**UNITED STATES COURT OF APPEALS**
**FOR THE FIFTH CIRCUIT**

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**No. 93-8086**
**Summary Calendar**

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**IN THE MATTER OF: GARY W. JOHNSON,**

**Debtor.**

**GARY W. JOHNSON,**

**Appellant,**

**VERSUS**

**TEXAS VENTURE PARTNERS, ET AL.,**

**Appellees.**

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**Appeal from the United States District Court**
**for the Western District of Texas**
**(A-91-CV-605)**

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(November 22, 1993)

Before KING, HIGGINBOTHAM, and BARKSDALE, Circuit Judges.

PER CURIAM:[1]

In issue is the preclusive effect of a state court judgment in a bankruptcy court dischargeability proceeding. We hold that the bankruptcy court correctly applied principles of issue preclusion in ruling that the debts in issue were nondischargeable. Accordingly, we **AFFIRM**.

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[1] Local Rule 47.5.1 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that rule, the court has determined that this opinion should not be published.

I.

In 1985, Texas Venture Partners and others brought suit in Texas state court against Gary W. Johnson, his business partner, and two corporations controlled by them, claiming that Johnson and his partner, David Christian, had made fraudulent representations that induced the plaintiffs to invest in an oil and gas prospect. Suit was brought under several theories of recovery, including the Texas Business and Commerce Code § 27.01 (statutory fraud); common law fraud; and the Texas Deceptive Trade Practices - Consumer Protection Act (DTPA), V.C.T.A., Bus. & C. § 17.41 *et seq.* A jury found for Venture Partners in May 1987.

The verdict did not include attorney's fees; Venture Partners moved successfully for an interlocutory judgment and a new trial on this issue. Again, Venture Partners prevailed in the new trial (attorneys' fees); and in December 1988, a final judgment was entered for both trials.

Before the new trial, however, Johnson had filed in January 1988 a voluntary petition under Chapter 7 of the Bankruptcy Code.[2] Attempting to protect their state court judgment from discharge, Venture Partners filed their complaint against dischargeability, claiming that the debt under the state court judgment (including the attorney's fees) should be excepted from discharge under §

[2] After his Chapter 7 filing, Johnson sought to remove the trial on attorney's fees to federal district court. That court remanded the case to the state court that had tried the case on the merits, resulting in the judgment discussed *supra*.

523(a)(2)(A) of the Bankruptcy Code.[3] Later, Venture Partners moved for summary judgment on this issue, contending, *inter alia*, that the state judgment precluded relitigation of any of the elements of § 523(a)(2)(A).

The bankruptcy court ruled that some of the requirements for issue preclusion had been met, but that an evidentiary hearing was needed to determine whether other requirements of the doctrine were satisfied.[4] After that hearing on January 30, 1990, the bankruptcy court ruled that the state judgment precluded relitigation of the matters covered by the § 523 claim. Accordingly, it entered judgment in favor of Venture Partners, adopting certain jury findings and the state court final judgment.

After Johnson's motions for rehearing and a new trial were denied, he appealed to district court, which affirmed.

II.

Johnson contends that the bankruptcy court erred by giving preclusive effect to the state court judgment, and by granting

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[3] Section 523(a)(2)(A) excepts from discharge debts that are

> for money, property, services, or an extension, renewal, or refinancing of credit, to the extent obtained by --
>
> > (A) false pretenses, a false representation, or actual fraud, other than a statement respecting the debtor's or an insider's financial condition[.]

Bankruptcy Code § 523(a)(2(A), 11 U.S.C. § 523 (1993).

[4] At issue in the hearing was whether the case had been "actually litigated" in state court (where Johnson at times proceeded *pro se*). The bankruptcy court found that it had; Johnson does not appeal this issue.

summary judgment for Venture Partners accordingly. Of course, we review a summary judgment *de novo*. ***Abbott v. Equity Group, Inc.***, 2 F.3d 613, 618 (5th Cir. 1993) (citing ***Degan v. Ford Motor Co.***, 869 F.2d 889, 892 (5th Cir. 1989)). It is proper if there is "no genuine issue as to any material fact and ... the moving party is entitled to a judgment as a matter of law." ***Id.*** at 618-19; Fed. R. Civ. P. 56(c).

In seeking summary judgment, Venture Partners contended that the state verdict had preclusive effect because "[t]he jury's answer to Special Issue No. 1 ... establishes that the jury and the State District Court found that ... Johnson committed actual fraud upon each of the Plaintiffs within the meaning of 11 U.S.C., § 523(a)(2)(A)." Johnson asserts that issue preclusion was inappropriate for a variety of reasons.

A.

Johnson initially contends that issue preclusion is inappropriate for policy reasons, because the bankruptcy court "must make an independent determination of all elements comprising the complaint ... [and] ... may not abandon its duty to the state courts" through issue preclusion.[5] This argument is meritless.

[5] Johnson makes much of the fact that the bankruptcy court "abandon[ed] its duty" to make independent determinations, because it did not have before it the transcript of the state proceedings. We have previously held, however, that the bankruptcy court need not consider the trial transcript; in appropriate cases, consideration of "`portions of the record'" will suffice. ***In Re Davis***, 3 F.3d 113, 115 (5th Cir. 1993) (quoting ***Grogan v. Garner***, 498 U.S. 279, 282 (1991)).

Issue preclusion principles properly apply to proceedings under § 523(a). ***Grogan v. Garner***, 498 U.S. 279, 284 & n.11 (1991).[6]

B.

Issue preclusion applies if the following requirements are met:

> (1) the issue to be precluded must be identical to that involved in the prior action; (2) in the prior action the issue must have been actually litigated; and (3) the determination made of the issue in the prior action must have been necessary to the resulting judgment.

***In Re Davis***, 3 F.3d 113, 114 (5th Cir. 1993) (citing ***In Re Shuler***, 722 F.2d 1253, 1256 n.2 (5th Cir.), *cert. denied*, 469 U.S. 817 (1984)). Johnson contends that the first and third requirements were not met. We address first the third requirement.

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[6] Johnson also contends that the state judgment cannot preclude further litigation because it is void. Johnson's theory is that the state court lacked jurisdiction to enter a judgment for rescission and for attorneys' fees under common law or statutory fraud. This contention also must fail, for two reasons.

First, as we discuss *infra*, rescission and attorney's fees are available remedies under Texas common-law or statutory fraud.

Second, a mere error in granting relief does not render a judgment void under Texas law. Instead, it is void only when the court entering it lacks jurisdiction over the parties or subject matter, or when the court acts outside its statutory or constitutional authority. *See*, *e.g.*, ***Shoberg v. Shoberg***, 830 S.W.2d 149, 152 (Tex. App. - Houston [14th Dist.] 1992); ***Austin Indep. Sch. Dist. v. Sierra Club***, 495 S.W.2d 878, 882 (Tex. 1973). This is not such a case. Even if the state judgment was erroneous because the relief granted was unavailable under Texas law, Johnson's remedy was to use ordinary appellate or other procedures to correct it. *See* ***Browning v. Navarro***, 887 F.2d 553, 562-63 (5th Cir. 1989). He did not do so; and, as the bankruptcy court noted, he "may not re-urge these contentions in this forum by way of a collateral attack on an otherwise valid state court judgment."

1.

The bankruptcy court found that the state jury findings under, *inter alia*, Special Issue No. 1, were necessary to the state judgment. That issue asked whether Johnson had committed fraud upon any of the plaintiffs, with respect to the sale of interests in the prospect. The jury decided that Johnson had committed fraud on all of the plaintiffs.

Johnson contends that this finding was not necessary to the judgment, because it dealt with fraud claims under either common law or statutory fraud, not with DTPA claims. Essentially, he asserts that rescission and a grant of attorney's fees are incompatible with any theory of recovery other than one under the DTPA.

The parties do not dispute that rescission is an available remedy for common law fraud; it also is available under statutory fraud. *See, e.g.*, ***Yarbrough v. Cooper***, 559 S.W. 2d 917 (Tex. Civ. App. - Houston [14th Dist.] 1977). Further, attorney's fees are explicitly available in fraud cases. V.C.T.A., Bus. & C. § 27.01. The bankruptcy court did not err in determining that the finding was essential to the state court judgment.

2.

Johnson also contends that the dischargeability issues are not the same as those resolved by the state judgment. His claim centers on certain of the 20 "Representations and Failures to Disclose" that were submitted to the jury in conjunction with Special Issue No. 1, and which were adopted by the bankruptcy

court. Johnson contends that the jury's finding of fraud was based in part on its consideration of the "Representations and Failures to Disclose." He asserts that the "multifarious" nature of the list makes it impossible to determine which of the 20 items was the basis for the jury's finding of fraud under Special Issue No. 1, and that certain of the 20 items would not independently support a finding of nondischargeability under § 523(a)(2(A).

This argument is not well taken. As the bankruptcy court concluded, the jury findings on Special Issue No. 1 alone, without regard to the Representations and Failures to Disclose, support a finding of nondischargeability under § 523(a)(2)(A). That issue read in relevant part as follows:

> In connection with this Special Issue, you are instructed that a person commits FRAUD by his REPRESENTATION when he makes:
>
> 1. a representation of an *existing or past material fact*;
>
> 2. which is [false];
>
> 3. which he *knew was false* at the time he made it;
>
> 4. the representation is made to an investor *with the intent to induce the investor to invest* in the Gonzales Oil Prospect;
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> 5. the *investor acts in reliance on the representation* by investing in the Gonzales Oil Prospect; and
>
> 6. such action was to the investor's detriment by incurring obligations and liabilities which would not have been incurred but for such representations.
>
> A fact is a material fact if it would likely affect the conduct of a reasonable investor with

> reference to his investment in the Gonzales Oil Prospect.

(Emphasis added.)

This instruction, pursuant to which the jury found that Johnson had committed fraud as to each of the plaintiffs, tracks the elements of fraud as required by § 523(a)(2)(A).[7] That is, to support such nondischargeability, the misrepresentations must have been: "(1) knowing and fraudulent falsehoods, (2) describing past or current facts, (3) that were relied upon by the other part[ies]." ***In Re Allison***, 960 F.2d 481, 483 (5th Cir. 1992). The special issue more than adequately addresses each of these elements; and a jury finding of fraud under the special issue is identical, for purposes of issue preclusion, to a finding for § 523(a)(2)(A) purposes that Johnson committed fraud.

III.

For the foregoing reasons, the judgment is

**AFFIRMED**.

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[7] We note that Johnson contends, for the first time on appeal, that Texas statutory fraud and common-law fraud do not require "knowing and fraudulent misrepresentation," as § 523 requires. We decline to address this issue, because it was not raised previously. *E.g.*, ***Russell v. Sun America Securities, Inc.***, 962 F.2d 1169, 1176 (5th Cir. 1992).