

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEBRASKA

IN THE MATTER OF:)
)
RAY WALTER ARP,) CASE NO. BK95-80897
) A97-8087
DEBTOR(S))
)
ARLIE A. CARSON III,) CH. 7
) Filing No. 10, 14
)
Plaintiff(s),)
vs.)
)
RAY WALTER ARP,)
)
Defendant(s).)

MEMORANDUM

Hearing was held on a Motion for Summary Judgment filed by plaintiff. Appearances: Monica Kruger for the debtor\defendant and Richard Gilloon for the plaintiff. This memorandum contains findings of fact and conclusions of law required by Fed. Bankr. R. 7052 and Fed. R. Civ. P. 52. This is a core proceeding as defined by 28 U.S.C. § 157(b)(2)(I).

Decision

Plaintiff's motion for summary judgment is granted.

Background

Plaintiff sued defendant in the state courts of the state of Hawaii. Defendant appeared, filed motions and pleadings, but did not appear at trial. Trial was held and judgment was entered in favor of plaintiff and against defendant for intentional fraud in the amount of \$54,900.00 and for punitive damages in a sum of \$50,000.00, for a total of \$104,900.00. The punitive damage award resulted from the trial court's finding that the defendant's conduct was willful, wanton, intentional, oppressive and malicious, and implied a spirit of mischief and criminal indifference to the civil obligations.

The trial court made detailed findings of fact and conclusions of law concerning the factual basis for the

determination that intentional fraud was involved and the factual basis for the imposition of punitive damages.

The debtor filed bankruptcy under Chapter 13 in the District of Nebraska and the case was eventually converted to Chapter 7. This adversary proceeding, requesting a judgment of non-dischargeability under 11 U.S.C. § 523(a)(2)(A) and 523(a)(6), was timely filed. Plaintiff now requests summary judgment on all issues.

Discussion

Summary judgment is proper if the pleadings, depositions, answer to interrogatories and admissions on file, together with the affidavits show that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Federal Rule of Civil Procedure 56(c) is incorporated in Federal Rule of Bankruptcy Procedure 7056.

To preclude the entry of summary judgment, the non-movant must make a sufficient showing on every essential element of its case on which it has the burden of proof at trial. Celotex Corp. v. Catrett, 477 U.S. 317, 106 S.Ct. 2548 (1986).

Summary judgment is not a substitute for trial on disputed factual issues. Continental Grain Co. v. Frank Seitzinger Storage, 837 F.2d 838 (8th Cir. 1988).

A non-moving party may not rest upon mere denials or allegations in the pleadings but must set forth specific facts sufficient to raise a genuine issue for trial. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 106 S.Ct. 2505 (1986) (citing Celotex, supra, at 477 U.S. 324).

Collateral estoppel applies in bankruptcy court to prevent the re-litigation of factual and legal issues that have been determined at a prior state court action. Grogan v. Garner, 111 S.Ct. 654 (1991). In Matter of Farfalla, 132 B.R. 628 (Bankr. D. Neb. 1991), Judge Minahan, citing Johnson v. Miera (In re Miera), 926 F.2d 741 (8th Cir. 1991), stated:

The issue sought to be precluded must be the same as that involved in the prior action; the issue must have been litigated in the prior action; the issue must have been determined by a

valid and final judgment; and the determination must have been essential to the prior judgment.

Each of the elements required for application of collateral estoppel are met in this case. All of the issues concerning fraud that are raised by the complaint to determine dischargeability of the debt are the same as those involved in the state court action. Under Hawaiian law, the plaintiff was required to prove that the defendant made false statements of material fact, that the defendant intended to induce the plaintiff to act, that the representations were made by the defendant with knowledge of their falsity or without knowledge of their truth or falsity, and the plaintiff reasonably believed that the representations were true and justifiably relied on the representations to his damage. Elliot Medgal & Assocs. v. Hawaii Planing Mill, Ltd. 814 F.Supp. 898 (D. Hawaii 1993). Under 11 U.S.C. § 523(a)(2)(A), the plaintiff must show that the defendant received money or property through a false representation. The issues in the two actions are identical.

Those issues were tried in state court. The defendant/debtor appeared pro se, filed various motions and requests for continuance, but failed to appear for trial. Evidence was adduced, a record made, and detailed factual findings and conclusions of law entered. Concerning the punitive damage issue, the Hawaii court followed the Hawaii law that prohibited imposing punitive damages unless the defendant acted intentionally, wantonly, maliciously or willfully and with a total and wanton disregard for the plaintiff. Man v. Raymark Industries, 728 F.Supp. 1461 (D. Hawaii 1989).

The state court issued a valid and final judgment, which has apparently not been appealed, and the determination of the defendant's false representation and the willful and malicious nature of his actions were essential to the state court judgment. Furthermore, the state court utilized the higher standard of "clear and convincing evidence" in finding that the plaintiff had proved all of the elements of fraud, while the standard for determining the dischargeability of a debt under Section 523 of the Bankruptcy Code requires merely a "preponderance of the evidence." Grogan, supra, 111 S.Ct. At 659. The defendant is therefore collaterally estopped from re-litigating the factual or legal issues litigated in the state court.

In Cohen v. De La Cruz, 118 S.Ct. 1212 (1998), the United States Supreme Court determined that once it is established that specific money or property has been obtained by fraud, "any debt" arising therefrom is excepted from the discharge. Cohen at 1216. The court in Cohen found that not only was the amount actually received by the misrepresenting party deemed to be nondischargeable under Section 523(a)(2)(A) but also nondischargeable was any liability "arising from money, property, etc., that is fraudulently obtained, including treble damages, attorney's fees, and other relief that may exceed the value obtained by the debtor." Cohen at 1219. Treble damages in that case were treated as the equivalent of "punitive damages."

Therefore, since there is no material question of fact and since all of the issues presently before this court in the dischargeability proceeding have been previously litigated in the state court of Hawaii, summary judgment is appropriate.

Based on the state court findings of fact concerning the fraud issue, the debt represented by the judgment is non-dischargeable.

A separate judgment entry shall be filed.

DATED: December 15, 1998.

BY THE COURT:

/s/ Timothy J. Mahoney
Timothy J. Mahoney
Chief Judge

Copies faxed by the Court to:

16 GILLOON, RICHARD
11 KRUGER, MONICA GREEN

Copies mailed by the Court to:

United States Trustee

Movant (*) is responsible for giving notice of this journal entry to all other parties (that are not listed above) if required by rule or statute.

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JUDGMENT

Judgment is entered in favor of the plaintiff and against the defendant in the amount of \$104,900.00, including \$54,900.00 actual damages due to fraud and \$50,000.00 punitive damages. Interest shall accrue on said judgment at the state of Hawaii judgment rate from the date of entry of the judgment until the date of the bankruptcy petition until this date. Thereafter, interest shall accrue at the federal rate.

Such judgment is nondischargeable in bankruptcy.

See Memorandum entered this date.

DATED: December 15, 1998

BY THE COURT:

/s/ Timothy J. Mahoney
Timothy J. Mahoney
Chief Judge

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