

THIS OPINION IS NOT INTENDED  
FOR PUBLICATION

UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF OHIO  
EASTERN DIVISION

FILED  
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U.S. BANKRUPTCY COURT  
NORTHERN DISTRICT OF OHIO  
CLEVELAND

|                    |   |                                     |
|--------------------|---|-------------------------------------|
| In re:             | ) | Case No. 03-24763                   |
|                    | ) |                                     |
| NAYAN S. SHAH,     | ) | Chapter 7                           |
|                    | ) |                                     |
| Debtor.            | ) | Judge Pat E. Morgenstern-Clarren    |
| _____              | ) |                                     |
|                    | ) |                                     |
| CYRIL E. MARSHALL, | ) | Adversary Proceeding No. 04-1064    |
|                    | ) |                                     |
| Plaintiff,         | ) |                                     |
|                    | ) |                                     |
| v.                 | ) |                                     |
|                    | ) |                                     |
| NAYAN S. SHAH,     | ) | <b><u>MEMORANDUM OF OPINION</u></b> |
|                    | ) |                                     |
| Defendant.         | ) |                                     |

Creditor Cyril Marshall, M.D. filed a complaint to determine the dischargeability of debt owed to him by the debtor-defendant Nayan Shah. He brings the complaint under bankruptcy code §§ 523(a)(2), (a)(4), (a)(6), and (a)(19). The parties have now filed cross-motions for summary judgment based on a prepetition judgment entered by the state court.

**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).

**THE STATE COURT LAWSUIT**

Dr. Marshall filed a six count state court complaint against Mr. Shah and JNN International, Inc. asserting these counts: fraud, willful and malicious conversion of money, breach of fiduciary duty, breach of an oral contract under which the defendants agreed to invest

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Marshall's money in an initial public offering and repay it with at least a 30% profit within 60 days, breach of a written agreement to the same effect, and state securities fraud. The state court judge entered this judgment:

Plaintiff's motion for summary judgment against defendants Shah and JNN International Inc, jointly and severally, is granted. Judgment is entered in the amount of \$130,000.00 plus post judgment interest at 10% per annum from the date of this judgment.

In March of 2002 it is uncontraverted that defendant Shah solicited \$100,000.00 from the plaintiff to invest in an IPO in England. It is further uncontroverted that a promissory note was delivered to plaintiff that guaranteed the repayment of the principal and of a minimum expected profit of 30% within sixty (60) days. There is further uncontraverted evidence that the defendants solicited and accepted numerous other monies and issued numerous other promissory notes. There are no material issues of fact in this case. The plaintiff's motion for summary judgment is granted as to all counts of the complaint. Court costs assessed to the defendant(s).

**THE ADVERSARY PROCEEDING MOTIONS**

The debtor filed his chapter 7 bankruptcy case shortly after the state court entered its judgment. Marshall filed this adversary proceeding asking that the debt owed to him by the debtor be declared nondischargeable in the bankruptcy. These motions and briefs followed:

Defendant's motion to dismiss and alternate motion for summary judgment (Docket 10);

Plaintiff's response to motion of defendant to dismiss and alternate motion for summary judgement; and plaintiff's motion for summary judgment (Docket 11);

Defendant's brief in opposition to plaintiff's motion for summary judgment (Docket 12); and

Plaintiff's reply to defendant's brief in opposition to plaintiff's motion for summary judgment (Docket 14).

The debtor-defendant argues that the complaint should be dismissed or summary judgment granted in his favor because the state court judgment does not include a "separate

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award of compensatory damages, punitive damages, attorney fees or additional relief other than the fact that Defendants issued a promissory note which was not paid and upon which judgment was issued.” (Docket 10). His position is the state court granted judgment only on the promissory note, that such a judgment is dischargeable in bankruptcy, and the adversary proceeding complaint is, therefore, barred by the doctrine of collateral estoppel.

The plaintiff agrees that collateral estoppel applies, but in his favor. As a result, he contends that the defendant’s motion should be denied and his motion for summary judgment should be granted.

**MOTION TO DISMISS STANDARD**

Under bankruptcy rule 7012(b), which incorporates federal rule 12(b)(6), a complaint should be dismissed if it fails to state a claim upon which relief can be granted. *See* FED. R. BANKR. P. 7012. Such a dismissal is proper “only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations’.” *Trollinger v. Tyson Foods, Inc.*, 370 F.3d 602, 615 (6th Cir. 2004) (quoting *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506 (2002)).

**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

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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**

The doctrine of collateral estoppel, or issue preclusion, applies in dischargeability proceedings. *Grogan v. Garner*, 498 U.S. 279 (1991). This doctrine “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 (quoting *Sanders Confectionary Products, Inc. v. Heller Financial, Inc.*, 973 F.2d 474, 480 (6th Cir. 1992)). A judgment entered on a summary judgment motion satisfies the actually litigated requirement. *Nat’l Acceptance Co. of America v. Bathalter*, 951 F.2d 349 (6th Cir. 1991) (unpublished).

Federal courts look to state law to determine the preclusive effect of a state court judgment. *Markowitz*, 190 F.3d at 461. Under Ohio law, a judgment is entitled to preclusive effect in these circumstances:

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(1) [A court entered 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; and (4) the party against whom estoppel is sought was a party or in privity with the party in the prior action.

*Gonzalez v. Moffitt (In re Moffitt)*, 252 B.R. 916, 921 (BAP 6th Cir. 2000) (quoting *Murray v. Wilcox (In re Wilcox)*, 229 B.R. 411, 415-16 (Bankr. N.D. Ohio 1998)). The dispute here is over what issues were actually and directly litigated in the summary judgment motion and were necessary to the state court judgment.

**A. THE PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT  
AND BANKRUPTCY CODE § 523**

For the plaintiff to prove that the state court judgment is entitled to preclusive effect in the bankruptcy court, he must show that the judgment is based on the same elements needed to prove that the debt is nondischargeable under the bankruptcy code. In other words, the plaintiff must show that the findings of fact underlying the state court judgment would also prove his case under bankruptcy code §§ 523(a)(2), (a)(4), (a)(6), and (a)(19). The first step, then, is to identify what the plaintiff must prove under each cited code section and then compare it to the judgment.

**11 U.S.C. § 523(a)(2)**

Although the plaintiff has not specified which part of bankruptcy code § 523(a)(2) he relies on, he appears to invoke § 523(a)(2)(A). That section provides:

- (a) A discharge under section 727 . . . does not discharge an individual debtor from any debt—
  - (2) for money . . . to the extent obtained by—

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(A) false pretenses, a false representation, or actual  
fraud . . . .

11 U.S.C. § 523(a)(2)(A).

To prove his case under this section, a creditor must show 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). Debt based on actual fraud also comes within the scope of § 523(a)(2)(A). *Mellon Bank v. Vitanovich (In re Vitanovich)*, 259 B.R. 873, 877 (BAP 6th Cir. 2001) (citing *McClellan v. Cantrell*, 217 F.3d 890, 893 (7th Cir. 2000)). Actual fraud in this context requires proof that the debtor intended to deceive or defraud. *Id.*

The state court did not make any findings of fact on the issues of material misrepresentation, knowledge, intent, reliance or proximate cause. The plaintiff argues that the state court judge made the necessary findings when he ruled that judgment was granted on all counts of the complaint. Since one count is for fraud, the plaintiff contends that is the same as a finding of fraud. A recitation that judgment is granted on a count of a complaint is not, however, a substitute for such findings for issue preclusion purposes. As a result, the judgment is not entitled to preclusive effect.

**11 U.S.C. § 523(a)(4)**

Section 523(a)(4) makes nondischargeable a debt:

(4) for fraud or defalcation while acting in a fiduciary capacity, embezzlement, or larceny[.]

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11 U.S.C. § 523(a)(4). The plaintiff has not specified whether his claim is under the fiduciary capacity, embezzlement, or larceny section and each has different standards. The court, therefore, lacks sufficient information to analyze the issue preclusion effects of the state court judgment on this claim.

**11 U.S.C. § 523(a)(6)**

This section denies a debtor a discharge for a debt:

- (6) for willful and malicious injury by the debtor to another entity or to the property of another entity[.]

11 U.S.C. § 523(a)(6). An injury is “willful and malicious” if the debtor intends the consequences of his act or believes the consequences are substantially certain to result from it. *Markowitz* at 464.

The state court judgment does not contain a specific finding of intent. The judgment is not, therefore, entitled to preclusive effect in the adversary proceeding.

**11 U.S.C. § 523(a)(19)**

This section provides that a debtor will not be discharged from a debt that:

- (A) is for—
  - (i) the violation of any . . . State securities laws . . . .

11 U.S.C. §§ 523(a)(19). Again, there are no findings of fact in the state court judgment relating to a violation of any Ohio securities law that would support applying issue preclusion to this case.

**B. THE DEFENDANT’S MOTIONS**

For the same reasons discussed above, the defendant’s motion for summary judgment is also denied. The state court judgment does not contain any finding that the debtor did *not*

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commit fraud or do the other alleged acts with the requisite intent. Because the judgment is silent on these issues, the defendant is not entitled to a judgment that his only liability is for breach of contract, a debt which is dischargeable. And as the plaintiff could get relief under the facts as alleged if proven, the case cannot be dismissed for failure to state a claim.

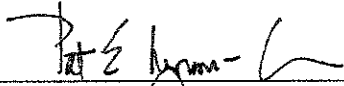
**C. THE AMOUNT OF THE DEBT**

Under the circumstances, this court must make an independent determination as to whether the debt is dischargeable. The amount of the debt—\$130,000.00—has however, been determined by the state court and that finding is entitled to preclusive effect here.

**CONCLUSION**

For the reasons stated, the plaintiff's motion for summary judgment is denied and the defendant's motion to dismiss or for summary judgment is also denied. A separate order will be entered reflecting this decision.

Date: 4 Aug 2008

  
\_\_\_\_\_  
Pat E. Morgenstern-Clarren  
United States Bankruptcy Judge

Served by clerk's office email and the Bankruptcy Noticing Center on:

George McGaughey, Esq.  
Donald Jaffe, Esq.



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| CYRIL E. MARSHALL, | ) | Adversary Proceeding No. 04-1064 |
|                    | ) |                                  |
| Plaintiff,         | ) |                                  |
|                    | ) |                                  |
| v.                 | ) |                                  |
|                    | ) |                                  |
| NAYAN S. SHAH,     | ) | <b><u>ORDER</u></b>              |
|                    | ) |                                  |
| Defendant.         | ) |                                  |

For the reasons stated in the memorandum of opinion filed this same date:

- (1) the defendant's motion to dismiss or for summary judgment is denied (Docket 10); and
- (2) the plaintiff's motion for summary judgment is denied. (Docket 11).

IT IS SO ORDERED.

Date: 4 August 2004

  
 \_\_\_\_\_  
 Pat E. Morgenstern-Clarren  
 United States Bankruptcy Judge

Served by clerk's office email and the Bankruptcy Noticing Center on:

George McGaughey, Esq.  
Donald Jaffe, Esq.