Not Intended for Publication and/or Citation

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF INDIANA
FORT WAYNE DIVISION

IN RE: CASE NO. 10-14134	)	
	)	
GEORGE KOTSOPOULOS	)	
CHRISTINE M. KOTSOPOULOS	)	
	)	
Debtors	)	
	)	
	)	
PETERS BROADCAST ENGINEERING, INC.	)	
	)	
Plaintiff	)	
	)	
vs.	)	PROC. NO. 10-1213
	)	
GEORGE KOTSOPOULOS	)	
	)	
Defendant	)	

DECISION ON MOTION FOR SUMMARY JUDGMENT

At Fort Wayne, Indiana, on August 19, 2011

By this adversary proceeding the court has been asked to declare that the defendant/debtor's obligation to the plaintiff is non-dischargeable, pursuant to § 523(a)(2), § 523(a)(4), and § 523(a)(6) of the United States Bankruptcy Code. That debt is represented by a judgment the plaintiff received from the Allen Superior Court, following a trial of the issues raised in proceedings before that court. The plaintiff has filed a motion for summary judgment based upon the proposition that, through collateral estoppel, the findings from the state court obviate the need for further litigation over dischargeability. It is that motion, together with the defendant's response thereto, which is presently before the court.

Summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file . . . 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. Bankr. P. Rule 7056(c); Fed. R. Civ. P. Rule 56(c). Thus, summary judgment is essentially an inquiry as to "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 251-52, 106 S.Ct. 2505, 2512, 91 L.Ed.2d 202 (1986).

Collateral estoppel, otherwise known as issue preclusion, "refers to the effect of a judgment in foreclosing litigation in a subsequent action of an issue of law or fact that has been actually litigated and decided in the initial action." LaSalle Nat'l Bank of Chicago v. County of DuPage, 856 F.2d 925, 930 n. 2 (7th Cir.1988) (cert. denied 489 U.S. 1081, 109 S. Ct. 1536 (1989)). For the court to apply collateral estoppel in a dischargeability proceeding, the requisite elements of the dischargeability claim must have been decided by the state court. See, In re Busick, 264 B.R. 518, 522 (Bankr. N.D. Ind. 2001); In re Staggs, 178 B.R. 767, 773-74 (Bankr. N.D. Ind. 1994) (discussing the elements of collateral estoppel). See also, In re Krautheimer, 210 B.R. 37, 52 (Bankr. S.D. N.Y. 1997). Thus, collateral estoppel "may be used in dischargeability actions where . . . there has been a prior state court decision," but only "where the fact issues in the state and federal proceedings are 'substantially identical.'" In re Halperin, 215 B.R. 321, 335 (Bankr. E.D. N.Y.1997). See also, Grogan v. Garner, 498 U.S. 279, 284 n.11, 111 S. Ct. 654 (1991). As the party asserting preclusion, the plaintiff is expected to identify the specific facts that were determined in the previous litigation and then to demonstrate how those facts compel a particular result in this action. See, Reid v. State, 719 N.E. 2d 451, 456 (Ind. App. 1999); In re Busick, 264 B.R. 518 (Bankr. N.D. Ind. 2001); Bicknell v. Stanley, 118 B.R. 652, 664 (D. S.D. Ind. 1990). Consequently, the issues before the court involve the findings made by the state court and whether those findings correspond with the facts plaintiff

needs to prove under § 523(a).

Plaintiff's judgment arises out of work it performed for Three Amigos, a corporation in which the debtor had an interest, and an endorsement the debtor forged on an insurance check that was payable to both the plaintiff and Three Amigos. That check was in the total sum of $39,800. The debtor forged plaintiff's endorsement on the check, deposited it into Three Amigos' account, and subsequently remitted $17,000 to the plaintiff, even though it should have received $26,312 of the check's proceeds. Plaintiff's judgment, which is in the total sum of $94,792.22, has several components:

> a. $46,270.22 represents amounts due for work performed for Three Amigos – including the $9,312 difference between the check proceeds the plaintiff received ($17,000) and the amount it should have been paid from that check ($26,312) – together with interest thereon;
>
> b. $18,624 represents enhanced damages, awarded pursuant to I.C. 34-24-3-1, based upon the $9,312 difference between what the plaintiff should have received from the insurance check and the amount actually paid to it; and
>
> c. $29,898, awarded pursuant to I.C. 34-24-3-1, as costs, expenses and attorney fees.[1]

The state court concluded that the defendant's actions in forging the plaintiff's endorsement on the check constituted crimes under Indiana law including theft, I.C. 35-43-4-2, forgery, I.C. 35-43-5-2, and deception, I.C. 35-43-5-3. This criminal conduct led to the enhanced damages, attorney fees and expenses the plaintiff was allowed to recover. See, I.C. 34-24-3-1 (authorizing up to three times actual damages, costs and attorney fees for certain crimes).

Plaintiff argues that the defendant's obligation to it is non-dischargeable as a debt incurred

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[1]Paragraph 96 of the state court's findings awards fees and expenses totaling $28,958 "as a result of Defendant's statutory deception, forgery and conversion" while paragraph 3 of the judgment awards $29,898 in fees, costs and expenses "pursuant to Indiana Code § 34-24-3-1." Neither party has addressed the reasons for the difference.

by "false pretenses, a false representation, or actual fraud," 11 U.S.C. § 523(a)(2)(A), "embezzlement or larceny," 11 U.S.C. § 523(a)(4), and/or a "willful and malicious injury." 11 U.S.C. § 523(a)(6), and the court has no trouble concluding that the debt arising out of defendant's having forged plaintiff's endorsement on the joint check deserves those labels. Fraudulent intent on the part of a debtor is the hallmark of both larceny and embezzlement under § 523(a)(4), see, Matter of Rose, 934 F.2d, 901, 903 (7th Cir. 1991) ("larceny is proven for § 523(a)(4) purposes if the debtor has wrongfully and with fraudulent intent taken property from its owner"); Matter of Weber, 892 F.2d 534, 538 (7th Cir. 1989) ("to prove embezzlement, the creditor must show . . . that (1) the debtor appropriated funds for his or her own benefit; and (2) the debtor did so with fraudulent intent or deceit."), and that same type of intent is a necessary element of both theft and forgery under Indiana law. See, I.C. 35-43-4-2(a) (theft is the knowing or intentional exertion of unauthorized control over another person's property "with the intent to deprive [them] of any part of its value"); I.C. 35-43-5-2 (forgery involves manipulating a written instrument "with intent to defraud"). See also, Dexter v. Miller, 2011 Bankr. LEXIS 1019 *4-5 (distinguishing between criminal conversion and theft for the purposes of § 523(a)(4)). Given the breadth of "fraud" under § 523(a)(2), see, McClellan v. Cantrell, 217 F.3d 890, 893 (7th Cir. 2000) (fraud "embraces all the multifarious means which human ingenuity can devise" to cheat another), the court has no difficulty concluding that forging an endorsement on a check constitutes fraud under that portion of the Bankruptcy Code. Similarly, forging an endorsement and intentionally misdirecting the funds so obtained can be comfortably classified as an intentional tort and a "willful and malicious injury" under § 523(a)(6). See, Kawauhau v. Geiger, 523 U.S. 57, 118 S.Ct. 974 (1998); In re Russell, 262 B.R. 449 (Bankr. N.D. Ind. 2001) (intentional misuse of the proceeds of a creditor's collateral constitutes a willful and

malicious injury). So the question is not so much whether the defendant's actions gave rise to a non-dischargeable debt but, rather, what portion of the judgment is nondischargeable.

The plaintiff argues the entire judgment of $94,792.22 is non-dischargeable; but substantial portions of that judgment relate to damages that have nothing to do with the plaintiff's losses as a result of the forged endorsement, and it is only the debt attributable to that misconduct which is non-dischargeable. The remainder of the judgment represents nothing more than an unpaid account: an ordinary debt that does not arise out of any kind of misconduct, and as such is dischargeable. See e.g., In re Barksdale, 438 B.R. 25, 33 (Bankr. N.D. N.Y. 2010); In re Barr, 194 B.R. 1009, 1017-18 (Bankr. N.D. Ill. 1996); In re Guy, 101 B.R. 961, 978-79 (Bankr. N.D. Ind. 1988); In re Cortese, 77 B.R. 961 (Bankr. S.D. Fla. 1987).

Had the defendant not forged plaintiff's endorsement on the check and then misdirected the check proceeds, the plaintiff would have received $9,312 more than it did. That $9,312, and the additional amounts awarded under I.C. 34-24-3-1, constitute the non-dischargeable portion of the judgment. See, Cohen v. de la Cruz, 523 U.S. 213, 218, 118 S.Ct. 1212, 1216 (1998) (Section 523(a)(6) excepts not only compensatory damages, but also any enhancements, such as attorney fees or punitive damages, from discharge); Matter of McFarland, 84 F.3d 943 (7th Cir. 1996) (all obligations under a contract incurred by fraud, including attorney fees, are non-dischargeable under § 523(a)(2)). Those additional awards are the enhanced damages of $18,624 and the $29,898 on account of plaintiff's costs, expenses and attorney fees. The three non-dischargeable components of the judgment total $57,834. As for the remaining portion of the judgment, there is no evidence that the circumstances under which that part of the debt was incurred

taint it in any way so as to make it non-dischargeable.[2]

There are no genuine issues of material fact. The defendant's obligation to the plaintiff, represented by the judgment issued by the Allen Superior Court in Cause No. 02D01-0909-PL-340, is non-dischargeable to the extent of $57,834, together with accruing interest thereon. Judgment will be entered accordingly.

/s/ Robert E. Grant
Chief Judge, United States Bankruptcy Court

[2]Although, the plaintiff argues that the state court's finding that the defendant "acted with malice, fraud, gross negligence, and oppressiveness," Findings of Fact and Conclusions of Law, ¶ 109, brings even the portion of the judgment that was based upon an account stated within one of the exceptions of § 523(a), there is nothing which links that finding to the judgment for an account stated. To the contrary, that statement was made in connection with findings concerning the forged endorsement and the amount of the check proceeds.