

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

In Re: David L. Ketcham, et al.,)	Case No.: 02-30320
)	
Debtors.)	Chapter 7
)	
)	Adv. Pro. No. 02-3151
Mile Marker Transport, et al.,)	
Plaintiffs,)	Hon. Mary Ann Whipple
)	
v.)	
)	
David L. Ketcham, et al.,)	
Defendants.)	

MEMORANDUM OF DECISION REGARDING SUMMARY JUDGMENT

This adversary proceeding is before the Court on Plaintiffs' motion for summary judgment [Doc. #31] and a *pro se* document the Court construes as Defendants' opposition [Doc. #33]. Also before the Court is Plaintiffs' Motion to Strike Defendants' Response [Doc. #34]. This case involves the dischargeability of a debt owed to Plaintiff Mile Marker Transport as a result of a state court judgment in the amount of \$40,260.08. Plaintiffs contend that the debt is non-dischargeable under 11 U.S.C. § 523(a)(2) by virtue of the doctrine of collateral estoppel. For the following reasons, the Court denies both Plaintiffs' motion to strike and Plaintiffs' motion for summary judgment.

Initially, the Court addresses Plaintiffs' motion to strike the document construed by the Court as Defendants' opposition to the summary judgment motion due to its failure to comply with the requirements of Fed. R. Civ. P. 56, which is made applicable to this proceeding by Fed. R. Bankr. P. 7056. Although it is true that Defendants fail to support the factual assertions in their opposition in accordance with Rule 56, they are entitled to and do oppose the motion based on both legal arguments and arguments attacking the evidence submitted in support of the motion for summary judgment. Plaintiffs' motion to strike is, therefore, denied. To the extent, however, that Defendants make improperly supported factual averments, the Court

has disregarded them in deciding Plaintiffs' motion for summary judgment.

Summary of Facts:

Plaintiff Mile Marker Transport ("Mile Marker") is a general partnership located in the state of Indiana. Its general partners are Plaintiff John E. Smock ("Smock") and Marianne King, who is not named as a party in this proceeding. In April, 1999, Defendant/Debtor David L. Ketcham ("Ketcham") resided in Delphos, Ohio. Although Ketcham was doing business as Ketcham Trucking, Inc., the business was not actually incorporated until July 14, 1999. Smock Affidavit ¶¶ 2-3 and Exhibit A.

In April, 1999, Mile Marker entered into an Independent Contractor Operating Agreement ("Agreement") with Ketcham. Under the terms of the Agreement, Mile Marker agreed to provide transportation services for certain commodities in exchange for 80% to 84% of the net freight revenue earned. *Id.* at ¶ 4 and Exhibit B. Mile Marker began providing transportation services pursuant to the Agreement. Thereafter, Ketcham issued a check to Mile Marker on April 30, 1999, in the amount of \$7,064.80, and a check to Smock on May 2, 1999, in the amount of \$760.00. However, shortly after they were issued, Ketcham stopped payment on the checks. *Id.* at ¶¶ 5-6 and Exhibit C. Nevertheless, Mile Marker had deposited the checks in its account and had issued checks based on those deposits, which were later returned due to insufficient funds. *Id.* at ¶ 7.

On June 16, 1999, Mile Marker filed a complaint against David Ketcham dba Ketcham Trucking, Inc. in the Common Pleas Court of Putnam County, Ohio. In the complaint, Mile Marker alleged that Ketcham breached the Agreement (Counts 1 and 2), was unjustly enriched (Count 6), fraudulently represented that he would abide by the terms of the Agreement (Count 3), fraudulently represented that he would honor the checks on which he stopped payment (Count 4), acted with bad faith and malice (Count 6), and tortiously interfered with Mile Marker's business (Count 7). *Id.*, Exhibit E. Ketcham filed an answer to the complaint and a counterclaim. *Id.* at ¶ 8. However, he did not appear at trial on May 15, 2000, and his counterclaim was dismissed. *Id.*, Exhibit F. In addition, after the presentation of testimony and evidence by Mile Marker and without setting forth any findings of fact or conclusions of law, the state court entered judgment "on the Complaint" and awarded Mile Marker \$20,260.08 in compensatory

damages and \$20,000.00 in punitive damages. *Id.*; Partial Trial Transcript [Doc. # 30].

On January 22, 2002, David Ketcham and Diana M. Ketcham filed a joint petition under Chapter 7 of the Bankruptcy Code. In bankruptcy Schedule F, they list Smock as a judgment creditor with a claim of \$55,000.

Mile Marker and Smock timely commenced this adversary proceeding to determine the dischargeability of debts under 11 U.S.C. § 523(a)(2)(A). The amended complaint [Doc. #7] names both Debtors David Ketcham and Diana Ketcham as defendants. In their amended complaint, Smock and Mile Marker allege that the Ketchams fraudulently misrepresented that they had incorporated their business (Counts 1 and 6), fraudulently misrepresented that they had the requisite regulatory operating authorities (Count 7), and fraudulently misrepresented that they would honor the checks issued to Mile Marker and Smock on which payment was stopped (Counts 2 and 3). Plaintiffs also allege that a state court action was filed and a judgment ultimately awarded against David Ketcham (Counts 4 and 5).¹ The complaint seeks both entry of judgment against Defendants in the total amount of \$73,884.68 and a determination that this sum is non-dischargeable in their Chapter 7 case. **Law and Analysis:**

I. Summary Judgment Standard

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. Fed. R. Civ. P. 56(c). In reviewing a motion for summary judgment, however, all inferences “must be viewed in the light most favorable to the party opposing the motion.” *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-88 (1986). The party moving for summary judgment always bears the initial responsibility of informing the court of the basis for its motion, “and identifying those portions of ‘the pleadings, depositions, answers to interrogatories, and admissions on file,

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Count 8 of the amended complaint incorporates all prior factual allegations and requests relief under § 523(a)(2) for all of the acts previously identified in the complaint. Although the amended complaint is overall somewhat unclear, the court does not interpret Count 8 as asserting a separate factual basis for relief, but as setting forth the legal grounds encompassing the entire amended complaint.

together with the affidavits if any' which [he] believes demonstrate the absence of a genuine issue of material fact." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Where the moving party has met its initial burden, the adverse party "must set forth specific facts showing that there is a genuine issue for trial. " *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A genuine issue for trial exists if the evidence is such that a reasonable factfinder could find in favor of the nonmoving party. *Id.*

II. Exception to Discharge under 11 U.S.C. § 523(a)(2)

On summary judgment, Plaintiffs seek an order declaring non-dischargeable the state court judgment entered in favor of Mile Marker and against David Ketcham under 11 U.S.C. § 523(a)(2).² That section provides in relevant part as follows:

- (a) A discharge under section 727 . . . of this title does not discharge an individual debtor from any debt –

 - (2) for money, property, services, or an extension, renewal, or refinancing of credit, to the extent obtained by –
 - (A) false pretenses, a false representation, or actual fraud, other than a statement respecting the debtor's or an insider's financial condition. . . .

11 U.S.C. § 523(a)(2).

In order to except a debt from discharge under § 523(a)(2)(A), a creditor must prove the following elements: (1) the debtor obtained money or services 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 Services, Inc. (In re Rembert)*, 141 F.3d 277, 280-81 (6th Cir. 1998). In order to except a debt from discharge, a creditor must prove each of these

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The amended complaint seeks judgment in the total amount of \$73,884.68. The state court judgment was in the total amount of \$40,260.08. The motion for summary judgment does not specify the amount, if any, of debt upon which summary judgment should be entered, but since it is based on collateral estoppel, the court assumes the summary judgment motion seeks entry by this Court of a final judgment that the state court judgment is non-dischargeable in the Ketchams' Chapter 7 case.

elements by a preponderance of the evidence. *Id.* at 281.

III. Collateral Estoppel

Plaintiffs base their motion on the alleged collateral estoppel, or issue preclusion, effect of the state court judgment. The question presented to this court is whether that judgment should be given preclusive effect in this court on the determination of whether the debt owed to Mile Marker is non-dischargeable. Under 28 U.S.C. § 1738, the federal full faith and credit statute, a federal court must accord a state court judgment the same preclusive effect the judgment would have in state court. *Corzin v. Fordu (In re Fordu)*, 201 F.3d 693, 703 (6th Cir. 1999). In determining whether the prior judgment should be given preclusive effect in a federal action, the federal court must apply the law of the state in which the prior judgment was rendered. *Id.* Thus, in the case *sub judice*, the Court must apply Ohio issue preclusion principles.

Under Ohio law, there are four elements to the application of the doctrine of collateral estoppel: (1) a final judgment on the merits after a full and fair opportunity to litigate the issue; (2) the issue was actually and directly litigated in the prior action 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; and (4) the party against whom estoppel is sought was a party or in privity with the party to the prior action. *Sill v. Sweeney (In re Sweeney)*, 276 B.R. 186, 189 (6th Cir. B.A.P. 2002). “Issue preclusion precludes the relitigation of an issue that has been **actually and necessarily** litigated and determined in a prior action.” *MetroHealth Medical Ctr. v. Hoffmann-LaRoche, Inc.*, 80 Ohio St. 3d 212, 217, 685 N.E.2d 529, 533 (1997) (emphasis added). The person asserting collateral estoppel carries the burden of proving its requirements by a preponderance of the evidence. *A Packaging Service Co. v. Siml (In re Siml)*, 261 B.R. 419, 422 (Bankr. N.D. Ohio 2001).

On the first element, the state court judgment in favor of Mile Marker is unquestionably a final judgment on the merits by a court of competent jurisdiction. The issue is whether Ketcham had a full and fair opportunity to litigate the issues in state court. There is no dispute that Ketcham did not appear at the trial. At that point, he was unrepresented by counsel. But there is no dispute that he was aware of the trial date, so it is fair to infer that he chose not to appear. Under these circumstances, the court finds that

Ketcham³ had a full and fair opportunity to litigate the state court action even though he failed to appear for trial. *Henson v. Henderson (In re Henderson)*, 277 B.R. 889, 892-93 (Bankr. S.D. Ohio 2002).

The second element is decidedly more difficult for Plaintiff. The issue is whether Ketcham's fraud and its consequences can be considered actually litigated, *Hicks v. De La Cruz*, 52 Ohio St.2d 71, 369 N.E.2d 776, 777 (Ohio 1977), when the debtor failed to appear at the trial in state court. Ohio courts have disagreed on whether or how to apply the standards of collateral estoppel, and in particular the "actually litigated" standard, in situations involving default judgments. See *Sweeney*, 276 B.R. at 192 and cases cited therein. The Ohio Supreme court has not decided this issue. See *Hinze v. Robinson (In re Robinson)*, 242 B.R. 380, 386 n.4 (Bankr. N.D. Ohio 1999).

Strictly speaking, a judgment entered after the necessary presentation of evidence by a plaintiff where defendant fails to appear for trial is not a default judgment. *Longbrake v. Rebarcheck (In re Rebarcheck)*, Case No. 02-2032/01-36238, 2002 LEXIS 1704, at *12, 2002 WL 32099803 at *4 (Bankr. N.D. Ohio Sept. 19, 2002). *But see Robinson*, 242 B.R. at 384 (debtor/defendant failed to appear for state court trial, and court entered what was denominated as a "default judgment" on liability). Nevertheless, the question of whether an issue was "actually litigated" when a defendant failed to appear for trial is also not clearly answered under Ohio law. *Longbrake, supra; Henderson, supra; cf. Zaperach v. Beaver*, 6 Ohio App.3d 17, 19, 451 N.E.2d 1249, 1252 (Ohio Ct. App. 1982) (where plaintiff failed to appear for first trial, court observed held that "[o]nly if there is an express adjudication of an issue by the court in the original action, whether by default or trial, can the judgment be utilized as establishing a matter as between the parties.").

In *Robinson*, Judge Speer of this Court set forth a test for application of the doctrine of collateral estoppel in bankruptcy court when a default judgment has been entered against a debtor in a prior Ohio state court lawsuit. That test has two elements. First, the state court (and bankruptcy court) plaintiff must have actually submitted to the state court admissible evidence apart from just the complaint. Second, the

3

As will be explained below, none of these elements are met as to Defendant/Debtor Diana Ketcham. She was not a party to the state court action.

state court, from the evidence submitted, must actually make findings of fact and conclusions of law that are sufficiently detailed to support application of the doctrine of collateral estoppel in the subsequent action. And “[i]n addition...this Court will only make such an application if the circumstances of the case would make it equitable to do so.” *Robinson*, 242 B.R. at 387. The Bankruptcy Appellate Panel for the Sixth Circuit later adopted this test in *Sweeney*, finding it an accurate predictor of how the Ohio Supreme Court would rule on the issue of the preclusive effect to be accorded Ohio default judgments. *Sweeney*, 276 B.R. at 194. Subsequently, in *Rebarchek*, Judge Speer applied this same test to the same factual context as this case, namely a judgment entered after a defendant failed to appear for trial in the state court. *Rebarchek*, 2002 Bankr. LEXIS 1704, at *14-*16, 2002 WL 32099803 at *5-*6. *See also Henderson, supra.*

Applying this test here, the partial transcript of the state court trial submitted by Mile Marker [Doc. #30] establishes that the judgment was entered *after* the presentation of evidence and exhibits at trial. The first part of the test for “actually litigated” is met. But the second part of the test is the problem for Mile Marker in this case. The state court simply entered judgment “on the Complaint” in the amount of \$20,260.08 in compensatory damages and \$20,000.00 in punitive damages. There are no findings of fact and conclusions of law in the record. *Cf. Rebarchek*, 2002 LEXIS 1704, at *14-*15, 2002 WL 32099803 at *5; *Henderson*, 277 B.R. at 893-94. The judgment does not distinguish among any of the varying causes of action in the state court complaint, some of which implicate the issues in this case and some of which do not.

In an attempt to address this problem, Plaintiffs argue that, although the state court set forth no findings of fact or conclusions of law, this Court may infer from the state court’s award of punitive damages that it found against Debtors on the fraudulent representation claims. Plaintiff’s argument is flawed in several respects.

In state court, Mile Marker alleged seven separate causes of action, only two of which were fraudulent representation claims. And they are not the same as the fraudulent representation claims alleged in this court. Neither the judgment entry nor the partial transcript of the state court proceedings provides

any indication as to the cause of action upon which Mile Marker was awarded punitive damages. Although it is true, as Plaintiffs contend, that in Ohio punitive damages cannot be awarded in a breach of contract action, the state court action also included a claim alleging tortious interference with business. In Ohio, the tort of business interference occurs when a person, without a privilege, induces or otherwise purposely causes a third party not to enter into or continue a business relationship. *Juhasz v. Quik Shops, Inc.*, 55 Ohio App. 2d 51, 57 (1977). Punitive damages are allowed in an Ohio intentional tort action if a plaintiff demonstrates by clear and convincing evidence that the defendant acted with malice. Thus, the state court's entry of judgment and award of punitive damages could reasonably have been the result of a finding against Ketcham on the tortious interference claim, which has not been asserted in the amended complaint in this case, and would not be within the province of § 523(a)(2) upon which the complaint in this case is based in any event. Furthermore, Mile Marker raised two fraudulent representation claims in state court. The factual underpinnings of only one of those claims, related to the dishonor of the checks, are alleged in this case.⁴ Because the state court could have awarded punitive damages on either one of the claims, such an award, standing alone, also does not warrant an inference that the factual allegations of misrepresentation as to the dishonor of checks alleged in this case were actually and necessarily litigated in state court.

Moreover, as set forth above, § 523(a)(2) exempts from discharge only those debts for money, property or services that were obtained by the false representations. The evidence in the summary judgment record is also insufficient for the court to conclude that the state court's award of punitive damages in the amount of \$20,000 was necessarily damages resulting from the false representations that Ketcham would honor the checks issued to Plaintiffs. In its fraud claim in Count 4 of the state court complaint, Mile Marker alleged compensatory damages in the amount of \$8,924.80. However, the state court awarded \$20,260.08

4

In state court, Mile Marker alleged fraud claims based upon allegedly false representations that Ketcham would abide by the Agreement (Count 3) and representations that he would honor certain checks made out to Plaintiffs (Count 4). In this case, Plaintiffs' allegations of fraudulent misrepresentation are based upon allegedly false representations both regarding the incorporation of Ketcham Trucking, Inc. and its acquisition of operating authorities (Counts 1, 6 & 7), and regarding honoring the checks (Count 3).

in compensatory damages. The remaining fraud claim in that complaint, as well as the breach of contract and unjust enrichment claims, alleged damages in the amount of \$13,730.00. While it is clear that the damages issue was litigated, it is unclear to what extent the compensatory damages awarded reflect damages due to the false representations alleged in Count 4 or to some other count of the state court complaint not involved in this case.

Indeed, Mile Marker's argument that this court should infer from the damages award, in the absence of any findings of fact, what was actually litigated in the state court was persuasively deconstructed by the Sixth Circuit Bankruptcy Appellate Panel in *Sweeney*, as follows:

We think this a better result than one which would allow preclusion from reasoning backwards from the damage awards to what "must" have been found in order to justify them. For example, one could reason that the court's award of punitive damages on the fraud count must mean that it actually decided that a fraud was committed. But that same reasoning would find preclusion to be the result of *every* default judgment, and so in every automobile accident case we would reason backwards from an award of damages to the conclusion that the court *must* have decided that the defendant was negligent. Even if a review of the record showed that evidence had been presented from which the court *could* have found negligence, there would be no assurance that it did, for we can never know whether the court awarded damages based on the evidence presented or merely on the defendant's default, as it was entitled to. It would always be free to ignore the evidence, or find it insufficient, and rely on the default instead. Only findings, or something like them, will show whether the court actually decided the question, and we think that the Plaintiffs have not carried their burden of showing such findings in this case.

Sweeney, 276 B.R. at 194-195. An inference in this case equally as reasonable as the one sought by Plaintiffs is that the state court's use of the words "on the Complaint" shows that its decision was simply based on the pleadings and not on the evidence actually presented by Smock at trial. This is exactly the concern articulated by the court in *Sweeney*. And for purposes of summary judgment, all inferences "must be viewed in the light most favorable to the party opposing the motion." *Matsushita Elec. Indus. Co.*, 475 U.S. at 587.

In the absence of any findings of fact and conclusions of law in the state court, this court finds that Plaintiffs have failed to meet the test articulated in *Robinson*, *Sweeney* and *Rebarchek* for determining whether an issue was actually litigated in the state court. This court cannot conclude from the summary

judgment record that any of the facts upon which collateral estoppel is now asserted here were actually litigated in the state court.

The foregoing analysis applies equally to the third element of the doctrine of collateral estoppel, namely that the issue in the present suit must have been identical to the issue in the prior suit. While there was some overlap between the claims and facts set forth in the state court action and the claims and facts set forth in his action, there are also many differences. In the absence of findings of fact and conclusions of law from the state court, this court cannot find the requisite identity of issues underpinning the state court judgment necessary to afford it collateral estoppel in this dischargeability action, either as to liability on any particular claim or as to damages.

The fourth element required for application in a subsequent action of the doctrine of collateral estoppel resulting from a prior judgment is the identity in the two actions of the parties against whom the doctrine is asserted. While it would certainly be appropriate to apply collateral estoppel against Defendant/Debtor David Ketcham, there is no basis in the record to support applying collateral estoppel against Defendant/Debtor Diana Ketcham. This Court may infer nothing with respect to Defendant/Debtor Diana Ketcham since she was not named as a party to the state court action. Nor have Plaintiffs offered any evidence that she was in privity with David Ketcham, against whom the state court judgment was entered. Thus, Plaintiffs have failed to demonstrate the requirements of issue preclusion with respect to Diana Ketcham in all respects.

A separate order in conformity with this memorandum will be entered by the court.

Dated:

/s/ Mary Ann Whipple
Mary Ann Whipple
United States Bankruptcy Judge