

**UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF OHIO  
EASTERN DIVISION**

IN RE:	)	CHAPTER 7
	)	
SCOTT DWIGHT PORTER,	)	
	)	CASE NO. 05-63088
Debtor.	)	
	)	ADVERSARY NO. 05-6122
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ADRIAN ZUMBAR,	)	
	)	JUDGE RUSS KENDIG
Plaintiff,	)	
	)	
vs.	)	
	)	
SCOTT DWIGHT PORTER,	)	<b>MEMORANDUM OPINION</b>
	)	
	)	
Defendant.	)	

This matter comes before the court upon a motion for summary judgment by Adrian Zumbar (hereinafter "Plaintiff") on January 25, 2006. Scott Dwight Porter (hereinafter "Defendant") filed his reply to motion for summary judgment on February 3, 2006. For the reasons set forth below, the Plaintiff's motion is denied.

The Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 1334, 157, and the general order of reference entered in this district on July 16, 1984. This is a core proceeding over which the court has jurisdiction pursuant to 28 U.S.C. § 157(b)(2). Venue in this district and division is proper pursuant to 28 U.S.C. §§ 1408 and 1409.

**FACTS & PARTIES' ARGUMENTS**

Plaintiff filed a complaint on September 15, 2005. The complaint alleges that Defendant is indebted to Plaintiff for \$36,800 and that Defendant was the owner of Universal Design Construction, Ltd. (hereinafter "Universal") in Dover, Ohio. Further, the complaint alleges that, in April 2003, Plaintiff entered into a contract with Universal for \$10,000 for remodeling services and, while the construction started in July 2003, it was never completed. In his answer, Defendant states that the contract speaks for itself.

Plaintiff's motion for summary judgment states that the debt is non-dischargeable under 11 U.S.C. § 523(a)(4), 11 U.S.C. § 523(a)(2) and § 523(a)(6). Plaintiff asserts that they are entitled to summary judgment because all elements of collateral estoppel are met.<sup>1</sup> Plaintiff contends that there is a final judgment on the merits of the previous case after a full and fair opportunity to litigate the issues, as evidenced by the trial court's judgment entry and Defendant's continual representation and participation in the state court proceeding. Further, that the issue was actually tried and necessary to the final decision, as evidenced by the trial court's express adjudication that Defendant's act violated the Ohio Consumer Sales Practice Act (hereinafter "CSPA"), that the acts were knowing violations of the act, and that these findings are the "something more" required by the *Rebarchek* case in this district. Plaintiff next states that the issue in the present suit is identical to the issue in the prior suit, as the issue in both cases is whether Defendant obtained the money by fraud. Further, since the trial court awarded punitive damages and attorney fees and found a "knowing" violation of the CSPA, the five elements of fraud are met. Plaintiff also contends that Defendant was a party in the previous action. Finally, Plaintiff states that the judgment entry fits within an exception to discharge under 11 U.S.C. Sections 523(a)(2), 523(a)(4) and 523(a)(6).

Defendant's reply states that the issue involved in this matter is not identical to the issue involved in the prior litigation. Further, Defendant states that the Ohio Administrative Code gives him eight weeks to complete the job and that this violation that does not require a finding of knowledge could be the basis for treble damages issued by the court. Finally, Defendant states that there is no indication in the state court entry that the violation was "knowing" and that the "something more" required by *Rebarchek* is not present in this case.

The state court complaint alleges numerous violations of the CSPA. They are as follows: failure to perform work in a workmanlike manner, evasion of obligation to complete the contract, failure to choose proper materials to protect structure against faults or hazards, failure to provide the consumer prior to the commencement of the work with an itemized list of repairs performed or services rendered, failure to supply Plaintiff a written estimate in compliance with O.A.C. 109:4-3-05(A)(1), failure to provide the appropriate disclosures under the administrative code, accepting payments under the contract for materials and not applying them to materials purchased, and engaging in a pattern of inefficiency. The complaint further alleges that "some or all" of the CSPA violations occurred after that type of violation was declared to be deceptive or unconscionable by the rule adopted in O.R.C. 1345.05(B)(2), or after the act was determined by the state court to violate O.R.C. 1345.02 or 1345.03 and committed after the decision containing the determination was made available for public inspection under O.R.C. 1345.05(A)(3).

The state court first ordered a default judgment against Defendant on the breach of contract claim and CSPA violation claim. After an evidentiary hearing on damages, a second state court

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<sup>1</sup> The opening paragraph of the motion for summary judgment references 11 U.S.C. §§ 523(a)(4) and 523(a)(6) as the bases for summary judgment. Plaintiff's Memorandum, however, references only 11 U.S.C. § 523(a)(2)(A). Since the only law presented by Plaintiff is on the latter provision, the Court concludes that motion is made pursuant to section 523(a)(2)(A).

judgment states that Plaintiff was entitled to compensatory damages, attorney fees pursuant to Ohio law and treble damages due to violations of section 1345.05 of the CSPA.

## DISCUSSION

### I. Summary Judgment Standard

The standard for summary judgment is set forth in Federal Rule of Civil Procedure 56, made applicable through Federal Rule of Bankruptcy Procedure 7056, which provides that:

The judgment 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 non-moving party. Adickes v. S.H. Kress & Co., 398 U.S. 144, 158-59 (1970). Summary judgment is not appropriate if a genuine dispute of material fact exists, “that is, if the 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).

The court must first consider the basis for the moving party’s motion for summary judgment, as the “party seeking summary judgment always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of the ‘pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any’, which it believes demonstrates the absence of a genuine issue of material fact.” Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). Subsequently, the nonmoving party must demonstrate that a genuine issue of material fact exists. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). The nonmoving party “may not rest upon the mere allegations or denials of his pleadings, but...must set forth specific facts showing there is a genuine issue for trial.” Id.

### II. Collateral Estoppel

Collateral estoppel, commonly referred to as issue preclusion, precludes relitigation of facts and issues that were fully litigated in a previous suit. Thompson v. Wing, 637 N.E.2d 917, 923 (Ohio 1994). Collateral estoppel applies to bankruptcy proceedings and litigants may invoke the doctrine in dischargeability 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). When applying collateral estoppel, the court must look to the forum state’s law of collateral estoppel. Marrese v. American Acad. 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. Therefore the court will apply Ohio law concerning collateral estoppel, since

the events giving rise to Plaintiff's complaint occurred in Ohio. For collateral estoppel to apply in Ohio, the proponent must establish the following 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.

Monahan v. Eagle Picher Indus., Inc., 486 N.E.2d 1165 (Ohio 1984). Elements one and four are not at issue. A final judgment on the merits was issued in the common pleas case, and there is no assertion that Defendant did not have a full and fair opportunity to litigate the issues presented. Further, the parties in this action are identical to the parties in the prior suit.

**A. 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 default judgment was actually litigated. Plaintiff filed his complaint in Common Pleas Court on March 5, 2004. Defendant did not answer. Plaintiff filed a motion for default judgment and it was granted on May 18, 2004. The complete judgment entry follows:

This matter is before this Court on Plaintiff's Motion for a judgment by default pursuant to Civil Rule 55. The Court finds that Defendant Universal Design Construction, Ltd. was served with process on April 6, 2004 and Defendant Scott Porter was served with process on April 7, 2004. The Court further finds that Defendants have failed to appear, plead or otherwise defend as required by the Ohio Rules of Civil Procedure.

It is therefore,

ORDERED, ADJUDGED AND DECREED that Plaintiff Adrian Zumbar shall recover a default judgment against Defendants Universal Design Construction, Ltd. and Scott Porter, jointly and severally on Counts One, Two and Three (Breach of

Contract/Warranty, CSPA violation, and personal liability for CSPA violation).

It is further ORDERED, ADJUDGED AND DECREED that a hearing shall be held on June 15, 2004 at 12:30 a.m. to determine the amount of damages, attorney fees and punitive damages to be awarded.

On June 23, 2004, following a hearing on damages, the Common Pleas court issued a separate order on damages. The applicable portions of the entry on damages are:

The Court

**FINDS** that the Plaintiff presented evidence relative to the issue of **Monetary Damages**, both **Compensatory** and **Punitive**, and the issue of Attorneys Fees.

**FINDS** that Plaintiff has proved, by a preponderance of the evidence, that he is entitled to an award of Nine Thousand Two Hundred Dollars (\$9,200.00) in **Compensatory Damages** and, further, based on violations of the Consumer Sales Practices Act (CSPA) (**1345.05, Ohio Revised Code**), the Defendant is entitled to treble damages of Twenty-Seven Thousand Six Hundred Dollars (\$27,600.00). Lastly, the Defendant has established that he has incurred in Attorneys Fees in the amount of Eight Hundred Fifty Dollars (\$850.00) which the undersigned concludes are reasonable and awardable under Ohio Law in this case.

(emphasis in original)

In the Sixth Circuit, a default judgment that is the subject of an “express adjudication” is given preclusive effect. Sill v. Sweeney (In re Sweeney), 276 B.R. 186 (6<sup>th</sup> Cir. B.A.P. 2002). As one court aptly notes:

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.

Henderson v. Henderson (In re Henderson), 277 B.R. 889, 893 (Bankr. S.D. Ohio 2002). “[A]n ‘express adjudication’ is one that expressly finds something.” Sweeney, 276 B.R. at 193; *see also* Keichel v. Wendt (In re Wendt), 304 B.R. 779 (Bankr. N.D. Ohio 2004). Essentially, in order for collateral estoppel to apply, the decision must be made on the merits.

In this case, Judge Edward O’Farrell issued a judgment entry on May 18, 2004, ordering that a default judgment be entered against Defendant. There is no indication that the court considered evidence or that any evidence was presented, and the court did not set forth any findings of fact or conclusions of law. Clearly, as Plaintiff admits, the judgment entry on liability does not qualify as an express adjudication. However, Plaintiff argues that the judgment entry as to damages, where the court found Defendant violated Ohio’s Consumer Sales Practices Act and awarded punitive damages, contains findings which support the requirement of an express adjudication, and also provides the basis for collateral estoppel. The Court disagrees.

Although Judge O’Farrell issued a judgment entry containing a finding that Defendant violated CSPA and awarded punitive damages to Plaintiff, it is inappropriate to use this entry to inversely infer findings as to the nature of the liability. The Sweeney court found this type of deduction problematic: “[w]e think this [requirement of express adjudication] a better result than one which would allow preclusion from reasoning backwards from the damage awards to what ‘must’ have been found . . . Only findings, or something like them, will show whether the court actually decided the question.” Id. at 194-95. In the state court case, Plaintiff pled multiple causes of action, and advanced several grounds for violations of the consumer protection statute. While the judgment entry following the damages hearing did find a consumer protection violation, there were no findings or conclusions which demonstrated that the matter was actually litigated or that the Court relied on anything but the default judgment in its decision. Sweeney required findings of fact or conclusions of law as a predicate to satisfaction of the “actually litigated” element of collateral estoppel. As neither is present here, the Court holds that Plaintiff has failed to demonstrate that the issue was actually litigated in state court.

Additionally, the Court cannot make any substantive inferences from the state court’s entry on damages. In its entry, the state court cited O.R.C. § 1345.05 after its notation that a consumer protection violation occurred. This particular provision, however, is the section of instruction to the state attorney general. Defendant could not have violated this provision of the Ohio Revised Code because it imposed no duties upon him. The Court concludes that Plaintiff has failed to prove that the issue was actually and directly litigated in the state court suit. As a result, collateral estoppel does not act to bar relitigation of this matter.

B. The Issue in the Present Suit must have been Identical to the Issue Involved in the Prior Suit

Plaintiff must show that the issue in the present suit is identical to the issue in the prior suit. In order to be successful, it is “precisely the *same* issue which must have previously been litigated and decided.” Thompson v. Wing, 70 Ohio St.3d 176, 185 (1994). This requires proof that the

“identical issue was actually litigated, directly determined, and essential to the judgment in the prior action.” Goodson v. McDonough Power Equip., Inc., 2 Ohio St.3d 193 (1983). A court must ascertain “whether the factual issues in the state court proceeding were applied ‘using standards identical to those in the dischargeability proceedings[.]’” Longbrake v. Rebarcheck (In re Rebarcheck), 293 B.R. 400 (Bankr. N.D. Ohio 2002) (citing Spilman v. Harley, 656 F.2d 224, 226 (6<sup>th</sup> Cir. 1981) (other citation omitted)).

In the motion for summary judgment, Plaintiff seeks to have the debt declared nondischargeable under 11 U.S.C. § 523(a)(2)(A) – the fraud or misrepresentation exception. Plaintiff aptly identifies the elements to a fraud claim:

- (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 the loss.

Jaffe v. Dawson (In re Dawson), 338 B.R. 756 (Bankr. N.D. Ohio 2006) (citing In re Catherman, 3341 B.R. 333, 356 (Bankr. N.D. Ohio 2005); In re Rembert, 141 F.3d 277, 280-81 (6<sup>th</sup> Cir. 1998)). Both a material misrepresentation and intent to deceive are required elements. However, the Ohio Consumer Sales Protection Act does not require proof of intent: “proof that an act is deceptive within the meaning of R.C. 1345.02(A) does not require proof of intent to deceive by the supplier.” Richards v. Beechmont Volvo, 127 Ohio App.3d 188, 190 (Ohio App. 1<sup>st</sup> Dist. 1998) (citing Funk v. Montgomery AMC/Jeep/Renault, 66 Ohio App.3d 815 (1990) (other citation omitted)).

In spite of this, Plaintiff urges the Court to impute intent to deceive through a combination of factors: a violation of the Ohio Consumer Sales Practices Act, the award of punitive damages under Ohio Revised Code § 1345.09(b), and the award of attorney fees. He relies on Rebarcheck which stated: “a debtor’s violation of the Ohio Consumer Protection Act, without more, does not require that the collateral estoppel doctrine be applied to a creditor’s cause of action under § 523(a)(2)(A).” Rebarcheck, 293 B.R. at 408. According to Plaintiff, the damage awards are the “more” which will allow the Court to find the debt nondischargeable through application of collateral estoppel.

As discussed in subsection A, the judgment entry was based on a default judgment, without evidence, for breach of contract and violations of the consumer protection act, none of which require a finding of intent. While Plaintiff suggests that intent is an element of an award of treble damages, the Court concludes this contention is erroneous. Ohio Revised Code § 1345.09(b) provides:

Where the violation was an act or practice declared to be deceptive or unconscionable by rule adopted under division (B)(2) of section 1345.05 of the Revised Code before the consumer transaction on

which the action is based, or an act or practice determined by a court of this state to violate section 1345.02 or 1345.03 of the Revised Code and committed after the decision containing the determination has been made available for public inspection under division (A)(3) of section 1345.05 of the Revised Code, the consumer may rescind the transaction or recover, but not in a class action, three times the amount of his actual damages or two hundred dollars, whichever is greater, or recover damages or other appropriate relief in a class action under Civil Rule 23, as amended.

Treble damages are awarded for committing a previously proscribed act. Knowledge or intent is not a prerequisite to an allowance of damages under this section. Rather, a violator is held to a standard of strict liability. A technical violation would result in the same penalty as a knowing violation.

Plaintiff's reliance on the award of attorney's fees is completely misplaced as well. According to Plaintiff, since his state court complaint alleged the violations of the CSPA were "knowing" and he was awarded attorney's fees, it follows that he was awarded attorneys fees for a knowing violation of the consumer protection statute. Plaintiff claims that "Judge O'Farrell's opinion granted litigation expenses to Plaintiff pursuant to Ohio Revised Code § 1349.09(F)(2), which awards attorney fees to the prevailing party when "[t]he supplier had knowingly committed an act or practice that violates this chapter." Plaintiff's Mot. For Summ. Judg. p. 7-8. However, the state court's judgment does not contain any reference to section 1349.09(F)(2). While Plaintiff was awarded attorney fees, it was pursuant to "Ohio Law." Plaintiff fails to consider that attorneys fees may have been given on the breach of contract claim. In light of the uncertainty surrounding the attorney fee award, the Court cannot infer intent from the award.

Finally, while Plaintiff relies heavily on Rebarchek, the Court finds it is inapplicable to this case. The Rebarchek court recognized, while there are similarities between a cause of action under section 523(a)(2)(A) and the Ohio Consumer Sales Practices Act, they are not identical. Rebarchek, 293 B.R. at 408. Further, there are notable factual distinctions between the cases. The findings of fact issued by the state court in Rebarchek mirror the requirements under section 523(a)(2)(A):

Defendants' actions . . . constitute a violation of the CSPA in that Defendants made material misrepresentations concerning the identity and quality of steel to be provided for the job. The Court further finds that Plaintiffs reasonably relied on Defendants' actions which violated the CSPA and that Plaintiffs reliance thereon proximately caused the damages alleged in the Complaint.

Rebarchek, 293 B.R. at 404. These findings, combined with treble damages, satisfied the Court. The same backbone of factual findings is not present in this case. For these reasons, the Court



finds Rebarck to be inapposite.

Based on the above, the Court holds that the issue in the dischargeability proceeding is not identical to the issue in the state court proceeding. Since this element has not been satisfied, Plaintiff cannot rely on collateral estoppel to preclude relitigation of this matter.

### CONCLUSION

As set forth above, the Court finds that the default judgment entered by the state court was void of findings of fact and conclusions of law which would indicate the matter was "actually litigated" in the state court. While the state court may have "expressly adjudicated" the damage award, the award cannot be used to inversely infer intent in the default judgment. Additionally, the issue in the state court complaint was not identical to the issue in the dischargeability complaint. Intent is not a required element of a claim under the Ohio Consumer Sales Practices Act, but it is a required element under 11 U.S.C. § 523(a)(2)(A). For these reasons, collateral estoppel is not applicable in this proceeding.

An order shall be entered in accordance with this opinion.

**/s/ Russ Kendig**

**JUN 05 2006**

Judge Russ Kendig  
U.S. Bankruptcy Judge

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