

**UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION**

IN RE:	)	CHAPTER 7
)	
MELISSA K. KUCZIRKA,	)	CASE NO. 01-63888
)	
Debtor.	)	JUDGE RUSS KENDIG
-----)	
EMPIRE AFFILIATES CREDIT	)	ADV. NO. 01-6215
UNION, INC.,)	
)	
Plaintiff,)	
)	
v.)	
	)	MEMORANDUM OF DECISION ON
MELISSA K. KUCZIRKA,	)	PLAINTIFF'S MOTION FOR
	)	SUMMARY JUDGMENT
Defendant.)	

Empire Affiliates Credit Union (hereafter "Plaintiff") filed a motion for summary judgment pursuant to Federal Rule of Bankruptcy Procedure 7056, incorporating Federal Rule of Civil Procedure 56, on April 24, 2002. In the motion, Plaintiff argues that the default judgment awarded it in state court should be given preclusive effect by this court under the doctrine of collateral estoppel. Additionally, Plaintiff contends that the treble damages awarded in the judgment are nondischargeable under 11 U.S.C. § 523(a)(2). Defendant-debtor Melissa K. Kuczirka (hereafter "Debtor") did not respond to the motion.

The court has jurisdiction over this proceeding pursuant to 28 U.S.C. § 1334 and the general order of reference entered in this district on July 16, 1984. This matter is a core proceeding under 28 U.S.C. § 157(b)(2)(I).

BACKGROUND

Plaintiff filed the complaint under 11 U.S.C. § 523(a)(2)(A). According to Plaintiff, Debtor wrote a \$1,500.00 credit card check to a third party, Jennifer Hanlon, who negotiated the check. The check was later returned for non-sufficient funds because it exceeded Debtor's credit limit. Plaintiff filed suit against Debtor and Jennifer Hanlon in the Coshocton County Municipal Court and received a default judgment for \$4,484.91 against debtor, including \$3,389.94 for treble damages and attorney's fees. The default judgment was entered after Debtor failed to respond to the complaint.

In an amended answer, Debtor states that she did not receive money from the check, but Jennifer Hanlon obtained the funds. Debtor denies any fraud or misrepresentation in connection with the transaction. She also alleges that \$2,146.26 has been paid on the judgment. It is her position that the treble damages and attorney's fees are dischargeable and therefore no additional monies are owed Plaintiff. Debtor also raised several affirmative

defenses.

ARGUMENT

Plaintiff presents two arguments in its motion for summary judgment. First, Plaintiff desires the court to give effect to the default judgment from the state court and find the debt owing nondischargeable under section 523(a)(2). Plaintiff presents both policy and legal arguments in support of its position that the default judgment can be given preclusive effect. The heart of Plaintiff's argument is a party should not have a second bite at the litigation apple, especially when the party elected not to defend the matter in the first instance. Second, Plaintiff asserts that the treble damages and attorney's fees awarded by the state court are also nondischargeable under section 523(a)(2).

STANDARD OF REVIEW

Motions for summary judgment are governed by Federal Rule of Civil Procedure 56, as adopted by Federal Rule of Bankruptcy Procedure 7056. The rule provides that a motion for summary judgment should be granted "forthwith 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).

DISCUSSION

As a preliminary matter, the court addresses a procedural defect in the Plaintiff's motion for summary judgment. Although the motion was timely filed and accompanied by a certificate of service, the Plaintiff failed to provide notice of the motion to Debtor. Pursuant to Local Bankruptcy Rule 9013-1(a), notice of the motion and an opportunity to object are to be provided to opposing parties. The absence of the notice renders Plaintiff's motion procedurally deficient.

While Debtor did not respond to the motion, in accordance with Rule 7056 the court is obligated to determine if the summary judgment standard has been met. Thus, the moving party must not only demonstrate the absence of genuine issues of material fact, but also show that it is entitled to judgment as a matter of law. *See* Fed. R. Civ. P. 56. Upon review of the motion, the court finds Plaintiff's legal argument for application of collateral estoppel is not well-taken and denies the motion.

The United States Supreme Court found that collateral estoppel can apply to dischargeability proceedings in bankruptcy courts. *See Grogan v. Garner*, 498 U.S. 279 (1991). Under the Full Faith and Credit act, a federal court is required to yield the same degree of deference to a state court decision as would be given by a state court. *See Bay Area Factors v. Calvert (In re Calvert)*, 105 F.3d 315 (6th Cir. 1997). To determine whether a state court would recognize the preclusive effect of a default judgment in a subsequent proceeding, it is necessary to look to state law. *See id.* (citing *Marrese v. American Academy of Orthopaedic Surgeons*, 470 U.S. 373 (1985) (quotation omitted).

The Bankruptcy Appellate Panel has recently reviewed the interplay of collateral estoppel and default judgments under Ohio law. *See Sill v. Sweeney (In re Sweeney)*, 2002 WL 628641 (B.A.P. 6th 2002). As stated in *Sweeney*, the collateral estoppel requirements under Ohio law are:

1) A final judgment on the merits in the previous case after a full and fair opportunity to litigate the issue; 2) The issue must have been actually and directly litigated in the prior suit and must have been necessary to the final judgment; 3) The issue in the present suit must have been identical to the issue in the prior suit; 4) The party against whom estoppel is sought was a party or in privity with the party to the prior action.

Id. at *2 (citing Gonzalez v. Moffitt (In re Moffitt), 252 B.R. 916, 921 (B.A.P. 6th Cir. 2000) (quoting Murray v. Wilcox (In re Wilcox), 229 B.R. 411, 415-16 (Bankr. N.D. Ohio 1998)).

When a party seeks to rely on a default judgment as the basis for issue preclusion, the question of whether the matter was actually litigated is of primary importance. Here, Plaintiff contends that the issue was actually litigated and equates actual litigation with the requirement, under the doctrine of res judicata, of a decision on the merits. Plaintiff relies on Martin v. Stoddard (In re Stoddard), 248 B.R. 111 (Bankr. N.D. Ohio 2000), for the proposition that Ohio courts recognize that relitigation of claims adjudicated by a default judgment can be precluded by operation of res judicata. The court believes what Plaintiff argues is that since a default judgment is a decision on the merits, it follows that in order to obtain a default judgment, the matter must have been actually litigated. Plaintiff cites no authority for this position, nor did the court locate any such authority. Further, Plaintiff fails to address the statement by the Stoddard court that “the principles of res judicata do not apply to dischargeability proceedings.” In re Stoddard, 248 B.R. at 120, fn 6. *See also* Brown v. Felsen, 442 U.S. 127 (1979). The court finds this line of reasoning entirely unpersuasive.

Plaintiff has cited relatively little case law from this circuit and has chosen to intermingle cases involving “true” defaults with cases where a default occurred after participation by the defending party. *See, e.g.*, Martin v. Stoddard (In re Stoddard), 248 B.R. 111 (N.D. Ohio 2000) (true default); Rally Hill Prod., Inc. v. Bursack (In re Bursack), 65 F.3d 51 (6th Cir. 1995) (default judgment following trial); Rogers v. Duguid, 193 B.R. 55 (Bankr. M.D. Fla. 1996) (default judgment entered following defendants election not to participate in the state court trial). Further, much of the case law cited by the Plaintiff references deference to state court decisions containing actual findings of fact and conclusions of law while the subject default judgment contains no findings of fact or conclusions of law by the state court. *See* In re Bursack, 65 F.3d 51 (stating that collateral estoppel operates against facts which are properly pled and raised); Leeb v. Guy (In re Guy), 101 B.R. 961 (Bankr. N.D. Ind. 1988) (deferring to state court when state court has issued complete findings of fact and conclusions of law). In Sweeney, the Bankruptcy Appellate Panel developed the following rule: (1) default judgments may have preclusive effect in Ohio as to an issue which was the subject of an ‘express adjudication,’ and (2) an unanswered complaint and the default judgment based on it do not, by themselves, constitute an express adjudication.” In re Sweeney, 2002 WL 628641 at *6. Since Plaintiff cannot solely rely on the unanswered state court complaint, and resulting default judgment, it is necessary to determine if there was an express adjudication of fraud.

A review of the complaint indicates that the Plaintiff did not plead the elements of fraud. Fraud was never mentioned in the complaint, nor the default judgment. Count I of the state court complaint, in its entirety, alleges:

1. The Plaintiff is the holder of a check, a copy of which is attached hereto and labeled "Exhibit A."
2. Said check was returned by the Drawee Bank as unpaid.
3. The Defendant, Melissa Kuczirka is the Drawer of said check.
4. The Defendant, Jennifer Hanlon, is the Endorser of said check.
4. (sic) Although demand has been made upon the Defendants to pay said check pursuant to their obligation as Drawer and Endorser, the Defendants failed to do so.
5. The amount still due and owing on said check is \$1497.97.

Count II contains allegations for a civil remedy, statutory liquidated damages, pursuant to O.R.C. §§ 2307.60 and 2307.61.

The elements of fraud are well-known. In order to prove nondischargeability, a creditor must demonstrate that "(1) the debtor obtained money through a material misrepresentation that, at the time, the debtor knew was false or made with gross recklessness as to its truth; (2) the debtor intended to deceive the creditor; (3) the creditor justifiably relied on the false representation; and (4) its reliance was the proximate cause of loss." Rembert v. AT&T Universal Card Serv., Inc. (In re Rembert), 141 F.3d 277 (6th Cir. 1998) (citing Longo v. McLaren (In re McLaren), 3 F.3d 958, 961 (6th Cir. 1993)). Neither the complaint nor the default judgment demonstrate elements of fraud were pled, much less litigated, and certainly were not "expressly adjudicated."

The Sweeney court adopted the standard set forth by Judge Speer in Hinze v. Robinson (In re Robinson), 242 B.R. 380 (Bankr. N.D. Ohio 1999).¹ Default judgments will only be given preclusive effect when the following occurs:

First, the plaintiff must actually submit to the state court admissible evidence apart from his pleadings. In other words, a plaintiff's complaint, standing alone, can never provide a sufficient basis for the application of collateral estoppel. Second, the state court, from the evidence submitted, *must actually make findings of fact and conclusions of law* which are sufficiently detailed to support application of the collateral estoppel doctrine in the subsequent proceeding. In addition, given other potential problems that may arise with applying the collateral estoppel doctrine to default judgments (e.g., due process concerns), this Court will only make such an application if the circumstances of the case would make it equitable to do so.

In re Sweeney, 2002 WL 628641 at *7-8 (citing In re Robinson, 242 B.R. at 387) (emphasis added). As Plaintiff failed to meet either requirement, the court will not give the default judgment preclusive effect.

Since the default judgment cannot be given preclusive effect, the court finds it unnecessary to discuss whether the award under Count II, for treble damages and attorney's fees, is also dischargeable under 11 U.S.C. § 523(a)(2).

CONCLUSION

¹ Interestingly, Judge Speer also authored the Stoddard decision relied upon by Plaintiff.

Plaintiff's motion for summary judgment is defective because it does not contain the notice required by Local Bankruptcy Rule 9013-1(a). Regardless of any procedural defect, the court finds that Plaintiff is not entitled to summary judgment because Plaintiff has not demonstrated it is entitled to judgment as a matter of law. In order to recognize the preclusive effect of the default judgment, Plaintiff must have admitted evidence in addition to the state court pleadings and the state court must have rendered findings of fact and conclusions of law. There is no indication that the Plaintiff presented evidence to the state court, nor does the default judgment contain any findings of fact or conclusions of law. Therefore the court finds that collateral estoppel does not prevent relitigation of the issues involved herein.

An order in accord with this decision shall issue forthwith.

RUSS KENDIG
U.S. BANKRUPTCY JUDGE

**UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION**

IN RE:	)	CHAPTER 7
)	
MELISSA K. KUCZIRKA,	)	CASE NO. 01-63888
)	
Debtor.	)	JUDGE RUSS KENDIG
-----)	
EMPIRE AFFILIATES CREDIT	)	ADV. NO. 01-6215
UNION, INC.,)	
)	
Plaintiff,)	
)	
v.)	
	)	ORDER DENYING
MELISSA K. KUCZIRKA,	)	PLAINTIFF'S MOTION
	)	FOR SUMMARY JUDGMENT
Defendant.)	

Now before the court is the summary judgment motion filed by Empire Affiliates Credit Union ("Plaintiff") on April 24, 2002. For the reasons set forth in the accompanying memorandum of decision, **IT IS HEREBY ORDERED** that Plaintiff's motion is **DENIED**.

RUSS KENDIG
U.S. BANKRUPTCY COURT

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this _____ day of May 2002, the above Memorandum of Decision and Order Denying Plaintiff's Motion for Summary Judgment was sent via regular U.S. Mail to:

John L. Woodard
121 W. 3rd St.
P.O. Box 584
Dover, Ohio 44622

Stacie H. Wittenberg
Weltman, Weinberg & Reis
323 W. Lakeside Avenue, Suite 200
Cleveland, Ohio 44113-1099

Deputy Clerk