

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION

IN THE MATTER OF)	
)	
HENRY C. MURRAY and)	CASE NO. 05-33318 HCD
MAUREEN T. MURRAY,)	CHAPTER 7
)	
DEBTORS.)	
)	
)	
RUTH CHOU, for herself and next of friend for)	
ARIEL L.,)	
PLAINTIFFS,)	
vs.)	PROC. NO. 05-3080
)	
HENRY C. MURRAY and)	
MAUREEN T. MURRAY,)	
DEFENDANTS.)	

Appearances:

Seth L. Goldstein, Esq., attorney for plaintiffs, 2100 Garden Road, Suite H-8, Monterey, California 93940-5366;
and

June E. Bules, Esq., attorney for defendants, 110 West Adams Street, Plymouth, Indiana 46563.

MEMORANDUM OF DECISION

At South Bend, Indiana, on November 28, 2006.

Before the court is the Motion for Summary Judgment filed by the plaintiffs Ruth Chou and Ariel L. (“plaintiffs”) against the debtors Henry C. Murray and Maureen T. Murray (“defendants”). The plaintiffs commenced this adversary proceeding by filing a Complaint To Determine Dischargeability of Debt (“Complaint”), based upon a default judgment rendered in a California state court. They contend that the judgment debt owed to them by the defendants is excepted from the defendants’ discharge pursuant to § 523(a)(6) and (a)(2)(A) of the Bankruptcy Code. The defendants filed an Answer to the Complaint but did not respond to the Motion for Summary Judgment. After the appropriate time for response had passed, the court took the matter under advisement. For the reasons set forth below, after considering the Motion for Summary Judgment, the

underlying Complaint and Answer, the state court judgment, and all other documents in the record, the court denies the Motion for Summary Judgment.

Jurisdiction

Pursuant to 28 U.S.C. § 157(a) and Northern District of Indiana Local Rule 200.1, the United States District Court for the Northern District of Indiana has referred this case to this court for hearing and determination. After reviewing the record, the court determines that the matter before it is a core proceeding within the meaning of § 157(b)(2)(I) over which the court has jurisdiction pursuant to 28 U.S.C. §§ 157(b)(1) and 1334. This entry shall serve as findings of fact and conclusions of law as required by Federal Rule of Civil Procedure 52, made applicable in this proceeding by Federal Rules of Bankruptcy Procedure 7052 and 9014. Any conclusion of law more properly classified as a factual finding shall be deemed a fact, and any finding of fact more properly classified as a legal conclusion shall be deemed a conclusion of law.

Background

Henry and Maureen Murray filed a voluntary chapter 7 petition in this court on June 16, 2005. On September 9, 2005, Ruth Chou, on behalf of herself and her daughter Ariel L., filed a Complaint in this bankruptcy case, commencing an adversary proceeding against the defendants which sought that their debt be declared nondischargeable pursuant to 11 U.S.C. § 523(a)(2)(A) and (a)(6). The Complaint alleged that the plaintiffs were awarded a civil judgment against the defendants in the amount of \$44,103,155. The default judgment was entered on March 15, 2005, in Santa Clara County Superior Court in California three months before the defendants filed bankruptcy. According to the plaintiffs, “[t]he judgment was for intentional acts committed against Plaintiffs constituting sexual battery and child molestation.” R. 1 at ¶ 5. The Complaint alleged that those willful and malicious acts were nondischargeable under § 523(a)(6). The Complaint’s second claim alleged that defendant Henry Murray took money from them under false pretenses, fraud and deceit, and thus that the debt was nondischargeable under § 523(a)(2)(A).

Attached as an exhibit to the Complaint was the Amended Judgment (“Judgment”) entered in the California state court against the defendant Henry Clemons Murray, aka Lance Dubois.¹ It was a form, a list of categories with “X” in certain boxes. It indicated that a default judgment was entered in the amount of \$44,100,000 in damages and \$3,155 in costs, based on the plaintiff’s testimony. The Judgment was entered against Henry C. Murray; it did not name the defendant Maureen T. Murray. Nor did it state the grounds for the entry of judgment. The document indicated that a “statement of decision” was not requested. Attached as the third page of the Judgment was “Attachment 7,” which stated:

The Court finds, for the purposes of Bankruptcy Code Section 523(a)(2)(A) that the money obtained by the defendant was by actual Fraud; and for Subsection (6), the Fraud and acts committed by Defendant upon Ruth Chou and Ariel L. were willful and malicious.

R. 17, Amended Judgment (filed March 15, 2005, in Superior Court of California, County of Santa Clara). The record does not reflect whether the defendant appealed the default judgment or sought reconsideration of it. It indicates only that the defendants filed for bankruptcy three months later.

The defendants filed a timely Answer, denying that the California judgment was entered against Maureen Murray and denying all the allegations of intentional acts of sexual battery, child molestation, and the taking of money under false pretenses by Henry Murray. At the telephonic pre-trial conference held January 11, 2006, the court gave the parties 90 days for discovery. At the April 19, 2006, telephonic pre-trial conference, plaintiffs’ counsel stated that he would file a motion for summary judgment.

On June 30, 2006, the plaintiffs filed a barebones Motion for Summary Judgment stating only that the plaintiffs were entitled to judgment as a matter of law. It was based on three attached documents: the Declaration of Seth L. Goldstein, counsel for plaintiffs (“Declaration”); the Statement of Material Facts; and the Points and Authorities in Support of Motion for Summary Judgment (“Points and Authorities”). Attorney

¹ The Judgment attached to the original Complaint was incomplete. On July 5, 2006, the original Amended Judgment was filed, *see* R. 17, and the Complaint was amended to add the missing page of the Judgment, *see* R. 20. The term “Judgment” refers to that Amended Judgment found at R. 17.

Goldstein's Declaration stated that he was a licensed attorney who filed the California state court complaint on behalf of Ruth Chou and her daughter Ariel L., naming Henry C. Murray and others. He described the hearing:

On February 7, 2005 I appeared before the Honorable James P. Kleinberg with my client and her daughter, Ruth Chou and Ariel L., for the scheduled default hearing. The court took testimony from Ruth Chou on the circumstances including testimony to support liability of the defendant and damages suffered by the plaintiffs. I subsequently presented Judge Kleinberg with a judgment for his signature seeking the specific findings regarding fraud, and willful and malicious conduct on the party [*sic*] of defendant, Henry C. Murray Jr. aka Lance Dubois which he readily did find.

R. 16, Declaration, at ¶ 2. Attached to the Declaration was one exhibit: two pages (pages 1 and 3) of the "Interrogatories to Henry C. Murray" presented to the defendant in this adversary proceeding. Although the Declaration stated that the responses from the defendant were attached, they were not.

The Statement of Material Facts, quoted in its entirety, presented three "facts":

Statement of Fact 1: The complaint in Santa Clara County Superior Court naming Defendant, Henry Murray, Case No. 813498, contains one or more causes of action which[,] if proven, the judgment for damages would be excepted from discharge under 11 U.S.C. § 523(a)(2)(A) and/or 523(a)(6).

Proof: Declaration of Seth Goldstein at paragraph and Exhibit A attached thereto and the first amended complaint filed herein.

Statement of Fact 2: A valid default judgment in the amount of \$44,100,000 was entered against Defendant, Henry Clemens Murray aka Lance Dubois.

Proof: Interrogatories propounded upon Defendant, Interrogatory 9, 10 and 11 and Defendant's response thereto. [The court notes that the defendant's responses were not presented to this court.]

Statement of Fact 3: The California state trial Court found upon proof presented that the damages payable by Defendant Henry Clemens Murray aka Lance Dubois to plaintiffs were obtained by actual fraud and [were] willful and malicious within the meaning of the Bankruptcy Code Sections 523(a)(2)(A) and 523(a)(6).

Proof: Declaration of Seth L. Goldstein and Exhibit A of the first amended complaint.²

R. 16, Statement of Material Facts at 1-2.

In the Points and Authorities, the plaintiffs argued that there was no genuine issue of material fact and that the state court judgment had preclusive effect. They relied on a Ninth Circuit case, *Gayden v.*

² On September 7, 2006, Plaintiffs' counsel amended the Complaint in order to attach the third page of the state court Judgment which had been omitted from Exhibit 1 of the original Complaint. See R. 20.

Nourbakhsh (In re Nourbakhsh), 67 F.3d 798 (9th Cir. 1995), which held that a default judgment conclusively established “all the material allegations contained in the complaint . . . and every fact necessary to uphold the default judgment.”³ Points at 3-4 (quoting *In re Nourbakhsh*, 67 F.3d at 801). The plaintiffs also argued that, under California law, a “judgment by default is as conclusive as to the issues tendered by the complaint as if it had been rendered after answer filed and trial had on allegations denied by the answer.” R. 16, Points and Authorities at 4 (citing cases).

In the Points and Authorities, the plaintiffs asserted that the defendants’ conduct should be excepted from discharge under § 523(a)(2)(A) and (a)(6) and that nondischargeability was “not a close call in this matter.”

Henry Clemons Murray was found to have behaved in the most unspeakable manner with regards to plaintiff, Ruth Chou and her minor child. The verified complaint alleges causes of assault, sexual battery, intentional infliction of emotional distress, fraud and seeks punitive damages. The detailed and fact driven verified pleading shows that Defendant was a sexual predator preying on the weak to satisfy his sexual desire to degrade and harm as well as bilk them of their financial assets. The trial court conducted a default hearing taking testimony as set forth in the complaint, awarded damages in excess of 40 million dollars, and made specific findings that for the purposes of the Bankruptcy Code, the money obtained was obtained by “actual fraud” and the acts committed upon the plaintiffs were “willful and malicious.”

R. 16, Points and Authorities, at 5. The plaintiffs argued that the judgment had preclusive effect under California law and that “[l]itigants in California should rightly be able to rely upon California law when bringing an action against a resident of California or a defendant who committed the wrong in California.” *Id.* They contended that the “debt defendant seeks to discharge is as a matter of law excepted pursuant to Sections 523(a)(2)(A) and 523(a)(6) of the Bankruptcy Code.” *Id.* at 6.

The defendants failed to answer the summary judgment motion or to request a continuance. The court now considers the plaintiffs’ motion and the underlying record in this case.

³ In *In re Nourbakhsh*, the Ninth Circuit Court of Appeals reviewed the preclusive effect of default judgments under Florida law, not California law.

Discussion

The plaintiffs seek summary judgment on their Complaint against the defendants. They assert in the summary judgment motion that their earlier default judgment against the defendant Henry C. Murray collaterally estops the relitigation in the bankruptcy court of those facts alleged and proven in the California state court. They argue that the default judgment is conclusive and that there are no material facts in dispute. The plaintiffs urge this court to find that the debt owed by the defendants to them as a result of that default judgment, over \$44 million, is excepted from the debtors' discharge as a matter of law under § 523(a)(2)(A) or § 523(a)(6).

The plaintiffs can prevail in their summary judgment motion only if they meet the criteria for summary judgment. Under Rule 56(c) of the Federal Rules of Civil Procedure, made applicable in this court by Rule 7056 of the Federal Rules of Bankruptcy Procedure, summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c); see *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986); *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 585-86 (1986). In order to avoid trial, the moving party bears the burden of showing that no genuine issue of material fact is in dispute. See *Anderson*, 477 U.S. at 256; *Celotex*, 477 U.S. at 322. "To avoid summary judgment . . . the nonmoving party [is] required to set forth 'specific facts showing that there is a genuine issue for trial,' Fed. R. Civ. P. 56(e), and, further [has] to produce more than a scintilla of evidence in support of his position." *Silk v. City of Chicago*, 194 F.3d 788, 798 (7th Cir. 1999). In order to demonstrate that real factual disputes exist, the nonmovant must produce evidence of the disputes rather than relying solely on the allegations or denials in its pleadings. See *Barber v. United States (In re Barber)*, 236 B.R. 655, 659 (Bankr. N.D. Ind. 1998); N.D. Ind. L. B. R. B-7056-1. Summary judgment must be granted "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex*, 477 U.S. at 322.

Although this case turns, in the end, on the initial burden of production of evidence placed on the movant by Rule 56(c), the court first points out that the nonmoving party failed in its responsibility under Rule 56(e). The defendants herein denied the allegations of the Complaint, *see* R. 9, but did not oppose the motion for summary judgment. Rule 56(e) and this court’s Local Rule B-7056-1 require a nonmovant’s response. Indeed, “if a summary judgment respondent fails to file a timely statement of disputed material facts, uncontroverted statements in the moving party’s statement in support of summary judgment are deemed admitted.” *Barber*, 236 B.R. at 663 (citing *Giannopoulos v. Brach & Brock Confections, Inc.*, 109 F.3d 406, 412 (7th Cir. 1997)). The court finds that these defendants, by not responding to the plaintiffs’ motion for summary judgment, failed to comply with the local bankruptcy rule and federal rules. Therefore, all the material facts in the plaintiffs’ motion are deemed admitted.

Nevertheless, the court does not grant summary judgment automatically, merely because nonmovants failed to respond. The movants, with the initial burden of production, have the responsibility of demonstrating the basis for their claim that there are no material facts in dispute. The court still must consider whether the movants are entitled to a summary judgment as a matter of law. *See id.* at 664-65. It reviews the Statement of Material Facts presented by the movants, along with whatever materials are included to support those facts – affidavits, parts of the record, and other documents that were relied upon to validate the motion for summary judgment. If the facts admitted by default are dispositive of the issues before the court, then summary judgment properly may be granted. *See Hasbrook v. Citibank (In re Hasbrook)*, 289 B.R. 375, 378-79 (Bankr. N.D. Ind. 2002); *see also* N.D. Ind. L. B. R. B-7056-1.

In this bankruptcy proceeding, the plaintiffs did not set forth the facts presented in the state court complaint or at a hearing before the Santa Clara County Superior Court in California. Instead, they relied on the fact that a civil judgment was issued by that court. The plaintiffs argued that the judgment had collateral estoppel effect under California law. According to the plaintiffs, “[I]itigants in California should rightly be able to rely upon California law when bringing an action against a resident of California or a defendant who committed the

wrong in California.” R. 16 at 5. They contended that the “debt defendant seeks to discharge is as a matter of law excepted pursuant to Sections 523(a)(2)(A) and 523(a)(6) of the Bankruptcy Code.” *Id.* at 6.

The plaintiffs therefore based their summary judgment motion on collateral estoppel, also called issue preclusion. If it applies, that doctrine prevents a party from relitigating issues previously determined in another court. *See Jensen v. Foley*, 295 F.3d 745, 748 (7th Cir. 2002). The principles of collateral estoppel are applicable in adversary proceedings.⁴ *See Grogan v. Garner*, 498 U.S. 279, 285 n. 11, 111 S. Ct. 654, 658 n. 11, 112 L.Ed.2d 755 (1991); *Gupta v. Eastern Idaho Tumor Instit., Inc. (In re Gupta)*, 394 F.3d 347, 349 (5th Cir. 2004); *Baldwin v. Kilpatrick (In re Baldwin)*, 249 F.3d 912, 917 (9th Cir. 2001). “The effect of a judgment in subsequent litigation is determined by the law of the jurisdiction that rendered the judgment . . . provided the judgment was rendered in a proceeding that comported with due process of law.” *In re Catt*, 368 F.3d 789, 790-91 (7th Cir. 2004) (citing 28 U.S.C. § 1738 and supporting case law). In this case, a California state court rendered the default judgment at issue. The Seventh Circuit, in *Catt*, noted that Indiana and California are among “a significant minority of states . . . [to] allow findings made in default proceedings to collaterally estop, provided that the defaulted party could have appeared and defended if he had wanted to.” *Id.* at 791 (citing *Cal-Micro, Inc. v. Cantrell (In re Cantrell)*, 329 F.3d 1119 (9th Cir. 2003)). In *Cantrell*, the Ninth Circuit Court of Appeals made clear that a judgment by default “does not warrant the application of a special rule.” *Id.* at 1123.

. . . California law does, however, place two limitations on this general principle. The first is that collateral estoppel applies only if the defendant “has been personally served with summons or has actual knowledge of the existence of the litigation.” [cite] Collateral estoppel, therefore, only applies to a default judgment to the extent that the defendant had actual notice of the proceedings and a “full and fair opportunity to litigate.” [cite]

⁴ The Supreme Court, in *Brown v. Felsen*, 442 U.S. 127, 99 S. Ct. 2205, 60 L.Ed.2d 767 (1979), summarized the distinction between res judicata and collateral estoppel: “Whereas res judicata forecloses all that which might have been litigated previously, collateral estoppel treats as final only those questions actually and necessarily decided in a prior suit.” *Id.* at 139 n. 10, 99 S. Ct. at 2213 n. 10. *Brown* held that res judicata did not apply in dischargeability cases. “[W]e reject respondent’s contention that res judicata applies here and we hold that the bankruptcy court is not confined to a review of the judgment and record in the prior state-court proceedings when considering the dischargeability of respondent’s debt.” *Id.*, 442 U.S. at 138-39, 99 S. Ct. at 2213.

The second limitation, in the context of a default judgment, is that a decision has a preclusive effect in later proceedings “only where the record shows an express finding upon the allegation” for which preclusion is sought. [cite] But . . . “the express finding requirement can be waived if the court in the prior proceeding necessarily decided the issue.” [cite] In such circumstances, an express finding is not required because “if an issue was necessarily decided in a prior proceeding, it was actually litigated.” [cite]

Id. at 1124 (citing *Harmon v. Kobrin (In re Harmon)*, 250 F.3d 1240, 1247-48 (9th Cir. 2001); *Williams v. Williams (In re Williams’ Estate)*, 223 P.2d 248, 254 (1950)); *see also In re Baldwin*, 249 F.3d at 919; *Gottlieb v. Kest*, 141 Cal.App.4th 110, 148-49, 46 Cal. Rptr.3d 7, 33-34 (Cal App. 2006).

The issue herein, therefore, is whether the plaintiffs have proffered sufficient undisputed facts – facts deemed to be true as a result of the defendants’ default – that demonstrate as a matter of law that the debtors’ obligation to the plaintiffs is excepted from their discharge under § 523(a)(2)(A) and/or § 523(a)(6) of the Bankruptcy Code. Those sections provide that an individual debtor is not discharged from any debt —

(2) 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 . . .;

. . . and . . .

(6) for willful and malicious injury by the debtor to another entity or to the property of another entity.

11 U.S.C. § 523(a)(2)(A), (6).

To succeed under § 523(a)(2)(A), the plaintiffs have the burden of proving by a preponderance of the evidence that the debt owed to them by the defendants was obtained by actual fraud, false pretenses, or misrepresentation. *See McClellan v. Cantrell*, 217 F.3d 890, 893-94 (7th Cir. 2000) (stating that fraud is not limited to misrepresentations and misleading omissions); *In re Bero*, 110 F.3d 462, 465 (7th Cir.1997) (setting forth burden of proof). The plaintiffs must establish that (1) the defendants obtained the plaintiffs’ financial assets through representations that the defendants either knew to be false or made with such reckless disregard for the truth as to constitute willful misrepresentation; (2) the defendants acted with an intent to deceive the plaintiffs; and (3) the plaintiffs justifiably relied on the defendants’ false representations to their detriment. *See In re*

Sheridan, 57 F.3d 627, 635 (7th Cir. 1995); *Mayer v. Spanel Int'l, Ltd. (In re Mayer)*, 51 F.3d 670, 673 (7th Cir.), cert. denied, 516 U.S. 1008 (1995); *In re Maurice*, 21 F.3d 767, 774 (7th Cir. 1994); see also *Field v. Mans*, 516 U.S. 59, 74-75, 116 S. Ct. 437, 446, 133 L.Ed.2d 351 (1995) (holding that a creditor's reliance need only be justifiable, not reasonable).

To succeed under § 523(a)(6), the plaintiffs were required to demonstrate that the defendants intended to cause harm or that there was a substantial certainty that harm would occur. See *Kawaauhau v. Geiger*, 523 U.S. 57, 61, 118 S. Ct. 974, 977, 140 L.Ed.2d 90 (1998). The plaintiffs must establish that (1) the defendants owe them a debt resulting from an injury the defendants caused them; (2) the defendants' actions in causing the injury were willful; and (3) the defendants' actions in causing the injury were malicious. See *Baker Dev. Corp v. Mulder (In re Mulder)*, 307 B.R. 637, 641 (Bankr. N.D. Ill. 2004). The term "malicious" has been defined as "'in conscious disregard of one's duties or without just cause or excuse; it does not require ill will or a specific intent to do harm.'" *In re Thirtyacre*, 36 F.3d 697, 700 (7th Cir. 1994) (quoting *Wheeler v. Laudani*, 783 F.2d 610, 615 (6th Cir. 1986)). The term "willful" modifies "injury"; therefore, a nondischargeable action under § 523(a)(6) "takes a deliberate or intentional *injury*, not merely a deliberate or intentional *act* that leads to injury." *Geiger*, 523 U.S. at 61, 118 S. Ct. at 977 (concluding that § 523(a)(6) is intended to prevent the discharge of debts incurred as a result of intentional torts). The Supreme Court held that the § 523(a)(6) exception is limited to conduct associated with intentional torts and that "debts arising from recklessly or negligently inflicted injuries do not fall within the compass of § 523(a)(6)." *Id.* at 64, 118 S. Ct. at 978. The plaintiffs must prove each element by a preponderance of the evidence. See *Zygulski v. Daugherty*, 236 B.R. 646, 653 (N.D. Ind. 1999).

The element of intent is found in each of those exceptions to discharge of a debt. Intent usually is a question of fact and is "often not susceptible to summary judgment." *In re Kontrick*, 295 F.3d 724, 737 (7th Cir. 2002), *aff'd*, 540 U.S. 443, 124 S. Ct. 906, 157 L.Ed.2d 867 (2004). In addition, the plaintiffs have alleged fraud, and the seriousness of such an allegation requires a plaintiff to plead more than general, conclusory allegations of fraudulent conduct. See *In re Halverson*, 330 B.R. 291, 301 (Bankr. M.D. Fla. 2005) (citing cases).

Rule 9(b) of the Federal Rules of Civil Procedure, made applicable in adversary proceedings by Rule 7009 of the Federal Rules of Bankruptcy Procedure, requires that “the circumstances constituting fraud or mistake shall be stated with particularity.” Fed. R. Civ. P. 9(b); Fed. R. Bankr. P. 7009.

In this case, the plaintiffs assert that the California default judgment should be given preclusive or collateral estoppel effect in this bankruptcy proceeding and that the debt the defendants owe to the plaintiffs should be excepted from their discharge as a matter of law pursuant to § 523(a)(2)(A) and/or § 523(a)(6). However, after reviewing the record before it, this court finds that the law of California would not accord collateral estoppel effect to the default judgment rendered in the Santa Clara County Superior Court against Henry C. Murray. That judgment does not satisfy the two limitations on the application of collateral estoppel under California law. *See In re Cantrell*, 329 F.3d at 1124. First, there is no evidence or indication in this sparse record that the defendant Henry Murray was personally served with a summons or that he had actual notice or knowledge of the litigation. Second, the state court default judgment does not contain express findings on any of the allegations for which preclusion is sought.⁵ There is no finding that the defendant personally engaged in fraud, false pretenses, or false representations to obtain the plaintiffs’ money. *See Younie v. Gonya (In re Younie)*, 211 B.R. 367, 373-76 (9th Cir. B.A.P. 1997), *aff’d* 163 F.3d 609 (9th Cir. 1998) (concluding that default judgment, which contained factual findings, adjudicated fraud issue identical to what was required to find debt nondischargeable under § 523(a)(2)(A)). There is no finding that the defendant owed the plaintiffs a debt resulting from a willful and malicious injury he did to them or their property. *See Spenser v. Bogdanovich (In re Bogdanovich)*, 301 B.R. 129, 146 (Bankr. S.D.N.Y. 2003) (refusing to give collateral estoppel effect to general

⁵ The court has taken note that nothing in the record of this adversary proceeding ties Maureen T. Murray to the allegations in the Complaint, the California judgment underlying that Complaint, or the Motion for Summary Judgment. As the defendants stated in their Answer to the plaintiffs’ Complaint, the state court judgment was not entered against Maureen T. Murray. However, the defendants did not move for dismissal of the claims against her. It is inappropriate for a court to dismiss a complaint *sua sponte* against a particular defendant when that defendant did not seek dismissal and when the parties have not been accorded the opportunity to cure the defect or to respond. *See Dawson v. Newman*, 419 F.3d 656, 660 (7th Cir. 2005), *cert. denied*, ___ U.S. ___, 126 S. Ct. 2026 (2006). For this reason, the court does not dismiss the Complaint as to Maureen T. Murray.

jury verdict returned without articulating bases for damages award). In fact, because the civil judgment has no written opinion setting forth the court's determination and does not specify the causes of action upon which entry of default judgment was based, this court has no basis for determining the factual and legal justifications underlying the judgment. Moreover, the plaintiffs did not file the state court record in this court. For that reason, this court does not know what allegations were considered, and it cannot determine whether the essential factors required to establish § 523(a)(2)(A) or (a)(6) were actually litigated, proven and decided in the state court. *See Harold V. Simpson & Co. v. Shuler (In re Shuler)*, 722 F.2d 1253, 1258 (5th Cir.), *cert. denied*, 469 U.S. 817 (1984) (concluding that "the bankruptcy court – unable to discern from the record the subsidiary facts upon which the false-pretense allegation was made – properly refused to accord collateral estoppel effect to the conclusory false-pretense 'determination' in the state court judgment"); *Bowles v. Quigley*, _B.R._, 2006 WL 1627921 (N.D. Tex. June 7, 2006) (affirming bankruptcy court's decision not to give collateral estoppel effect to state court judgment because bankruptcy court "was required to look to the entire record of the state proceeding, not just the proposed judgment, to determine what subsidiary facts were actually litigated and necessarily determined").

The plaintiffs might argue that Attachment 7, appended to the Amended Judgment, is an express finding made by the Santa Clara County Superior Court concerning the allegations for which preclusion is sought. That statement provides:

The Court finds, for the purposes of Bankruptcy Code Section 523(a)(2)(A) that the money obtained by the defendant was by actual Fraud; and for Subsection (6), the Fraud and acts committed by Defendant upon Ruth Chou and Ariel L. were willful and malicious.

R. 17. The plaintiffs might contend that the state court expressly found that the defendant obtained money "by actual fraud," as that term is used in § 523(a)(2)(A), and that the acts committed by the defendant upon Ruth Chou and Ariel L. were "willful and malicious," as those terms are used in § 523(a)(6). However, the plaintiffs would be wrong to make such an assertion. In the view of this court, Attachment 7 is not an express finding of the facts before the state court; instead, it contains legal conclusions about the statutory terms in the Bankruptcy Code, without any showing of the evidence that was presented to the state court and that would buttress such

conclusions. The plaintiffs have failed to show that evidence of actual fraud or of willful and malicious injury to the plaintiffs by the defendants was presented to the California court, and the state court default judgment does not present any findings either. Without an adequate showing of the evidence supporting those determinations, this court cannot conclude that those issues were necessarily decided by the California court when it entered the default judgment and were identical to the issues in this bankruptcy proceeding.

The burden of proof was on the plaintiffs as the party attempting to invoke collateral estoppel and to obtain a summary judgment of their nondischargeability Complaint. This court determines that, because the plaintiffs failed to satisfy the two limitations established under California law, collateral estoppel cannot apply to the California default judgment upon which the plaintiffs rely. In addition, the court finds that the plaintiffs were unsuccessful, as the party seeking summary judgment, in shouldering the initial burden of informing the court of the basis for their motion and of identifying the parts of the record – “pleadings, depositions, answers to interrogatories, and affidavits, if any,” – which, in their view, demonstrate the absence of a genuine issue of material fact. In other words, they did not make a prima facie showing that they, as the moving party, were entitled to judgment as a matter of law. *See* Fed. R. Civ. P. 56(c); *see Celotex*, 477 U.S. at 322. Finally, the court determines that the plaintiffs, who were responsible for establishing that the debt owed to them by the defendants was nondischargeable, failed to demonstrate by a preponderance of the evidence that the debt must be excepted from the defendants’ discharge under either § 523(a)(2)(A) or (a)(6).

Because the plaintiffs failed to meet their burden of proof, the court denies their request for summary judgment on the basis of collateral estoppel.

Conclusion

For the reasons presented above, the court denies the Motion for Summary Judgment of the plaintiffs Ruth Chou and Ariel L. Trial on the Complaint will be set by separate order.

SO ORDERED.

/s/ Harry C. Dees, Jr.
HARRY C. DEES, JR., CHIEF JUDGE
UNITED STATES BANKRUPTCY COURT