UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

IN RE:	)	CHAPTER 7
	)	
ROBERT DUMMERMUTH,	)	CASE NO. 02-63585
	)	
Debtor.	)	JUDGE RUSS KENDIG
	)	
KAREN MORRISON, EXECUTRIX OF THE ESTATE OF MAGDALENA SAGRILLA,	)	ADV. NO. 02-6151
	)	
Plaintiff,	)	**MEMORANDUM OPINION**
	)	
v.	)	
	)	
ROBERT DUMMERMUTH,	)	
	)	
Defendant.		

Magdalena Sagrilla, (hereafter "Sagrilla"), commenced this adversary proceeding against Robert Dummermuth (hereafter "Defendant") to determine the dischargeability of debt under 11 U.S.C. § 523(a)(2)(A) resulting from a state court judgment arising out of contract between Sagrilla and Defendant for home improvements. On May 2, 2003, this court granted an order which substituted Karen Morrison, executrix of the estate of Magdelene Sagrilla (hereafter "Plaintiff"), as Plaintiff in this adversary proceeding. Now before the court is Plaintiff's motion for summary judgment filed on March 20, 2003 pursuant to Fed. R. Civ. P. 56 as incorporated into bankruptcy practice at Fed. R. Bankr. P. 7056. Defendant filed a response in opposition on April 4, 2003.

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).

I. Facts and Procedural History

Plaintiff entered into a contract with Defendant to pour a concrete foundation for her new manufactured home. This contract was later modified to include a sump pump. Defendant failed to perform under the contract. Plaintiff filed a complaint against Defendant on November 6,

1998 in Tuscarawas County Common Pleas Court (hereafter "Common Pleas Court").[1] In her complaint, Plaintiff alleged that Defendant violated the Ohio Consumer Sales Practices Act (OCSPA) by knowingly committing unfair, deceptive or unconscionable actions, by failing to provide notice of a right to cancel and by performing work in an unworkmanlike manner. Defendant filed an answer on December 12, 1998. The case proceeded through discovery but Defendant's counsel filed a motion to withdraw which was granted on July 7, 1999. On November 18, 1999, Plaintiff filed a motion for summary judgment and Defendant did not respond. The parties went to mediation on December 14, 1999 but no agreement was reached. The Common Pleas Court entered judgment for Plaintiff on all counts on December 30, 1999, granting treble damages in totaling $48,000.00 and attorney fees of $1,632.50, as well as court costs and injunctive relief.

Over the next two years Plaintiff filed several motions to compel and motions for sanctions which were granted by the Common Pleas Court. On July 3, 2002 the Common Pleas Court ordered Defendant to appear at a contempt hearing scheduled for July 24, 2002. The hearing was conducted and an evidentiary hearing was scheduled for September 3, 2002. An order and notice of garnishment was entered on August 7, 2002, but Defendant had filed bankruptcy on August 5, 2002 in this court. On October 1, 2002, a complaint to determine dischargeability was filed by Magdelene Sagrilla which initiated this adversary proceeding.

II. Standard of Review

Federal Rule of Bankruptcy Procedure 7056 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). In reviewing a motion for summary judgment, "'the inferences to be drawn from the underlying facts contained in the [moving party's] materials must be viewed in the light most favorable to the party opposing the motion.'" *Adickes v. S. H. Kress and Co.*, 398 U.S. 144, 158-59 (1970) (quoting *U.S. v. Diebold, Inc.*, 369 U.S. 654, 655 (1962)). If the evidence as presented "could not lead a rational trier of fact to find for the non-moving party, there is no 'genuine issue for trial.'" *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986) (citing *First Nat'l Bank of Ariz. v. Cities Serv. Co*, 391 U.S. 253, 288-89 (1968)).

The moving party "bears the initial responsibility of informing the . . . court of the basis for its motion, and identifying those portions of [the record] which it believes demonstrate the absence of a genuine issue of material fact." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Thereafter, the nonmoving party must come forward and demonstrate the existence of genuine issues of material fact. The nonmoving party cannot rely on the pleadings or a mere scintilla of evidence to demonstrate the existence of such facts, but instead must specifically set forth

[1] Plaintiff named Defendant as well as Boomer Masonry Contractors and Ed Rabes in that case, which was numbered 1999 CV 11 0443.

evidence sufficient to demonstrate the existence of disputed material facts. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986); *Celotex*, 477 U.S. at 324; *Cities Serv.*, 391 U.S. at 288. Only facts which could conceivably impact the outcome of the litigation are material. *See Liberty Lobby*, 477 U.S. at 248.

III. Analysis

A. Collateral Estoppel is Applicable to the Facts of This Case

The doctrine of collateral estoppel, also referred to as issue preclusion, bars the same parties from relitigating facts and issues that were fully litigated in a previous suit. *Thompson v. Wing*, 637 N.E. 2d 917, 923, 70 Ohio St.3d 176, 183 (1994). Collateral estoppel applies to bankruptcy proceedings and litigants can use it in nondischargeability proceedings to prevent the relitigation of issues that were previously decided in state court. *Murray v. Wilcox (In re Wilcox)*, 229 B.R. 411, 415 (Bankr. N.D. Ohio 1998). Federal common law does not apply when applying collateral estoppel from a state court judgment to a nondischargeability action. *Marrese v. American Academy of Orthopaedic Surgeons*, 470 U.S. 373, 374 (1985). A bankruptcy court must give the same issue preclusion effect to a state court judgment as it would be given under that state's law pursuant to the full faith and credit principles of 28 U.S.C. § 1738. *Id.* The court will thereby apply Ohio's law on collateral estoppel since the events giving rise to Plaintiff's complaint occurred in Ohio.

Ohio's collateral estoppel law has four elements:

> (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 involved in the prior suit; and
>
> (4) The party against whom estoppel is sought was a party or in privity with a party to the prior action.

Cashelmara Villas Ltd. Partnership v. DiBenedetto, 623 N.E. 2d 213, 87 Ohio App. 3d 809, 813-14 (1993), (quoting *Monahan v. Eagle Picher Industries, Inc.*, 486 N.E. 2d 1165, 21 Ohio App. 3d 179, 180-81 (1984)). Elements one and four are not at issue. This action is between the same parties as the prior state court action. A judgment was entered in favor of Plaintiff against Defendant in the Tuscarawas County Court of Common Pleas after Defendant filed an answer and participated in the case. He had notice of the proceeding and was given a fair opportunity to defend himself. The court will address elements two and three in more detail.

1. The Issue was Actually and Directly Litigated in the Prior Suit and was Necessary to the Final Judgment

The issue under this element is whether the Tuscarawas County Common Pleas Court judgment granting Plaintiff's unopposed motion for summary judgment was actually litigated. Plaintiff filed her complaint in Common Pleas Court on November 6, 1998, which Defendant answered through his attorney on December 4, 1998. Defendant's counsel was permitted to withdraw as counsel for Defendant due to a lack of cooperation on July 8, 1999. Plaintiff field her motion for summary judgment on November 11, 1999. The case proceeded to an unsuccessful mediation on December 14, 1999. Defendant did not respond to Plaintiff's motion for summary judgment. The court granted Plaintiff's motion on December 30, 1999.

The Sixth Circuit Bankruptcy Appellate Panel recently held that a default judgment that is the subject of an "express adjudication" will be given preclusive effect in Ohio. *Sill v. Sweeney (In re Sweeney)*, 276 B.R. 186 (6th Cir. B.A.P. 2002).

> The determining issue is whether the judgment includes recitations of findings by a judge and, thus, can be considered a decision on the merits. A default judgment containing no express findings by a judge and solely on an unanswered complaint does not constitute an express adjudication. On the other hand, a default judgment containing findings based on evidence submitted by the participating party, constitutes an express adjudication and may be given preclusive effect.

Henson v. Henderson (In re Henderson), 277 B.R. 889, 893 (Bankr. S.D. Ohio 2002), (citing *Sweeney*, 276 B.R. at 193) (internal citations omitted). Because of the similarity between a default judgment and the granting of an unopposed motion for summary judgment and the lack of standard for the application of collateral estoppel on an unopposed motion for summary judgment, this court will apply the standard set forth in *Sweeney*.[2]

A default judgment can be considered to be more severe than a judgment granted on an unopposed motion for summary judgment. A default judgment is entered where the defendant does not file a response to the complaint. In this case, Defendant filed an answer and participated in other respects, but failed to oppose Plaintiff's motion for summary judgment. While at the time the motion for summary judgment was filed Defendant did not have counsel, this was by his own doing and is irrelevant.

Judge O'Farrell, of the Tuscarawas County Court of Common Pleas, issued a judgment entry on December 30, 1999. The judgment contains express findings based upon the evidence

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[2] It is not clear that this standard is required, but this provides the maximum protection to Defendant.

presented by Plaintiff. This meets the "actually litigated" standard set forth in *Sweeney* and thereby satisfies the third element of Ohio's law on collateral estoppel.

2. The Issue in the Present Suit is Identical to the Issue Involved in the Prior Suit.

Rebarchek v. Rebarchek (In re Rebarchek), 293 B.R. 400 (Bankr. N.D. Ohio 2002), is nearly identical to the case at bar. In *Rebarchek* Judge Speer held that a violation of the Ohio Consumer Sales Practices Act, without more, did not permit the application of collateral estoppel under 11 U.S.C. § 523(a)(2)(A).

> For purposes of § 523(a)(2)(A), a false representation may be said to occur when a debtor, acting without the intent to materially perform his or her agreed upon obligation, knows or should have known that his or her representation would induce another to advance money, goods or services. *See Barnard Lumber Co. v. Patrick (In re Patrick)*, 265 B.R. 913, 916 (Bankr. N.D. Ohio 2001). By comparison, under the Ohio Consumer Sales Practices Act, which applies to solely "suppliers" and "consumers," a violation occurs when a supplier commits any unfair or deceptive act or practice in connection with a consumer transaction. O.R.C. § 1345.02(A). As it pertains to this requirement, however, no actual showing of a supplier's wrongful intent is required; instead, the consumer must simply show that the supplier did or said something that had "the likelihood of inducing in the mind of the consumer a belief that is not in accord with the facts." *Richards v. Beechmont Volvo*, 127 Ohio App.3d 188, 190, 177 N.E. 2d 1088 (1998). Thus, as it pertains to these two standards, it is clear that, although there are similarities, they are not identical. As such, a debtor's violation of the Ohio Consumer Protection Act [sic], without more, does not require that the collateral estoppel doctrine be applied to a creditor's cause of action under § 523(a)(2)(A).

Rebarchek, 293 B.R. at 408. However, Judge Speer found that because the state court granted treble damages and "went beyond simply finding that the Defendant violated the Ohio Consumer Sales Practices Act and also found that the Defendant made 'material misrepresentations,'" *Id.* the differences between the two causes of action were reconciled. This allowed for the application of collateral estoppel. *Id.*

Judge O'Farrell's order granting summary judgment found that Defendant violated §§ 1345.02 and 1345.03 of the Ohio Consumer Sales Practices Act by failing to provide notice of Plaintiff's right to cancel the contract and by performing work in an unworkmanlike manner. The

judgment also granted Plaintiff treble damages. Judge Speer's analysis in *Rebarchek* dealt only with § 1345.02(A) of the Ohio Consumer Sales Practices Act. While Judge O'Farrell found liability under that particular section, he also found liability under § 1345.03. The issue then becomes whether Judge O'Farrell's judgment finding a violation of § 1345.03 is enough to satisfy the standard in § 523(a)(2)(A).

There are five common law elements of fraud that must be established to make out a cause of action under § 523(a)(2)(A). The elements are as follows: (1) the debtor made false representations; (2) the debtor knew such representations to be false at the time they were made; (3) the representations were made with the intent to deceive the creditor; (4) the creditor relied on the representations; and (5) the creditor's loss was the proximate result of the misrepresentation having been made. *Colonial Pacific Leasing v. Mayerson (In re Mayerson)*, 254 B.R. 407, 409 (Bankr. N.D.Ohio 2000); *Stifter v. Orsine (In re Orsine)*, 254 B.R. 184, 188 (Bankr. N.D. Ohio 2000).

Section § 1345.03(A) of the Ohio Consumer Sales Practices Act states, "No supplier shall commit an unconscionable act or practice in connection with a consumer transaction. Such an unconscionable act or practice by a supplier violates this section whether it occurs before, during, or after the transaction." In order to recover under O.R.C. § 1345.03, a consumer must show that a supplier acted unconscionably and knowingly. *Karst v. Goldberg*, 623 N.E.2d 1348, 88 Ohio App.3d 413, 418 (1993). While proof of intent is not required to prove deception under O.R.C. § 1345.02, proof of knowledge is a requirement to prove an unconscionable act under O.R.C. § 1345.03. *Id.* "Knowledge," under O.R.C. § 1345.01(E), "means actual awareness, but such actual awareness may be inferred where objective manifestations indicate that the individual involved acted with such awareness." *See Suttle v. Decesare*, No. 81441, 2003 Ohio App. LEXIS 2604, at *16 (Ohio C.A. 8 June 5, 2003).

Defendant was found to have violated O.R.C. § 1345.03 which carries with it elements of unconscionable and knowing. Judge O'Farrell found that Defendant violated O.R.C. §§ 1345.02 and 1345.03 by failing to provide notice of Plaintiff's right to cancel the contract and performing work in an unworkmanlike manner. This finding was based in part on the uncontroverted affidavit of the Plaintiff in which she states that Defendant failed to waterproof her entire foundation, failed to install a faceplate at the top of her foundation, and failed to deliver a sump pump as called for in his contract with Plaintiff. Since O.R.C. § 1345.03 requires the scienter of knowingly, Judge O'Farrell's finding that Defendant violated this section demonstrates that Defendant had knowledge, *i.e.* actual awareness, that he was committing the aforementioned acts. Further, Plaintiff was awarded litigation costs pursuant to O.R.C. § 1345.09(F)(2), which awards attorney's fees to the prevailing party when "[t]he supplier has knowingly committed an act or practice that violates this chapter." With regard to this section, the Ohio Supreme Court stated that "a trial court may award a consumer reasonable attorney fees when the supplier in a consumer transaction *intentionally* committed an act or practice which is deceptive, unfair or unconscionable." *Einhorn v. Ford Motor Co.*, 48 Ohio St. 3d 27 (1990)(emphasis added). These additional findings by the Tuscarawas County Common Pleas Court as well as the grant of treble

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damages under O.R.C. § 1345.09(B), are the "more" that Judge Speer discussed in *Rebarchek,* curing any differences between a cause of action under 11 U.S.C. § 523(a)(2)(A) and the Ohio Consumer Sales Practices Act and demonstrating that Defendant possessed a wrongful intent..

IV. Conclusion

Based on the foregoing, the doctrine of collateral estoppel applies and there are no material facts in dispute. Plaintiff's motion for summary judgment is **GRANTED**.

An appropriate order shall enter.

/s/ Russ Kendig SEP 17 2003

RUSS KENDIG
U.S. BANKRUPTCY JUDGE