

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION

IN THE MATTER OF)	
)	
ANTHONY L. COLLIER,)	CASE NO. 10-30202 HCD
)	CHAPTER 7
)	
DEBTOR.)	
)	
)	
CLYDE J. SARGINSON,)	
)	
PLAINTIFF,)	
vs.)	PROC. NO. 10-3022
)	
ANTHONY L. COLLIER,)	
)	
DEFENDANT.)	

Appearances:

Joseph M. Flanders, Esq., attorney for plaintiff, Thorne Grodnik, LLP, 228 West High Street, Elkhart, Indiana 46516; and

Philip E. Hesch, Esq., attorney for defendant, 51192 Downing Court, Elkhart, Indiana 46514.

MEMORANDUM OF DECISION

At South Bend, Indiana, on September 16, 2010.

Before the court is the Motion for Summary Judgment filed by the plaintiff Clyde J. Sarginson (“plaintiff”) against the defendant Anthony L. Collier, chapter 7 debtor (“defendant” or “debtor”). The defendant filed a Response in Objection to Plaintiff’s Motion for Summary Judgment, and the court took the matter under advisement. For the reasons that follow, the court denies the plaintiff’s summary judgment motion.¹

¹ The court has jurisdiction to decide the matter before it pursuant to 28 U.S.C. § 1334 and § 157 and the Northern District of Indiana Local Rule 200.1. The court has determined that this matter is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(I).

BACKGROUND

The background facts are contested. Nevertheless, having gleaned the material facts from the pleadings in this court and in the Elkhart Superior Court, the statements of material facts, and the parties' affidavits, the court recognizes that this lawsuit grew out of one incident.

The plaintiff owned real estate on DeCamp Boulevard in Elkhart, Indiana. He was incarcerated on October 20, 2006, and spent 109 days in the Elkhart County Jail. While he was in jail, he asked the defendant to assist him with certain personal matters; he believed that the defendant was his friend. *See R. 19, Ex. B, ¶ 5.* According to the plaintiff, however, while he was incarcerated, the defendant and the plaintiff's (now former) wife went to the plaintiff's Elkhart residence and emptied the house of all his possessions and furnishings.² When he was released from jail, the plaintiff discovered that his property had been taken from his home and observed much of his property in a home owned by the defendant. The plaintiff claimed that the defendant admitted to the plaintiff that he and the plaintiff's wife had removed the property from the plaintiff's home. *See id. ¶ 8.* Those actions by the defendant, insisted the plaintiff, constituted a theft. He therefore filed a complaint in Elkhart Superior Court. *See R. 19 at 1-2, Ex. A, B.*

The defendant described the events differently. He explained that the plaintiff had executed a power of attorney, giving him the authority to conduct the plaintiff's affairs while the plaintiff was in jail. According to the defendant, with the plaintiff's consent he allowed the plaintiff's wife and sons to remove property from the plaintiff's house before the mortgage company foreclosed on the home. *See R. 20 at 4-5.* The defendant maintained that he did not remove any property from the plaintiff's home; nor did he take or sell the property; nor did he profit from that property at the plaintiff's expense. *See id. at 5.* He further explained that the plaintiff sued his wife for conversion and obtained a judgment against her. However, the

² The plaintiff's Affidavit states that the defendant and the plaintiff's former wife emptied his house "on or about January of 2006." *R. 19, Ex. A., ¶ 4.* However, the complaint filed in the Elkhart Superior Court states that he was incarcerated on October 20, 2006, for 109 days and that the defendant and former wife emptied the house while he was incarcerated. This date discrepancy is a genuine issue of material fact.

defendant did not know what she did with the property after he gave the plaintiff's wife and sons access to the plaintiff's home. *See* R. 20, Ex. A, ¶ 21.

On May 4, 2009, the plaintiff filed a complaint in the Elkhart Superior Court against the defendant, alleging that he converted and misappropriated the plaintiff's property and committed larceny against the plaintiff. He claimed actual damages in the amount of \$25,240.00, and sought treble damages. The Sheriff served the complaint on the defendant on May 8, 2009. About one week later, the defendant hired attorney Neil Holbrook to represent him.

The plaintiff filed a motion for default judgment in the state court on June 8, 2009, and on that same date the Elkhart Superior Court granted a Judgment by Default in favor of the plaintiff in the amount of \$76,720.00. *See* R. 1, Ex. A. Although attorney Holbrook had assured the defendant that he would take care of the complaint filed against him, the attorney did not enter an appearance and file an Answer until June 10, 2009, two days after the court entered the Judgment by Default. Moreover, Holbrook did not file a motion to set aside the judgment, to correct errors, or to grant other post-judgment relief. *See* R. 20 at 2.

The defendant said he never received notice of the judgment; he continued to rely on his attorney to safeguard his interests. He learned of the default judgment on September 9, 2009, when the Sheriff of Elkhart County served a copy of the motion and order for a proceedings supplemental hearing. *See id.* The hearing was held on September 22, 2009; the defendant showed up, but his attorney did not. The court continued the proceedings supplemental hearing until October 22, 2009, to give the attorney time to appear and to file any motions to set aside the default judgment. When the defendant contacted his attorney, Holbrook told the defendant that he would file a motion to set aside the judgment. On the morning of the hearing, the defendant contacted the attorney's office and was assured that attorney Holbrook would be at the hearing and would take care of everything. At the hearing, however, the defendant learned that his attorney neither filed a motion to set aside the judgment nor appeared at the hearing. *See id.* at 3. The court conducted the scheduled proceedings supplemental hearing and ordered that the judgment be satisfied.

On November 9, 2009, the plaintiff filed a Praecipe for Execution on Judgment with the state court. Thereafter, on the court's Order, the Sheriff of Elkhart County executed on the defendant's non-exempt property at his address on Highway U.S. 33 in Elkhart, Indiana, and levied on the defendant's personal property: a 1999 Dodge and various other motorized vehicles and equipment located on that real estate. The defendant then contacted counsel for the plaintiff and offered to pay \$10,000 to the plaintiff by January 10, 2010. Instead of honoring that agreement, however, the defendant filed his bankruptcy petition.

The defendant filed a voluntary chapter 7 bankruptcy case on January 26, 2010, and received his discharge on May 3, 2010; nevertheless, the case remained open because the chapter 7 trustee anticipated some distribution to the creditors.

The plaintiff commenced this adversary proceeding by filing a timely Complaint Objecting to Discharge of Debt. He alleged that the defendant "converted, misappropriated and committed larceny" against him. R. 1, ¶ 5. He asserted that the state court Judgment by Default entered against the defendant on June 8, 2009, was entitled to full faith and credit in this court and was nondischargeable. He also alleged that the defendant's actions created a nondischargeable debt owed by the defendant under § 523(a)(4), (a)(2)(A), and (a)(6). The defendant answered the Complaint, denying all its material allegations.

Following the court's pre-trial conference, the plaintiff filed a Motion for Summary Judgment. He argued in the Motion that the defendant was collaterally estopped from relitigating the issues and underlying facts that were previously litigated in the Elkhart Superior Court proceedings. He relied on the Seventh Circuit Court of Appeals decision *In re Catt*, 368 F.3d 789, 791 (7th Cir. 2004).

The plaintiff argued that this case was quite similar to *In re Catt*. He noted that the defendant was served with process, retained counsel at some point, but did not file a timely answer; nor did he file a motion to set aside the judgment or to assert a defense. He made an agreement with the plaintiff, after collection proceedings were underway, to pay the plaintiff \$10,000 by January 10, 2010; however, "he again proved to be dishonest, and filed for bankruptcy relief" instead. R. 19 at 6. The plaintiff insisted that the

defendant should be precluded from claiming that he did not have the opportunity to present a defense in state court and from attempting to relitigate the issue before the bankruptcy court. He requested that the court grant him summary judgment on his Complaint.

The defendant responded that the hearing transcripts and the state court Chronological Case Summary demonstrated that he did all he could do to seek an opportunity for a fair and full hearing. *See* R. 20, Exs. E, F, C. Attorney Holbrook never withdrew his appearance, the defendant pointed out; therefore, the defendant “was hamstrung as to what he could do to protect his right to a hearing and had to rely upon Attorney Holbrook to represent his interest in obtaining a hearing.” R. 20 at 4.

The defendant also insisted that the circumstances in this case were distinguishable from those in *In re Catt*. He pointed out that Catt, the defendant himself, was not cooperating with discovery or with his attorney, and that he failed to attend the hearing. His attorney told the court that Catt intended to file bankruptcy. His attorney then moved to withdraw as Catt’s attorney, and the court granted the motion the day before the scheduled trial. Catt did not show up for the trial the next day. The Seventh Circuit found that Catt had an opportunity to a full and fair hearing but decided “to bypass the state court litigation in the hope that any judgment rendered against him in that suit would be wiped out by a discharge in his anticipated bankruptcy.” *In re Catt*, 368 F.3d at 791.

The defendant then demonstrated the differences between his circumstances and Catt’s. The defendant in this proceeding, Collier, showed up at every hearing, even though his attorney did not appear. Moreover, this defendant had a valid defense to the plaintiff’s underlying complaint, he insisted, and always sought an opportunity to present his defense. His attorney dropped the ball and prejudiced his opportunity to have that hearing – by filing a belated answer, by not filing a motion to set aside the judgment, by not appearing at hearings. The defendant declared that he “had no opportunity to seek new counsel.” R. 20 at 7. He expected his attorney to appear and to file documents when he said he would. The defendant was denied his opportunity to present a defense through no fault of his own, he insisted. He did not waive or

forfeit his opportunity for a hearing; he was denied a hearing “due to the lackluster performance of Attorney Holbrook.” *Id.* He asked that the plaintiff’s summary judgment motion be denied and that the matter be set for trial on the plaintiff’s underlying complaint. The court took the matter under advisement after the briefing schedule had passed.

DISCUSSION

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 a real factual dispute exists, the nonmovant must produce evidence of the dispute 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.

The plaintiff based his summary judgment motion on the doctrine of collateral estoppel; he claimed that the defendant was collaterally estopped from relitigating

the issues determined in the Elkhart Superior Court Judgment by Default. 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. *See Grogan v. Garner*, 498 U.S. 279, 285 n. 11, 111 S. Ct. 654, 658 n. 11, 112 L.Ed.2d 755 (1991). “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); *see also Kramer Consulting, Inc. v. McCarthy (In re McCarthy)*, 350 B.R. 820, 831-33 (Bankr. N.D. Ind. 2006). The decision whether to apply the doctrine of collateral estoppel is within the court’s sound discretion. *See Parklane Hosiery Co., Inc. v. Shore*, 439 U.S. 322, 331, 99 S. Ct. 645, 651-52, 58 L.Ed.2d 552 (1979).

In this case, the Elkhart Superior Court rendered the default judgment at issue. In Indiana, “to bar relitigation of an issue, the doctrine of collateral estoppel requires: 1) a final judgment on the merits in a court of competent jurisdiction; 2) identity of the issues; and 3) the party to be estopped was a party or the privity of a party in the prior action.” *Huber v. United Farm Family Mut. Ins. Co.*, 856 N.E.2d 713, 717 (Ind. App. 2006) (citation omitted). The Seventh Circuit noted that Indiana is 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.” *In re Catt*, 368 F.3d at 791.

The court finds that the plaintiff herein did not demonstrate that the requirements for collateral estoppel have been met. He did not show, for example, that the state court default judgment was a final judgment on the merits. The state court granted recovery to the plaintiff based upon the defendant’s failure to appear and answer, without any determination concerning the allegations of theft in the state court complaint. In addition, the “identity of the issues” requirement has not been proven. The plaintiff has not demonstrated that Indiana’s statutory requirements for theft fulfill the Bankruptcy Code’s statutory requirements for nondischargeability of debt under § 523(a)(2)(A), (a)(4) or (a)(6). *See, e.g., In re*

McCarthy, 350 B.R. at 834-35 (determining that plaintiff failed to prove that breach of fiduciary duty, found under Ohio law, was identical to the fiduciary fraud or defalcation of § 523(a)(4)). Neither fraud nor any of the essential elements of § 523(a)(2)(A) was mentioned in the state court default judgment. *See In re Catt*, 368 F.3d at 792 (stating that the state court finding on fraud is “an essential predicate of the judgment”). Nor did that judgment conclude that the defendant’s conduct constituted defalcation, embezzlement, larceny, or willful and malicious injury, so that it could be found nondischargeable under § 523(a)(4) or (a)(6). Because the plaintiff has not shown (a) that the state court judgment was a final judgment on the merits and (b) that the issues in the state court and in this court are identical, this court will not bar the defendant from relitigating the issues determined in the Elkhart Superior Court by default judgment.

In addition, the plaintiff did not show that the “defaulted party could have appeared and defended if he had wanted to.” *Id.* at 791. The Judgment by Default was entered, without a hearing, based upon the fact that the defendant’s Answer was not filed by his attorney until after the Judgment was entered. The defendant actually did appear and defend himself in the later state court proceedings, but his counsel, who had assured the defendant of his presence, never attended. Courts have found that a defendant who decides not to present himself in a court case or at the trial, as a strategic decision, when he “could have appeared and defended if he had wanted to,” has not been denied due process. *See Papadakis v. Zelis (In re Zelis)*, 66 F.3d 205, 208 (9th Cir. 1995); *Hubbard v. Comacho (In re Comacho)*, 411 B.R. 496, 503 (Bankr. S.D. Ga. 2009); *Ohio Bureau of Workers’ Compensation v. Foster (In re Foster)*, 280 B.R. 193, 206 (Bankr. S.D. Ohio 2002).

The facts herein, in contrast, demonstrate that the defendant attempted to participate and did appear but that his attorney did not. The default judgment was granted in favor of the plaintiff because the defendant’s attorney failed to file a timely appearance and Answer to the complaint, even though he had said he would “handle it.” The attorney told the defendant that he would file motions and attend hearings, but

he never did.³ This court therefore cannot conclude that the defendant “had a fair chance, which he booted, for a full and fair hearing” in the state court action. *In re Catt*, 368 F.3d at 792. Without evidence that the defendant himself booted the chance for a full and fair hearing, and without a showing of the collateral estoppel requirements, this court in its discretion determines that collateral estoppel cannot apply to bar the litigation of the nondischargeability claims in this adversary proceeding.

Equally evident in this proceeding is the contested nature of the essential facts that are required to prove the nondischargeability claims. Because the plaintiff failed in his burden of demonstrating that there are no genuine issues of material fact in dispute, the plaintiff’s summary judgment motion must be denied. A trial to resolve the nondischargeability of the defendant’s debt to the plaintiff under § 523(a)(2)(A), (a)(4), and/or (a)(6) is required.

CONCLUSION

For the reasons set forth above, the Motion for Summary Judgment filed by the plaintiff Clyde J. Sarginson against the defendant Anthony L. Collier is denied. Further proceedings with respect to the plaintiff’s Complaint Objecting to Discharge of Debt will be set by separate order.

SO ORDERED.

/s/ HARRY C. DEES, JR.
Harry C. Dees, Jr., Judge
United States Bankruptcy Court

³ Neil Holbrook was suspended from the practice of law from November 3, 2008, until May 3, 2009, due to his failure to provide competent representation and other professional misconduct. *See In re Holbrook*, 894 N.E.2d 565 (2008) (Order of the Indiana Supreme Court); *see also* Order of the United States District Court for the Northern District of Indiana, Cause No. 3:08-MC 195 RM (Nov. 17, 2008). His reinstatement to the practice of law was conditional; it was “subject to 18 months of probation under the terms and conditions set forth in the Conditional Agreement for Discipline incorporated by reference in the Indiana Supreme Court’s September 23, 2008 order.” Order of April 22, 2009, in Cause NO. 3:08-MC-195 RM. The defendant herein retained Holbrook as his attorney during this period of probation.