

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION



In re:)	Case No. 09-11823
)	
ROGER D. KASSOUF,)	Chapter 7
)	
Debtor.)	Judge Pat E. Morgenstern-Clarren
_____)	
)	
TIMOTHY KENNEY, et al.,)	Adversary Proceeding No. 09-1210
)	
Plaintiffs,)	
)	
v.)	<u>MEMORANDUM OF OPINION¹</u>
)	<u>GRANTING PLAINTIFFS' MOTION</u>
ROGER D. KASSOUF,)	<u>FOR SUMMARY JUDGMENT IN</u>
)	<u>PART AND DENYING IT IN PART</u>
Defendant.)	

The plaintiffs Timothy and Carri Kenney hold a state court judgment against the debtor Roger Kassouf, which judgment is based in part on slander of title claims and claims under the Ohio Consumer Sales Practices Act. They filed this adversary proceeding seeking a declaration that those parts of the state court judgment based on slander of title and the Ohio Consumer Sales Practices Act are nondischargeable under 11 U.S.C. §§ 523(a)(2) and (a)(6). The plaintiffs now move for summary judgment, arguing that the state court judgment has preclusive effect in this proceeding. For the reasons that follow, the court finds that collateral estoppel applies to the slander of title portion of the state court judgment, but not to the Consumer Sales Practices Act portion. As a result, the plaintiffs are entitled to judgment that the slander of title portion of the

¹ This opinion is not intended for commercial publication, either print or electronic.

state court judgment (\$28,080.83) is a nondischargeable debt under 11 U.S.C. § 523, but genuine issues of material fact preclude judgment in their favor at this point as to the Consumer Sales Practices Act claim.

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 AND PROCEDURAL BACKGROUND

In the underlying state court action, the plaintiffs claimed that the debtor breached a contract to construct their residence and that, among other things, he wrongfully filed a mechanic's lien against the house. They alleged that the lien filing was improper because it stated money was owed for services that the debtor had either not performed or had performed inadequately. The plaintiffs based their complaint on violations of the Ohio Consumer Sales Practices Act (CSPA) and slander of title, among other causes of action. After a default judgment hearing at which the debtor did not appear, but at which evidence was presented, the state court entered a judgment in favor of the plaintiffs. The state court judgment included findings of fact and conclusions of law as to each count in the complaint.

POSITIONS OF THE PARTIES

The plaintiffs allege that collateral estoppel applies, so that the state court judgment conclusively established the elements of nondischargeability as to the CSPA and slander of title claims. Specifically, they contend that the CSPA portion of the state court judgment is nondischargeable under 11 U.S.C. § 523(a)(2)(A) because it expressly states that the debtor

intentionally and knowing violated the CSPA. In addition, they argue that the slander of title portion of the judgment is nondischargeable under 11 U.S.C. § 523(a)(6) because the state court judgment finds that the debtor acted willfully and maliciously in filing the mechanic's lien.

This court's adversary case management scheduling order entered on August 13, 2009 required briefs in opposition to dispositive motions to be filed by September 18, 2009.² The debtor did not oppose the plaintiffs' motion for summary judgment.

LEGAL STANDARDS

A. Summary Judgment Standards

The summary judgment standards are governed by federal civil rule 56³ which provides, in pertinent part:

Rule 56. Summary Judgment

(a) By a Claiming Party. A party claiming relief may move, with or without supporting affidavits, for summary judgment on all or part of the claim.

* * *

(c) Serving the Motion; Proceedings. . . . The judgment sought should be rendered if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law.

FED. R. CIV. P. 56. The law in the Sixth Circuit is that:

Summary judgment for [the movant] is appropriate "if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact

² Docket 9.

³ Federal civil rule 56 is made applicable in bankruptcy proceedings by federal bankruptcy rule 7056.

and that the movant is entitled to judgment as a matter of law.” FED.R.CIV.P. 56(c). However, [the movant] bears the burden of proving that there are no genuine issues of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986).

Nance v. Goodyear Tire & Rubber Co., 527 F.3d 539, 546-47 (6th Cir. 2008). Further:

In evaluating the evidence presented, a court must draw all inferences in the light most favorable to the non-moving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986). A genuine issue of material fact exists when there are “disputes over facts that might affect the outcome of the suit under the governing law.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). However, “[w]here the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no ‘genuine issue for trial.’” *Matsushita*, 475 U.S. at 587, 106 S.Ct. 1348.

Savedoff v. Access Group, Inc., 524 F.3d 754, 762 (6th Cir. 2008). Thus, to meet their burden of proof, the plaintiffs must establish that (1) there is no dispute over any fact affecting the outcome of the suit, and (2) they are entitled to judgment as a matter of law. This is so regardless of the fact that the debtor did not file a brief in opposition to the motion.

B. Preclusion

The plaintiffs assert that, under the doctrine of collateral estoppel, the state court findings of fact regarding the CSPA and slander of title claims are sufficient to establish that those parts of the judgment are nondischargeable under 11 U.S.C. § 523. “Collateral estoppel [or issue preclusion] precludes the relitigation, in a second action, of an issue that has been actually and necessarily litigated and determined in a prior action which was based on a different cause of action.” *State ex rel. Kirby v. S.G. Loewendick & Sons, Inc.*, 64 Ohio St.3d 433, 438 (Ohio 1992). A bankruptcy court must recognize the preclusive effect of a state court judgment, if a

state court would give the judgment preclusive effect. *Bay Area Factors v. Calvert (In re Calvert)*, 105 F.3d 315, 317 (6th Cir. 1997). “[T]he person asserting the estoppel has the burden of proving the requirements of estoppel have been met.” *Spilman v. Harley*, 656 F.2d 224, 229 (6th Cir. 1981). In Ohio,

Collateral estoppel applies when the fact or issue (1) was actually and directly litigated in the prior action, (2) was passed upon and determined by a court of competent jurisdiction, and (3) when the party against whom collateral estoppel is asserted was a party in privity with a party to the prior action.

State ex rel. Davis v. Public Employees Retirement Board, 120 Ohio St.3d 386, 392 (Ohio 2008).⁴

Under Ohio law, the state court judgment is a final judgment on the merits of the plaintiffs’ CSPA and slander of title claims against the debtor. *See FDIC v. Willoughby*, 19 Ohio App. 3d 51, 53 (Ohio Ct. App. 1984); *see also Calvert*, 105 F.3d at 317 (holding that “collateral estoppel applies to true default judgments in bankruptcy dischargeability proceedings.”).

Therefore, collateral estoppel applies to preclude the debtor from relitigating the merits of those same causes of action. However, collateral estoppel “treats as final only those questions actually and necessarily decided in a prior suit.” *Spilman*, 656 F.2d at 227. As a result, the court must determine whether the state court judgment “contains factual findings sufficient to establish that the judgment against [the debtor] is nondischargeable under § 523(a)(2)(A) and/or (a)(6).”

Schafer v. Rapp (In re Rapp), 375 B.R. 421, 429 (Bankr. S.D. Ohio 2007).

⁴ Issue preclusion under both Ohio and federal law contain “the common element that the precise issue must be raised in both proceedings,” which is the only element at issue in this case. *Gonzalez v. Moffitt (In re Moffitt)*, 252 B.R. 916, 921 (B.A.P. 6th Cir. 2000).

C. Nondischargeability under 11 U.S.C. § 523(a)(2)(A)

Bankruptcy code § 523(a)(2)(A) excepts a debt from discharge if it is a debt:

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). The Sixth Circuit has interpreted this section to require a creditor to prove by a preponderance of the evidence that:

- (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).

In contrast, to prove a violation of the CSPA, a plaintiff must show that the defendant “committed an unfair or deceptive act in connection with a consumer transaction.” OHIO REV. CODE § 1345.02(A). Significantly, “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.’” *Id.*, citing *Richards v. Beechmont Volvo*, 127 Ohio App.3d 188, 190 (Ohio Ct. App.

1998) (“Proof that an act is deception within the meaning of R.C. 1345.02(A) does not require proof of intent to deceive by the supplier.”). Because the CSPA and § 523(a)(2)(A) require proof of different elements, a judgment for “violation of the Ohio Consumer Sales Practices 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).” *Longbrake v. Rebarcheck (In re Rebarcheck)*, 293 B.R. 400, 408 (Bankr. N.D. Ohio 2002).⁵

In this case, the state court judgment on the CSPA claim finds that the debtor’s “acts of intentionally refusing to honor the express warranty, failing to deliver, abandoning the job without justification after accepting money from plaintiffs, and failing to perform in a workmanlike manner constitute unfair, deceptive and unconscionable acts,” and that those acts damaged the plaintiffs.⁶ To amount to intentional deception under § 523(a)(2)(A), the state court judgment would have had to include a finding that the debtor did not intend to perform as promised when he signed the contract with the plaintiffs. *See, e.g., Graffice v. Grim (In re Grim)*, 293 B.R. 156, 163 (Bankr. N.D. Ohio 2003). The state court judgment did not find that the debtor intended to deceive the plaintiffs, nor did it find justifiable reliance by the plaintiffs. As a result, the state court judgment did not actually and necessarily litigate the “intent to deceive” and “justifiable reliance” issues under the *Rembert* standard for 11 U.S.C. § 523(a)(2)(A) nondischargeability. The doctrine of collateral estoppel does not, therefore,

⁵ The plaintiffs cite *Rebarcheck* for the proposition that a violation of the CSPA can constitute grounds for a finding of nondischargeability under § 523(a)(2)(A). Docket 60 at 7. However, in *Rebarcheck*, the bankruptcy court specifically recognized that the state court judgment included an express finding that the defendant made a material misrepresentation.

⁶ Docket 60, exh. 1A, p. 4.

apply to the CSPA portion of the state court judgment, because it did not decide all the necessary elements for nondischargeability under 11 U.S.C. § 523(a)(2)(A). The plaintiffs are not entitled to summary judgment on this issue because material issues of fact remain regarding the debtor's intent and the plaintiffs' justifiable reliance.

D. Nondischargeability under 11 U.S.C. § 523(a)(6)

The bankruptcy code also excepts from discharge a debt “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). A plaintiff must show both willful injury and malicious injury to receive a judgment of nondischargeability under § 523(a)(6). *Markowitz v. Campbell (In re Markowitz)*, 190 F.3d 455, 463 (6th Cir. 1999) (“the absence of one creates a dischargeable debt.”). An intentional *act* is insufficient; the *injury* itself must be intentional. *Kawaauhau v. Geiger*, 523 U.S. 57, 61 (1998). “A willful injury results when the actor either desires to cause the consequences of his actions or believes that the consequences are substantially certain to result from his actions.” *Rapp*, 375 B.R. at 436 (internal quotation marks omitted), *citing Markowitz, supra*. In addition, “[a] person has acted maliciously when that person acts in conscious disregard of his duties or without just cause or excuse.” *Id.*

The state court judgment found that the debtor acted “knowingly, intentionally, willfully, and maliciously, and that defendant *believed that plaintiffs’ damages were substantially certain to result* from the mechanic’s lien.”⁷ The issue of whether the debtor caused a willful and malicious injury was, therefore, actually litigated and decided in the state court action. Because a willful and malicious injury is also required for a finding of nondischargeability under

⁷ Docket 60, exh. 1A (emphasis added).

§ 523(a)(6), the doctrine of collateral estoppel applies to prevent the debtor from relitigating those same issues. Based on this identity of issues, the court finds that there is no material fact at issue regarding the dischargeability of the slander of title portion of the state court judgment, and that the plaintiffs are entitled to judgment as a matter of law. The slander of title portion of the state court judgment is, therefore, nondischargeable under 11 U.S.C. § 523(a)(6).

CONCLUSION

For the reasons stated, the portion of the state court judgment attributable to the slander of title claim is nondischargeable under 11 U.S.C. § 523(a)(6), but that judgment does not contain sufficient findings of fact to establish that the CSPA portion of the judgment is nondischargeable under 11 U.S.C. § 523(a)(2)(A). The plaintiffs' motion for summary judgment is, therefore, granted in part and denied in part. The court will enter a separate order consistent with this opinion.



Pat E. Morgenstern-Clarren
United States Bankruptcy Judge