IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEBRASKA

IN THE MATTER OF:	)	
	)	
DOHRMAN MACHINE PRODUCTION, INC.,	)	CASE NO. BK93-82120
	)	
DEBTOR	)	CH. 11

MEMORANDUM

Hearing was held on December 17, 1996, on the Debtor's Objection to Proof of Claim filed by Stewart & Stevenson Services, Inc., and the Resistance by Claimant. Appearances: Sam Brower for the debtor; Chris Curzon for Schmid, Mooney & Frederick, P.C.; Eric Lindquist for Stewart & Stevenson. 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)(B).

Background

Stewart & Stevenson Services, Inc., (S&S), a creditor of the debtor Dohrman Machine Production, Inc., (Dohrman), filed a petition in the District Court of Harris County, Texas on August 4, 1993, alleging that the debtor had failed to pay the amount of $190,946.00 for equipment sold by it to the debtor. By agreement of the parties, the deadline for the debtor to file an answer was extended to November 23, 1993.[1]

On November 24, 1993, S&S filed a motion for default judgment. On that same date, Dohrman filed its answer. The Harris County District Court granted S&S's motion on December 2, 1993, and awarded S&S $190,946.00, together with interest of $19,041.11 and attorneys' fees of $63,700, despite the fact that the entry of default judgment after an answer has been filed, even one filed out of time, was contrary to Texas law as stated by the Texas appellate courts and the Texas Rules of Civil Procedure. The award of attorney fees is complained of by the debtor because S&S's petition and its motion for default judgment were prepared and submitted by in-house

[1]At the hearing, the debtor disputed the date that was agreed upon as the deadline for filing an answer. However, the debtor did not raise this issue in its post-trial brief.

counsel. Despite these facts, Dohrman did not appeal the entry of default judgment for reasons that are unclear.[2]

Dohrman filed its Chapter 11 petition on December 30, 1993. Its objection to that portion of the claim of S&S representing attorney fees was not filed until September 30, 1996, and a motion to amend that objection to resist the entire claim was filed subsequent to the hearing on the original objection. S&S filed its resistance to the debtor's objection to its claim on November 20, 1996. A hearing on the matter was held December 17, 1996.[3]

Decision

The award of attorney fees pursuant to the entry of default judgment is res judicata between the parties, and this court is prohibited by that doctrine and the Rooker-Feldman doctrine from revisiting any issues determined by that judgment. Accordingly, the issue of attorney fees in S&S's claim against the debtor is precluded. In addition, the same doctrines cause this court to be precluded from considering the validity of the balance of the claims, as requested in the motion to amend.

Discussion

In its original objection to claim, Dohrman seeks to have S&S's claim reduced by the amount of $63,700, or the amount of the attorney fees awarded pursuant to the default judgment. S&S claims that the issue regarding attorneys' fees is barred

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[2]At the hearing, there was some question as to whether Dohrman ever received notice of S&S's motion or the entry of judgment. Neither party produced evidence of this fact. However, S&S has submitted documents along with its post-trial brief which suggest that the clerk of the District Court in Texas did mail notice of the default judgment to Dohrman at its West Point, Nebraska post office box. Notice was not provided by either the clerk of the District Court or by S&S to the debtor's counsel in Nebraska or Texas.

[3] A related matter was also heard at the same time regarding the debtor's objection to the claim of Schmid, Mooney & Frederick, P.C. A ruling on that matter was deferred pending resolution of this issue.

by the doctrines of collateral estoppel and res judicata, and that the bankruptcy court must give full faith and credit to the Texas state court judgment.

In its post-trial brief, the debtor has cited a few Texas appellate court cases which hold that a default judgment may not be entered if there is an answer on file, even if that answer was filed out of time. See, R.T.A. Int'l, Inc. v. Cano, 915 S.W.2d 149 (Tex. App. 1996, writ denied); $429.30 in United States Currency v. State, 896 S.W.2d 363 (Tex. App. 1995, no writ); Dowell Schlumberger, Inc. v. Jackson, 730 S.W.2d 818 (Tex. App. 1987, writ ref'd n.r.e.). See also, Tex. R. Civ. P. 239. However, the propriety of the entry of default judgment in the state court case is an issue neither before the court presently, nor one which this court has the jurisdiction to determine under the Rooker-Feldman doctrine. Goetzman v. Agribank, FCB, 91 F.3d 1173 (8th Cir.), cert. denied, ___ U.S. ___, 117 S. Ct. 612 (1996). This court is prohibited from sitting as a super-appellate court to the Texas state court system, and cannot second-guess the decisions of Texas state court judges. Id.

If it is the position of the debtor that the default judgment was entered in error, the proper recourse was to petition the District Court Judge who entered the judgment or appeal the judgment to the Texas appellate courts. It would appear from a review of Texas case law and the Bankruptcy Code that an appeal might still be timely as of the date of this memorandum. See, 11 U.S.C. §§ 108(c), 362(c)(2)(C), 1141(d)(1)(A); Burrhus v. M & S Machine & Supply Co., 897 S.W.2d 871 (Tex. App. 1995, no writ); Roadside Stations, Inc. v. 7HBF, Ltd., 905 S.W.2d 1 (Tex. App. 1994, no writ); Raley v. Lile, 861 S.W.2d 102 (Tex. App. 1993, writ denied). See also, Dohrman v. Dohrman Machine Production, Inc. (In re Dohrman Machine Production, Inc.), No. 8:CV96-505 (D. Neb. December 19, 1996) (affirming denial of stay of confirmation order pending appeal).

The issue sub judice is whether the default judgment itself has a preclusive effect in this court, such that any litigation between the parties concerning the award of attorney fees is foreclosed, regardless of the fact that the judgment entered was contrary to Texas law and rules of civil procedure and that a Texas appellate court probably would have reversed the entry of judgment for that reason.

A federal court must look to the law of the state that rendered a judgment to determine whether that particular state would afford the judgment preclusive effect. Marrese v. American Academy of Orthopaedic Surgeons, 470 U.S. 373, 380, 105 S. Ct. 1327, 1331-32, 84 L. Ed. 2d 274 (1985). The parties to this lawsuit have used the doctrines of res judicata and collateral estoppel somewhat interchangeably. However, the two doctrines are not necessarily interchangeable and Texas courts make a distinction between them. Williams v. National Mortgage Co., 903 S.W.2d 398 (Tex. Ct. App. 1995, writ denied).

As delineated by the United States Supreme Court:

> Under res judicata, a final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action. Under collateral estoppel, once a court decides an issue of fact or law necessary to its judgment, that decision precludes relitigation of the same issue on a different cause of action between the same parties.

Kremer v. Chemical Construction Corp., 456 U.S. 461, 467 n.6, 102 S. Ct. 1883, 1890 n.6, 72 L. Ed. 262 (1982).

When the issue between the parties in a bankruptcy setting is the nature of a debt rather than the underlying judgment, i.e. whether the debt is dischargeable, then the doctrine of collateral estoppel, or issue preclusion, is generally involved. See, e.g., Gober v. Terra + Corp. (In re Gober), 100 F.3d 1195 (5th Cir. 1996); Gayden v. Nourbakhsh (In re Nourbakhsh), 67 F.3d 798 (9th Cir. 1995); Bush v. Balfour Beatty Bahamas, Ltd. (In re Bush), 62 F.3d 1319 (11th Cir. 1995). However, when the issue is the underlying judgment, the doctrine of res judicata, or claim preclusion is involved. See, e.g., Comer v. Comer (In re Comer), 723 F.2d 737 (9th Cir. 1984) (Attack on the amount of a judgment was barred by res judicata, and was distinguished from a determination of dischargeability).

The doctrine involved here is res judicata, as the dispute concerns the underlying state court judgment rather

than the nature of that judgment. Therefore, the law of the State of Texas regarding res judicata must be consulted.

In Texas, the following elements must be proved to successfully assert a defense of res judicata: (1) a prior final judgment on the merits by a court of competent jurisdiction; (2) identity of the parties and of those in privity with them; and (3) a second action based on the same claims as were raised or could have been raised in the first action. Amstadt v. United States Brass Corp., 919 S.W.2d 644 (Tex. 1996). There is no question that the Texas court had jurisdiction over both parties, that the parties were the same in the state court case as they are in this contested matter, and that the objection to S&S's claim is based on the same claims or defenses that could have been raised in the state court action. The only question is whether a default judgment is a final judgment.

A default judgment does not carry with it a presumption of finality as would a judgment entered following a trial on the merits in Texas. Zamarripa v. Sifuentes, 929 S.W.2d 655 (Tex. App. 1996, no writ). In order to determine whether the default judgment entered was final, a court must determine the intention of the trial court from the language of the decree and the record as a whole. Id. at 656.

In the case at bar, the trial court disposed of all of the issues raised in S&S's petition, and neither party has yet to appeal the judgment. The debtor did not collaterally attack the judgment in the bankruptcy court until almost three years after judgment had been entered. This judgment is final for res judicata purposes, and all of the elements of res judicata are therefore satisfied.

It does not matter for res judicata purposes, as it might under the doctrine of collateral estoppel, that the judgment entered in Texas was a default judgment. The vast majority of cases in the country, including the U.S. Supreme Court and the Fifth and Eighth Circuit Courts of Appeal, have held that even a default judgment operates as res judicata if issued by a court with proper jurisdiction over the parties and subject matter and in the absence of fraud or collusion. See, Morris v. Jones, 329 U.S. 545, 550-51, 67 S. Ct. 451, 455, 91 L. Ed. 488 (1947); Kapp v. Naturelle, Inc. (In re Kapp), 611 F.2d 703 (8th Cir. 1979); Moyer v. Mathas, 458 F.2d 431 (5th Cir. 1972). See also, Sewell v. Merrill, Lynch, Pierce, Fenner, &

Smith, Inc., 94 F.3d 1514 (11th Cir. 1996); SMA Life Assurance Co. v. Sanchez-Pica, 960 F.2d 274, 275 (1st Cir. 1992); Schlangen v. Resolution Trust Corp., 934 F.2d 143 (7th Cir. 1991); Credit Alliance Corp. v. Williams, 851 F.2d 119 (4th Cir. 1988); Young Eng'rs, Inc. v. United States Int'l Trade Comm'n, 721 F.2d 1305 (Fed. Cir. 1983); In re Roloff, 598 F.2d 783 (3d Cir. 1979);McDonald v. U.S. Die Casting & Dev. Co., 628 So.2d 433 (Ala. 1993); Arnold & Arnold v. Williams, 870 S.W.2d 365 (Ark. 1994); Martin v. General Fin. Co., 48 Cal. Rptr. 773 (Cal. Ct. App. 1966); Magliocco v. Olson, 762 P.2d 681 (Colo. Ct. App. 1987); Ratner v. Willametz, 520 A.2d 621 (Conn. App. Ct. 1987); Tutt v. Doby, 265 A.2d 304 (D.C. 1970); Bay Fin. Sav. Bank v. Hook, 648 S.2d 305 (Fla. Dist. Ct. App. 1995); Morgan v. Department of Offender Rehabilitation, 305 S.E.2d 130 (Ga. Ct. App. 1983); Matsushima v. Rego, 696 P.2d 843 (Haw. 1985); Grisanzio v. Bilka, 511 N.E.2d 762 (Ill. App. Ct. 1987); Millison v. ADES of Lexington, Inc., 277 A.2d 579 (Md. 1971); Schwartz v. Flint, 466 N.W.2d 357 (Mich. Ct. App. 1991); First State Bank v. Muzio, 666 P.2d 777 (N.M. 1983); Robbins v. Growney, 645 N.Y.S.2d 791 (N.Y. App. Div. 1996); Fox v. Gabler, 626 A.2d 1141 (Pa. 1993); McAfee v. O'Hare, 604 A.2d 781 (R.I. 1992); A.B.C.G. Enters., Inc. v. First Bank Southeast, N.A., 515 N.W.2d 904 (Wis. 1994).

In a case factually similar to this one, In re Husain, 168 B.R. 591 (Bankr. S.D. Tex. 1994), a debtor sought to have the bankruptcy court reduce or disallow attorney fees awarded by a state court judge. The bankruptcy court held that it could not alter or amend the award.

> [H]ere the attorneys fees were incurred and awarded pre-petition and this court is not prepared to, and can find no authority for [altering or amending a final state court judgment] . . . The debtor could have appealed the judgment, or filed her bankruptcy petition before the judgment was entered or . . . she could have filed a controverting affidavit to challenge the amount of the attorney's fees requested . . . She did none of the above and the state court judgment is now res judicata.

Id. at 594.

Therefore, the default judgment entered by the Texas state court in this matter is res judicata between the

parties, and this court may not revisit any of the issues determined by that judgment. Dohrman's objection to the claim of S&S is overruled.

Separate journal entry to be filed.

DATED: January 15, 1997

BY THE COURT:

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

Copies faxed by the Court to:

BROWER, SAM R.	397-4633
CURZON, CHRISTOPHER	493-7005
LINDQUIST, ERIC	392-0816

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.

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEBRASKA

IN THE MATTER OF: DOHRMAN MACHINE PRODUCTION, INC., DEBTOR(S) Plaintiff(s) vs. Defendant(s)	CASE NO. BK93-82120 A CH. 11 Filing No. 369, 389 JOURNAL ENTRY DATE: January 15, 1997 HEARING DATE: December 17, 1996

Before a United States Bankruptcy Judge for the District of Nebraska regarding Debtor's Objection to Proof of Claim #48 & 91 filed by Stewart & Stevenson Services, Inc.; Resistance by Claimant.

APPEARANCES

Sam Brower, Attorney for debtor
Chris Curzon, Attorney for applicant
Eric Lindquist, Attorney for Stewart & Stevenson, etc.

IT IS ORDERED:

Dohrman's objection to the claim of S&S is overruled.

BY THE COURT:

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

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