UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

IN RE:	)	
	)	CHAPTER 7
WILBUR N. OLMSTEAD,	)	
	)	CASE NO. 03-60356
Debtor.	)	
	)	JUDGE RUSS KENDIG
_____	)	
	)	ADV. PRO. NO. 03-6083
HOLIDAY BOWL, INC.,	)	
	)	
Plaintiff,	)	
vs.	)	
	)	**MEMORANDUM OF DECISION**
WILBUR N. OLMSTEAD,	)	
	)	
Defendant.	)	

This matter comes before the court upon a motion for summary judgment by Holiday Bowl, Inc. (hereafter "Plaintiff") and a response by the debtor, Wilbur Olmstead (hereafter "Defendant").

The court has jurisdiction over this matter pursuant to 28 U.S.C. § 1334(b) and the general order of reference entered in this district on July 16, 1984. This is a core proceeding under 28 U.S.C. § 157(b)(2)(I). The following constitutes the court's findings of fact and conclusions of law pursuant to Federal Rule of Bankruptcy Procedure 7052.

I. FACTS AND ARGUMENTS

On January 31, 2003, Defendant filed for relief under the Bankruptcy Code. On June 17, 2003, Plaintiff commenced this adversary proceeding. The purpose of this adversary is to object to the dischargeability of a $500,000.00 debt owed by Defendant to Plaintiff pursuant to 11 U.S.C. § 523(a)(2) and (a)(6). This debt stems from a default judgment entered against Defendant by virtue of a third party complaint in the state court case styled Janice Harvis v. The Holiday Bowl, Inc..Case No. 2002-CV-01202. Defendant failed to appear for a status conference and answer the third party complaint, which resulted in a default judgment in the amount of $500,000.00.

In support of its motion for summary judgment, Plaintiff argues that collateral estoppel applies to this case. Plaintiff asserts that Ohio law, which controls the outcome, dictates that the default judgment in this case is enough for this court to apply collateral estoppel and grant judgment

to Plaintiff. Plaintiff argues that the state court's granting of punitive damages on a complaint based solely on claims of fraud, malice and misrepresentation should be enough for this court to conclude that Defendant's debt is non-dischargeable. Plaintiff argues that if this court does not decide that collateral estoppel applies to the case as a whole, then at least Defendant should not be able to re-litigate the issue of damages.

Defendant counters that the elements required to give default judgments preclusive effect are not present in this case: no admissible evidence apart from the pleadings was presented in state court, and the state court did not make detailed findings of fact and conclusions of law. Further, Defendant argues that this court should give no preclusive effect to the state court's determination of damages since its damage calculation was based solely on the amount sought in the complaint.

II. STANDARD OF REVIEW

The procedure for granting summary judgment is found in Federal Rule of Civil Procedure 56(c), made applicable to this proceeding through Federal Rule of Bankruptcy Procedure 7056, which provides in part that

> [j]udgment sought shall be rendered 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).

The evidence must be viewed in the light most favorable to the nonmoving party. Adickes v. S.H. Kress & Co., 398 U.S. 144, 158-59 (1970). Summary judgment is not appropriate if a material dispute exists over the facts, "that is, if evidence is such that a reasonable jury could return a verdict for the nonmoving party." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). Summary judgment is appropriate, however, if the opposing party "fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). *See also* Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574 (1986).

The Sixth Circuit Court of Appeals has recognized that Liberty Lobby, Celotex, and Matsushita effected "a decided change in summary judgment practice," ushering in a "new era" in summary judgments. Street v. J.C. Bradford & Co., 886 F.2d 1472, 1476 (6th Cir. 1989). In responding to a proper motion for summary judgment, the nonmoving party "cannot rely on the hope that the trier of fact will disbelieve the movant's denial of a disputed fact, but must 'present affirmative evidence in order to defeat a properly supported motion for summary judgment.'"

Street, 886 F.2d at 1479 (quoting Liberty Lobby, 477 U.S. at 257). The nonmoving party must introduce more than a scintilla of evidence to overcome the summary judgment motion. Street, 886 F.2d at 1479. It is also not sufficient for the nonmoving party merely to "show that there is some metaphysical doubt as to the material facts." Matsushita, 475 U.S. at 586. Moreover, "[t]he trial court no longer has the duty to search the entire record to establish that it is bereft of a genuine issue of material fact." Street, 886 F.2d at 1479-80. That is, the 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.

This line of cases emphasizes the point that when one party moves for summary judgment, the nonmoving party must take affirmative steps to rebut the application of summary judgment. Courts have stated that:

> Under *Liberty Lobby* and *Celotex*, a party may move for summary judgment asserting that the opposing party will not be able to produce sufficient evidence at trial to withstand a directed verdict, and if the opposing party is thereafter unable to demonstrate that he can do so, summary judgment is appropriate. "In other words, the movant could challenge the opposing party to 'put up or shut up' on a critical issue [and] . . . if the respondent did not 'put up,' summary judgment was proper."

Fulson v. City of Columbus, 801 F. Supp. 1, 4 (S.D. Ohio 1992) (citations omitted) (*quoting* Street, 886 F.2d at 1478).

III. ANALYSIS

For the following reasons, the court finds that collateral estoppel does not apply to this case.

A. The Judgment of the Stark County Common Pleas Court Is Not Entitled to Preclusive Effect

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). In order to determine whether the Stark County court's default judgment should have preclusive effect, the full faith and credit principles of 28 U.S.C. § 1738 demand that the court decide what preclusive effect, if any, would be given by an Ohio court. Marrese v. American Academy of Orthopaedic Surgeons, 470 U.S. 373, 374 (1985); Markowitz v. Campbell (In re Markowitz), 190 F.3d 455, 461 (6th Cir. 1999). Under Ohio law, there are four prerequisites to the application

of collateral estoppel:

> 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 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.

Gonzales v. Moffitt (In re Moffitt), 252 B.R. 916, 921 (B.A.P. 6th Cir. 2000) (quoting Murray v. Wilcox (In re Wilcox), 229 B.R. 411, 415-16 (Bankr. N.D. Ohio 1998).

The primary point of contention between the parties is whether the second element, direct and actual litigation, has been met. The court in Sill v. Sweeney (In re Sweeney), 276 B.R. 186 (B.A.P. 6th Cir. 2002), found that the rule to be gleaned from the available Ohio cases was that a default judgment must contain *express findings* in order to be given preclusive effect. Id. at 193. The Sweeney court adopted the rule from Hinze v. Robinson (In re Robinson), 242 B.R. 380 (Bankr. N.D. Ohio 1999). The Robinson court found that default judgments should be given preclusive effect when two circumstances are present:

> First, the plaintiff must actually submit to the state court admissible evidence apart from the pleadings. In other words, a plaintiff's complaint, standing alone, can never provide a sufficient basis for the application of the collateral estoppel doctrine. Second, the state court, from the evidence submitted, must actually make findings of fact and conclusions of law which are sufficiently detailed to support the application of the collateral estoppel doctrine in the subsequent proceeding.

Sweeney, 276 B.R. at 193-94 (quoting Robinson, 242 B.R. at 387).

Applying the above articulated test, it is clear that Plaintiff cannot prevail. The judgment entered by the Stark County court is sparse at best. It reads in its entirety:

> Upon due consideration of the Motion filed by Defendant and Third Party Plaintiff, the court finds same well taken and is, therefore, sustained.
>
> It is therefore, Ordered, Adjudged and Decreed that Defendant and Third Party Plaintiff, The Holiday Bowl, Inc., be and hereby is granted Judgment against Wilbur Olmstead in the amount of $500,000 as and for punitive damages based on the facts set forth in the answer and Third Party Complaint.

Judgment Entry of Default, Case No. 2002-CV-01202. This judgment entry makes clear that the state court considered no evidence independent of what was stated in the answer/third party complaint. This complaint is quite short and contains no detailed recitation of facts. Thus, the first

element necessary to grant preclusive effect to a default judgment, admissible evidence apart from the pleadings, is absent.

The second element, detailed findings of fact and conclusions of law, is absent as well. The state court judgment makes no findings of fact or conclusions of law. It merely states that its judgment is "based on the facts set forth in the answer and Third Party Complaint." Since Plaintiff's third party complaint contains only minimal facts, the default judgment essentially gives no factual assessment whatsoever.

Finally, the fact that the state court awarded punitive damages is not enough to conclude that Defendant's acts fall within the purview of 11 U.S.C. § 523(a)(4) or (6). As the Sixth Circuit B.A.P. stated in Sweeney, "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." Sweeney, 276 B.R. at 195.

B. The Damage Award of the Stark County Common Pleas Court Is Not Entitled to Preclusive Effect

Plaintiff argues that even if the issue of dischargeability is not precluded, this court should not re-litigate the amount of damages owed. The Robinson court, while finding that the state court default judgment was not preclusive as to the issue of dischargeability, did find that the amount of the judgment could not be re-litigated. Robinson, 242 B.R. at 388. However, the Robinson court based this decision on the fact that the record of the case indicated that the state court carefully considered what damages were incurred by the plaintiff. Id. This careful consideration is lacking in this case. The $500,000.00 judgment against Defendant was merely made "based on the facts set forth in the answer and Third Party Complaint." There is no indication that evidence apart from the pleadings was considered. Nor are there any findings of fact or conclusions of law to support why such an amount was entered. As stated above, Plaintiff's third party complaint filed in state court contains few facts, certainly not enough for this court to have any indication of how the state court arrived at its damage figure. Thus, the issue of damages must be re-litigated

IV. Conclusion

Based on the foregoing reasons, Plaintiff's motion for summary judgment is denied. In reaching this decision, the court considered all arguments of the parties, whether or not specifically addressed in this memorandum of Decision.

_____

RUSS KENDIG
U.S. Bankruptcy Judge

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WILBUR N. OLMSTEAD,	)	
	)	CASE NO. 03-60356
Debtor.	)	
	)	JUDGE RUSS KENDIG
_____	)	
	)	ADV. PRO. NO. 03-6083
HOLIDAY BOWL, INC.,	)	
	)	
Plaintiff,	)	
vs.	)	
	)	**ORDER**
WILBUR N. OLMSTEAD,	)	
	)	
Defendant.	)	

For the reasons set forth in the accompanying Memorandum of Decision, Holiday Bowl Inc.'s motion for summary judgment is hereby denied.

It is hereby **ORDERED** that both parties shall appear at a further pretrial conference on April 21, 2004 at 10:00 a.m. Counsel may participate telephonically if they notify chambers at least one day prior to the conference.

So Ordered.

_____
RUSS KENDIG
U.S. Bankruptcy Judge

Service List

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