United States Bankruptcy Court
Northern District of Illinois
Eastern Division

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Bankruptcy Caption: In re Sam Rubin

Bankruptcy No. 98-13755-BKC-AJC

Adversary Caption: Michael H. Weisser v. Sam Rubin

Adversary No. 98-1381-AJC-A

Date of Issuance: April 11, 2000

Judge: John H. Squires

Appearance of Counsel:

Attorney for Plaintiff: Robert C. Meyer, P.A., Robert C. Meyer, Esq., 2233 Coral Way, Miami, Florida 33145

Attorney for Defendant/Debtor: Sam Rubin, Pro Se, 2431 NE 196th Street, North Miami Beach, Florida 33180

Trustee or Other Attorneys: N/A

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

IN RE:	)	
	)	
SAM RUBIN,	)	CASE NO. 98-13755-BKC-AJC
	)	CHAPTER 7
Debtor.	)	
_____	)	
	)	
MICHAEL H. WEISSER,	)	
	)	
Plaintiff,	)	
	)	
v.	)	ADV. NO. 98-1381-BKC-AJC-A
	)	
SAM RUBIN,	)	
	)	
Defendant.	)	

MEMORANDUM OPINION

This matter comes before the Court on the renewed motion for summary judgment filed by the Plaintiff, Michael H. Weisser (the "Plaintiff"), pursuant to Federal Rule of Bankruptcy Procedure 7056. For the reasons set forth herein, the Court denies the motion.

I. JURISDICTION AND PROCEDURE

The Court has jurisdiction to entertain this matter pursuant to 28 U.S.C. § 1334 and Local Rule 87.2 of the United States District Court for the Southern District of Florida. This matter constitutes a core proceeding under 28 U.S.C. § 157(b)(2)(I).

II. FACTS AND BACKGROUND

In early 1996, the Plaintiff filed two separate lawsuits against Sam Rubin, (the "Defendant") in the Circuit Court of the Eleventh Judicial Circuit for Dade County, Florida. The first lawsuit sought damages of $15,000.00, plus interest and costs. It included claims of civil breach of contract, theft, conversion, and violations of the Florida Civil Remedies for Criminal Practices Act (Fla. Stat. § 772.103). The Defendant did not file an answer to the complaint. On August 5, 1996, the state court entered a final default judgment against the Defendant in the amount of $15,000.00, plus interest and costs.

In the second lawsuit, the Plaintiff sued the Defendant, two other individuals and a corporate entity seeking $450,000.00 in compensatory damages, plus unspecified punitive damages, interest and costs. This lawsuit included claims for fraud and inducement, breach of fiduciary duty, accounting, RICO under 18 U.S.C. § 1962, Florida Civil Remedies for Criminal Practices Act (Fla. Stat. § 772.103(1) and (4)), and unjust enrichment. The Defendant did not file an answer to that complaint. On July 3, 1996, the state court entered a final default judgment against the Defendant and the corporate co-defendant in the amount of $450,000.00, plus interest and costs.

On April 30, 1998, the Defendant filed a voluntary Chapter 7 petition. Thereafter, on July 30, 1998, the Plaintiff filed this adversary complaint against the Defendant asserting that the debts arising from the state court default judgments should be excepted from discharge pursuant to 11 U.S.C. § 523(a)(2)(A), (a)(4) and (a)(6). On August 21, 1998, the Plaintiff filed his original motion for summary judgment asserting that the default judgments

entered in the state court lawsuits should be given preclusive effect in the matter at bar, and that the doctrine of collateral estoppel should apply with respect to the facts asserted therein, which would establish the Defendant's debts to the Plaintiff are non-dischargeable.

The Defendant, who is proceeding pro se, asserts that his failure to answer the state court complaints and the subsequent default judgments entered in both of those cases resulted from several extraordinary circumstances. After the state court complaints were filed, the Defendant retained an attorney. The Defendant asserts that the attorney assured him that the complaints had been responded to and would be appropriately defended. In reality, however, the attorney failed to defend either suit, and the attorney has been disciplined by the Supreme Court of Florida and placed on an inactive list of attorneys. The Defendant contends that he did not learn of the default judgments in the state court lawsuits until late in1996. At that time, his wife had become extremely ill, and was diagnosed with breast cancer.

The Plaintiff's original motion for summary judgment was denied by Judge Robert K. Rodibaugh on January 9, 1999. Judge Rodibaugh concluded the state court judgments were entered on the basis of the Defendant's failure to appear and answer those complaints, and that the underlying facts in both state court proceedings had never been actually litigated. Therefore, application of the doctrine of collateral estoppel was improper.

After denial of that motion, the Plaintiff served a second request for admissions pursuant to Fed. R. Bankr. P. 7036 which, among other things, requested the Defendant to admit he committed fraud, breach of contract, civil theft, conversion, and breach of fiduciary duty regarding his dealings with the Plaintiff. These requests were filed on February 12,

1999. On March 12, 1999, the Defendant filed his response denying these allegations.

Thereafter, the docket reveals that there was no significant activity until the Plaintiff filed the renewed motion for summary judgment on March 7, 2000. The Plaintiff relies on a recent opinion which held that under Florida law, a pure default judgment can have preclusive effect for collateral estoppel purposes in dischargeability determinations filed under 11 U.S.C. § 523. See Lasky v. Itzler (In re Itzler), 2000 Bankr. Lexis 121 (Bankr. S.D. Fla. Jan. 20, 2000). The Plaintiff argues that Lasky binds the Court and mandates that it rule in his favor. At the scheduled hearing on the motion, the Defendant appeared pro se and requested time to seek counsel to assist him in the defense of this motion. He contended that he had not committed any of the wrongful conduct complained of by the Plaintiff. The Court took the matter under advisement.

III. APPLICABLE STANDARDS

A. Summary Judgment

In order to prevail on a motion for summary judgment, the movant must meet the statutory criteria set forth in Rule 56 of the Federal Rules of Civil Procedure, made applicable to adversary proceedings by Federal Rule of Bankruptcy Procedure 7056. Rule 56(c) reads in part:

> [T]he 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).

Summary judgment is appropriate only where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Hargett v. Valley Fed. Sav. Bank, 60 F.3d 754, 760 (11th Cir. 1995). If the record presents factual issues, the court must not decide them; it must deny the motion and proceed to trial. Burger King Corp. v. Weaver, 169 F.3d 1310, 1315 (11th Cir. 1999), cert. denied, 120 S.Ct. 370 (1999). All reasonable inferences drawn from the underlying facts must be viewed in a light most favorable to the party opposing the motion. Earley v. Champion Int'l Corp., 907 F.2d 1077, 1080 (11th Cir. 1990).

In 1986, the United States Supreme Court decided a trilogy of cases which encourage the use of summary judgment as a means to dispose of factually unsupported claims. Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986); Matsushita Electric Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574 (1986); Celotex Corp. v. Catrett, 477 U.S. 317 (1986). The burden is on the moving party to show that no genuine issue of material fact is in dispute. Anderson, 477 U.S. at 248; Matsushita, 475 U.S. at 585-86; Celotex, 477 U.S. at 322.

B. The Standards for Dischargeability in the Eleventh Circuit

The United States Supreme Court has held that the burden of proof to sustain a claim of non-dischargeability pursuant to Section 523 of the Bankruptcy Code is on the party seeking to except the debt from discharge by a preponderance of the evidence. Grogan v. Garner, 498 U.S. 279, 291 (1991).

C. The Doctrine of Collateral Estoppel

Collateral estoppel bars relitigation of an issue previously decided in a judicial proceeding if the party against whom the prior decision is asserted had a "full and fair opportunity" to litigate that issue in an earlier case. Allen v. McCurry, 449 U.S. 90, 95 (1980). Collateral estoppel principles apply to dischargeability proceedings. Grogan, 498 U.S. at 284-85 n.11. If the prior judgment was rendered by a state court, then the collateral estoppel law of that state should be applied to determine the judgment's preclusive effect. In re St. Laurent, 991 F.2d 672, 675-76 (11th Cir. 1993) (citing In re Touchstone, 149 B.R. 721, 725 (Bankr. S.D. Fla. 1993)). Thus, this Court is bound to apply Florida state collateral estoppel standards. The real purpose of the doctrine is to avoid needless relitigation of issues that have already been tried.

Under Florida law, the following elements must be established before collateral estoppel can be invoked: (1) the issue at stake must be identical to the one decided in the prior litigation; (2) the issue must have been actually litigated in the prior proceeding; (3) the prior determination of the issue must have been a critical and necessary part of the judgment in that earlier decision; and (4) the standard of proof in the prior action must have been at least as stringent as the standard of proof in the later case. St. Laurent, 991 F.2d at 676 (citations omitted). While collateral estoppel may bar a bankruptcy court from relitigating factual issues previously decided in state court, the ultimate issue of dischargeability is a legal question to be addressed by the bankruptcy court in the exercise of its exclusive jurisdiction. See In re Halpern, 810 F.2d 1061, 1064 (11th Cir. 1987).

IV. DISCUSSION

The focus of the renewed motion at bar is on the "actually litigated" or second element for application of collateral estoppel. Initially, the Court notes that because it has been furnished with such a small portion of the prior state court records, it is questionable whether the limited record shows that the alleged fraud, breach of fiduciary duty and conversion issues raised in the prior litigation were critical and necessary parts of the state court judgments. The default judgments do not contain any factual findings or legal conclusions. Only money judgments were awarded to the Plaintiff. Hence, it is not shown that the third required element for application of the doctrine of collateral estoppel has been appropriately demonstrated. The only focus of the motion, however, is on the "actually litigated" element.

The Eleventh Circuit declined to reach the issue of whether a Florida default judgment should be accorded preclusive effect in a bankruptcy dischargeability proceeding. See In re Bush, 62 F.3d 1319, 1323 n.6 (11th Cir. 1995). Bush applied the doctrine in a matter involving a debtor who actively participated in that adversary proceeding for almost a year, was represented by counsel, had answered the complaint in the prior litigation, filed a counterclaim and discovery requests, and thereafter proceeding pro se, began to refuse to cooperate in discovery by failing to produce documents and appear at depositions. The Bush court followed the lead of the Ninth Circuit in In re Daily, 47 F.3d 365 (9th Cir. 1995) in applying the doctrine where the default judgment was not "ordinary." The Bush court noted that:

> Where a party has substantially participated in an action in which he had a full and fair opportunity to defend on the merits, but subsequently chooses not to do so, and even attempts to frustrate the effort to bring the action to judgment, it is not an abuse of discretion for a district court to apply the doctrine of collateral estoppel to prevent further litigation of the issues resolved by the default judgment in the prior action.

62 F.3d at 1325 (footnote omitted). Significantly, the court in Bush stated in a footnote:

> We note that whether to allow issue preclusion is within the sound discretion of the trial court. Parklane Hosiery Co., Inc. v. Shore, 439 U.S. 322, 331, 99 S.Ct. 645, 651-652, 58 L.Ed.2d 552 (1979). The presence of mitigating factors in another case might cause a court to exercise discretion to deny preclusion to a default judgment even if the doctrine's formal elements are otherwise met. In some cases, the amount of money at stake or the inconvenience of the forum might disincline a defendant to offer a defense. In the case of such an "ordinary" default, a subsequent court might decline to allow preclusion. In this case, however, the amount of money was substantial, the forum was convenient and Bush did, in fact, participate in the litigation long after the issue was joined.

Id. at n.8. Thus, the Eleventh Circuit made it clear that application of the doctrine of collateral estoppel, even in the matter of a prior state court default, is discretionary with the trial court.

In the case of Lasky, on which the Plaintiff relies, Judge Robert A. Mark concluded that a default judgment entered in a Florida state court, like a judgment entered after a trial, is a matter that has been "fully litigated" under Florida state law. Judge Mark arrived at this conclusion based on several Florida state court opinions, including Perez v. Rodriguez, 349 So.2d 826 (Fla. Dist. Ct. App. 1977) ("The law is clear that a default judgment conclusively establishes between the parties, so far as subsequent proceedings on a different cause of

action are concerned, the truth of all material allegations contained in the complaint in the first action and every fact necessary to uphold the default judgment....”). Moreover, Judge Mark cited two Florida Supreme Court cases which held that collateral estoppel applies in instances of a pure default judgment. See Masciarelli v. Maco Supply Corp., 224 So.2d 329 (Fla. 1969); Aviant v. Hammond Jones, Inc., 79 So.2d 423 (Fla. 1955). The Court respectfully declines to follow Judge Mark’s position in Lasky, in light of the Eleventh Circuit’s statement in Bush that application of the doctrine is discretionary with the Court.

The Court concludes that it is the better exercise of its discretion to deny application of the doctrine of collateral estoppel based on the sparse record adduced by the Plaintiff and in light of the Defendant’s unusual situation. There is no showing in the record that the Plaintiff was put to the trouble and expense to prove the serious allegations of his claims against the Defendant in the state court, or that he was improperly stalled by any dilatory or obstructionist tactics employed by the Defendant or his attorney. The Defendant has denied all of the substantive allegations of fraud, breach of fiduciary duty and conversion, and contends he was not apprized of the entry of the default judgments until late 1996, having been virtually abandoned by his now disbarred attorney.

Moreover, the final default judgments do not contain any findings of fact or conclusions of law, and there has been no furnishing to this Court of any transcripts of proceedings, depositions, affidavits or any evidence to support the substantive allegations against the Defendant as Bankruptcy Rule 7056 contemplates in order to properly grant summary judgment. There is no showing on this record that the Defendant had any substantial participation in the underlying state court litigation. Further, there is no showing

that the default judgments were entered based on the presentation of any evidence, rather than on the procedural default on the part of the Defendant. In short, the Plaintiff has not shown that there was any active participation by the Defendant in the state court actions, or that he was afforded a full and fair opportunity to defend on the merits, but subsequently chose not to do so, or that he frustrated the effort to bring those actions to judgment.

Thus, it seems to be the better exercise of this Court's discretion not to apply the doctrine of collateral estoppel. On this record, the issues decided against the Defendant have not been shown to have been actually proven or litigated, but merely the subject of a procedural default. The unusual circumstance of a debtor being virtually abandoned by counsel in the prior state court proceedings constitutes an equitable consideration militating in favor of not applying the doctrine. Thus, the Plaintiff should be required to prove his case as he has not shown that he did so in the prior state court litigation.

V. CONCLUSION

For the foregoing reasons, the Plaintiff's renewed motion for summary judgment is denied.

This Opinion constitutes the Court's findings of fact and conclusions of law in accordance with Federal Rule of Bankruptcy Procedure 7052. A separate order shall be entered pursuant to Federal Rule of Bankruptcy Procedure 9021.

ENTERED:

DATE: _____

_____
John H. Squires
United States Bankruptcy Judge

cc: See attached Service List