

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA
FORT LAUDERDALE DIVISION

In re:

CANDACE L. QUINN

Debtor.

CENDANT MOBILITY SERVICES
CORPORATION,

Plaintiff,

vs.

CANDACE L. QUINN,

Defendant.

Case No.04-25177-BKC-JKO

Chapter 7

Adv. No. 04-2357-BKC-JKO

ORDER ON DEFENDANT'S SUMMARY JUDGMENT MOTION

THIS MATTER came before the Court for hearing on July 10, 2006 on Defendant's Motion for Final Summary Judgment as to Counts V, VI, VII and VIII, For Partial Summary Judgment as to Counts I, II, III, and IV and Memorandum of Law in Support Thereof [CP 51]. The Court considered Plaintiff's Memorandum of Law in Opposition to Defendant's Motion for Final Summary Judgment

as to Counts V, VI, VII and VIII, for Partial Summary Judgment as to Counts I, II, III, and IV [CP 63] and Defendant's Reply to Plaintiff's Memorandum of Law in Opposition to Defendant's Motion for Final Summary Judgment as to Counts V, VI, VII and VIII, for Partial Summary Judgment as to Counts I, II, III, and IV [CP 69]. At the hearing on July 10, 2006, the Court directed briefing on whether matters determined in the California state court litigation styled *Cendant Mobility Services vs. KPMG, LLP*, Case No. BC 312019, Superior Court of the State of California for the County of Los Angeles, 2005 ("*Cendant v. KPMG*") are entitled to issue preclusive effect because Quinn should be regarded as having been in privity with her former employer, KPMG. The Court considered Quinn's Memorandum of Law Regarding Privity in Connection with Defendant's Motion for Final Summary Judgment as to Counts V, VI, VII and VIII, for Partial Summary Judgment as to Counts I, II, III, and IV of the Amended Adversary Complaint [CP 100] and Plaintiff's Supplemental Memorandum of Law: (1) In Opposition to Defendant's Motion for Final Summary Judgment as to Counts V, VI, VII and VIII, for Partial Summary Judgment as to Counts I, II, III, and IV; and (2) In Response to Defendant's Memorandum of Law in Regard to Privity [CP 103]. The Court having heard oral arguments and reviewed all the papers is satisfied that it is appropriate to rule.

Stipulated Facts

Quinn has been a practicing attorney for over twenty years and has been licensed to practice law in Massachusetts and New York. Quinn has an LLM degree and was employed by KPMG from 1983 to 2003. She was employed in KPMG's New York offices from the time of her initial employment until she was transferred in January 2001 to its Mountain View, California office.

Cendant, a creditor in the bankruptcy case and the Plaintiff in this adversary proceeding, is in the employee relocation business. In the normal course of business, Cendant assists its corporate clients' employees transfer to various geographic locations. In a typical transaction, Cendant purchases

the employee's residence so that the employee's transfer will not be delayed by the employee's efforts to sell his or her house.

Under Cendant's program, employees being relocated put their homes on the market to attempt to sell them to third parties. Once a contract is entered into by a third party, rather than wait for closing to occur, Cendant typically buys out an employee's interest at the contract price and then completes the closing with the buyer. This allows the employee to receive funds from the sale of the property more quickly so that the employee can purchase a new home in the area of relocation.

Additionally, Cendant offers an equity advance program called the Buyer Value Option Program ("BVO Program"). The BVO Program allows a relocating employee using the program to receive funds from Cendant based on the employee's equity in the home without actually waiting for a sales contract. In the Fall of 2000, KMPG informed Quinn that she going to be transfered from New York to Silicon Valley. In connection with her job transfer, KPMG advised Quinn that Cendant would assist her in relocating to California. KMPG authorized Cendant to extend its BVO Program to Quinn and her husband, Ofer Nissim ("Nissim"). Under the BVO Program, Quinn and Nissim were responsible for retaining the services of a real estate broker to market their New York Residence. At such time as Quinn and Nissim might receive an offer to purchase the New York Residence, Quinn was to contact Cendant, which would then purchase the New York Residence from Quinn and Nissim at the price and on the terms negotiated with the third party buyer. Cendant would then consummate the sale to the third party buyer under the agreed terms at the negotiated price. If Quinn and Nissim required funds to purchase a home in California before finding a buyer for their New York Residence, Cendant was authorized under the BVO Program to advance to Quinn and Nissim up to seventy-five percent of their current equity in their New York Residence.

When KMPG authorized Cendant to extend the BVO Program to Quinn, KPMG required that Cendant order two Broker Market Analysis Reports (“BMA”). This requirement had two purposes: (a) to assist Quinn and Nissim in setting a reasonable price for their home, and (b) to provide Cendant with a basis for calculating the amount of the equity advance Cendant could make to Quinn and Nissim.

In early February 2001, Cendant advised Quinn of the BMA results on her New York Residence. The average sales price of the two BMA’s was \$662,000. Thereafter, Quinn received a \$75,000 advance against Quinn and Nissim’s interest in the sale proceeds from the New York Residence (“Equity Advance”).

On January 31, 2001, Quinn executed an Equity Advance Agreement in the amount of \$75,000 (“Equity Advance Agreement”). On February 5, 2001, Cendant wire transferred \$75,000 to Quinn’s Citibank account pursuant to the Equity Advance Agreement. The Equity Advance Agreement states, in its opening sentence, that the Equity Advance is to be used in connection with the purchase of a new residence. It is undisputed that Quinn received the \$75,000 Equity Advance and that the funds were placed into her personal bank account.

Thereafter, Quinn received a second equity advance in the amount of \$387,750. This second equity advance was memorialized in a written agreement which was forwarded to Cendant by Quinn with Nissim’s and her signatures on the document (“Equity Loan Agreement and Promissory Note”).

The Equity Loan Agreement and Promissory Note specifically states “the makers represent that the loan will be used solely for the purpose of purchasing a new principal residence....” It is undisputed that Quinn received the \$387,750 in funds contemplated by the Equity Loan Agreement and Promissory Note and that she did not use any of those funds towards the purchase of a new home in California.

Almost a year later, on December 22, 2001, Cendant entered into an agreement with Quinn and Nissim to purchase their New York Residence for the sum for the sum of \$580,000. While preparing

the documentation to close-out Quinn's employee relocation transaction, and after Cendant had made the Equity Advance and Second Equity Advance, Cendant discovered that Quinn and Nissim's actual equity in the New York Residence was \$138,606.59 and not the \$462,750 already paid to Quinn in equity advances. After deducting the mortgage balance due on the New York Residence and miscellaneous other costs, Quinn and Nissim owed Cendant a net balance of \$328,452.74 for the equity advances made to them. Cendant demanded repayment from Quinn and Nissim, asserting that both breached the terms and conditions of the Equity Advance Agreement and the Equity Loan Agreement and Promissory Note by failing to repay the excessive equity advances that had been made to them. Cendant repeatedly e-mailed, called and sent demand letters to Quinn and Nissim asking for repayment. Quinn and Nissim have never repaid any of the \$328,452.74 balance due Cendant.

California State Court Proceedings

On April 2, 2002, Cendant filed a Complaint against Quinn and Nissim in the Superior Court of California for Santa Clara County for: (1) breach of contract; (2) money paid by mistake; (3) fraud; (4) conversion; and (5) common count for money paid ("California Action"). In due course, Nissim cross-claimed against Quinn for equitable indemnity and contribution, Quinn cross-claimed against Nissim, and Nissim counter-claimed against Cendant for negligence and conversion, alleging that Cendant negligently made advances to Quinn resulting in the loss of his equity in the New York Residence.¹

During the pre-trial procedures in the California Action, discovery was undertaken including requests for admissions. In her Response to Request for Admissions propounded by Nissim in the California Action, Quinn admitted that Cendant deposited had deposited the \$75,000 and \$387,750

¹Nissim and Quinn had divorced in the interim.

equity advances into her Citibank account. Beyond admitting that she had received those funds, Quinn failed to account for her subsequent use of the funds, claiming instead that she could not do so because she did not have all of the relevant banking records. Quinn gave the same answer with regard to questions about whether Nissim had access to the funds or had withdrawn any of the funds.

In her deposition in the California action, Quinn claimed that she did not understand what the agreement meant by “equity advance agreement.” She further testified that she did not understand that the funds paid by Cendant as equity advances were for equity in the New York Residence or that the funds were to be used for a home purchase in California. Finally, Quinn testified that she spent the majority of the Equity Advances on community (family) obligations, and that no portion of the Equity Advances was used to purchase a home in California.

At his deposition in the California Action, Nissim admitted that the outstanding mortgage balance on the New York Residence at the time of the Equity Advances was in excess of \$441,000. Nissim denied signing the \$75,000 Equity Advance Agreement or the Acceptance Information Sheet containing the instructions to wire transfer the Equity Advance to Quinn’s personal bank account. He admitted signing the Equity Loan Agreement and Promissory Note for the \$387,750 Second Equity Advance, but contended that the dollar amount in the agreement was blank when he signed it. Nissim further testified in his deposition in the California Action he knew the Equity Advances would be transferred into Quinn’s personal bank account but he had trusted his then-wife Quinn. He testified that after he and Quinn were served with the summons and complaint in the California Action, Quinn told him that it was clear that Cendant had made a mistake and must not have realized the mortgage balance should have deducted before the Equity Advances were made. Finally, Nissim testified that Quinn did not contest the dollar amount claimed by Cendant.

A trial was held in the California Action (“Trial”) before the Honorable Leslie Nichols on November 19 and 20, 2003. On the second day of Trial, the parties stipulated that a final judgment entered be against Quinn and in favor of Cendant on the causes of action for breach of contract, money paid by mistake, and the common count for money paid. Pursuant to that settlement (the “Settlement Agreement”), the remaining two causes of action for fraud and conversion were dismissed with prejudice.

On December 2, 2003, Judge Nichols formally approved the Settlement Agreement and awarded damages to Cendant in the amount of \$328,452.74, prejudgment interest in the sum of \$90,900.00, court costs in the sum of \$2,714.80, less a credit of \$15,000, for a total judgment of \$407,067.54 (the “Final Judgment”).

The Settlement Agreement provided in relevant part:

1. As to the judgment to be entered on the breach of contract, implied contract (money paid by mistake), and common count (money had and received) causes of action of the complaint, Quinn knowingly and expressly and on the advice of counsel waives any and all homestead exemptions and head of household exemptions as to garnishment of wages under Chapter 222 of Florida Statutes as well as under the statutes and laws of any other jurisdiction to which Quinn relocates.
2. Cendant Mobility will dismiss the causes of action for fraud and conversion with prejudice.
3. Cendant agrees to stay execution of the judgment until November 15, 2006 provided that Quinn makes 36 consecutive monthly payments of Two Thousand Dollars (\$2000) to Cendant Mobility towards satisfaction of the judgment with the first \$2000 payment on December 15, 2003, and continuing each and every month thereafter on the 15th of each month through and including November 15, 2006.

...

If Quinn fails to make any of the 36 monthly payments, as and when agreed, time being of the essence, with no notice of right to cure default required, the agreement to stay execution is null and void and of no force and effect and Cendant Mobility may take all steps available under law and this agreement to enforce the judgment.

Quinn has failed to comply with the terms of the Settlement Agreement or otherwise satisfy the judgment debt owed to Cendant. Subsequent to the California Action, Quinn relocated to Broward County, Florida, and became “Of Counsel” for Fisher & Philips, LLP, in its Fort Lauderdale office.

Florida State Court Proceedings

Cendant domesticated the Final Judgment in Broward County on June 14, 2004 (the “Domesticated Foreign Judgment”). On August 16, 2004, Cendant sought and obtained a Continuing Writ of Garnishment After Judgment from the Circuit Court for Broward County addressed to Fisher & Philips, thereby garnishing Quinn’s wages. The garnishment writ was served that same day.

Bankruptcy Court Proceedings

The next day, August 17, 2004, Quinn filed her petition under chapter 7 of the Bankruptcy Code. The case remains pending and this adversary proceeding is brought in this case.

In her Bankruptcy Schedules, Quinn represented under penalty of perjury that she did not own any real estate. As to personal property, Quinn represented that she owned a mere \$300 worth of furnishings and personal effects in Florida as well as additional furniture in storage in California worth another \$350. Quinn listed a Term Life Policy and Pension Plan Workers’ Compensation claim, pending patent application, certain stocks and potential divorce property settlement. Quinn scheduled approximately \$484,000 of debt, of which almost \$400,000 is owed to Cendant. She represented that her gross monthly income at the time was some \$19,400.

In her Statement of Financial Affairs, Question No. 1, Quinn represents that she made \$250,000 working for KMPG in 2002. She represents that her 2003 income was \$188,000 from KMPG and approximately \$66,000 from Fisher & Philips with total compensation equaling \$250,000. For the eight

months prior to filing bankruptcy in 2004, Quinn indicated that she made \$98,000 in income and received approximately \$250,000 in insurance proceeds, for a total of some \$350,000.

Conclusions of Law

Cendant Mobility filed its Amended Complaint to Deny Discharge (the “Amended Complaint”) on April 8, 2005. The Amended Complaint consisted of eight counts. Counts I through IV seek denial of the Debtor’s discharge pursuant to various subsections of 11 U.S.C 727(a) (the “727 Counts”), while Counts V through VIII seek a declaration of non-dischargeability, pursuant to various subsections of 11 U.S.C. § 523(a) (the “523 Counts”), as to debts owed to Cendant pursuant to the Final Judgment.

This Court has jurisdiction pursuant to 28 U.S.C. §§ 1334 and 157. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(I) and 157(b)(2)(J).

Quinn argues that the issues contained in the 523 Counts were fully litigated in prior proceedings and consequently, are barred by the doctrine of collateral estoppel. Additionally, Quinn argues that she entitled to partial summary judgment on the 727 Counts based on the doctrines of collateral estoppel and/or res judicata.

Cendant counters that Quinn has not met her burden for establishing res judicata or collateral estoppel. Cendant argues that the issues that Quinn attempts to bar with collateral estoppel and res judicata were not actually litigated in the California Action. Cendant asserts that this Court should look past the Final Judgment and the Settlement Agreement incorporated therein and examine the entire state court record before determining whether summary judgment can be granted in this adversary proceeding.

Legal standard for summary judgment

Under Fed. R. Civ.P. 56, incorporated into this adversary proceedings by Fed.R.Bankr.P. 7056, summary judgment is proper if the pleadings, deposition, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material facts that the moving party is entitled to judgment as a matter of law. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); Fed.R.Civ.P. 56(c).

Collateral estoppel

The doctrine of collateral estoppel is intended to protect parties for multiple lawsuits and the possibility of inconsistent decisions, and to preserve judicial resources. *Kelly v. Okoye (In re Kelly)*, 182 B.R. 255, 258 (9th Cir. BAP 1995), *aff'd* 100 F.3d 110 (9th Cir. 1996). Generally, the preclusive effect of a state court judgment in a subsequent federal lawsuit is determined by the full faith and credit statute, which provides that state judicial proceedings “shall have the same full faith and credit in every court in the United States . . . as they have by law or usage in the courts of such State . . . from which they were taken.” 28 U.S.C. § 1738.

The Supreme Court has held that the doctrine of collateral estoppel applies to dischargeability proceedings. *Grogan v. Garner* 498 U.S. 279, 284-91 (1991). To succeed on her motion for summary judgment, Quinn must demonstrate that collateral estoppel is warranted under California law. In order for a prior judgment to be entitled to collateral estoppel effect under California law, the following five elements must be met:

- (1) The issue sought to be precluded from relitigation must be identical to that decided in a former proceeding;
- (2) The issue must have been actually litigated in the former proceeding;
- (3) It must have been necessarily decided in the former proceeding;
- (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 of the former proceeding.

Younie v. Gonya (In re Younie), 211 B.R. 367, 373 (9th Cir. BAP 1997 (citation omitted)), *aff'd* 163 F.3d 609, (9th Cir. 1998). Addressing each of these elements *seriatim*:

Identical issues

California law provides a different analytical framework than that provided under federal law for determining whether a cause of action brought in a second lawsuit was the same cause of action as that brought in the first action. Federal law utilizes a transactional analysis; i.e., two claims constitute a single cause of action if they arise out of the same “nucleus of operative fact, or [are] based upon the same factual predicate.” *Eastman Kodak Company v. Atlanta Retail, Inc.*, 456 F.3d 1277, 1288 (11th Cir. 2006). By contrast, California law follows the “primary right” theory of Pomeroy;² i.e. a cause of action consists of (1) a primary right possessed by the plaintiff, (2) a corresponding duty to devolving upon the defendant, and (3) a delict or wrong done by the defendant which consists of a breach of such primary right and duty. *City of Simi Valley v. Superior Court*, 111 Cal.App. 4th 1077 (Cal.App. 2003). Thus two actions constitute a single cause of action if they both affect the same primary rights. *Id.* at 1082.

The fact that the statutes under which the first and subsequent actions are brought are not identical does not necessarily bar the application of res judicata. For example, in *Williamson v. Columbia Gas & Electric Corp.*, 186 F.2d 464, 469 (3d Cir. 1950), *cert. denied*, 341 U.S. 921, 71 S.Ct. 743, 95 L.Ed. 1355 (1951), the court held that res judicata barred a second suit where one suit was under the Clayton Act and the other under the Sherman Act. The same principle applies where a state

²Pomeroy, *Code Remedies* (5th ed.), p. 528; 4 Witkin, *California Procedure* (4th ed. 1997), Ch. V, Pleadings § 24.

statute is the authority for one action and a federal statute for the other, when the two statutes afford the same right or interdict the same wrong, *Mitchell v. National Broadcasting Co.*, 553 F.2d 265 (2d Cir. 1977).

Identity of the cause of action implies not only identity of the allegations but also identity of the operative facts in support of those allegations. *Nash County Bd. Of Education v. Biltmore Company*, 640 F.2d 484, 488 (4th Cir. 1981). Here, the Court finds that the fraud and conversion causes of action in the California Action are identical to the causes of actions regarding non-dischargeability under 11 U.S.C. § 727 and § 523. The wrongs alleged and the specific operative facts in the two cases, i.e., the “primary rights” in the California Action and the claims here are identical. In the California Action the wrongs alleged were breach of contract, money paid by mistake and money had, fraud³, and conversion⁴.

In the Amended Complaint, Cendant is seeking a denial of discharge and dischargeability under various provisions 11 U.S.C § 727 (Counts I through IV)⁵ and § 523 (Counts V through VIII)⁶.

³Under California law, elements that must be proven to establish common law fraud are (1) defendant made a false representation; (2) defendant had knowledge of the falsity; (3) defendant intended to induce plaintiff’s reliance; (4) plaintiff actually and reasonably relied; and (5) plaintiff suffered damages. *Cocker Citizens Nat’l Bank v. Control Medals Corp.*, 566 F.2d 631. 636 (9th Cir. 1977).

⁴Under California law, wrongful dominion over the property of another gives rise to a cause of action for conversion. The elements of conversion are (1) plaintiff’s ownership or right to possession of the property; (2) defendant’s conversion by wrongful act or disposition of property rights; and (3) damages. *Burlesci v. Petersen*, 68 Cal.App.4th 1062, 1066.

⁵The 727 Counts include:

Count I- Denial of Discharge Pursuant to § 727(a)(2)(A)

The elements for a debtor to be denied a discharge under § 727(a)(2)(A), are that the debtor with intent to hinder, delay or defraud a creditor . . .has transferred, removed, destroyed, mutilated or concealed, or has permitted to be transferred, removed, destroyed, mutilated or

concealed property of the debtor within one year before the date of the filing of the petition. In order to deny a debtor's discharge under this section, the objecting party must show that a transfer occurred, the property transferred was property of the debtor, the property transferred was within one year of the petition and was transferred with the intent to hinder or delay a creditor.

Count II- Denial of Discharge Pursuant to § 727(a)(3)

In order for a debtor to be denied a discharge under § 727(a)(3), the objection party must show that the debtor concealed, destroyed, mutilated, falsified or failed to keep and preserve recorded information including books, documents, records and papers from which the debtor's financial condition or business transactions might be ascertained, unless such act or failure to act was justified under all of the circumstances of the case.

Count III- Denial of Discharge Pursuant to § 727(a)(4)

In order for a debtor to be denied a discharged under § 727(a)(4), the objecting party must prove that the debtor knowingly and fraudulently, in or in connection with the case - (A) made a false oath or account; (B) presented or used a false claim, (C) gave, offered, received or attempted to obtain money, property, or advantage, or promise of money property, or advantage for acting or forbearing to act; or (D) withheld from an officer of the estate entitled to possession under this title, any recorded information, including books, documents, records, and paper, relating to the debtor's property or financial affairs.

Count IV- Denial of Discharge Pursuant § 727(a)(5)

In order for a debtor to be denied discharge under § 727(a)(5), the objecting party must show, that the debtor has failed to explain satisfactorily, before determination of denial of discharge under this paragraph, any loss of assets or deficiency of assets to meet the debtor's liabilities.

⁶ The 523 Counts include:

Count V- Declaration of Non-Dischargeability pursuant to § 523(a)(2)(A)

In order to except a debt from discharge under § 523(a)(2)(A), the objecting party must prove that the debtor (1) made a false representation or engaged in actual fraud with the purpose and intent of deceiving a creditor; (2) that the creditor justifiably relied upon the representation or conduct; and (3) that the creditor sustained a loss as a result of the representation.

Count VI- Declaration of Non-Dischargeability pursuant § 523(a)(2)(B)

In order to except a debt from discharge under § 523(a)(2)(B), the objecting party must show that the debtor made use of a statement (1) in writing; (2) that is materially false; (3) respecting the debtor's or an insider's financial condition; (4) on which the creditor to whom the debtor is liable for money, property, services or credit reasonable relied; (5) that the debtor cause to be made or published with intent to deceive.

Quinn concedes that the elements of the 727 Counts raised by Cendant in the Amended Complaint, insofar as they relate to events which occurred after entry of the Final Judgment are not in any way identical to the elements of the causes of action in the California Action and therefore, collateral estoppel does not attach to the 727 Counts to that extent. The Court agrees. Quinn contends, however, that each of the elements of the 727 Counts relating to pre-Final Judgment conduct by Quinn are identical to the elements of the California Action, are part of the same primary rights, and are accordingly identical issues for collateral estoppel purposes. The Court agrees with this contention as well.

The elements of California common law fraud mirror the elements of § 523(a)(2)(A) and are thus identical for collateral estoppel purposes. *In re Younie, supra* at 373. Because the elements of common law fraud in the California are substantively identical to the elements of § 523(a)(2)(A), the issue at stake in this proceeding is identical to the issue in the state court proceeding regarding fraud. The Court similarly finds that the elements of § 523(a)(2)(B) regarding false financial statements are

Count VII-Declaration of Non-Dischargeability Pursuant to § 523(a)(6)

In order to except a debt from discharge under § 523(a)(6), the objecting party must prove that the debtor caused a willful and malicious injury to the property of the creditor. As Cendant has admitted in its Response, § 523(a)(6) is basically a count for conversion which may be proven by showing that a debtor committed an intentional act for the purpose of causing injury or which is substantially certain to cause injury.

Count VIII- Declaration of Non-Dischargeability pursuant to § 523(a)(19)

In order to except a debt from discharge under § 523(a)(19), the debt must be for the violation of any Federal securities laws ..., any State securities laws, or any regulations or order issued under such Federal or State securities laws; or common law fraud, deceit or manipulation in connection with the purchase or sale of any security; and results from any judgment, order, consent order, or decree entered into by the debtor, or any court or administrative order for any damages, fine penalty, citation, restitutionary payment, disgorgement payment, attorney fee, cost or other payment owed by the debtor.

subsumed in California common law fraud and are therefore part of the same primary right for California collateral estoppel purposes.

Like common law fraud, the elements of conversion under California law are substantially identical to the elements needed to prove non-dischargeability under § 523(a)(6) where both require a willful, malicious or wrongful injury to the property of another. The Court finds that the conversion count in the California Action and the § 523(a)(6) Count are identical for collateral estoppel purposes.

Cendant has also sought in Count VII a determination of non-dischargeability for fraud in the purchase or sale of securities under § 523(a)(19). Cendant has failed to plead or point to any evidence that suggests that Quinn purchased or sold securities, and most particularly has failed to plead or suggest that it was damaged by any such purchase or sale. Because there is no factual basis for this Count, the Court will not undertake any comparative analysis of the elements of a § 523(a)(19) claim and a fraud claim under California law, and Count VII will be dismissed.

After examining the Amended Complaint in conjunction with the allegations in the California Action, the Court is convinced that the first prong of issue preclusion – identity of the causes of action – is satisfied here. The fraud and conversion claims contained in the California Action are part of the same primary rights as those asserted in the claims brought here under §§ 523 and 727, with the exception of the § 727 claims arising out of events which occurred subsequent to the entry of the Final Judgment.

Actually litigated

The California Action was tried on November 19 and 20, 2003. Prior to the completion of the presentation of evidence in the matter, the parties stipulated that a judgment be entered against Quinn

and in favor of Cendant on the First, Second and Fifth causes of action.⁷ The Final Judgment specifically states that both oral and documentary evidence were presented on November 19 regarding the remaining causes of action – the fraud and conversion counts. After the testimony of Cendant’s expert witness on the first day of trial, the parties entered into the Settlement Agreement whereby the fraud and conversion counts which were dismissed by Cendant with prejudice.

Two factors must be considered in making a determination of whether issues were actually and fully litigated: (1) had the issue been effectively raised in the prior action, either in pleadings or through development of the evidence and argument at trial or on motion; and (2) did the losing party have a fair opportunity procedurally, substantively and evidentially to contest the issue. *Balfour Beatty Bahamas, Ltd. v. Beatty*, 62. F.3d 1319 (11th Cir. 1995) citing *Overseas Motors, Inc. v. Import Motors Ltd.* 375. F. Supp. 499, 516 (E.D. Mich 1974), *aff’d* 519 F.2d 119 (6th Cir.), *cert. denied.* 423 U.S. 987, 96 S. Ct. 395 (1975).

Cendant argues that the issues of fraud and conversion were not *necessary* for the Settlement Agreement or Final Judgment and suggests that the parties merely stipulated to the counts for fraud conversion being dismissed. Cendant states “issue preclusion ordinarily does not attach unless it is clearly shown that the parties intended the issue to be foreclosed in litigation.” 18A Fed. Prac & Proc. Juris.2d § 4443. Consequently, Cendant asserts that issue collateral estoppel is inappropriate under these circumstance.

Quinn counters that the issues were actually litigated in the pleadings from the California Action, as detailed in Quinn’s Motion for Summary Judgment and Cendant’s Response; Cendant’s

⁷The claims for breach of contract, money paid by mistake, and the common count for money paid, respectively.

Mandatory Settlement Conference Statement; Cendant's trial brief; and the fact that the Settlement Agreement and Final Judgment were entered after Cendant's expert testified at the trial.

This Court finds that the issues regarding fraud and conversion were effectively raised and that Cendant had a fair opportunity to contest the issues in the California Action. The causes of action for fraud and conversion in the California Action were disposed of in Quinn's favor when, on the second day of trial, Cendant and Quinn entered into the Settlement Agreement that was incorporated into the Final Judgment. Having raised the issues of fraud and conversion in the California Action, having introduced evidence with respect to them, and having had a full opportunity to try those issues to decision, Cendant dismissed them with prejudice. The Court finds that the issues of fraud and conversion were actually litigated in the California Action. Since fraud and conversion form the basis for the 523 Counts and are applicable to a portion of the 727 Counts, these Counts are, to that extent, part of the same primary rights as were litigated in the California Action. To the extent that fraud or conversion form the basis for the 523 or 727 Counts, this Court determines this prong of the collateral estoppel test is met.

Necessarily decided and final and on the merits

Quinn argues that the issues relevant for collateral estoppel purposes were necessarily decided in the California Action based on the identical or substantially similar allegations in the California Action and in the Amend Complaint and complete the record in the California action.

Cendant counters that the issues that Quinn seeks to collaterally estop were not necessarily decided in the California Action. Cendant argues that the very nature of the manner in which the California Action was resolved – a Settlement Agreement incorporated into a Final Judgment – is evidence of the fact that certain issues were not necessarily decided. Cendant further argues that due to California’s choice of remedies laws, it elected to settle the breach of contract claim with Quinn and abandon the fraud claim, and therefore the fraud claim was not necessarily litigated in the California Action.

Both parties accept that the Final Judgment in the California Action was a final judgment for collateral estoppel analysis. However, there is significant disagreement over whether the judgment was on the merits. Cendant argues that one of the central characteristics of a consent judgment, such as the Final Judgment, is that the court has not actually resolved the substance of the issues presented. 18A Fed. Prac & Proc. Juris. 2d § 4443. Cendant asserts that the judgment in the California Action is not a result of an adjudication, but instead derives from a contractual agreement entered into by the parties. Quinn counters that a consent judgment is as conclusive as to any matter actually litigated following trial. *Safe Flight Instrument Corp. v. United Control Corp.*, 576 F.2d 1340 (9th Cir. 1978); *See also, E. & J. Gallo Winery v. Encana Energy Services, Inc.*, 388 F. Supp. 2d 1148 (E.D. Cal. 2005).

Quinn argues that the issues she is attempting to collaterally estop were decided on the merits in the California Action. Quinn relies on the fact that a Final Judgment was entered in the California

Action after a two day trial in which Cendant had the opportunity to present oral and documentary evidence.

A consent judgment is conclusive as to any matter actually litigated. The Final Judgment was entered after consideration of the merits in a two day trial where the issues of fraud and conversion were raised. Although Cendant claims that it did not pursue incorporating the fraud and conversion causes of action into the Final Judgment because of California's choice of remedies laws and Quinn's concession on the breach of contract claims, it is clear that fraud and conversion were pled; evidence on those issues was presented; and the fraud and conversion causes of action were subsequently dismissed with prejudice. Cendant is foreclosed from re-litigating those issues.⁸ Therefore, these prongs of the collateral estoppel analysis are satisfied.

Privity

The final step in analyzing whether collateral estoppel is available under California law is whether the party against whom preclusion is sought was the same or in privity with the party from the former proceeding. Cendant was the plaintiff in the California Action and Quinn was the defendant. Because the parties are the same and identical or substantially similar issues are being litigated, the privity prong of issue preclusion analysis is met.

Privity to and judicial notice of *Cendant v. KPMG*

Quinn has alerted this Court to the proceedings in *Cendant v. KPMG* which involved a dispute arising from the same contract and Equity Advances as here. Quinn argues that the Court can either take judicial notice of the pleadings and rulings in this action or determine that Quinn is in privity with

⁸As will be more fully discussed below, the Court is aware (through the application of collateral estoppel and judicial notice) of the admissions made by Cendant and the determinations made by the court in *Cendant v. KPMG, supra*, which further undercuts any allegation the Quinn engaged in fraud or conversion.

KPMG, which would allow her to invoke collateral estoppel regarding the issues litigated in *Cendant v. KPMG*. Quinn argues that the pleadings and orders in *Cendant v. KPMG* both support her contention that the doctrine of collateral estoppel bars Cendant from re-litigating issues that were previously litigated in California and that Cendant has asserted facts in the Amended Complaint which are contrary to admissions Cendant made in *Cendant v. KPMG*.

To find that one person is in privity with another is to find that the relationship between those persons is such that a judgment involving one of them may justly be conclusive upon the other, although the other was not party to the lawsuit. *Gill and Duffus Services, Inc. v. A.M. Niral Islam C.A.*, 675 F.2d 404 (D.C. Cir. 1982). Quinn argues that privity of contract existed between KPMG and Quinn because the documents that form the basis for *Cendant v. KPMG* involved a series of agreements among all three of them in the Relocation Management Agreement and the Equity Advance and Promissory Note, which was executed by Quinn in favor of Cendant and contains indemnification language as between Cendant and KPMG.

The interconnections among Cendant, KPMG and Quinn arising out of the various agreements are such that Cendant cannot plausibly contend that Quinn is not in privity with the other two. Cendant and KPMG contracted for Cendant to provide relocation services to Quinn; KPMG indemnified Cendant for certain matters relating to Quinn's relocation; Quinn undertook contractual obligations to Cendant arising out of the Cendant-KPMG agreements. None of the agreements between Quinn and Cendant could have come into being but for the existence of the KPMG-Cendant agreements. Consequently, the Court finds that there was privity between Quinn and KPMG for the purposes of collateral estoppel.

Even if this Court were to determine that privity did not exist between Quinn and KPMG, this Court could still take judicial notice of the court record in *Cendant v. KPMG*. It is generally agreed that

courts can take judicial notice of other courts' records under Federal Rule of Evidence 201(b)(2). 21B Fed. Prac. & Proc. Evid.2d § 5106.4. Federal courts had long been liberal in noticing judicial records. Whatever the federal common law may have been, since the enactment of Rule 201 federal courts notice the records of any court, state or federal. 1 Weinstein & Berger, *Weinstein's Evidence*, 2d ed.1996, p. 201-42.

Under either (or both) privity of contract or judicial notice, this Court is able to consider the pleadings and orders from *Cendant v. KPMG*. In *Cendant vs. KPMG* , Cendant admitted: (a) that during an initial conversation with Quinn, Cendant employee Karen Stavac wrote on the information sheet the information provided by Quinn during a telephone conversation. Stavac erroneously noted on the information sheet that the principal amount of the Indymac loan (the mortgage on the New York Residence) was \$44,716 while the actual principle amount of the loan exceeded \$441,000;⁹ (b) this clerical error constituted negligence on the part of Cendant; (c) before it made the Equity Advance to Quinn in February 2001, Cendant did not undertake to determine the amount of the mortgage on Quinn's property from any public records; (d) before it made the Equity Advance to Quinn in February 2001, Cendant did not seek to obtain information about the Indymac loan from any source other than the single telephone conversation with Quinn; (e) at the time Cendant advanced the second equity advance of \$387,750 to Quinn it had not yet received any title report from the title company or any information as to the state of the title to the New York Residence; (f) in making the error in computing the available equity in the New York Residence before making the advance of \$387,750 to Quinn, Cendant's conduct fell below a standard of reasonable business care; (g) it was below the reasonable standard of business care for Cendant to have made an equity advance of \$387,750 to Quinn in

⁹There is no suggestion in the record that Quinn provided inaccurate information to Stavac.

February 2001 without first having received documentation or information (“estoppel certificate”) from Indymac stating the payoff amount for its loan secured by a mortgage on the New York Residence; (h) in making the error computing the equity advance of \$387,750 to Quinn in February 2001 Cendant did not carefully administer the equity loan; and (i) Cendant was negligent in the act of over-advancing sums to Quinn.

Based on the foregoing, this Court is further assured that there is no basis for Cendant’s fraud and conversion claims against Quinn. Therefore the Counts in the Amended Complaint that rely on fraud or conversion relating to any conduct by Quinn prior to the entry of the Final Judgment are baseless and appropriate for summary judgment.

Accordingly, it is ORDERED:

1. Partial Summary Judgment in favor of Quinn is GRANTED with regards to Counts I, II, III, and IV of the Amended Complaint such that Cendant may not assert any conduct by Quinn which occurred prior to November 20, 2003, as a basis for seeking denial of Quinn’s discharge under any provision of 11 U.S.C. § 727.

2. Summary Judgment in favor of Quinn is GRANTED with regards to Counts V, VI, VII, and VIII in the Amended Complaint, and each of those Counts is hereby DISMISSED with prejudice.

3. The Court will conduct a pretrial conference with respect to the remaining portions of Counts I, II, III, and IV on **October 30, 2006 at 10:30 a.m.** The Court anticipates setting a trial date at the pretrial conference.

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