

**UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF VIRGINIA
LYNCHBURG DIVISION**

| | | |
|----------------------|---|-----------------------|
| In re: CRAIG ROGERS, |) | Case No. 05-64531-LYN |
| |) | |
| Debtor, |) | |
| _____ |) | |
| THOMAS PERSONS, |) | Adv. No. 06-06016 |
| |) | |
| Plaintiff, |) | |
| |) | |
| v. |) | |
| |) | |
| CRAIG ROGERS, |) | |
| |) | |
| Defendant, |) | |
| _____ |) | |

MEMORANDUM and ORDER

This matter comes before the court on a motion for summary judgment filed by Thomas Persons (“the Plaintiff”). The Plaintiff filed a complaint seeking a declaration that any claim that he may have against the debtor, Craig Rogers (“the Defendant”) is non-dischargeable, notwithstanding the discharge order entered in Bankruptcy Case no. 05-04531-LYN.

This Court has jurisdiction over this matter. 28 U.S.C. § 1334(a) & 157(a). This proceeding is a core proceeding. 28 U.S.C. § 157(b)(2)(I). This Court may enter a final order.

Facts

In his complaint the Plaintiff alleges the following: In 2001, the Plaintiff lent the Defendant more than \$250,000.00, which funds were to be used by the Defendant in a business venture to pay expenses such as payroll, rent, and equipment. Under the loan agreement, the Defendant was to use the funds for the purposes intended, to provide the Plaintiff with updated financial information, and to repay the loans with interest according to a certain repayment schedule.

The Plaintiff alleges that the Defendant fraudulently induced the Plaintiff into making the loans through misrepresentations concerning the Defendant's intended use of the funds, the nature of the business and activities and the Defendant's intent to repay the loans. The Plaintiff also alleges that the Defendant misappropriated the funds for his personal use and for other business interests. The Plaintiff also alleges that, after the funds were loaned, the Defendant failed to repay any of the funds and that he, on more than one occasion, represented that he had sent the funds when he had not.

The Plaintiff further asserts that he borrowed the funds given to the Defendant and that he has incurred more than \$200,000.00 in interest based on his borrowing those funds.

On August 26, 2004, the Plaintiff obtained a default judgment in the amount of \$524,112.92 against the Defendant in the Court of Common Pleas in Richland County, South Carolina ("the South Carolina Judgment").

On October 14, 2005, the Defendant filed the a chapter 7 bankruptcy petition with the Clerk of this Court. The Plaintiff filed the instant complaint. The Defendant filed an answer generally denying many of the allegations in the complaint.

Discussion

This matter comes before the Court on a motion for summary judgment filed by the Plaintiff seeking a declaration that a certain debt owed by the Defendant to the Plaintiff is non-dischargeable under 11 U.S.C. § 523(a)(2)(A). A motion for summary judgment shall be granted 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) as made applicable by Fed. R. Bankr. P. 7056. The parties need not formally offer their outside matter as evidence or have it marked as an exhibit at the hearing on the motion. Wright, Miller & Kane, Federal Practice and Procedure: Civil 3d, § 2721, p. 366 (1998). The court may not try issues of fact on a Rule 56 motion but may only determine whether there are issues to be tried. Wright, Miller & Kane, Federal Practice and Procedure: Civil 3d, § 2712, p. 205-6 (1998) (Citations omitted.). Summary judgment is improper if the existence of material fact issues is uncertain. Id. at 210.

Section 523(a)(2)(A) provides:

(a) A discharge under section 727, 1141, 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any 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.

Under this paragraph a plaintiff must prove the common law elements of fraud. "The operative terms in § 523(a)(2)(A)... 'false pretenses, a false representation, or actual fraud,' carry the acquired meaning of terms of art. They are common law terms, and... they imply elements that the common

law has defined them to include.” Field v. Mans, 516 U.S. 59, 69, 116 S.Ct. 437, 443, 133 L.Ed.2d 351 (1995). “Then, as now, the most widely accepted distillation of the common law of torts was the Restatement (Second) of Torts (1976), published shortly before Congress passed the Act.” Id., 516 U.S. at 70, 116 S.Ct. at 443-444. “We construe the terms in § 523(a)(2)(A) to incorporate the general common law of torts, the dominant consensus of common-law jurisdictions, rather than the law of any particular state.” Id. at footnote 9.

To prevail on a claim for actual fraud under section 523(a)(2)(A), a plaintiff must prove the following elements:

- (1) the debtor made the representation;
- (2) at the time of the representation, the debtor knew it to be false;
- (3) the debtor made the representation with the intent and purpose of deceiving the plaintiff;
- (4) the plaintiff reasonably¹ relied on the representation and the reliance was reasonably founded; and
- (5) the plaintiff sustained a loss or damage as the proximate consequence of the representation having been made.

4 Collier on Bankruptcy, §523.08[1][e], pg 523-45 to 523-46 (15th ed. Rev.) (Citations omitted).

In order to prevail under section 523(a)(2), a creditor must prove each element by a preponderance of the evidence. Grogan v. Garner, 498 U.S. 279, 290, 111 S.Ct. 654, 661, 112 L.Ed.2d 755 (1991).

The elements of fraud are presented in conjunctive. The Plaintiff must prove each element by a preponderance of the evidence in order to prevail. If the Plaintiff fails to meet his

¹ The standard for reliance under section 523(a)(2)(A) is justifiable reliance, not reasonable reliance. See discussion below.

burden for any of the elements, then he cannot be awarded judgment on this motion.

Consequently, if it is determined that the Plaintiff has failed to prove one of the elements, the others need not be examined.

The motion for summary judgment is based on two arguments. The first is that the South Carolina Judgment, under the doctrine of claim preclusion, is sufficient to support a judgment holding that the debt at issue is non-dischargeable under 11 U.S.C. § 523(a). The second argument is based on the declaration of the Plaintiff and supporting documents.

The Plaintiff first argues that he is entitled to a judgment declaring his claim in this case to be non-dischargeable based on the South Carolina Judgment. In determining the preclusive effect of a state-court judgment, the federal courts must, as a matter of full faith and credit, apply the forum state's law of collateral estoppel. In re Ansari, 113 F.3d 17 (4th Cir. 1997) Cert. denied Ansari v. Pahlavi, 522 U.S. 914, 118 S.Ct. 298 (1997).

Indeed, though the federal courts may look to the common law or to the policies supporting res judicata and collateral estoppel in assessing the preclusive effect of decisions of other federal courts, Congress has specifically required all federal courts to give preclusive effect to state-court judgments whenever the courts of the State from which the judgments emerged would do so:

“[J]udicial proceedings [of any court of any State] shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State……” 28 U.S.C. § 1738 (1976).

Allen v. McCurry, 449 U.S. 90, 96, 101 S.Ct. 411, 415 (1980) (Quoted in part in Ansari and Hagan v. McNallen (In re McNallen), 62 F.3d 619, 624 (4th Cir.1995).

Res judicata², or claim preclusion, prohibits relitigation of identical legal claims and

² Res Judicata is sometimes used to include both issue preclusion and claim preclusion. It is not used in that manner herein.

collateral estoppel, or issue preclusion, bars relitigation of the same legal issue. Ansari, 113 F.3d at 23. The South Carolina Supreme Court has held that the doctrine of collateral estoppel cannot be based on judgments issued by default, because the doctrine only applies when the issue has been actually and necessarily litigated.

In the context of a default judgment, collateral estoppel or issue preclusion does not apply because an essential element of that doctrine requires that the claim sought to be precluded actually have been litigated in the earlier litigation. 50 C.J.S. Judgments § 797 (1997).

The State v. Bacote, 331 S.C.328, 331, 503 S.E.2d 161, 163 (South Carolina 1998).

The doctrine of res judicata is available under South Carolina law if three elements are met: 1) there must be a final, valid judgment on the merits; 2) there must be an identity of parties; and 3) the second action must involve matters properly included in the first suit. Stone v. Roadway Express, 367 S.C. 575, 580, 627 S.E.2d 695, 697 (South Carolina 2006). In this case, the parties are the same and the matters are the same. The second and third elements are met.

Additionally, there is a final judgment between the parties concerning the issues. It only remains to be determined whether the judgment was on the merits. It was. The term “on the merits” is a term of art and does not necessarily mean that the issues were actually litigated. “A judgment on the merits is one which is based on legal rights as distinguished from mere matters of practice, procedure, jurisdiction or form.” In re Gilson, 250 B.R. 226, (Bankr. E.D.Va. 2000) (Quoting Fairmont Aluminum Co. v. Commissioner of Internal Revenue Service, 222 F.2d 622, 625 (4th Cir., 1955)). A default judgment under South Carolina law, then, may give rise to res

judicata.³

The South Carolina Judgment, however, does not provide the Plaintiff all that he seeks by way of this motion. It is a judgment for money and nothing more. It does not in any way include a declaration that may be construed to mean that the judgment was obtained by fraud or any other means that would constitute grounds for a finding that any claim arising from it is nondischargeable. On the basis of the South Carolina Judgment, it is concluded that the Plaintiff has a claim against the Defendant in this bankruptcy case in the amount of \$524,012.92 as of January 25, 2005, but it cannot be concluded that any such debt is non-dischargeable.

The Plaintiff also argues that judgment should be entered in his favor based on the declaration of the Plaintiff and supporting documents. We need only consider the third element of fraud as provided above, that which requires the Plaintiff to demonstrate that the Defendant made a representation or representations with the intent and purpose of deceiving the plaintiff. There is evidence in the record that would tend to support such a conclusion, but on a motion for summary judgment the Court must draw all reasonable inferences in favor of the nonmoving party. See, e.g., Russell, Bankruptcy Evidence Manual, § 301.97 and cases cited therein.

A review of the Plaintiff's affidavit and the exhibits supporting it, considered in the light most favorable to the Defendant, indicate that there is a genuine issue as to the Defendant's intent to deceive the Plaintiff. Accordingly, determination of the intent of the Defendant shall be determined at trial. The motion of the Plaintiff for summary judgment will thus be denied.

ORDER

³ Under federal law, judgment by default commands the full effects of claim preclusion. Wright, Miller & Cooper, Federal Practice and Procedure: Jurisdiction 2d § 4442.

The motion of the Plaintiff for summary judgment is denied.

So ORDERED.

Upon entry of this memorandum and order the Clerk shall forward copies of this memorandum to Evelyn K. Krippendorf, Esq., counsel for the Defendant, and Kari K. Munro, counsel for the Plaintiff.

Entered on this 30th day of January, 2007.

