THIS OPINION IS NOT INTENDED FOR PUBLICATION

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

In re:	)	Case No. 03-13936
	)	
RICHARD A. EGY and DIANE E. EGY,	)	Chapter 7
	)	
Debtors.	)	Judge Pat E. Morgenstern-Clarren
	)	
JOHN JENSEN, et al.,	)	Adversary Proceeding No. 03-1198
	)	
Plaintiffs,	)	
	)	
v.	)	
	)	
RICHARD A. EGY, et al.,	)	**MEMORANDUM OF OPINION**
	)	
Defendants.	)	

The plaintiffs obtained a state court default judgment against the debtors prepetition. In this adversary proceeding complaint, the plaintiffs request a determination that the judgment debt is not dischargeable under 11 U.S.C. § 523(a)(2)(A) because it is a debt for fraud and fraudulent concealment. The plaintiffs move for summary judgment on the ground that the state court judgment should be given preclusive effect. The debtors oppose that request. (Docket 8, 15, 16). For the reasons set forth below, the plaintiffs' motion is denied.

JURISDICTION

Jurisdiction exists under 28 U.S.C. § 1334 and General Order No. 84 entered by the United States District Court for the Northern District of Ohio. This is a core proceeding under 28 U.S.C. § 157(b)(2)(I).

FACTS

A.

In 1995, the plaintiffs filed a state court lawsuit against Richard and Diane Egy in the Lorain County Court of Common Pleas, Case No. 95CV115276. The complaint and the actual allegations made in it are not part of the record in this adversary proceeding. When the Egys failed to respond to the complaint, the state court entered a default judgment against them. It does not appear that the state court held an evidentiary hearing before entering the judgment. The judgment states:

> THE COURT FURTHER FINDS that, as a direct, proximate and foreseeable result of the [debtors'] unlawful conduct, Plaintiffs have been damaged in the amount of $5,569.00.
>
> THE COURT FURTHER FINDS that [debtors'] unlawful conduct exhibited a conscious disregard for the rights of Plaintiffs having a great probability of causing substantial harm to Plaintiffs.
>
> IT IS THEREFORE ORDERED that Plaintiffs . . . are hereby granted judgment against [the debtors], jointly and severally, in the amount of $5,569.00.
>
> IT IS FURTHER ORDERED that Plaintiffs are granted judgment, for exemplary damages, in the amount of $2,000.00.
>
> IT IS FURTHER ORDERED that attorney fees be granted to Plaintiffs, in the amount of $3,000.00, as reasonable and necessary fees incurred in pursuing this claim pursuant to Ohio's Declaratory Judgment Act.
>
> IT IS FURTHER ORDERED that, as a result of the foregoing, final judgment be entered in favor of Plaintiffs and against [debtors], jointly and severally, for a total amount of $10,569.00 plus costs and interest at the statutory rate of 10% from and after October 15, 1993.

B.

The debtors filed their chapter 7 petition on March 31, 2003. The plaintiffs then filed this adversary proceeding in which they allege that the debtors through fraud and concealment settled an insurance claim for damage to the plaintiffs' property, executed a release for the claims related to the damage, and received the insurance settlement. They further allege that they obtained a state court judgment based on this fraudulent activity.

SUMMARY JUDGMENT STANDARD

Summary judgment is appropriate only where there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. FED. R. CIV. P. 56(c), made applicable by FED. R. BANKR. P. 7056; *Celotex Corp. v. Catrett,* 477 U.S. 317 (1986); *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242 (1986); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.,* 475 U.S. 574 (1986). The movant must initially demonstrate the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett,* 477 U.S. at 323. The burden is then on the non-moving party to show the existence of a material fact which must be tried. *Id.* The non-moving party must oppose a proper summary judgment motion "by any of the kinds of evidentiary material listed in Rule 56(c), except the mere pleadings themselves . . . ." *Celotex Corp. v. Catrett,* 477 U.S. at 324. "[T]he nonmoving party has an affirmative duty to direct the court's attention to those specific portions of the record upon which it seeks to rely to create a genuine issue of material fact." *Poss v. Morris (In re Morris),* 260 F.3d 654, 665 (6th Cir. 2001). All reasonable inferences drawn from the evidence must be viewed in the light most favorable to the party opposing the motion. *Hanover Ins. Co. v. American Eng'g Co.*, 33 F.3d 727, 730 (6th Cir. 1994). Summary judgment may be granted when "the record taken as a whole could not lead a

rational trier of fact to find for the non-moving party." *Northland Ins. Co. v. Guardsman Prod., Inc.*, 141 F.3d 612, 616 (6th Cir. 1998) (quoting *Agristor Fin. Corp. v. Van Sickle*, 967 F.2d 233, 236 (6th Cir. 1992)).

DISCUSSION

Individual chapter 7 debtors are entitled to discharge their prepetition debts with certain exceptions. The plaintiffs rely on the fraud and false pretenses exception set out in bankruptcy code § 523(a)(2)(A). They claim that the state court judgment proves their case and they should be granted summary judgment based on the doctrine of collateral estoppel.

A. 11 U.S.C. § 523(a)(2)(A)

Debts are not dischargeable under bankruptcy code § 523(a)(2)(A) if they are:

> (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)(A).

To except a debt from discharge based on fraudulent misrepresentation under § 523(a)(2)(A), a creditor must prove each of these elements:

> (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 Servs., Inc. (In re Rembert), 141 F.3d 277, 280-81 (6th Cir. 1998) (citations and footnotes omitted). Additionally, debt based on actual fraud comes within the scope of § 523(a)(2)(A). *Mellon Bank v. Vitanovich (In re Vitanovich)*, 259 B.R. 873, 877

(B.A.P. 6th Cir. 2001) (citing *McClellan v. Cantrell*, 217 F.3d 890, 893 (7th Cir. 2000)). Actual fraud in this context requires the intent to deceive or defraud. *Id.*

B. The Preclusive Effect of the Judgment

"The doctrine of collateral estoppel 'precludes relitigation of issues of fact or law actually litigated and decided in a prior action between the same parties and necessary to the judgment, even if decided as part of a different claim or cause of action'." *Markowitz v. Campbell (In re Markowitz)*, 190 F.3d 455, 461 (6th Cir. 1999) (quoting *Sanders Confectionary Prods., Inc. v. Heller Fin., Inc.*, 973 F.2d 474, 480 (6th Cir. 1992)). Collateral estoppel, or issue preclusion, applies in dischargeability proceedings. *Grogan v. Garner*, 498 U.S. 279 (1991). The full faith and credit requirements of 28 U.S.C. § 1738 also apply. This court must, therefore, look to Ohio law to determine the preclusive effect of the plaintiffs' default judgment. *Markowitz,* 190 F.3d at 461.

Ohio law gives preclusive effect to a judgment when these four conditions are met:

> 1) A final judgment on the merits [was entered] 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.

Gonzalez v. Moffitt (In re Moffitt) , 252 B.R.916, 921 (B.A.P. 6th Cir. 2000) (citing *Murray v. Wilcox (In re Wilcox)*, 229 B.R. 411, 415-16 (Bankr. N.D. Ohio 1998)). The debtors acknowledge that the default judgment is a final judgment between the same parties which was entered after a full and fair opportunity to litigate. They argue, however, that collateral estoppel does not apply because this is a default judgment where the issue of fraud central to this

dischargeability action was not actually litigated in the state court and was not necessary to the entry of the default judgment.

The Ohio Supreme Court has not addressed whether default judgments are entitled to preclusive effect under Ohio law. The lower state courts have not developed a consistent answer to this question, with some courts finding that a default judgment is to be given preclusive effect. *See Sill v. Sweeney (In re Sweeney),* 276 B.R. 186, 192 (B.A.P. 6th Cir. 2002). In *In re Sweeney,* the Bankruptcy Appellate Panel of the Sixth Circuit Court of Appeals surveyed Ohio law and concluded that in order for collateral estoppel to apply to a default judgment:

> the state court must decide the merits of the case, and the court being asked to give preclusive effect to a default judgment in a 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 and conclusions will have preclusive effect.

In re Sweeney, 276 B.R. at 194 (adopting the rule established in *Hinze v. Robinson (In re Robinson)*, 242 B.R. 380 (Bankr. N.D. Ohio 1999)).

Applying this interpretation of state law, the plaintiffs' default judgment is not entitled to be given preclusive effect in this dischargeability action. The state court complaint is not in evidence and it has not been established that the factual issues relevant under § 523(a)(2)(A) were raised as issues in the state court. In addition, the default judgment does not provide any of the specific findings required for a § 523(a)(2)(A) determination, including a finding of fraudulent intent. The default judgment merely states that the debtors engaged in some unspecified unlawful conduct with a conscious disregard for the plaintiffs' rights. Such a general

entry does not give this court enough information to tell exactly what was decided and it is, therefore, insufficient for purposes of collateral estoppel under Ohio law.

The plaintiffs believe that a different standard should be applied. They argue that this court should not follow *Sweeney* because it placed too much reliance on a published decision, *Zaperach v. Beaver,* 6 Ohio App. 3d 17, 451 N.E.2d 1249 (1982), and paid too little attention to more recent decisions that apply a looser standard simply because they are unreported decisions. They point out that Ohio changed its rules for citing to unpublished opinions shortly after the *Sweeney* decision was entered.[1] The *Sweeney* panel did not, however, blindly follow a published opinion in preference to unpublished decisions. The opinion carefully considered and discussed Ohio case authority (both published and unpublished) regarding the standards for applying collateral estoppel to default judgments and then predicted "the rules the Supreme Court of Ohio would adopt if it were to pass directly on this question." *In re Sweeney,* 276 B.R. at 194. The rule change is not, therefore, material to the manner in which *Sweeney* was decided.[2] This court finds the *Sweeney* analysis sound and adopts it.

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[1] The new rule states:

(A) Notwithstanding the prior versions of these rules, designations of, and distinctions between, "controlling" and "persuasive" opinions of the courts of appeals based merely upon whether they have been published in the Ohio Official Reports are abolished.

(B) All court of appeal opinions issued after the effective date of these rules may be cited as legal authority and weighted as deemed appropriate by the courts.

* * *

Ohio St. Rpt. Opinions Rule 4.

[2] Moreover, the revised citation rule refers to opinions issued after the May 1, 2002 effective date, while the unpublished cases on which the plaintiffs rely were issued before that date.

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CONCLUSION

For the reasons stated, the plaintiffs are not entitled to summary judgment based on collateral estoppel and their motion is denied. A separate order will be entered reflecting this decision.

10 Oct 03

Pat E. Morgenstern-Clarren
United States Bankruptcy Judge

Served by mail on: William Kolis, Esq.
Stephen Hobt, Esq.

By: Joyce L. Gordon, Secretary

Date: 10/10/03

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	)	
Plaintiffs,	)	
	)	
v.	)	
	)	
RICHARD A. EGY, et al.,	)	**ORDER**
	)	
Defendants.	)	

For the reasons stated in the memorandum of opinion entered this same date, the plaintiffs' motion for summary judgment is denied. (Docket 8).

IT IS SO ORDERED.

Date: 10 October 2003

Pat E. Morgenstern-Clarren
United States Bankruptcy Judge

Served by mail on: William Kolis, Esq.
Stephen Hobt, Esq.

By: Joyce L. Gordon, Secretary

Date: 10/10/03