

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEBRASKA

IN THE MATTER OF)	
)	
GEORGE EDMUND HEROLD and)	
LORI ANN HEROLD,)	CASE NO. BK00-80336
)	A00-8034
DEBTOR(S))	
)	CH. 7
GARY JOHNSON,)	Filing No. 12,18,22,25
Plaintiff(s))	
vs.)	
)	
GEORGE EDMUND and)	
LORI ANN HEROLD,)	
)	
Defendant(s))	

MEMORANDUM

Hearing was held on Motion for Summary Judgment filed by Gary Johnson. Appearances: Murl Miller for the plaintiff and Jerry Pollard for the defendants. This memorandum contains findings of fact and conclusions of law required by Fed. R. Bankr. P. 7052 and Fed. R. Civ. P. 52. This is a core proceeding as defined by 28 U.S.C. § 157(b)(2)(I).

Introduction

This matter is before the court on the plaintiff's Motion to Dismiss and for Summary Judgment and a resistance by the defendant. At issue in this case is the dischargeability of a debt incurred by the defendants by a confession of judgment. Mr. and Mrs. Johnson, the debtors, admit that the debt is non-dischargeable as to Mrs. Johnson. The issue is narrowed to the dischargeability of the debt applied to Mr. Herold. The facts of the case are not in issue.

Background

Mr. and Mrs. Herold, the debtors, were previously employed by Johnson Electric, a company owned by Gary Johnson. Mrs. Herold was employed as a bookkeeper and, in 1995, Mrs. Herold was charged in the state courts of South Dakota with

eighteen (18) felony counts of Grand Theft for taking money from Mr. Johnson while she was employed by him. Mr. Herold was not charged with any crime. In a plea agreement, the State allowed Mrs. Herold to plead guilty to one count of felony grand theft and dismissed the remaining seventeen (17) counts with prejudice. In connection with this matter, Mrs. Herold is currently on probation and under court order to make timely restitution payments. Both Mr. and Mrs. Herold signed the confession of judgment confessing to joint and several liability on the restitution debt owed to Mr. Johnson. In the confession of judgment, Mr. Herold admitted no wrong-doing.

In a civil action brought by Mr. Gary Johnson, both Mr. and Mrs. Herold again signed a confession of judgment. Mr. Herold professed no criminal or civil wrong-doing in this confession of judgment but rather agreed to be jointly and severally liable in order to keep his wife out of jail. In conjunction with this civil proceeding, an irrevocable wage assignment was executed by Mr. Herold as well. At the time of hearing on the present motion, payments were being timely made by Mr. Herold.

On February 17, 2000, the Herolds filed for protection under Chapter 7 of the Bankruptcy Code. The restitution debt owed to Mr. Johnson was listed on the debtors' schedules and included among the debts the debtors wished to discharge in their bankruptcy. Mr. Johnson filed the present action alleging that the debt is nondischargeable as to both debtors pursuant to 11 U.S.C. §§ 523(a)(4) and 523(a)(6). Mrs. Herold admits that the debt is nondischargeable as to her. The only remaining issue, therefore, is the dischargeability of the debt as it applies to Mr. Herold.

Mr. Johnson states in his Motion for Dismissal and for Summary Judgment that 1.) this court lacks jurisdiction based on the Rooker-Feldman Doctrine and the case must be dismissed or, in the alternative, that 2.) summary judgment is warranted in the plaintiff's favor based on collateral estoppel and estoppel. The defendant argues, in turn, that the court has jurisdiction because the state court did not decide the dischargeability issue. Further, Mr. Herold argues that he serves only as a guarantor of the debt incurred by Mrs. Herold as a result of her criminal activity.

Motion to Dismiss

In the present case, Mr. Johnson argues that this court lacks jurisdiction to determine the dischargeability proceeding and it must be dismissed because of the Rooker-Feldman doctrine. The Rooker-Feldman doctrine precludes lower federal courts from deciding a collateral attack on a state court decision. Rooker v. Fidelity Trust Co., 263 U.S. 413, 44 S.Ct. 149, 68 L.Ed. 362 (1923) and District of Columbia Court of Appeals v. Feldman, 460 U.S. 462, 103 S.Ct. 1303, 75 L.Ed.2d 206 (1983). The Rooker-Feldman doctrine is jurisdictional in nature and, therefore, its application cannot be waived. Blanton v. United States, 94 F.3d 227, 233-34 (6th Cir. 1996).

In determining whether Rooker-Feldman applies, it must be ascertained whether the party bringing the claim is seeking what in substance would be an appellate review of a state court decision. Martin v. Stoddard (In re Stoddard), 248 B.R. 111, 120-121 (Bankr. N.D. Ohio 2000)(citing Johnson v. Odom, 901 F.Supp. 220, 223 (W.D. La. 1995)). The doctrine applies to those claims that are "inextricably intertwined" with a state court judgment as well as those claims that were actually raised in the state court. Feldman, 460 U.S. 462, 103 S.Ct. 1303, 75 L.Ed.2d 206; Chaney v. Chaney (In re Chaney), 229 B.R. 266 (Bankr. D. N.H. 1999). Rooker-Feldman does not apply if there was no opportunity to raise the claim at issue. In re Stoddard, 248 B. R. at 121.

In the present case, the plaintiff argues that a discharge of the debt as to Mr. Herold would, in essence, reverse the decision of the South Dakota Court and, therefore, be in violation of the Rooker-Feldman doctrine. However, this reasoning circumvents the purpose of the Code. In an adversary proceeding, the dischargeability of the debt is determined, not a party's guilt or innocence. If the plaintiff's argument is followed to its logical conclusion, the result would be to render nondischargeable all judgments entered by state courts.

In Section 523 of the Bankruptcy Code, a number of obligations are listed which Congress made nondischargeable for policy reasons. A bankruptcy court's duty is to determine the dischargeability of a debt claimed to fall under one of the Section 523 subdivisions. In a Section 523 proceeding, what is being determined is not the guilt or innocence of a person, but rather the nature/type of debt. In the present case, the nature of the debt as to Mrs. Herold is that of a

nondischargeable debt as she is held to be guilty of embezzlement and has to pay restitution for this crime. However, the debt owed by Mr. Herold is of a contractual nature and does not fit under any subsection of Section 523. He did not admit wrongdoing in either of the confessions of judgment and, under South Dakota law, no presumption of fault arises from the execution of a confession of judgment. Further, because the debtors had not filed for bankruptcy at the time of the confessions of judgment, neither party had an opportunity to raise the dischargeability claim at issue here. The Rooker-Feldman doctrine does not apply in this instance. This court retains jurisdiction and the case is not dismissed.

Summary Judgment

Federal Rule of Civil Procedure 56, incorporated into the Bankruptcy Code by Bankruptcy Rule of Procedure 7056, states that summary judgment is appropriate "if the pleadings, depositions, answer 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); ARE Sikeston Limited Partnership v. Weslock National Inc., 120 F.3d 820 (8th Cir. 1997). Furthermore, if there has been adequate time for discovery, Federal Rule of Civil Procedure 56(c) mandates that the trial court grant a motion for summary judgment "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Celotex Corp. v. Catrett, 477 U.S. 317, 322, 106 S.Ct. 2548, 2552, 91 L.Ed.2d 265 (1986); ARE Sikeston Limited Partnership, 120 F.3d at 827-28. Disputes over facts that might affect the outcome of the suit under governing law will properly preclude entry of summary judgment. Guinness Import Co. v. Mark VII Distrib. Inc., 153 F.3d 607, 611 (8th Cir. 1998).

Collateral Estoppel

The plaintiff argues that collateral estoppel applies to bar both defendants from now arguing that the debt is nondischargeable. Issue preclusion (formerly known as collateral estoppel) "applies to legal or factual issues 'actually and necessarily determined,' with such a determination becoming collusive in subsequent suits based on a different cause of action involving a party to the prior

litigation." Lang v. Anderberg-Lund Printing Co., (In re Anderberg-Lund Printing Co.), 109 F.3d 1343, 1346 (8th Cir. 1997) (quoting Montana v. United States, 440 U.S. 147, 99 S.Ct. 970, 59 L.Ed.2d 210 (1979)). Issue preclusion applies in bankruptcy dischargeability proceedings brought under Section 523(a). Grogan v. Garner, 498 U.S. 279, 284-85 n.11, 111 S.Ct. 654, 112 L.Ed. 2d 755 (1991); Madsen v. Lease, 195 F.3d 988, 989 (8th Cir. 1999). If a party was not named in a prior action, it is necessary to show that the non-named party's interests were fully represented in order to apply the doctrine of collateral estoppel. County of Boyd v. US Ecology, Inc., 48 F.3d 359, 361 (8th Cir. 1995).

Mr. Herold was not a named party in the state court civil or criminal proceedings. It is impossible to conclude from the record before the court that he was adequately represented. There is no evidence that he was represented by any attorney at all. Further, Mr. Herold admitted no wrongdoing. The only matter that Mr. Herold admitted any liability to was the restitution amount. He agreed to be jointly and severally liable with his wife on the restitution debt.

Estoppel

In the present case, the plaintiff urges this court to hold as a matter of law that Mr. Herold is estopped from discharging the restitution award. Mr. Johnson argues that both the state court and the victim in this case detrimentally relied on the promises of Mr. Herold. Estoppel arises where one party, by acts or conduct, induces another party to do that which he would not otherwise have done, and is thereby prejudiced. Cooper v. James, 2001 WL 521993 (S.D. 2001). The elements of promissory estoppel or detrimental reliance are a promise which the promissor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance; such a promise is binding if injustice can be avoided only by enforcement of the promise. Jacobson v. Gulbransen, 623 N.W.2d 84(S.D. 2001).

Presumably, in this case, the act of Mr. Herold signing the confession of judgment and irrevocable wage assignment caused the State and Mr. Johnson to rely, to their detriment, on his promises. It is unclear what the detriment of the parties is. It is possible that the detriment to the State is the promise not to charge Mrs. Herold with all the counts of

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DEBTOR(S))
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GARY JOHNSON,) CH. 7
) Filing No. 12,18,22,25
Plaintiff(s))
vs.) JUDGMENT
)
GEORGE EDMUND and)
LORI ANN HEROLD,)

Defendant(s)) DATE: June 19, 2001
HEARING DATE: February
22, 2001

Before a United States Bankruptcy Judge for the District of
Nebraska regarding Motion for Summary Judgment filed by Gary
Johnson, Plaintiff, and the Resistance by Defendants/debtors

APPEARANCES

Jerry Pollard, Attorney for defendants
Murl Miller, Attorney for plaintiff

IT IS ORDERED:

Judgment is entered in favor of plaintiff and against
defendant, Lori Ann Herold. The debt owed by her to Mr.
Johnson is nondischargeable. See Memorandum entered this
date. The case shall proceed against Mr. Herold.

BY THE COURT:

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

Copies faxed by the Court to:

POLLARD, JERRY 605-665-1952
MILLER, MURL 605-665-3524

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.