

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

In Re:)	Case No. 01-30067-7
William Clarence McDaniel)	
)	Chapter 7
Debtor.)	
)	Adv. Pro. No. 01-3072
Alice Cutlip)	
)	Hon. Mary Ann Whipple
Plaintiff,)	
)	
v.)	
)	
William Clarence McDaniel)	
Defendant.)	

**MEMORANDUM OF DECISION AND ORDER
REGARDING SUMMARY JUDGMENT MOTIONS**

This adversary proceeding is before the Court on plaintiff Alice Cutlip's motion for summary judgment, defendant-debtor William McDaniel's opposition and cross-motion for summary judgment and plaintiff's reply and opposition to the cross-motion. This case involves the dischargeability of a debt owed to Plaintiff by McDaniel as a result of a state court judgment finding McDaniel liable for misleading statements made in violation of the Ohio Consumer Sales Practices Act. Plaintiff contends that the debt is non-dischargeable under 11 U.S.C. § 523(a)(4) and (6) by virtue of the doctrines of *res judicata* and/or collateral estoppel.

Under Fed.R. Civ. P. 56, made applicable to this proceeding by Fed.R.Bankr.P. 7056, summary judgment is proper only where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, (1986); Fed.R.Civ.P. 56(c). In support of her motion, Plaintiff offers her affidavit wherein she avers that on June 5, 1991, she was involved in a jewelry transaction with Classic Gem & Design, Dave McDaniel

and Defendant. She further avers that on April 22, 1992, she spoke with Defendant at Classic Gem & Design regarding the transaction. The evidence is undisputed that the complaint in the state action was sent by certified mail to Classic Gem & Design and that Defendant's brother signed for the certified mailing on April 30, 1992. However, in support of his position that he was not properly served with the complaint and, thus, that *res judicata* does not apply, Defendant offers his affidavit stating that he ceased to operate, own, or be a partner in the business at Classic Gem & Design in 1988. He, therefore, contends that service at the business address was not reasonably calculated to reach him. Having reviewed the parties' motions and the exhibits in support of the motions, the Court finds that a genuine issue of material fact exists as to whether service of process in the state action was reasonably calculated to reach McDaniel. *See Mullane v. Central Hanover Bank and Trust*, 339 U.S. 306, 314 (1950) (finding that "a fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections").

For the foregoing reasons, good cause appearing, it is

ORDERED that Plaintiff's motion for summary judgment be, and hereby is, **DENIED**; and

IT IS FURTHER ORDERED that Defendant-Debtor's motion for summary judgment be, and hereby is, **DENIED**; and

IT IS FURTHER ORDERED that this case be set for trial on **March 28, 2003, at 2:00 p.m.**

Dated:

Mary Ann Whipple
United States Bankruptcy Judge