

Denial of Discharge
§ 523(a)(6)
Claim/Issue Preclusion
Summary Judgment

Empire Wholesale Lumber Co. v. Meyers, et al., Adversary No. 99-6079-fra
Benjamin Meyers, Case No. 97-63375-fra7
Appellate No. 01-35012

11/19/2002 FRA

Unpublished

Court of Appeals aff'd BAP which had aff'd FRA

The Court of Appeals denied the Defendant's appeal, saying that Defendant's contention that it was error to enter a judgment against him after the Plaintiff's motion for summary judgment was denied before trial reflected a misunderstanding of the effect of a denial of summary judgment. Other assignments of error were affirmed for the reasons stated in the BAP opinion.

The Panel stated that although circumstances suggested that the appeal was frivolous, it declined to award fees and double costs at that time.

Underlying Bankr. Opinions at: E99-18(5) and E99-24(10).
Underlying BAP Opinion at E00-18(12).

E02-10(3)

FILED

NOV 19 2002

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

**CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS**

FOR THE NINTH CIRCUIT

In re: BENJAMIN R. MEYERS,

Debtor,

BENJAMIN R. MEYERS,

Appellant,

v.

EMPIRE WHOLESALE LUMBER CO., an
Ohio Corporation; ERIC R.T. ROOST, U.S.
Bankruptcy Trustee of the Estate of
Benjamin R. Meyers,

Appellees.

No. 01-35012

D.C. No. OR-00-01046-KMaB

MEMORANDUM*

Appeal from the Ninth Circuit
Bankruptcy Appellate Panel
Brandt, Marlar, and Klein, Bankruptcy Judges, Presiding

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9TH CIR. R. 36-3.

Submitted November 8, 2002**
Seattle, Washington

Before: REAVLEY,*** KOZINSKI, and W. FLETCHER, Circuit Judges.

Benjamin R. Meyers appeals the decision of the Bankruptcy Appellate Panel (BAP). Meyers contends, among other things, that the bankruptcy court erred by entering a judgment against him because Empire Wholesale Lumber Co.'s motion for summary judgment was denied before trial commenced. Meyers's contention reflects a misunderstanding of the effect of a denial of a motion for summary judgment, and we affirm.

Summary judgment is only appropriate if there are no genuine issues of material fact to be tried. FED. R. CIV. PRO. 56. A denial of summary judgment is not a decision on the merits; it is simply a decision that a material issue of fact exists which requires trial. 10A CHARLES ALAN WRIGHT, ARTHUR R. MILLER & MARY KAY KANE, FEDERAL PRACTICE AND PROCEDURE § 2712 (1998 & Supp. 2002).

The district court partially denied Empire's motion for summary judgment

** The panel unanimously finds this case suitable for decision without oral argument. See FED. R. APP. P. 34(a)(2).

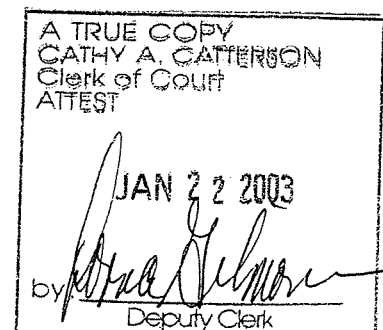
*** Honorable Thomas M. Reavley, Senior United States Circuit Judge for the Fifth Circuit, sitting by designation.

because it concluded that the question of Meyers's personal liability for the judgment against his corporation involved unresolved issues of material fact. The district court did not reach the merits of Empire's claim; it simply decided trial would be necessary to determine whether Meyers was personally liable for conversion by his corporation and whether a judgment against Meyers would be dischargeable in bankruptcy. After trial, the bankruptcy court determined that Meyers was personally liable and that the judgment was nondischargeable under 11 U.S.C. § 523(a)(6). The district court's denial of summary judgment and the bankruptcy court's judgment on the merits do not conflict.

None of Meyers's other assignments of error have any merit, and all were addressed by the BAP. We affirm for the reasons stated in the BAP's opinion.

Empire has requested an award of attorney's fees and costs pursuant to Federal Rule of Appellate Procedure 38. Although circumstances suggest that Meyers's appeal is frivolous, we decline to award fees and double costs at this time.

AFFIRMED.



Office of the Clerk
United States Court of Appeals for the Ninth Circuit
95 Seventh Street, P. O. Box 193939
San Francisco, CA 94119-3939

January 22, 2003

RECEIVED
NANCY B. DICKERSON, CLERK
U.S. BKCY. APP. PANEL
OF THE NINTH CIRCUIT

JAN 27 2003

BAP Clerk
Bankruptcy Appellate Panel
125 South Grand Avenue
Pasadena, CA 91105

FILED _____
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DATE INITIAL

C.A. NO.	TITLE	AGENCY/ D.C. NO.
01-35012	Meyers v. Empire Wholesale Lum	OR-00-01046-KMaB

Dear Clerk:

The following document(s) in the above listed cause(s) is (are) being sent to you under cover of this letter.

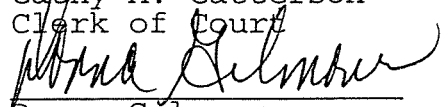
- Certified copy of the Decree of the Court
- Judgment of the National Labor Relations Board
- Certified copy of the Entry of Dismissal

The record on appeal will follow under separate cover.

Please acknowledge receipt on the enclosed copy of this letter.

Very truly yours,

Cathy A. Catterson
Clerk of Court


By: Donna Gilmour
Deputy Clerk

Enclosure(s)
cc: ALL COUNSEL

Bankruptcy Ct.

U.S. Bankruptcy Appellate Panel
of the Ninth Circuit
125 South Grand Avenue, Pasadena, California 91105
Appeals from Central California (626) 229-7220
Appeals from all other Districts (626) 229-7225

CLERK, U.S. BANKRUPTCY COURT DISTRICT OF OREGON	
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To: Clerk, Bankruptcy Court, Eugene District of Oregon

RE: BENJAMIN R. MEYERS

CA No. 01-35012

BAP No. OR-00-1046-KMaB

Bkcy No. 697-63375-aer7

The judgment of this Panel entered on 11/30/00 was appealed to the United States Court of Appeals for the Ninth Circuit. Attached is a copy of the mandate of the Court of Appeals received on January 27, 2003. The Court of Appeals affirmed the BAP decision.

Nancy B. Dickerson, BAP Clerk

By: Ben Moss
Deputy Clerk

Date: January 28, 2003

JUDGMENT

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NO. 01-35012
CT/AG#: OR-00-01046-KMaB

In re: BENJAMIN R. MEYERS

Debtor

BENJAMIN R. MEYERS

Appellant

v.

EMPIRE WHOLESALE LUMBER CO., an Ohio Corporation; ERIC R.T.
ROOST, U.S. Bankruptcy Trustee of the Estate of Benjamin R.
Meyers

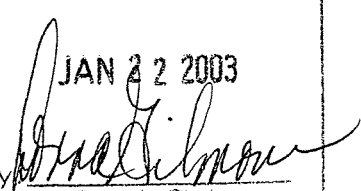
Appellees

APPEAL FROM the United States Bankruptcy Appellate Panel
of the Ninth Circuit.

THIS CAUSE came on to be heard on the Transcript of the Record
from the United States Bankruptcy Appellate Panel of the
Ninth Circuit and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said Bankruptcy Appellate Panel in this cause be, and hereby is AFFIRMED.

Filed and entered - 11/19/02.

A TRUE COPY
CATHY A. CATTERSON
Clerk of Court
ATTEST
JAN 22 2003
by 
Deputy Clerk