

IN THE UNITED STATES BANKRUPTCY COURT FOR THE
SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

U.S. BANKRUPTCY COURT
SOUTHERN DISTRICT OF MISSISSIPPI
FILED
OCT 18 1996
CHARLENE J. PENNINGTON, CLERK
BY _____ DEPUTY

IN RE:

CHAPTER 7

WILLIAM DEWEY LOGAN, JR.

CASE NO. 9404041JEE

BEVERLY B. SANDERS, JR., M.D.

VS.

ADVERSARY NO. 950044

WILLIAM DEWEY LOGAN, JR.

Hqn. Vann F. Leonard
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Chapter 7 Trustee

Edward Ellington, Judge

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This matter came before the Court on the *Motion For Summary Judgment* filed by Defendant/Debtor, William Dewey Logan, and the *Plaintiff's Response To Defendant's Motion For Summary Judgment* and *Plaintiff's Counter Motion For Summary Judgment* filed by the Plaintiff/Creditor, Beverly B. Sanders, Jr. After considering the pleadings and briefs submitted by the parties, the Court finds that the Debtor's motion for summary judgment should be granted in part

and denied in part and that Sanders' counter-motion for summary judgment should be denied.

FINDINGS OF FACT

On May 30, 1991, Sanders obtained a *Default Judgment* against the Debtor and his co-defendants in the Superior Court of Fulton County, Georgia, in Sanders v. Logan, et. al., Case No. D-183292. The default judgment arose from an alleged fraudulent investment scheme perpetrated by the Debtor and the other defendants against Sanders. In his amended complaint filed in the Superior Court of Fulton County, Georgia, Sanders alleges that he was induced by the Debtor and the other defendants to invest \$12,500 in Atlanta Diagnostic Imaging Center Limited Partnership. The amended complaint sought judgment against the Debtor and the other defendants for "fraud and deceit" (See *Complaint Objecting To Dischargeability Of Debt Owed To Plaintiff*, Exhibit B¹, ¶25, p.6); for "violation of the Georgia Securities Act of 1973" (See *Georgia Amended Complaint*, ¶27, p. 7); for "theft of property in the principal amount of \$12,500.00, interest . . . in the amount of \$2,066.50. . . , liquidated exemplary damages in at least the amount of \$29,333.00, reasonable attorney's fees and expenses of litigation and costs" (See *Georgia Amended Complaint*, ¶33, p. 8); and for "violation of the Georgia RICO Act treble damages in the amount of \$43,699.50 (See *Georgia Amended Complaint*, ¶40, pp. 10-11).

¹Hereinafter, Exhibit B will be designated as *Georgia Amended Complaint*.

Neither the Debtor nor any of the other defendants filed an answer to the complaint nor were they present at the state trial court proceeding, and no evidence was presented to the state trial court on their behalf. Sanders was the only witness. No record, written or electronic, of the state trial court proceeding is available. Therefore, the facts supporting the state trial court's findings are not known.

The Debtor now resides in Carthage, Mississippi. On December 19, 1994, the Debtor filed a petition for relief under Chapter 7 of the Bankruptcy Code² in the Southern District Of Mississippi, Jackson Division.

On March 3, 1995, Sanders commenced this adversary proceeding by filing an *Objection To Dischargeability Of Debt Owed To Plaintiff*. Sanders filed an *Amended Complaint Objecting To Dischargeability Of Debt Owed To Plaintiff* on October 6, 1995. In his amended complaint, Sanders is seeking to have the Court adjudicate his claim against the Debtor to be nondischargeable pursuant to § 523(a)(2)(A), § 523(a)(2)(B), § 523(a)(4) and § 523(a)(6). Sanders asserts that he is entitled to a nondischargeability judgment based solely upon the default judgment entered by the state trial court. Sanders further asserts that the Debtor is barred from attacking the trial court judgment in the Bankruptcy Court pursuant to the doctrine of collateral estoppel.

²Hereafter, all code sections refer to the United States Bankruptcy Code found at Title 11 of the United States Code unless otherwise stated.

On March 27, 1995, the Debtor filed an *Answer And Defenses Of William Dewey Logan, Jr. To The Complaint Objecting To Dischargeability Of Debt Owed To Plaintiff*. The Debtor filed an *Answer and Defenses Of William Dewey Logan, Jr. To The Amended Complaint Objecting To Dischargeability Of Debt Owed To Plaintiff* on October 11, 1995.³ In his answer, the Debtor responds that, among other things, the doctrine of collateral estoppel does not apply to bar litigation of Sanders' claim in this Court because Sanders has not met the elements required to have collateral estoppel apply. Consequently, the Debtor contends that Sanders' amended complaint should be dismissed with prejudice.

On January 3, 1996, the Debtor filed the *Motion For Summary Judgment* and a *Memorandum Brief In Support Of Motion For Summary Judgment* which are presently before the Court. In reference to the default judgment, the Debtor asserts that there is no genuine issue as to any material fact and that he is entitled to judgment as a matter of law declaring the debt to be discharged as Sanders has failed to meet his burden under § 523 of the Code.

Sanders filed *Plaintiff's Response To Defendant's Motion For Summary Judgment and Plaintiff's Counter-Motion For Summary Judgment* on January 23, 1996. In his answer to the Debtor's motion for summary judgment, Sanders contends that there are material facts which are in dispute so as to bar the Debtor's motion for summary judgment. In his counter-motion for summary judgment,

³Hereinafter, all references to the Debtor's answer refers to this answer to Sanders' amended complaint.

Sanders asserts that there is no genuine issue as to any material fact and that based upon the doctrine of collateral estoppel he is entitled to a judgment from this Court as a matter of law that his state court default judgment against the Debtor may not be discharged. The Debtor filed a response and a brief in opposition to Sanders' counter-motion for summary judgment on February 12, 1996.

CONCLUSIONS OF LAW

I.

This Court has jurisdiction of the subject matter and of the parties to this proceeding pursuant to 28 U.S.C. § 1334 and 28 U.S.C. § 157. This is a core proceeding as defined in 28 U.S.C. § 157(b)(2)(I).

II.

A.

The Debtor filed his motion for summary judgment alleging that there are no genuine issues of material fact in the dispute between the parties, and consequently, the Court should declare the debt to be dischargeable. To support his motion for summary judgment, the Debtor listed his designation of undisputed material facts and attached copies of discovery to his motion.

In his response filed in opposition to the Debtor's motion for summary judgment, Sanders lists several facts which he alleges to be undisputed material facts which are not listed by the Debtor.

He also lists several items to which "(t)he Plaintiff disagrees with the statements contained" in the Debtor's recitation of facts. [See *Plaintiff's Response To Defendant's Motion For Summary Judgment and Plaintiff's Counter Motion For Summary Judgment*, p. 2-3, ¶4 (January 23, 1996)]. Sanders refers to exhibits which he states supports his position, but there are no exhibits attached to his pleading (nor are they attached to his brief).

Sanders also filed a counter motion for summary judgment alleging that there are no disputed material facts, and consequently, he is entitled to have his state court judgment adjudicated to be nondischargeable as a matter of law.

Federal Rule of Bankruptcy Procedure 7056⁴ states in pertinent part:

Rule 56. Summary Judgment

(a) **For Claimant.** A party seeking to recover upon a claim, . . . may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in the party's favor upon all or any part thereof.

(b) **For Defending Party.** A party against whom a claim, . . . is asserted . . . may, at any time, move with or without supporting affidavits for a summary judgment in the party's favor as to all or any part thereof.

(c) **Motion and Proceedings Thereon.** . . . 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

⁴Rule 7056 states that "Rule 56 F.R.Civ. P. applies in adversary proceedings."

that the moving party is entitled to a judgment as a matter of law.

In order for the Court to sustain a motion for summary judgment, "[t]he pleadings, depositions, answers to interrogatories, and admissions of file, together with any affidavits, must demonstrate there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Krim v. BancTexas Group, Inc., 989 F.2d 1435, 1444 (5th Cir. 1993) (quoting Ayo v. Johns-Manvill Sales Corp., 771 F.2d 902, 904 (5th Cir. 1985)). See also Celotex Corp. V. Catrett, 477 U.S. 317, 322-34, 106 S.Ct. 2548, 2552-58, 91 L.Ed.2d 265 (1986); Adickes v. S.H. Kress & Co., 398 U.S. 144, 157, 90 S.Ct. 1598, 1608, 26 L.Ed.2d 142 (1970); Madison v. Madison (In re Howard F. Madison), Case No. 9300347MC, Adversary No. 930019MC (Bankr. S.D. Miss., Ellington, November 10, 1993).

The Court views the available evidence in the light most favorable to the nonmoving party. Matsushita Electric Industrial Co., Ltd. V. Zenith Radio Corp., 475 U.S. 574, 587-88, 106 S.Ct. 1348, 1356-57, 89 L.Ed.2d 538, 553 (1986). However, "the nonmoving party must adduce admissible evidence which creates a fact issue concerning the existence of every essential component of that party's case. Unsubstantiated assertions of an actual dispute will not suffice." Thomas v. Price, 975 F. 2d 231, 235 (5th Cir. 1992) (citation omitted).

In In re Sams, Judge David W. Houston, III of the Northern District of Mississippi summarized what a court must consider when ruling on a motion for summary judgment:

It is not the function of the court to weigh the evidence and determine its credibility, but to decide whether there is a genuine issue for trial.

The court must, however, determine if the factual issues are material. Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. Factual disputes that are irrelevant or unnecessary will not be counted. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202, 211 (1986).

A.G. Edwards And Sons, Inc. V. Sams (In re Sams), 167 B.R. 73, 74 (Bankr. N.D. Miss. 1994).

In reference to both parties' motions for summary for summary judgment, the Court finds that there is no dispute between the parties as to the validity of the default judgment which was entered In the state of Georgia. However, there is a total lack of information as to the actual facts on which the state court judge based the default judgment.

In his answer to the motion for summary judgment, Sanders states that the Debtor does not mention several "uncontroverted and material facts" regarding the service of process in Georgia on the Debtor. *Plaintiff's Response To Defendant's Motion For Summary Judgment and Plaintiff's Counter-Motion For Summary Judgment*, ¶ 3, p. 2. However, for the reasons stated below, the Court does not consider these facts to be "facts that might affect the outcome of the suit under the governing law." In re Sams, 167 B.R. at 74.

B.

Since Sanders has objected to the discharge of his judgment against the Debtor pursuant to § 523(a)(2)(A), § 523(a)(2)(B), § 523(a)(4) and § 523(a)(6) based solely on the doctrine of collateral estoppel, the Court must now examine the doctrine of collateral estoppel.

The U. S. Supreme Court has stated that "collateral estoppel principles do indeed apply in discharge exception proceedings pursuant to § 523(a)." Grogan v. Garner, 498 U.S. 279, 284, n11, 112 L.Ed. 2d 755, 763, n11, 111 S.Ct. 654 (1991). The Supreme Court also stated that "(a) federal court may rely in the first instance on state preclusion principles to determine the extent to which an earlier state judgment bars subsequent litigation." Marrese v. American Academy of Orthopaedic Surgeons, 470 U.S. 373, 382, 84 L.Ed. 2d 274, 282, 105 S.Ct. 1327 (1985), *reh'g denied*, 471 U.S. 1062 (1985).

More recently, the Supreme Court reiterated its position on the application of collateral estoppel in Matsushita Electric Industrial Co., Ltd. v. Epstein, ___ U.S. ___, 134 L. Ed. 2d 6, 116 S.Ct. 873 (1996) when it stated:

The Full Faith and Credit Act mandates that the "judicial proceedings" of any State "shall have the same full faith and credit in every court within the United States . . . as they have by law or usage in the courts of such State . . . from which they are taken." 28 U.S.C. § 1738. The Act thus directs all courts to treat a state court judgment with the same respect that it would receive in

the courts of the rendering state. Federal courts may not "employ their own rules . . . in determining the effect of state judgments," but must "accept the rules chosen by the State from which the judgment is taken." Kremer v. Chemical Constr. Corp., 456 U.S. 461, 481-482, 102 S.Ct. 1883, 1898, 72 L.Ed.2d 262 (1982).

Matsushita Electric, 134 L. Ed. 2d at 16-17. Since the default judgment was entered in the state of Georgia, this Court must follow the law of the state of Georgia. See also Garner v. Lehrer (In re Garner), 56 F. 3d 677,679 (5th Cir. 1995).

Judge James E. Massey of the United States Bankruptcy Court for the Northern District of Georgia, Atlanta Division, recently examined the issue of collateral estoppel under Georgia law in Mills v. Ellerbee, (In re Ellerbee), 177 B.R. 731 (Bankr. N.D. Ga. 1995). Judge Massey stated:

In Georgia, collateral estoppel will preclude further litigation of facts determined in a prior proceeding when these three requirements are met:

(1) the issue determined in the prior proceeding is the same as that in the subsequent proceeding, Firestone Tire & Rubber Co. V. Pinyan, 155 Ga.App. 343, 270 S.E. 2d 883 (1980);

(2) the issue was actually litigated and determined, Blakely v. Couch, 129 Ga.App. 625, 200 S.E. 2d 493 (1973); and

(3) the issue was necessary to the adjudication of the prior proceeding, Blakely v. Couch, supra. . . .

. . . .

A Georgia court would apply the doctrine of collateral estoppel only where the issue previously determined in litigation between the same parties is the same issue in the current case.

In re Ellerbee, 177 B.R. at 737.

The Court must now apply these factors to the case at bar.

I

Sanders states in his *Plaintiff's Response To Defendant's Motion For Summary Judgment and Plaintiff's Counter-Motion For Summary Judgment* (Response) that "(b)ased upon the testimony of the Plaintiff at his deposition, it is difficult to determine with specificity what issues were raised during the hearing before the Superior Court of Fulton County, Georgia. Moreover, . . ., that issue, as well as other defenses raised by the Defendant, are moot." *Plaintiff's Response To Defendant's Motion For Summary Judgment and Plaintiff's Counter-Motion For Summary Judgment*, ¶ 6, p. 3.

Sanders' position is wrong. These defenses are not moot. The first requirement Sanders must prove in order to have collateral estoppel apply is that "the issue determined in the prior proceeding is the same as that in the subsequent proceeding...." (citation omitted) In re Ellerbee, 177 B.R. at 737. If Sanders cannot determine what issues were addressed by the state court, how can this Court? Sanders asserts that his claim is nondischargeable under several subsections of § 523 of the Bankruptcy Code. Looking to one of the subsections of § 523 on which he bases his claim of nondischargeability, § 523(a)(2)(A), the Fifth Circuit Court of Appeals enumerated the elements which an objecting party

must prove In order to prevail under § 523(a)(2)(A). The Fifth Circuit stated:

Section 523(a)(2)(A) contemplates frauds involving "moral turpitude or intentional wrong; fraud implied in law which may exist without imputation of bad faith or immorality, is insufficient." 3 *Collier on Bankruptcy* ¶ 523.08[4] (15th ed. 1989) (footnote omitted) (quoted in *Matter of Foreman*, 906 F. 2d 123, 127 (5th Cir. 1990)) (footnote omitted) The misrepresentations must have been: (1) knowing and fraudulent falsehoods, (2) describing past or current facts, (3) that were relied upon by the other party. *Collier*, supra (quoted in *Foreman*).

Allison v. Roberts (In re Allison), 960 F. 2d 481, 483 (5th Cir. 1992). If Sanders cannot tell the Court what issues were determined in the state court proceeding, then he cannot prove to this Court that collateral estoppel should apply because he cannot show to this Court that the elements enumerated In In re Allison are the same issues that were determined at the state court proceeding.

In addition, neither can Sanders show that the Allison elements have been "actually litigated" as required to be proven in order to have collateral estoppel apply according to the law of the state of Georgia. Mills v. Ellerbee (In re Ellerbee), 177 B.R. 731 (Bankr. N.D. Ga. 1995). [Other courts holding that collateral estoppel generally does not apply when the state court judgment was a default: Sheerin v. Davis (In re Davis), 3 F. 3d 113 (5th Cir. 1993); Meyer v. Rigdon, 36 F. 3d 1375 (7th Cir. 1994); M & M Transmissions, Inc. v. Raynor (In re Raynor), 922 F. 2d 1146 (4th Cir. 1991); Napshin v. Goetz (In re Goetz), 134 B.R. 367 (Bankr. W.D. Mo. 1991); Brill v. Dvorak (In re Dvorak), 118 B.R. 619

(Bankr. N.D. Ill. 1990); Rally Hill Productions, Inc. v. Bursack (In re Bursack), 163 B.R. 302 (Bankr. M.D. Tenn. 1994).]

The recent Fifth Circuit opinion of Garner v. Lehrer (In re Garner), 56 F. 3d 677 (5th Cir. 1995) addressed the issue of the collateral estoppel effect of a default judgment under Texas law. In Garner, the debtor answered the complaint but failed to appear at the trial. The Fifth Circuit nevertheless found that the issues were actually litigated based upon Texas law. The Fifth Circuit found that "the Texas Supreme Court has described the 'judgment where a defendant has answered but fails to appear for trial' as a 'post-answer default judgment'....Accordingly, '[i]n a post-answer default, the defendant's answer places the merits of the plaintiff's cause of action at issue.'" Garner, 56 F. 3d at 680. (citations omitted). Based upon Texas law, the Fifth Circuit found that the issues were properly raised and actually litigated for collateral estoppel purposes.

Garner can be distinguished from the case at bar. One major distinction is that unlike the debtor in Garner, neither the Debtor nor any of the other defendants ever filed an answer in the Georgia state court litigation. In addition, in the case at bar, this Court must look to the law of the state of Georgia not the law of the state of Texas. As previously discussed, under Georgia law, collateral estoppel does not apply in the case at bar because Sanders cannot show that the issues before the state court are identical to those before this Court nor can he show that the were

actually litigated. Mills v. Ellerbee, (In re Ellerbee), 177 B.R. 731, 737 (Bankr. N.D. Ga. 1995).

In addition to objecting under § 523(a)(2)(A), Sanders has objected to the dischargeability of his judgment against the Debtor pursuant to § 523(a)(2)(B), § 523(a)(4) and § 523(a)(6). Like § 523(a)(2)(A), each of these subsections of § 523 have separate elements which must be proven by Sanders if he is to prevail. Sanders must prove the elements necessary to obtain relief under § 523 by a preponderance of the evidence. Grogan v. Garner, 498 U.S. 279, 291, 112 L.Ed. 2d 755, 767, 111 S. Ct. 654 (1991), Allison v. Roberts (In re Allison), 960 F. 2d 481, 483, (5th Cir. 1992), Wiches Lumber Company v. Magee (In re Magee), 164 B.R. 530, 533 (Bankr. S.D. Miss. 1994).

Since Sanders cannot prove any of the In re Ellebree elements as required under Georgia law to have collateral estoppel apply, the Court will not address the other grounds for nondischargeability alleged by Sanders.

ii

In the Debtor's motion for summary judgment, the Debtor correctly lists the elements Sanders must establish in order to have collateral estoppel apply (See *Motion For Summary Judgment*, ¶4, p. 3). The Court agrees with the Debtor that these elements have not been established by Sanders and that the Debtor's motion for summary judgment should be granted as to that aspect of his motion. However, the Court does not agree that the Debtor is

entitled to a judgment declaring Sanders' claim to be dischargeable. Since collateral estoppel does not apply to bar the litigation of Sanders' claim in this Court, this matter should be litigated at a later date.

CONCLUSION

There is no disagreement between the parties that a valid default judgment was entered against the Debtor for a sum certain. However, as stated previously, neither party has presented any material facts to show the basis on which the state court entered the judgment, and Sanders has not shown that the matter was actually litigated.

The U.S. Supreme Court stated in Grogan v. Garner, 498 U.S. 279, 284 (1991) that collateral estoppel may be applied in § 523(a) proceedings before a bankruptcy court. However, the Supreme Court further stated that a federal court is to look to "state preclusion principles to determine the extent to which an earlier state judgment bars subsequent litigation." Marrese, 470 U.S. at 382.

Sanders has failed to prove the elements established by the courts in the state of Georgia in order to have collateral estoppel apply. Consequently, Sanders' counter-motion for summary judgment should be denied as he has failed to show that he is entitled to a judgment of nondischargeability as a matter of law based upon the doctrine of collateral estoppel.

The Debtor's motion for summary judgment should be granted in part and denied in part. As stated by the Debtor in his motion for

summary judgment, Sanders has not met the elements established by the courts of the state of Georgia in order to have collateral estoppel apply. Since collateral estoppel does not apply to bar the litigation in this Court of the issue of dischargeability of Sanders' claim against the Debtor, the Court will deny the Debtor's request for a judgment declaring Sanders' claim to be dischargeable and set the matter for trial at a later date.

A separate judgment consistent with this opinion will be entered in accordance with Federal Rules of Bankruptcy Procedure 7054 and 9021.

SO ORDERED this the 18th day of October, 1996.


UNITED STATES BANKRUPTCY JUDGE

IN THE UNITED STATES BANKRUPTCY COURT FOR THE
SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

U.S. BANKRUPTCY COURT SOUTHERN DISTRICT OF MISSISSIPPI FILED OCT 18 1996 CHARLENE J. PENNINGTON, CLERK BY _____ DEPUTY

IN RE:

CHAPTER 7

WILLIAM DEWEY LOGAN, JR.

CASE NO. 9404041JEE

BEVERLY B. SANDERS, JR., M.D.

VS.

ADVERSARY NO. 950044

WILLIAM DEWEY LOGAN, JR.

FINAL JUDGMENT

Consistent with the opinion dated contemporaneously herewith:

IT IS HEREBY ORDERED AND ADJUDGED that the counter-motion for summary judgment contained in Beverly B. Sanders, Jr.'s *Plaintiff's Response To Defendant's Motion For Summary Judgment and Plaintiff's Counter Motion For Summary Judgment* is denied.

IT IS FURTHER ORDERED that the Debtor's *Motion For Summary Judgment* is granted in part as collateral estoppel does not bar the Debtor from litigating the issue of dischargeability of Sanders' default judgment in this Court. The Debtor's *Motion For Summary Judgment* is denied in part as this Court will not grant a judgment in favor of the Debtor declaring Sanders' claim to be dischargeable. The Court will set this matter for trial at a later date by separate order.

SO ORDERED this the 18th day of October, 1996.


UNITED STATES BANKRUPTCY JUDGE