UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

IN RE:	)	CASE NO. 05-55294
	)	
Robert C. Walkerow,	)	CHAPTER 7
	)	
Debtor.	)	JUDGE MARILYN SHEA-STONUM
	)	
	)	
Integrity Technical Services, Inc.,	)	Adversary No. 05-5162
	)	
Plaintiff,	)	
	)	Opinion Re: Motion to Dismiss
v.	)	
	)	
Robert C. Walkerow,	)	
	)	
Defendant.	)	

This matter is before the Court on the Motion of Robert C. Walkerow ("Debtor" or "Defendant") to Dismiss the Complaint of Integrity Technical Services, Inc. ("Plaintiff") and the Plaintiff's Response. The Complaint is based on a judgment (the "Judgment") obtained by the Plaintiff against, *inter alia*, the Debtor in the Summit County Court of Common Pleas. Plaintiff seeks to have this Court determine the Judgment to be non-dischargeable pursuant to 11 U.S.C. § 523(a)(4) and (a)(6). The Plaintiff argues that the Judgment is entitled to

"preclusive effect" such that it establishes the elements of fraud and willful and intentional behavior. At a pre-trial conference in this matter the Court authorized the filing of dispositive motions with respect to the preclusive effect of the Judgment and the Court directed counsel to focus on the conceptual frames of issue preclusion and claim preclusion rather than res judicata and collateral estoppel.[1]

Jurisdiction

This matter is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(I) and (O). This Court has jurisdiction over this matter pursuant to 28 U.S.C. § 157(a) and (b)(1) and by the Standing Order of Reference entered in this District on July 16, 1984.

Undisputed Facts

Based on the pleadings filed in this adversary proceeding, the Court finds the following facts to be undisputed.

1. On August 22, 2005 (the "Petition Date"), the Debtor filed a voluntary petition for relief under Chapter 7 of the Bankruptcy Code, commencing Case No. 05-55294.

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[1] "In Migra v. Warren City School District Board of Education, 465 U.S. 75, 77 n. 1, 104 S.Ct. 892, 79 L.Ed.2d 56. (1984), the United States Supreme Court expressed its preference for the use of the terms "issue preclusion" and "claim preclusion" to refer to the preclusive effect of a judgment in foreclosing future litigation rather than the more traditionally utilized terms "collateral estoppel" and "res judicata." "Claim preclusion generally refers to the effect of a judgment in foreclosing litigation of a matter that never has been litigated, because of a determination that it should have been advanced in an earlier suit." Migra, 465 U.S. at 77 n. 1, 104 S.Ct. 892. Issue preclusion refers to the effect of a judgment in foreclosing relitigation of a matter that has been actually litigated and decided. Id."

In re Fordu, 201 F.3d 693, 702-03 (6th Cir. 1999). Despite the Court's request that counsel state their arguments under the frames of issue preclusion and claim preclusion, counsel for the Debtor refers only to collateral estoppel and Plaintiff's counsel to the "preclusive effect" of a prior judgment.

2. Prior to the Petition Date, Plaintiff filed suit against, *inter alia*, Defendant in the Summit County Court of Common Pleas (the "Ohio Litigation"). The complaint in the Ohio Litigation asserted causes of action based upon breach of contract and various tort claims, including fraudulent misrepresentations, fraud and intentional interference.

3. The Defendant was represented by counsel and filed an answer in the Ohio Litigation.

4. Prior to the trial in the Ohio Litigation, Defendant's counsel withdrew from representation of Defendant. Thereafter, Defendant failed to appear at a hearing on Plaintiff's Motion for Sanctions.

3. The Judgment entered in the Ohio Litigation, in pertinent part, reads, "[t]his matter came on for hearing on Plaintiff's Motion for Sanctions ... . None of the Defendants appeared, and this Court granted Plaintiff sanctions, including adverse judgment on the Complaint."

The Motion to Dismiss

The Debtor filed a motion, pursuant to Fed. R. Civ. P. 12(b)(6), as made applicable by Fed. R. Bankr. P. 7012, to dismiss the Complaint for failure to state a claim under 11 U.S.C. § 523(a)(2), (a)(4) or (a)(6). In the context of a motion to dismiss under Fed. R. Civ. P. 12(b)(6), as made applicable by Fed. R. Bankr. P. 7012, the court must view the allegations in the light most favorable to the nonmoving party. *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974). The issue that must be decided is not whether plaintiff will ultimately prevail but whether plaintiff is entitled to offer evidence to support the claims stated in his complaint. *Id.* Thus, a motion to dismiss for failure to state a claim will not be granted unless it appears *beyond doubt* that plaintiff can prove no set of facts in support of his claim which would

entitle him to relief. *Id.* (emphasis added).

In his motion, the Debtor argues, *inter alia*, that the "Plaintiff cannot use collateral estoppel as a basis for establishing that the debt is non-dischargeable based upon a default judgment rendered in the state court action because it was not an "express adjudication" in order to be given preclusive effect in Ohio," and that Plaintiff has failed to otherwise state a claim for relief under § 523(a)(2), (4) or (6). In response, Plaintiff suggests that the Defendant was served with the complaint in the Ohio Litigation, was represented by counsel in that litigation and answered and defended the complaint, until the matter was set for a hearing. According to Plaintiff, it was at that time that Defendant's counsel withdrew from representation and Defendant "admitted the debt" during a chamber's conference. Citing *In re Cashelmara Villa Ltd. Ptnshp. v. DiBenedetto*, 623 N.E.2d 213, 215 (Ohio Ct. App. 1993) and *Monahan v. Eagle Pilcher Indus., Inc.*, 486 N.E.2d 1165, 1168 (Ohio Ct. App. 1984), Plaintiff argues an Ohio court would give estoppel effect to the Judgment because the relevant issue was *admitted*, and thereafter a judgment was rendered.

Discussion

The full faith and credit statute requires that state preclusion law be applied when determining the preclusive effect of judgments of state courts. 28 U.S.C. § 1738. When applying the doctrine of issue preclusion, the principles of the Full Faith and Credit Statute (28 U.S.C. §1738) require a bankruptcy court to "give to a state-court judgment the same preclusive effect as would be given that judgment under the law of the State in which the judgment was rendered." *Rally Hill Productions, Inc. v. Bursack (In re Bursack)*, 65 F.3d 51, 53 (6th Cir. 1995), *citing Migra v. Warren City Sch. Dist. Bd. of Educ.*, 465 U.S. 75, 81 (1984). *See also Bay Area Factors v. Calvert (In re Calvert)*, 105 F.3d 315, 317 (6th Cir. 1997). Accordingly, this Court must look to Ohio substantive law to determine whether the

judgment in the Ohio Litigation should have any preclusive effect in this adversary proceeding.

Issue Preclusion will apply under Ohio law if: "(1) A final judgment on the merits has been rendered in the previous case after a full and fair opportunity to litigate the issue; (2) The issue was actually and directly litigated in the prior suit and was necessary to the final judgment; (3) The issue in the present suit must be 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 to the prior action." *Sill v. Sweeny (In re Sweeney)*, 276 B.R. 186, 189 (6th Cir. B.A.P. 2002); *In re Fordu*, 201 F.3d 693, 704 (*quoting Thompson v. Wing*, 637 N.E.2d 917, 923 (Ohio 1987)).

Full and Fair Opportunity to Litigate

In determining whether Defendant had a full and fair opportunity to litigate the prior action for purposes of applying issue preclusion, the question is not whether the Defendant fully defended his case, but whether he had the opportunity to do so. *See, e.g., DeLong v. Thomas (In re Thomas)*, Adv. Pro. No. 04-5189, Memorandum Opinion entered February 14, 2006 p. 7 (*citing, inter alia*, *Cashelmara Villas Ltd. Ptnshp*, 623 N.E. 2d at 215). The parties do not dispute that Defendant was properly served in the Ohio Litigation and that he filed an answer and participated in at least some of the proceedings. Based on the undisputed facts and considered in the light most favorably to the Plaintiff, the Court finds that the Defendant was provided a full and fair opportunity to litigate the Ohio Litigation.

Actually and Directly Litigated

With respect to this element, the question is whether, under Ohio law, an issue, resolved by default judgment, can be considered "actually and directly litigated" when the judgment is the result of a discovery sanction or the defendant's failure to appear at trial, after

having answered the complaint. *See Rebarchek v. Rebarchek*, 293 B.R. 400, 406 (Bankr. N.D. Ohio 2002) and *Hinze v Robsinson* (*In re Robinson*), 242 B.R. 380 (Bankr. N.D. Ohio 1999) for a discussion about how or when Ohio courts grant "default judgments" issue preclusive effect in subsequent litigation. In *Rebarchek* and *In re Robinson*, the courts use "actually and directly litigated" and "necessary to the judgment" as another way of describing that the state court rendered a "judgment on the merits." Use of the latter phraseology makes things clearer.

> [T]he rule established in *Robinson* is that the state court must decide the merits of the case, and the court being asked to give preclusive effect to a default judgment in subsequent litigation must have some reliable way of knowing that the decision was made on the merits. The best evidence would be findings of fact and conclusions of law by the court entering the default judgment. These need not be entered in any special or formal way, but the default court must state what findings and conclusions, if any, it has reached in arriving at the judgment. Those findings will have [issue] preclusive effect.

In re Sweeney, 276 B.R. at 194.

In this case, the Judgment on its face suggests that it was not rendered on the merits, but rather as a result of the Defendants failure to appear at a hearing on a motion for sanctions. There are no specific findings of fact or conclusions of law in the Judgment. Plaintiff's counsel's statement that Defendant "admitted the debt" in a pre-trial conference in the Ohio Litigation is not sufficient evidence to prove that the Judgment was entered on the merits. Thus, this Court has no "reliable way of knowing that the decision was made on the merits."[2] As a result, the Judgment is not entitled to issue preclusive effect such that it

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[2] Plaintiff argues that there must be some exception to this rule, otherwise, all defendants will adopt the trial strategy of defending up until trial, and then allow a "default judgment" to be taken. The Court does not believe this risk exists. Such a strategy is not likely to be successful. Plaintiffs have the ability to affirmatively present evidence to the court, which will remain uncontested as a result of the defendants' failure to appear, from which the court can make and enter specific findings of fact and conclusions of law.

establishes the elements of fraud and willful and intentional behavior.[3]

The inapplicability of the doctrine of issue preclusion to the Judgment does not prevent the Plaintiff from asserting fraud or willful and intentional behavior as a basis for excepting the debt from discharge under § 523. *See Brown v. Felsen*, 442 U.S. 127 (1979). The Defendant argues that Plaintiff has failed to allege sufficient facts in the Complaint to state a claim for relief under § 523(a)(2), (4) or (6). The Complaint alleges that "Defendant made fraudulent misrepresentations to induce Plaintiff to contract and extend credit, upon which Plaintiff relied and Defendant intentionally interfered with Plaintiff's contractual rights." This allegation is sufficient to withstand the Defendant's Motion to Dismiss. The issue before the Court is not whether Plaintiff will ultimately prevail, but whether Plaintiff is entitled to offer evidence to support his claims. It does not appear beyond doubt that Plaintiff can prove no set of facts in support of its claims which would entitle Plaintiff to relief.

Therefore, the Court finds that the Judgment is not entitled to "preclusive effect," but denies the Defendant's Motion to Dismiss for failure to state a claim. The Court will conduct a further pre-trial conference in this adversary proceeding on June 28, 2006 at 2:30 p.m.

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cc: (via electronic mail) David Mucklow
Mark Weisman

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[3] Because of the Court's finding with respect to the second requirement, it will not discuss the two additional requirements for determining whether a prior judgment should be given issue preclusive effect by this Court.