Bankruptcy Court did not err in denying preclusive effect to it because the state court did not necessarily

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[80] *See Sterling Factors, Inc. v. Whelan (In re Whelan)*, 236 B.R. 495, 502 (Bankr. N.D. Ga. 1999) (denying preclusive effect to judgment that failed to apportion the damages clearly among the claims, which made it impossible to find the entire judgment nondischargeable).

determine the Cherrys actually suffered damages in the amount of $355,000. We also conclude the Bankruptcy Court did not err in excluding the debt for attorney's fees and costs from the amount excepted from discharge because it is unclear whether the fees and costs flowed or arose from the fraud-in-the-inducement misrepresentations or the pertinent predicate acts.