UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION

IN THE MATTER OF	)	
	)	
DONALD WAYNE HOFFMAN,	)	CASE NO. 12-32626 HCD
	)	CHAPTER 7
DEBTOR.	)	
	)	
	)	
SUN ENTERPRISES, INC.,	)	
	)	
PLAINTIFF,	)	
vs.	)	PROC. NO. 12-3070
	)	
DONALD WAYNE HOFFMAN,	)	
	)	
DEFENDANT.	)	

Appearances:

Michael K. Banik, Esq., counsel for plaintiff, 217 South Fourth Street, Elkhart, Indiana 46516; and Donald Wayne Hoffman, pro se defendant, 52256-4 Ideal Beach Road, Elkhart, Indiana 46514.

MEMORANDUM OF DECISION

At South Bend, Indiana, on September 27, 2013.

Before the court is the Amended Motion for Summary Judgment filed by the plaintiff Sun Enterprises, Inc. ("Sun" or "plaintiff"), against the chapter 7 debtor Donald Wayne Hoffman ("debtor" or "defendant"). The motion asks for summary judgment on the underlying Complaint Objecting to Discharge of Debt, which requested that the court hold the debtor's indebtedness to Sun nondischargeable. The accompanying Memorandum of Law in support of the motion specified that the debt should be excepted from the debtor's discharge pursuant to 11 U.S.C. § 523(a)(2)(A) and § 523(a)(6). For the reasons given in this Memorandum of Decision, the court denies the Amended Motion for Summary Judgment.[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

These undisputed facts were presented by the plaintiff. On November 18, 2011, Sun Enterprises, a Kentucky corporation, obtained a judgment in the amount of $194,592.47 plus costs against Hoffman and others, jointly and severally, in the Circuit Court of Boone County, Commonwealth of Kentucky. The Kentucky Judgment was not appealed or set aside. Sun commenced a legal proceeding to authenticate and enforce the Kentucky judgment in the Elkhart Superior Court on January 26, 2012.

On July 23, 2012, Hoffman filed a voluntary chapter 7 petition in bankruptcy. On August 21, 2012, the meeting of creditors was held. The next day, the chapter 7 Trustee filed his no-asset report. The Order granting the debtor a discharge under 11 U.S.C. § 727 was entered on October 29, 2012, and the debtor's bankruptcy case was closed on November 12, 2012.

The plaintiff commenced this adversary proceeding on October 17, 2012, by filing a Complaint Objecting to Discharge of Debt ("Complaint"). In its Complaint, the plaintiff described the procedural posture of the earlier proceedings and summarized the rulings of the Kentucky Judgment. In Count 1, the Complaint's only count, Sun asked this court to find the Kentucky Judgment debt nondischargeable "because the verdict was based on specific findings of misrepresentation, conversion, and fraud." R. 1 at ¶ 13. The Complaint's Exhibits were the Judgment of the Circuit Court, Boone County, Kentucky (Ex. A); Complaint on Foreign Judgment filed by the plaintiff in the Elkhart Superior Court (Ex. B); and Certification of the Judgment by the Boone County Circuit Court (Ex. C).

The plaintiff properly served the defendant and his bankruptcy counsel pursuant to Federal Rule of Bankruptcy Procedure 7004(b)(9) and (g). When the defendant did not file an answer, the plaintiff filed a Motion and Amended Motion for Summary Judgment and a Memorandum of Law in support. The Memorandum included its Statement of Undisputed Material Facts and Designated Evidence. Those undisputed facts are presented as "background facts" in the first paragraph, above. The only additional undisputed material facts listed by the plaintiff are as follows:

> The Boone County judgment was entered pursuant to a bench trial, at which the Defendant, Hoffman, did not appear. After a hearing on the facts, the Boone County Court found that Hoffman and the Co-Defendants each committed acts that constituted: negligence; intentional misrepresentation; conversion; and fraud/fraud in the inducement. The Boone County Court found the Defendants, individually and collectively, liable for damages under each of these theories.
>
> Hoffman's actions, which include fraud and conversion, create a non-dischargeable debt which Hoffman owes to Sun pursuant to 11 U.S.C. Section[s] 523(a)(2)(A) and 523(a)(6).
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> Although Hoffman has failed and refused to pick up or sign the certified copy of the adversary complaint, the Defendant was also served via regular U.S. Mail. Defendant has actual notice of the lawsuit and has retained counsel to attempt to negotiate a settlement of these claims.

R. 11, "Statement of Undisputed Material Facts and Designated Evidence," at 1-2. When the defendant failed to respond to the Amended Motion for Summary Judgment, the plaintiff filed a Motion for Entry of Judgment. The court then took the matter under advisement.

In its Memorandum of Law, the plaintiff argued that it was entitled to summary judgment on its § 523(a)(2)(A) claim "due to Mr. Hoffman's actual fraud against Sun." R. 11 at 4. Citing *Cohen v. de la Cruz*, 523 U.S. 213, 217 (1998), it asserted that it was undisputed that § 523(a)(2)(A) excepts debts arising from the debtor's fraud, including treble damages, fees and costs. It also was undisputed, it contended, that Hoffman's actions constituted a fraud against Sun and that, pursuant to *Cohen*, the judgment obtained by Sun is entirely nondischargeable.

The plaintiff also argued that it was entitled to summary judgment on its § 523(a)(6) claim because "Mr. Hoffman both willfully and maliciously engaged in actions including, but not limited to fraud, conversion and breach of his fiduciary duty causing intentional injury to Sun." *Id.* at 5-6. Citing *Peklar v. Ikerd*, 260 F.3d __ (9th Cir. 2001), Sun insisted that it was entitled to summary judgment under § 523(a)(6) because the "undisputed facts demonstrate that Mr. Hoffman knowingly converted assets belong[ing] to Sun while acting in a fiduciary capacity causing injury to Sun." *Id.* at 6.

This court turned to the Kentucky Judgment to review the specific findings of misrepresentation, conversion, and fraud on which its verdict was based, and to consider the defendant's actions and conduct

that led to those charges. According to that Judgment, the case was tried to the bench. The plaintiff Sun appeared, with counsel, but none of the defendants (Elite RV Services, LLC; Neal Stafford; Donn May; and Don Hoffman) appeared, nor any counsel on their behalf. A full hearing was held, however, with opening and closing statements by plaintiff's counsel, the presentation of live testimony by one witness and of affidavit testimony by two expert witnesses, and exhibits. The decision contained no summation of the evidence given. The Kentucky court found in favor of the plaintiff on each of its claims:

> The Court finds that the Defendant, Elite RV Services breached its contract with Plaintiff. The Court also finds that all of the defendants are jointly and severally liable to the Plaintiff, for the following:
>
> 1. **Negligent Misrepresentation:** Defendants each made numerous misrepresentations regarding their ability, intention, and capability to repair and restore the two RVs at issue, the time for completion of the work, and the purchase of parts for both RVs. Said misrepresentations were made negligently, carelessly, and with no regard for their truth or falsity. Plaintiff reasonably relied on said misrepresentations to its detriment. Defendants are therefore individually and collectively liable to Plaintiff for monetary damages for negligent misrepresentation.
>
> 2. **Intentional Misrepresentations:** Defendants made numerous knowing and intentional misrepresentations regarding their ability, intention, and capability to repair and restore the two RVs at issue, the time for completion of the work, and the purchase of parts for both RVs. Said misrepresentations were made knowingly, intentionally, and with the intent to induce Plaintiff to rely upon them. Plaintiff reasonably relied on said misrepresentations to its detriment. Defendants are therefore individually and collectively liable to Plaintiff for monetary damages for negligent [*sic*] misrepresentation.
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> 3. **Conversion:** Defendants' actions constitute the tort of conversion. Defendants are therefore individually and collectively liable to Plaintiff for monetary damages for this conversion.
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> 4. **Fraud/Fraud in the Inducement:** Defendants' actions were undertaken knowingly, intentionally, and with malice aforethought, and for the purpose of inducing Plaintiff to enter into the Contracts, to advance large sums of money, to grant Defendants additional time far beyond the promised completion time, and to take such other steps to enrich the Defendants. Defendants had no intention, ability, or capability, at any time, to complete the work according to the terms of the Contracts, or to comply with the numerous representations made to the Plaintiff. Defendants committed fraud and fraud in the inducement, for the purposes of obtaining monetary gain, and with full knowledge that their continuing and on-going representations were untrue, or with a blatant disregard for their truth or falsity. Defendants are therefore individually and collectively liable to Plaintiff for monetary damages, including punitive damages, as a result of their fraudulent actions.

R. 1, Ex. A at 2-3. The court determined that the defendants were jointly and severally liable to the plaintiff for damages in the total amount of $194,592.47. The Judgment itemized the damages pertaining to each recreational vehicle, the 1998 Coach and the 1997 Coach, and the damages to both vehicles together.

Sun now argues before this court that the Kentucky Judgment's ruling of liability against Hoffman, which included the determinations that his actions constituted fraud and conversion, created a nondischargeable debt under 11 U.S.C. § 523(a)(2)(A) and § 523(a)(6). Sun requests entry of summary judgment in its favor and against the debtor on its claim of nondischargeability.

DISCUSSION

The plaintiff's Motion for Summary Judgment on its Complaint seeks a judgment that the debt at issue is nondischargeable under § 523(a)(2)(A) and (a)(6) of the Bankruptcy Code. This court's review of a motion for summary judgment is governed by Rule 56 of the Federal Rules of Civil Procedure, made applicable in this court by Rule 7056 of the Federal Rules of Bankruptcy Procedure. The court renders summary judgment only if the record shows that "there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c); Fed. R. Bankr. P. 7056; *see Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S. Ct. 2548, 2552, 91 L.Ed.2d 265 (1986). The moving party bears the initial burden of demonstrating that no genuine issue of material fact exists. *See Celotex*, 477 U.S. at 323. If the moving party satisfies its initial burden, then the nonmoving party must "go beyond the pleadings and by [its] own affidavits, or by the 'depositions, answers to interrogatories, and admissions on file,' designate 'specific facts showing that there is a genuine issue for trial.'" *Id.* at 324 (quoting Fed. R. Civ. P. 56(e)). The court neither weighs the evidence nor assesses the credibility of witnesses. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249, 106 S. Ct. 2505, 2511, 91 L.Ed.2d 202 (1986). 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. If the party fails to respond to the motion, Rule 56(e) permits the court to enter judgment

against that party only if it is appropriate – "that is, if the motion demonstrates that there is no genuine issue of material fact *and* that the movant is entitled to judgment as a matter of law." *Johnson v. Gudmundsson*, 35 F.3d 1104, 1112 (7th Cir. 1994) (citations omitted).

In this case, the defendant did not respond to the plaintiff's Complaint or summary judgment motion. Rule 56(e) provides the necessary guidance to courts in this circumstance. The 2010 amended version of Rule 56 still gives a court the authority to enter judgment on an unopposed motion if appropriate, but its language is slightly changed: The rule no longer measures appropriateness, but rather the movant's entitlement to summary judgment.

> If a party fails to properly support an assertion of fact or fails to properly address another party's assertion of fact as required by Rule 56(c), the court may: . . . (3) grant summary judgment if the motion and supporting materials – including the facts considered undisputed – show that the movant is entitled to it.

Fed. R. Civ. P. 56(e)(3). In addition, the Advisory Committee Comments to the 2010 Amendments stated that "summary judgment cannot be granted by default even if there is a complete failure to respond to the motion." In its previous and present versions, therefore, Rule 56(e) requires this court to review the movant's summary judgment motion to determine that he has carried out a movant's requisite burden under Rule 56, despite the defendant's failure to respond. *See Harris v. Skokie Maid and Cleaning Serv., Ltd.*, 2013 WL 3506149 at *3 (N.D. Ill. July 11, 2013) ("Even though the plaintiff's motion for summary judgment is unopposed, the standard of review remains the same.") (citing *Vermont Teddy Bear Co., Inc. v. 1-800 Beargram Co.*, 373 F.3d 241, 244 (2d Cir. 2004)). For that reason, this court weighs whether the plaintiff's motion and supporting materials show that Sun is entitled to judgment as a matter of law based on the undisputed material facts in the record.

The court finds, first, that the state court judgment has been duly authenticated. The plaintiff filed a copy of the Kentucky Judgment in the Elkhart Superior Court, with the official notarized Certification, signed by the Judge who issued the original Judgment and by the official custodian of that Judgment, the Clerk of the Boone County Circuit Court. The plaintiff's filing of the Kentucky Judgment

and Certification established the authenticity of the Kentucky state court judgment and, as such, satisfied Indiana Code § 34-54-11-1 and Indiana's Trial Rule 44(A)(1).

Nevertheless, in order to enforce the Kentucky Judgment against this defendant in this adversary proceeding, the plaintiff was required to demonstrate that the state court judgment had collateral estoppel effect in this proceeding. Sun argued that the Kentucky Judgment's findings proved that Hoffman's debt to Sun was nondischargeable, but it failed to demonstrate that collateral estoppel applied and thus that the Kentucky Judgment could be enforced herein without relitigation of the issues.

The principles of collateral estoppel apply to bankruptcy proceedings that seek exceptions from discharge under § 523(a). *See Grogan v. Garner*, 498 U.S. 279, 284, 111 S. Ct. 654, 112 L.Ed.2d 755 (1991). Findings made by a state court are entitled to collateral estoppel effect in a later bankruptcy proceeding. *See In re Davis*, 638 F.3d 549, 554 (7th Cir. 2011). In Indiana, findings made in default proceedings also collaterally estop subsequent litigation, "provided that the defaulted party could have appeared and defended if he had wanted to." *In re Catt*, 368 F.3d 789, 791 (7th Cir. 2004). However, "the [collateral estoppel] effect of a state court judgment in the bankruptcy proceedings is 'determined by the law of the jurisdiction that rendered the judgment.'" *Garoutte v. Damax, Inc.*, 400 B.R. 208, 211 (S.D. Ind. 2009) (quoting *In re Catt*, 368 F.3d at 790-91, applying 28 U.S.C. § 1738)).

> Under Indiana law, the doctrine of collateral estoppel or issue preclusion applies to bar later litigation of a fact or issue if that fact or issue was necessarily decided in an earlier lawsuit. For an Indiana judgment to preclude further litigation of an issue, there are three requirements: "(1) a final judgment on the merits in a court of competent jurisdiction, (2) identity of issues, and (3) the party to be estopped was a party or the privity of a party in the prior action." Indiana courts also consider "whether the party against whom the prior judgment is asserted had a full and fair opportunity to litigate the issue and whether it would be otherwise unfair under the circumstances to permit the use of issue preclusion."

Garoutte, 400 B.R. at 211-12 (citations omitted); *see also In re Brown*, 489 Fed. Appx. 890, 894 (6th Cir. 2012) (stating substantially similar doctrine of collateral estoppel under Kentucky law).

In this case the judgment was rendered in Kentucky. The plaintiff did not request that the Kentucky Judgment be given preclusive effect in this adversary proceeding through the application of

collateral estoppel. Nor did the plaintiff present to this court the collateral estoppel requirements under Kentucky law. *See, e.g., ColeMichael Investments, L.L.C. v. Burke*, 436 B.R. 53, 63 (N.D. Ill. 2010) (noting that Texas law, the substantive body of law under which the prior judgment was entered, must be followed in determining whether collateral estoppel could apply). Finally, Sun did not demonstrate that Kentucky, like Indiana, is among the minority of states to grant collateral estoppel effect to the findings made in default proceedings, provided they fulfill the applicable criteria under Kentucky law. *See id.* (noting that, under Texas law, default judgments do not meet the "actually litigated" prong of the issue preclusion test).[2]

A judgment previously rendered in another court can be given preclusive effect in later decisions only if the collateral estoppel criteria of the appropriate jurisdiction are met. One criterion in Indiana (and in Kentucky, as well, *see In re Brown*, 489 Fed. Appx. at 894) is an "identity of the issues": The issues that would be litigated in the later action, namely this bankruptcy proceeding, must have been identical to those litigated in the prior Kentucky state court proceeding.

In this case, the state court found intentional misrepresentations made with the intent to induce Sun to rely on them. It also found that the defendants' actions were undertaken intentionally, for the purpose of inducing the plaintiff to enter into the contracts, to advance the defendants money, and to give them more time to complete the contracts. This court has determined, however, that those findings do not reflect issues identical to those that must be proven under the Code's exceptions to discharge alleged by the plaintiff, 11 U.S.C. § 523(a)(2)(A) and § 523(a)(6).

Under § 523(a)(2)(A) of the Bankruptcy Code, a 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 –

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[2] The court is aware that the state court judgment was not a default judgment, but rather was a bench trial at which no defendants appeared to oppose the evidence and arguments of the plaintiff. Nevertheless, no presentation of the evidence on which that judgment was based is before this court. The plaintiff has not established that the Kentucky Judgment was a "final judgment on the merits" at which the defendant had a full and fair opportunity to litigate. *See In re Catt*, 368 F.3d 789, 791 (7th Cir. 2004); *In re Brown*, 489 Fed. Appx. at 894.

> (A) false pretenses, a false representation, or actual fraud, other than a statement respecting the debtor's or an insider's financial condition . . . .

11 U.S.C. § 523(a)(2)(A). To succeed under § 523(a)(2)(A), a plaintiff has the burden of proving by a preponderance of the evidence that the debt owed to it by the defendant 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); *Matter of Bero*, 110 F.3d 462, 465 (7th Cir.1997) (setting forth burden of proof). The plaintiff must establish that (1) the defendant made a false representation or omission, which he either knew was false or made with such reckless disregard for the truth as to constitute willful misrepresentation; (2) the defendant acted with an intent to deceive or defraud the plaintiff; and (3) the plaintiff justifiably relied on the defendant's false representation to its detriment. *See In re Davis*, 638 F.3d at 553; *Ojeda v. Goldberg*, 599 F.3d 712, 716-17 (7th Cir. 2010); *Matter of 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 creditor's reliance need only be justifiable, not reasonable).

In the Kentucky Judgment, the state court found that the defendants made many misrepresentations, both negligent and intentional, and it further found that misrepresentations were made with no regard for their truth or falsity. However, the Judgment did not set forth Hoffman's conduct. This court has no evidence of the statements he made to the plaintiff, or of whether he made statements knowing that they were false or made with reckless disregard for the truth. *See In re Ward*, 233 B.R. 810, 815 (Bankr. N.D. Ill. 1999) (finding material factual disputes as to each § 523(a)(2)(A) element, denying summary judgment motion). The state court also found that the defendants made misrepresentations "with the intent to induce Plaintiff to rely," but there was no finding that Hoffman himself acted with an intent to deceive. *See In re Stover*, 2012 WL 4867407 at *4 (Bankr. S.D. Ind. Oct. 12, 2012) (finding that, "given the fact sensitive nature of the circumstantial evidence needed to prove intent," summary judgment should not be granted). Finally, the state court found that the plaintiff reasonably relied on the misrepresentations, but again there was no factual basis for determining whether, in light of unspecified misrepresentations, Sun's

reliance was reasonable. The Judgment made repeated references to "defendants' actions," but no descriptions of those actions were given and no specific conduct by Hoffman was provided.

Nor are the requisite material facts presented in the plaintiff's Complaint or Statement of Undisputed Material Facts. Each one simply states the procedural steps taken by the plaintiff and the legal conclusions of the Judgment. The Complaint concluded that the Judgment itself was nondischargeable under § 523. *See* R.1 at 3, ¶¶ 12-13. The Statement of Material Facts concluded that "Hoffman's actions, which include fraud and conversion, create a non-dischargeable debt which Hoffman owes to Sun pursuant to 11 U.S.C. Section[s] 523(a)(2)(A) and 523(a)(6)." R. 11 at 2. After reviewing the record in this adversary proceeding and in the defendant's main case, this court still has no picture of Hoffman's actions or the conduct about which Sun complains.[3]

The plaintiff also seeks summary judgment under § 523(a)(6) of the Bankruptcy Code, which excepts from discharge any debt "for willful and malicious injury by the debtor to another entity or to the property of another entity." *See Kawaauhau v. Geiger*, 523 U.S. 57, 118 S. Ct. 974, 140 L.Ed.2d 90 (1998) (analyzing language in § 523(a)(6)); *see also Jendusa-Nicolai v. Larsen*, 677 F.3d 320, 321-24 (7th Cir. 2012) (same). "This provision is intended to prevent the discharge of debts incurred as a result of intentional torts." *In re Pickens*, 234 F.3d 1273 (7th Cir. 2000) (unpub'd). Debts are excepted from discharge under § 523(a)(6) "only if the debtor intended the injury, not merely the act that caused the injury." *Garoutte*, 400 B.R. at 213 (citing *Kawaauhau*, 523 U.S. at 61). By a preponderance of the evidence, the plaintiff must establish these elements: "(1) that the debtor intended to and caused an injury to the [creditor or to the] creditor's property interest; (2) that the debtor's actions were willful; and (3) that the debtor's actions were malicious." *In re Burke*, 405 B.R. 626, 652 (Bankr. N.D. Ill. 2009).

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[3] To the extent that the underlying facts can be winnowed from the Kentucky Judgment, it suggests that Elite RV Services had a contract with Sun, that the defendants negligently and/or intentionally misrepresented their ability and intention to repair and restore Sun's 2 RVs, and that they did not complete the job. If those are the underlying facts, it would appear that the plaintiff has established only a breach of contract action and not fraud under § 523(a)(2)(A). *See In re Davis*, 638 F.3d at 554. The plaintiff's Memorandum of Law argued only that Hoffman's actions constituted a fraud against Sun.

The Kentucky Judgment found that the defendants' "actions were undertaken knowingly, intentionally, and with malice aforethought." R. 1, Ex. A, at 3. The actions were not described, however, and the legal conclusions drawn about the way those "actions" were done are not identical to the § 523(a)(6) criteria of willful and malicious actions intending to cause and causing an injury. *See Kawaauhau*, 523 U.S. at 61-62 (holding that "nondischargeability takes a deliberate or intentional injury, not merely a deliberate or intentional act that leads to injury"). The Judgment mentioned no injury, and none of the other findings actually fits the factors of § 523(a)(6). The plaintiff did assert, in its Memorandum of Law, that the debtor "willfully and maliciously engaged in actions including, but not limited to fraud, conversion and breach of fiduciary duty causing intentional injury to Sun." R. 11 at 5-6. However, "fraud, conversion, and breach of fiduciary duty" are not actions, and that conclusory allegation was not substantiated by any facts. In the end, this court has not one iota of evidence, of material facts, that Hoffman himself willfully and maliciously caused an injury to Sun or its property.

The court determines that the plaintiff has failed to establish the necessary factors for proving the nondischargeability of the debtor's debt to Sun, either in its own Complaint, Motion, or Memorandum of Law, or in the Kentucky Judgment upon which it relied. It further concludes that the plaintiff cannot prove that the issues to be litigated in this adversary proceeding are identical to those litigated in the Kentucky state court. Without an identity of the issues, the Kentucky Judgment cannot preclude further litigation of the nondischargeability issues in this court under the doctrine of collateral estoppel.

It is clear that the Kentucky Judgment below "did not reflect specific and detailed factual findings sufficient to invoke collateral estoppel in the bankruptcy proceeding." *ColeMichael Investments*, 436 B.R. at 63. What is not clear is whether the factual underpinnings that are required for application of collateral estoppel were actually litigated before the state court. It is noteworthy, however, that, even though the defendants did not appear at trial, the state court did not simply deem the unchallenged facts admitted, as a result of the defendants' nonappearance. The court heard witness and affidavit testimony, admitted evidence,

and weighed the arguments of plaintiff's counsel. Nevertheless, the Kentucky Judgment contained only legal conclusions, without the factual details necessary to establish that this defendant's conduct constituted, for example, willful and malicious injury under § 523(a)(6) or intent to deceive under § 523(a)(2)(A). *See, e.g.*, *In re Davis*, 638 F.3d at 553 (finding that state court made no determination as to intent and thus that collateral estoppel did not apply to prevent the litigation of the issue in bankruptcy court); *Leventhal v. Schenberg*, 484 B.R. 731, 734 (N.D. Ill. 2012) (affirming bankruptcy court's conclusion that state court judgment for malicious prosecution necessarily included finding of willful and malicious injury and established "willful" element of 523(a)(6)).

Collateral estoppel applies to cases in which the earlier court decision "used the same standards that the bankruptcy court would have used" in finally determining factual issues that are relevant to a subsequent dischargeability claim. *In re Mergen*, 473 B.R. 743, 747 (Bankr. W.D. Wis. 2012). The court examined the Kentucky Judgment to determine what facts were fully and fairly litigated in that proceeding. It found that the Kentucky Judgment contained no factual findings, and therefore this court was unable to ascertain whether the defendant's conduct met the requisite elements for a finding of nondischargeability. *See ColeMichael*, 436 B.R. at 63 ("Most importantly, the [state] court did not make specific findings about the elements of any of the nondischargeability provisions that were at issue before the bankruptcy court.").

One other point should be made. The plaintiff also argued that it was "undisputed" that "Mr. Hoffman's actions constitute a fraud against Sun," that "Mr. Hoffman both willfully and maliciously engaged in actions including, but not limited to fraud, conversion and breach of his fiduciary duty causing intentional injury to Sun," and that "Mr. Hoffman knowingly converted assets belong[ing] to Sun while acting in a fiduciary capacity causing injury to Sun." R. 11 at 5-6. Without referring to the defendant's default, it appears that Sun based its claim that there were no disputed material facts on the fact that the defendant failed to respond, either in the Kentucky state court or in this court, and in particular failed to respond to the plaintiff's summary judgment motion. The defendant did, in fact, fail to respond or to oppose

the motion for summary judgment, and under Rule 56(e) and this court's Local Rule B-7056-1 all the material facts in the plaintiff's motion are deemed admitted.

Nevertheless, as was explained above, the court does not grant summary judgment automatically, merely because the nonmovant failed to respond. The movant is required to demonstrate his entitlement to summary judgment as a matter of law by proving the required elements of the cause of action. He has the initial burden of production and therefore has the responsibility of demonstrating the basis for his claim that there are no material facts in dispute. 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).

In this case, however, the plaintiff's "undisputed facts" were legal conclusions rather than material facts. Without material facts as to which there is no genuine issue, the plaintiff did not demonstrate as a matter of law that the defendant's debt to the plaintiff was excepted from discharge under § 523(a)(2)(A) or § 523(a)(6). This court cannot make the requisite findings on nondischargeability issues without material facts before it. For example, the § 523(a)(2)(A) element of 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*, *Kontrick v. Ryan*, 540 U.S. 443, 124 S. Ct. 906, 157 L.Ed.2d 867 (2004). In addition, the element of fraud 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. Missing were any specific representations Hoffman made to Sun, statements that he knew to be false or made with such reckless disregard for the truth as to constitute willful misrepresentation. There was no showing that the debtor made misrepresentations with the intent

and purpose of deceiving Sun. Also, there was no demonstration that the debtor intended to injure Sun and caused an injury to it or its property interest.

The court therefore finds that this summary judgment action lacks material facts which were established by the plaintiff through its pleadings and motions. The Kentucky Judgment did not supply those facts, and in any case that state court judgment was not presented to this court on collateral estoppel grounds. The plaintiff simply asserted legal conclusions without showing that the defendant's conduct and specific actions demonstrated each of the elements in either or both of the exceptions to discharge. The court finds that none of the elements of a § 523(a)(2)(A) or § 523(a)(6) claim has been demonstrated with respect to this debtor Donald Wayne Hoffman. Accordingly, the plaintiff is not entitled to a judgment as a matter of law. Sun's Amended Motion for Summary Judgment is denied.[4]

Sun also filed a Motion for Entry of Judgment, seeking judgment on the merits in favor of the plaintiff and against the defendant, on the Complaint. It requested that the defendant's obligation to the plaintiff, in the amount of $194,592.47, be held nondischargeable under § 523(a)(4) [*sic*]. *See* Fed. R. Civ. P. 54; Fed. R. Bankr. P. 7054. Because the court has denied the plaintiff's Motion for Summary Judgment, its Motion for Entry of Judgment also is denied.

CONCLUSION

For the reasons presented in this Memorandum of Decision, the Amended Motion for Summary Judgment and the Motion for Entry of Judgment filed by the plaintiff Sun Enterprises, Inc., against the chapter 7 debtor Donald Wayne Hoffman, are denied.

SO ORDERED.

/s/ HARRY C. DEES, JR.
HARRY C. DEES, JR., JUDGE
UNITED STATES BANKRUPTCY COURT

[4] Plaintiff's Motion for Telephonic Status Conference also is denied as moot.