

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF INDIANA
FORT WAYNE DIVISION

IN RE: CASE NO. 04-14609)
)
NORMA A. RILEY)
)
Debtor)
)
)
AUTOMOTIVE COLOR & SUPPLY)
CORPORATION)
)
Plaintiff)
)
vs.) PROC. NO. 05-1018
)
)
NORMA SANDERS)
)
Defendant)

**DECISION AND ORDER DENYING
PLAINTIFF’S MOTION FOR SUMMARY JUDGMENT**

At Fort Wayne, Indiana, on August 4, 2005

By this adversary proceeding the court has been asked to declare that the defendant/debtor’s obligation to the plaintiff it is a non-dischargeable debt, pursuant to § 523(a)(2)(A) and § 523(a)(4) of the United States Bankruptcy Code. That debt arises out of a dishonored check and is represented by an agreed judgment, in the sum of \$687.60, from the Allen Superior Court. The plaintiff has filed a motion for summary judgment based upon the proposition that the agreed judgment it received in the state court, supplemented by counsel’s affidavits and a copy of the agreed entry, obviate the need for further litigation on the dischargeability issue.¹ The motion also requests recovery of the attorney

¹The motion is largely based on the doctrines of collateral estoppel and res judicata. Other than including res judicata as grounds for summary judgment, the plaintiff has not argued how applies it here and it does not. Res judicata prohibits the re-litigation of the same claim in a subsequent proceeding. The purpose of this proceeding is not to determine whether the defendant owes the plaintiff money, but only whether that debt should be excepted from discharge in the

fees and expenses incurred in the prosecution of this action. In addition to filing a response to the motion, the defendant filed its own motion asking the court to strike the affidavits and the agreed entry plaintiff submitted in support of the motion for summary judgment.² It is the issues raised by these motions that are 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). Rule 56 requires the moving party to inform the court of the basis of the motion and to identify “those portions of ‘the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any,’ which it believes demonstrate the absence of a genuine issue of material fact.” Celotex Corp. v. Catrett, 477 U.S. 317, 323, 106 S.Ct. 2548, 2553. The

debtor’s bankruptcy. The plaintiff’s non-dischargeability claim under § 523(a) is separate and distinct from the state law claim that gave rise to the debt; it did not and could not arise until the defendant actually filed bankruptcy. Thus, it could not have been determined prior to that time, it was not determined in the prior litigation and res judicata does not prevent this court from making an independent determination of the issue. See, Brown v. Felsen, 442 U.S. 127, 99 S.Ct. 2205 (1979).

²Except as contemplated by Rule 12(f), the purpose of a motion to strike should be limited to removing things from the docket that are so woefully inadequate they do not deserve to be filed. It is not the proper vehicle to deal with things which qualify for filing but are simply not sufficient to accomplish their ostensible purpose. See, Colodny v. Iverson, Yoakum, Papiano & Hatch, 838 F. Supp. 572, 575 (D. M.D. Fla. 1994) (motion to strike is not an appropriate way to challenge the basis of factual allegations). Such deficiencies should be addressed in one’s normal response or reply to the submission, rather than by filing a separate motion asking the court to strike the offending document. Knudsen v. Liberty Mutual Ins. Co., 411 F.3d 805 (7th Cir. 2005) (“we hope that in the future [parties] will address the issues directly rather than move to strike the [opponent’s] papers.”). See also, S.D. Ind. L.R. 56.1(f) (“Collateral motions in the summary judgment process, such as motions to strike are disfavored.”). Defendant’s motion to strike is based upon perceived deficiencies in the evidentiary value of the materials filed in support of the plaintiff’s motion. As such, those arguments should have been advanced in the brief opposing the motion, not by filing a motion asking the court to strike the documents.

non-moving party may oppose the motion with any of the evidentiary materials listed in Rule 56(c), but reliance on the pleadings alone is not sufficient to withstand summary judgment. Posey v. Skyline Corp., 702 F.2d 102, 105 (7th Cir. 1983).

Rule 56(e) of the Federal Rules of Civil Procedure, which is made applicable to bankruptcy proceedings by Fed. R. Bankr. P. Rule 7056, permits the use of affidavits to support or oppose a motion for summary judgment. Fed. R. Civ. P. Rule 56(e). “The policy of Rule 56(e) is to allow the affidavit to contain all evidentiary matter, which, if the affiant were in court and testifying on the witness stand, would be admissible as part of his testimony.” Pfeil v. Rogers, 757 F.2d 850, 860 (7th Cir. 1985). See also, Resolution Trust Corp. v. Juergens, 965 F.2d 149, 152 (7th Cir. 1992)(“Summary judgment is supposed to be a substitute for trial, and an affidavit in support of a Rule 56 motion is a substitute for live testimony.”). If affidavits are used, they “shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein.” Fed. R. Civ. P. Rule 56(e). If an affidavit does not satisfy these requirements, it should not be considered by the court in ruling on the motion. Adusumilli v. City of Chicago, 164 F.3d 353, 359 (7th Cir. 1998); Friedel v. City of Madison, 832 F.2d 965, 970 (7th Cir. 1987). See also, 10B Wright & Miller, Federal Practice & Procedure: Civil 3d § 2738.

Plaintiff has filed two affidavits in support of its motion, both of which represent the testimony of its counsel, Mr. Brian Tracey. In the first affidavit counsel states that, upon signing the agreed entry in the state court proceeding, the debtor told him that she knew her checking account was closed when she issued the check in question and that she intended on filing bankruptcy in order to discharge the debt. The second affidavit lays out the attorney fees and expenses plaintiff has

incurred in bringing this action.

As noted by the Seventh Circuit:

The use of affidavits by counsel is in certain confined situations undoubtedly appropriate, but it is a tactic fraught with peril, and counsel must remember that the requirements of Rule 56(e) are set out in mandatory terms and the failure to comply with those terms makes the proposed evidence inadmissible during the consideration of the summary judgment motion. Friedel, 832 F.2d at 970.

The rule requires three things and they are not changed simply because the affiant is an attorney. Midland Engineering Co. v. John A. Hall Const. Co., 398 F. Supp. 981 (D.C. Ind. 1975). The affidavit must be based upon the affiant's personal knowledge, it must set forth facts that would be admissible in evidence, and it must demonstrate that the affiant is competent to testify to those facts. Where his first affidavit is concerned, it is the third requirement which Mr. Tracey has difficulty fulfilling.

Mr. Tracey is counsel for the plaintiff and with his affidavits he purports to be a witness for his client as well. The Indiana Rules of Professional Conduct do not permit an attorney to serve as both an advocate and a witness in the same proceeding unless one of three exceptions applies. IRPC Rule 3.7(a) (made effective in the District Court for the Northern District of Indiana by local rule 83.5(f)), and to the Bankruptcy Court for the Northern District of Indiana by local bankruptcy rule B-9010-1). An attorney may act in both capacities if the testimony relates to an uncontested issue, relates to the nature and value of legal services rendered, or if counsel's disqualification would result in a substantial hardship to the client. None of these exceptions apply where Mr. Tracey's first affidavit is concerned. The issues surrounding the circumstances under which the check was given are the heart and soul of plaintiff's non-dischargeability claim and certainly are not uncontested. They have been denied in the defendant's answer. The affidavit does not relate to the nature and

value of the legal services provided – that is the subject of counsel’s second affidavit. Finally, there is no indication that the plaintiff would suffer any kind of hardship – much less a substantial one – if Mr. Tracey is not permitted to serve as both counsel and a witness. The policy behind Rule 56(e) is to allow the affidavits submitted in support of a motion for summary judgment to contain any evidentiary matters that would be admissible as part of the affiant’s testimony if the affiant were in court and testifying at trial. Pfeil, 757 F.2d at 860. Based upon the present record, Mr. Tracey may not properly serve as plaintiff’s counsel and also offer testimony at trial concerning the circumstances under which the check in question was given.³ Since he could not offer that testimony at trial, the court should not consider those portions of his affidavit in ruling on the motion for summary judgment.

The second component of plaintiff’s motion is that, through doctrine of collateral estoppel, the agreed judgment from the Allen Superior Court establishes the nondischargeability of the judgment debt. While the doctrine is alive and well in the bankruptcy courts, see e.g., Grogan v. Garner, 498 U.S. 279, 111 S. Ct. 654 (1991); In re Catt, 362 F.3d 789 (7th Cir. 2004); Klingman v. Levinson, 831 F.2d 1292 (7th Cir. 1987); In re Busick, 264 B.R. 518 (Bankr. N.D. Ind. 2001); In re Staggs, 178 B.R. 767, 774 (Bankr. N.D. Ind. 1994), aff’d Matter of Staggs, 177 B.R. 92 (N.D. Ind. 1995), plaintiff has failed to show how its operation leads to the conclusion that the debtor’s obligation is a non-dischargeable one. “Generally, collateral estoppel operates to bar subsequent relitigation of the same fact or issue where that fact or issue was necessarily adjudicated in a former suit and the same fact or issue is presented in the subsequent lawsuit.” Staggs, 178 B.R. at 774

³The court has recently approved the parties’ pre-trial order which lists Mr. Tracey as a witness for the plaintiff. Trial is not scheduled to take place until September 26, 2005. It would seem that Mr. Tracey has sufficient time to decide whether he will be a witness or an attorney at trial and make any necessary arrangements.

(citations omitted). The key to collateral estoppel is that findings of fact were necessarily made by a court in connection with prior litigation between the parties in which a final judgment was rendered. It then acts to bar the relitigation of those same facts in a subsequent proceeding. The party asserting preclusion is expected to identify the facts that were determined in the previous litigation and then demonstrate how those facts compel a particular result in the subsequent action. Busick, 264 B.R. at 522.

Here, it is not at all apparent what findings of fact, if any, may have been made by the state court in connection with its judgment. This court has only an agreed judgment which says little more than that the matter has been settled and that the plaintiff is entitled to the entry of judgment against the defendant for a certain sum of money.⁴ Although that judgment has been approved by the state court, the only facts it contains are the recital that the matter has been settled and that the plaintiff is entitled to recover \$687.60. Plaintiff's motion does nothing to indicate how those two facts are identical to the issues presented in this proceeding or how they lead to the conclusion that the debt represented by the judgment is a nondischargeable one. Without any meaningful findings of fact from the prior litigation, this court has no basis for concluding that collateral estoppel precludes further litigation on the issue of dischargeability.

⁴Because a consent judgment rarely requires the court to make findings resolving disputed factual issues, such judgments do not fulfill the technical requirements for the operation of collateral estoppel. They may, nonetheless, operate as an estoppel if it appears that the parties clearly intended not only to conclude the litigation but also to finally determine certain factual issues or if they could reasonably have foreseen that the facts they had agreed to would have a conclusive effect. Klingman, 831 F.2d at 1296. See also, United States v. International Bldg. Co., 345 U.S. 502, 506, 73 S.Ct. 807 (1953); Balbrier v. Austin, 790 F.2d 1524, 1527-28 (11th Cir. 1986). The agreed judgment from the Allen Superior Court fails to meet this standard. See, Bicknell v. Stanley, 118 B.R. 652, 668-69 (S.D. Ind. 1990); Matter of Ethridge, 80 B.R. 581, 587 (Bankr. M.D. Ga. 1987)(consent judgments that did nothing more than provide for the entry of judgment did not have any collateral estoppel effect).

The final aspect of plaintiff's motion concerns its request to recover the attorney fees and expenses it has incurred in this proceeding.⁵ It has no such right. Nothing in the Bankruptcy Code authorizes a creditor to recover the attorney fees and expenses associated with dischargeability litigation. If it exists, the right must come from non-bankruptcy law. Here, the right is predicated upon I.C. 34-4-30-1⁶ which allows the victims of certain crimes to recover treble damages and attorney fees. Yet, plaintiff's claim under that statute has been reduced to judgment and whatever rights plaintiff may have had have been merged in that judgment, so that there is no further right to the recovery of attorney fees. Restatement (2d) Judgments § 18 ("When a valid and final personal judgment is rendered in favor of the plaintiff, the plaintiff cannot thereafter maintain an action on the original claim or any part thereof . . ."); In re Schlecht, 36 B.R. 236, 240 (Bankr. D. Alaska 1983). See also, In re Clifton, 1996 WL 931683 *4 (Bankr. N.D. Ind. 1996), aff'd Anthony Wayne Credit v. Clifton, N.D. Ind. 1:96cv382 (Dec. 13, 1996).

Plaintiff's motion for summary judgment is DENIED.

SO ORDERED.

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

⁵Since the court may not consider the critical facts in Mr. Tracey's first affidavit and has no meaningful facts from the state court proceeding, there is no basis for granting plaintiff's motion for summary judgment and, arguably, no reason to address the issue of attorney fees. The court does so, however, in an effort to assist the parties in their evaluation of this case and (although they declined the opportunity for mediation) to help facilitate an economical resolution of the matter. Mr. Tracey's second affidavit indicates that his client has already incurred almost \$1,600 in attorney fees litigating the dischargeability claim in this court, and there is more to follow because the parties have requested a half day to try the case. While the court does not know the amount of defendant's attorney fees, it is obvious that a great deal of time and effort is being devoted to fighting about a \$687.60 judgment, in a dispute that allegedly began with a check for \$216.90.

⁶This statute was repealed and replaced by I.C. 34-24-3-1. The language of the statute has not been changed.