

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF INDIANA
FORT WAYNE DIVISION

IN RE: CASE NO. 03-15214)
)
JORGE GARCIA HUERTA)
)
Debtor)
)
)
MARCELA RELUE)
)
Plaintiff)
)
vs.) PROC. NO. 04-1109
)
JORGE GARCIA HUERTA)
)
Defendant)

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

At Fort Wayne, Indiana, on August 10, 2005.

The plaintiff initiated this adversary proceeding asking the court to declare that the defendant/debtor’s obligation to her is a non-dischargeable debt, pursuant to § 523(a)(4) of the United States Bankruptcy Code. That debt arises out of a real estate transaction and is represented by a judgment, in the sum of \$55,837.50, from the Allen Superior Court. The plaintiff moved for summary judgment, arguing that the judgment it received in state court collaterally estops further litigation on the issue of fraud. It is this motion for summary judgment which is presently before the court.¹

¹The defendant’s response to the motion includes statements directed to the sufficiency of the complaint, including failure to plead fraud with particularity. The defendant answered the complaint nearly one year before this summary judgment motion was filed. As the underlying purpose of Rules 8 and 9(b) is to ensure that a defendant has been sufficiently apprised of the conduct of which the plaintiff complains, so that it can adequately respond to those allegations,

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 plaintiff believes that the judgment it received in state court obviates the need for litigation on the dischargeability issue in bankruptcy court. 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

Baselski v. Paine, Webber, Jackson & Curtis, Inc., 514 F. Supp. 535, 540 (N.D. Ill. 1981), the filing an answer before raising the issue of insufficient particularity waives that requirement. See, In re Universal Factoring Co., Inc., 279 B.R. 297 (Bankr. N.D. Okla. 2002); Sithon Maritime Co. v. Holiday Mansion, 983 F. Supp. 977 (D. Kan. 1997); Todaro v. Orbit International Travel, Ltd., 755 F. Supp. 1229, 1234 (S.D. N.Y. 1991); United Nat. Records, Inc. v. MCA, Inc., 609 F. Supp. 33, 38 (D.C. Ill. 1984). See also, 5C Wright & Miller, Federal Practice and Procedure § 1394 (3d ed. 2004). The defendant was apparently quite capable of responding to plaintiff’s allegations and any objections to the lack of particularity were waived when the defendant filed its answer. The defendant also includes a statement that the plaintiff failed to include a statement as to whether this proceeding is core or non-core, as is required by rule 7008 of the Federal Rules of Bankruptcy Procedure. However, other than stating the requirements of the rule, it states nothing further. If it is asking the court to dismiss the proceeding, it should move to do so. The “affirmative defenses” included in the answer – “Plaintiff’s complaint fails to subscribe to the mandates of Rules 7008 and 7009” – are not sufficient to raise the issue, particularly when they are followed by specific denials of the allegations.

U.S. 1081, 109 S. Ct. 1536 (1989)). “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.” 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)(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.

For the court to apply collateral estoppel in a dischargeability proceeding, the requisite elements of the dischargeability claim must have been specifically decided by the state court. 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. at 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 the subsequent 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).

The plaintiff’s underlying claim is that the defendant breached a contract for the purchase of real estate the defendant owned. Generally, a mere breach of contract by the debtor without more, does not imply existence of actual fraud for purposes of the exception to discharge under 523(a)(2)(A). In re Guy, 101 B.R. 961, 978 (Bankr. N.D. Ind. 1988); In re Emery, 52 B.R. 68, 70

(Bankr. E.D. Pa.1985). But, the proceeding in state court included more than just a determination of whether the defendant breached a contract. The plaintiff also asked that the defendant be held liable under a state criminal statute for fraud which also enabled an award of treble damages and attorney fees.² Following a trial on the matter, one in which the defendant failed to appear, but the plaintiff presented its case, the Allen Superior Court entered its judgment, including a list of findings.

The judgment the plaintiff received in state court essentially provides that the court found that the defendant told the plaintiff the property was not encumbered, knowing that the property was encumbered, the plaintiff relied on defendant's statement, continued to make payments to plaintiff in reliance on defendant's statement, and that it was this misrepresentation which caused injury to the plaintiff, thus satisfying the requirements of the state fraud statute. The state court found that the defendant breached the contract, and that there was intent to defraud the bank when the loan was obtained, but only found "evidence of intent to defraud" when it came to the defendant. The state court may have found that the defendant engaged in conduct so as to constitute "evidence of intent to fraud" under the requirements of the state criminal statute, but this does not equate to a finding that the debt is non-dischargeable under § 523(a)(4).

Section 523(a)(4) excepts from discharge any debt resulting from "fraud or defalcation while acting in a fiduciary capacity..." 11 U.S.C. §523(a)(4). To succeed, the plaintiff must demonstrate the existence of a fiduciary relationship between it and the debtor/defendant, and the obligation to the plaintiff must have arisen from fraud or defalcation while acting in a fiduciary capacity. Whether

²Indiana law allows the victims of certain crimes to recover up to three times their actual damages and attorney fees from the person who caused the loss. I.C. 34-24-3-1. One of these crimes is defrauding creditors – I.C. 35-43-5-4.

or not a fiduciary relationship exists is a question of federal law. In re Marchiando, 142 B.R. 246, 249 (N.D. Ill. 1992), aff'd, 13 F.3d 1111 (7th Cir. 1994), cert. denied, Illinois Dept. of the Lottery v. Marchiando, 512 U.S. 1205, 114 S.Ct. 2675 (1994); In re Wheeler, 101 B.R. 39, 45 (Bankr. N.D. Ind. 1989); In re Marshall, 24 B.R. 105, 107 (Bankr. W.D. Mo. 1982). It applies only to technical or express trusts or to those imposed by statute, as opposed to those which arise out of equitable considerations or which are implied by law. In re Stone, 91 B.R. 589, 593-94 (D. Utah 1988); Marchiando, 142 B.R. at 249; In re Myers, 52 B.R. 901, 904 (Bankr. E.D. Va. 1985); In re Owens, 54 B.R. 162, 164 (Bankr. D. S.C. 1984).

The plaintiff contends, repeatedly, in its brief that a fiduciary relationship existed due to the buyer-seller relationship, but fails to demonstrate how this is so. Other than bare statements in the complaint and in its motion, the plaintiff has failed provide a basis for its assertions of a fiduciary relationship. Generally, buyer-seller relationships, such as the relationship between the plaintiff and defendant, are not indicative of a fiduciary relationship. See, Davis v. Aetna Acceptance Co., 293 U.S. 328, 333-34, 55 S.Ct. 151 (1934); In re Mukhi, 254 B.R. 722, 731 (Bankr. N.D. Ill. 2000); In re Ward, 88 B.R. 727, 729 (Bankr. W.D. Pa. 1988). The judgment issued by the state court makes no such finding, neither does the plaintiff point to the source of such a relationship. Furthermore, there is no indication that the judgment rendered in state court provides fraud resulted from the relationship. As a result, the findings made in the state court proceeding fail to compel a similar result in this action.

Without findings of fact which fulfill the plaintiff's burden on the issues it has raised – that the debt owed it by the defendant is non-dischargeable under § 523(a)(4) of the United States Bankruptcy Code, the court has no basis for determining if, as the plaintiff argues, a determination

of fraud in state court collaterally estops a separate determination in the bankruptcy court for dischargeability under § 523(a)(2)(4). See, United States v. International Bldg. Co., 345 U.S. 502, 506, 73 S.Ct. 807 (1953). See also, Balbirer v. Austin, 790 F.2d 1524, 1527-28 (11th Cir. 1986); Matter of Ethridge, 80 B.R. 581 (Bankr. M.D. Ga. 1987); Bicknell v. Stanley, 118 B.R. 652, 668-69 (Bankr. S.D. Ind. 1990).

Plaintiff's motion for summary judgment is DENIED.

SO ORDERED.

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