

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION



In re:) Case No. 11-18235
)
IBRAHIM B. AHMAD and,) Chapter 7
LUCY M. AHMAD,)
)
Debtors.) Chief Judge Pat E. Morgenstern-Clarren
)
_____)
)
CARMEN RIVERA, *et al.*,) Adversary Proceeding No. 12-1004
)
Plaintiffs,)
)
v.) **MEMORANDUM OF OPINION**¹
)
LUCY M. AHMAD, *et al.*,)
)
Defendants.)

Plaintiffs Carmen Rivera and Elizabeth Rivera filed this adversary proceeding seeking a determination that the defendant-debtors, Ibrahim and Lucy Ahmad, owe them a debt which is nondischargeable, as well as other relief. This court lifted the automatic stay to permit the plaintiffs to prosecute their pending state court action against the debtors; that court has now entered a summary judgment for the plaintiffs. Returning to the bankruptcy court, the plaintiffs request summary judgment that the state court judgment is not discharged under Bankruptcy

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

Code § 523(a)(2)(A).² The request, which is unopposed,³ is granted for the reasons stated below.⁴

I. 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), and it is within the court's constitutional authority as analyzed by the United States Supreme Court in *Stern v. Marshall*, 131 S.Ct. 2594 (2011).

II. SUMMARY JUDGMENT

Summary judgment is appropriate when the moving party shows that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law. FED. R. CIV. P. 56(a) (applicable under FED. R. BANKR. P. 7056). In evaluating the evidence, all facts and any inferences that may be drawn from those facts are viewed in the light most favorable to the non-moving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). To avoid summary judgment, the non-moving party is required to present sufficient evidence to create a genuine issue of material fact. FED. R. CIV. P. 56(c); *Poss v. Morris (In re Morris)*, 260 F.3d 654, 665 (6th Cir. 2001). Summary judgment should not be granted in favor of a movant merely because the adverse party does not respond to the motion. Instead, the court must

² Docket 72, 74.

³ The debtors' opposition to the motion was due August 9, 2013. (Docket 70).

⁴ The motion states that counsel was informed that debtor Ibrahim Ahmad died, but that he was unable to verify that information. This does not amount to a statement noting the death of a party under Federal Civil Rule 25. *See* FED. R. CIV. P. 25(a) (made applicable by FED. R. BANKR. P. 7025).

examine the motion to determine whether the movant has met its initial burden and is entitled to judgment as a matter of law. *Yeschick v. Mineta*, 675 F.3d 622, 632 (6th Cir. 2012); *Cacevic v. City of Hazel Park*, 226 F.3d 483, 491 (6th Cir. 2000).

III. DISCUSSION

A. 11 U.S.C. § 523(a)(2)(A)

Generally, individual chapter 7 debtors receive a discharge of all their debts at the end of the bankruptcy process. Bankruptcy Code § 523(a)(2)(A) contains this exception from discharge of a debt—

(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 exclude a debt from discharge under this provision, a creditor must prove 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) (footnote omitted).

B. Issue Preclusion

“Issue preclusion refers to the effect of a judgment in foreclosing litigation of a matter that has been actually litigated and decided.” *Corzin v. Fordu (In re Fordu)*, 201 F.3d 693, 703

(6th Cir. 1999). Issue preclusion applies in bankruptcy proceedings. *Grogan v. Garner*, 498 U.S. 279, 285 n. 11 (1991). “Even though Congress intended the bankruptcy court to determine the issue of whether a debt is dischargeable, Congress does not require the bankruptcy court to redetermine all the underlying facts.” *Phillips v. Weissert (In re Phillips)*, 434 B.R. 475, 485 (B.A.P. 6th Cir. 2010). Therefore, the determination as to whether a debt is dischargeable may be made based on facts which were previously determined by a state court. Under the full faith and credit statute (28 U.S.C. § 1738), a bankruptcy court is required to give a state court judgment the same preclusive effect that the state court would give it. *Fordu*, 201 F.3d at 703.

Ohio law determines the preclusive effect of the plaintiffs’ state court judgment. Based on that law, issue preclusion 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. Pub. Employees Ret. Bd., 899 N.E.2d 975, 982 (Ohio 2008) (citation and quotation marks omitted).

A fact or issue is actually and directly litigated when a party had a full and fair opportunity to litigate but “chose not to contest anything.” *Butler Cnty. Bd. of Comm’rs v. City of Hamilton*, 763 N.E.2d 618, 626 (Ohio Ct. App. 2001). The fact or issue must, however, have been determined by a final appealable order. *Glidden Co. v. Lumbersmens Mut. Cas. Co.*, 861 N.E.2d 109, 118 (Ohio 2006). A final summary judgment meets this requirement, and Ohio law gives it preclusive effect. *Masek v. Kleese Dev. Assocs.*, No. 2011-T-0107, 2012 WL 4481360 at *3 (Ohio Ct. App. Sept. 28, 2012); *see also Glidden Co.*, 861 N.E.2d at 118 (stating that

collateral estoppel could not be invoked because the partial summary judgment in the prior action never became final as the action was ultimately settled and dismissed); *A-1 Nursing Care of Cleveland, Inc. v. Florence Nightingale Nursing, Inc.*, 647 N.E.2d 222, 627 (Ohio Ct. App. 1994) (noting that “[s]ummary judgment terminates a party’s action on the merits and a subsequent filing of an action decided on summary judgment is prohibited by the doctrine of *res judicata*”); *Ed Schory & Sons, Inc. v. Francis (In re Francis)*, 226 B.R. 385, 388 (B.A.P. 6th Cir. 1998) (noting that a summary judgment is a final determination of rights after a full opportunity to litigate for purposes of issue preclusion under Ohio law). An issue is considered to have been passed upon and determined by a prior judgment if it was directly determined by and essential to the judgment. *Buckeye Union Ins. Co. v. New England Ins. Co.*, 720 N.E.2d 495, 501 (Ohio 1999).

C. The Motion for Summary Judgment

The plaintiffs offer this evidence to support their motion for summary judgment:⁵

The plaintiffs filed an action against Safur Builders, Inc., the debtors, and Judith Cotto-Nichols in state court in November of 2010: *Rivera, et al. v. Safur Builders, Inc., et al.*, Case No. CV-10-741869 (the state court case), and the debtors filed their chapter 7 bankruptcy case on September 22, 2011.⁶ The court lifted the automatic stay to allow the plaintiffs to prosecute the state court case against the debtors. On return to state court, the plaintiffs moved for summary judgment and for a determination that their discovery requests in that action were deemed

⁵ See docket 72.

⁶ The state court later entered a judgment against Safur only. See Exh. A, Amended Complaint, docket 36.

admitted by the debtors. Ultimately, the state court considered each requested admission to be deemed admitted, granted summary judgment, and entered a final judgment against the debtors, jointly and severally, in the amount of \$177,000.00 plus interest. The state court supplemented the judgment to state specifically that it included the plaintiffs' claim for fraud.

These are the admissions relied on by the state court:

The debtors were sole owners of Safur—a corporation which did not maintain a separate existence or will apart from the debtors and which was their alter ego. The debtors used money or property belonging to the corporation for their personal use and expenses, did not execute a note or any other loan documents, and did not pay or repay the corporation.

The debtors used Safur's corporate form to defraud the plaintiffs. They entered into an agreement with the plaintiffs to repair damage to their residence caused by a fire in exchange for the plaintiffs' insurance proceeds. They told the plaintiffs that they would: (1) fully restore their home to its pre-fire condition; (2) bring the home into compliance with the city building code; (3) take actions to protect the home from theft; and (4) provide new appliances. The debtors intended for the plaintiffs to rely on these representations and made them for the purpose of obtaining the insurance proceeds. They knew the representations were false and did not intend to perform. Instead of using the proceeds as represented, the debtors used them for their own personal expenses, to take a vacation, and to repair their own residence.

Based on this evidence, the plaintiffs established in this case that there are no genuine issues of material fact and that they are entitled to a determination as a matter of law that the state judgment is entitled to preclusive effect and that the debt represented by that judgment is not dischargeable under § 523(a)(2)(A). The debtors were parties to the state court action and the

state court judgment is a final judgment in which both the debtors' liability to the plaintiffs and the factual issues related to § 523(a)(2)(A) dischargeability were determined by the state court. In granting judgment for fraud under Ohio law, the state court necessarily considered and determined: (1) that the debtors made a representation to the plaintiffs; (2) that was material to the transaction at hand, (3) they made the representation falsely, with knowledge of its falsity or with such utter disregard and recklessness as to whether it was true or false that the debtors' knowledge may be inferred, (4) they made it with the intent to mislead the plaintiffs into relying upon it, (5) the plaintiffs justifiably relied, and (6) the plaintiffs' resulting injury was proximately caused by their reliance. *See Volbers-Klarich v. Middletown Mgt., Inc.*, 929 N.E.2d 434, 440 (Ohio 2010) (stating the elements of an Ohio fraud claim). As the elements of fraud under Ohio law are virtually identical to those under § 523(a)(2)(A), those findings support a determination of nondischargeability in this proceeding. *Francis*, 226 B.R. at 389.

Because the plaintiffs met their initial burden and because the debtors did not respond with any additional facts or arguments, there are no genuine issues of material fact and the plaintiffs are entitled to judgment as a matter of law.

IV. CONCLUSION

For the reasons stated, the plaintiffs' motion for summary judgment is granted and their state court judgment against the debtors is determined to be nondischargeable under 11 U.S.C. § 523(a)(2)(A). A separate judgment will be entered in accordance with this opinion.



Pat E. Morgenstern-Clarren
Chief Bankruptcy Judge

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For the reasons stated in the memorandum of opinion entered this same date, the plaintiffs' motion for summary judgment is granted. (Docket 72, 74). The plaintiffs' state court judgment against the defendant-debtors for fraud in the amount of \$177,000.00 plus interest is determined to be nondischargeable under 11 U.S.C. § 523(a)(2)(A).

IT IS SO ORDERED.

A handwritten signature in black ink that reads "Pat E. Morgenstern-Clarren". The signature is written in a cursive style with a large, looped initial "P".

Pat E. Morgenstern-Clarren
Chief Bankruptcy Judge