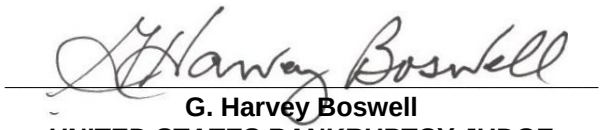
Not intended for publication

Dated: March 20, 2006
The following is SO ORDERED.



G. Harvey Boswell
UNITED STATES BANKRUPTCY JUDGE

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF TENNESSEE
EASTERN DIVISION

In re:	
DON & PATRICIA HOPPER,	**CASE NO. 04-14185**
debtor.	**Chapter 7**
WOODLIST, INC.,	
plaintiff	
v.	**Adv. Pro. No. 04-5377**
DON HOPPER & PATRICIA HOPPER	
defendants.	

MEMORANDUM OPINION AND ORDER DENYING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

At issue in this case is the dischargeability of a judgment the Superior Court of the Commonwealth of Massachusetts allegedly awarded to the plaintiff against the debtors in 2002. Woodlist, Inc., ("Woodlist"), filed a complaint seeking to except the judgment debt from the debtors' discharge on December 17, 2004. As grounds for this complaint, Woodlist alleged that the debt should be excepted from the Hoppers' discharge pursuant to 11 U.S.C. § 523(a)(6) as one which resulted from a "willful and malicious injury."

On January 18, 2006, at a pre-trial conference in the adversary proceeding, Woodlist's attorney informed the Court that he would be filing a motion for summary judgment on behalf of his client. After listening to arguments and upon agreement of the parties, the Court agreed to take the motion under advisement once it was filed. Woodlist's motion for summary judgment was filed on February 13, 2006.[1]

The January 18, 2006, hearing on the plaintiff's motion for summary judgment was conducted pursuant to FED. R. BANKR. P. 9014. Resolution of this matter is a core proceeding. 28 U.S.C. § 157(b)92). This Memorandum Opinion and Order shall serve as the Court's findings of facts and conclusions of law. FED. R. BANKR. P. 7052.

I. FINDINGS OF FACT

On May 16, 2002, Woodlist, Inc. filed a complaint against "Don Hopper, individually and in his corporate capacity, together with Patty Hopper, Margaret Mitchell and David Henderson, d/b/a Hardwood Brokers of America" in the Superior Court of the Commonwealth of Massachusetts. The action alleged breach of contract, conversion and violation of Massachusetts General Laws chapter 93A, section 11. According to the complaint, Woodlist allegedly placed fourteen separate purchase orders with the Hoppers for various types of wood flooring. Woodlist wired a total of $57,160.81 to the debtors for these orders. The Hoppers accepted all fourteen orders as well as the $57,160.81; however, the Hoppers failed to fill any of the purchase orders. Although Woodlist made numerous demands on the debtors for return of the wired money, the Hoppers never returned any portion of the $57,160.81.

The Hoppers never responded to the Massachusetts complaint. As a result, Woodlist filed a "Motion for Entry of Default Judgement and Assessment of Damages." According to the Plaintiff, the Superior Court of Massachusetts granted that motion and on August 22, 2002, issued a "Findings and Order" and an "Assessment of Damages" awarding the plaintiffs $57,160.81 in regular damages and $114,321.62 in punitive damages. The plaintiff attached copies of the August 22, 2002, "Findings and Order" and the August 22, 2002, "Assessment of Damages" as exhibits to its "Memorandum of Law in Support of Plaintiff's Motion for Summary Judgment;" however, there is a handwritten notation on the front page of each of these documents which states that "[t]he entry of this [document] . . . is vacated pursuant to Rule 60(a) having entered in error." Each notation is dated September 5, 2002.

Woodlist also attached two separate notices of docket entry to its "Memorandum of Law in Support of Plaintiff's Motion for Summary Judgment." These notices state that an "Assessment of

[1]The attorney for Woodlist, Kevin Baskette, filed his brief and memorandum of law in support of the plaintiff's motion for summary judgment immediately after the January 18th hearing; however, due to oversight, the actual motion for summary judgment was not filed until February 13, 2006.

Damages" dated August 22, 2002, and a "Findings and Order of the Court" dated August 22, 2002, were docketed to the state court case on September 5,2002. Given the fact that the notations on the August 22, 2002, "Assessment of Damages" and the "Findings and Order" state that each document was vacated on September 5, 2002, and the notices of docket entry were dated September 5, 2002, this Court is unable to decipher whether or not an "Assessment of Damages" or a "Findings and Order" was ever actually entered in the state court lawsuit. Woodlist's attorney made no attempt to clarify this fact either in his pleadings or at the hearing in the matter.

The Hoppers filed their chapter 7 petition on September 20, 2004. The debtors listed Woodlist on their schedule F with an "unknown" amount. Woodlist filed their adversary complaint against the debtors on December 17, 2004. The debtors were granted a discharge on December 29, 2004; however, the debt owing to Woodlist was excepted from the discharge pending resolution of this proceeding.

In its motion for summary judgment, Woodlist argued that because the Massachusetts court found that the debtors had converted the plaintiff's funds and that the plaintiffs had engaged in unfair and deceptive practices, the Massachusetts judgment necessarily supported the conclusion that the debtors had willfully and maliciously injured the plaintiffs. Woodlist did not introduce any items into evidence at the hearing on its motion for summary judgment. Woodlist also failed to offer any testimony regarding the motion. It simply filed its motion and memorandum of law which cited the state court decision. Woodlist did not offer any proof as to what items, if any, of evidence were submitted to the trial court in Massachusetts.

II. CONCLUSIONS OF LAW

Summary judgment is appropriate when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, 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." FED. R. CIV. P. 56(c) made applicable to bankruptcy proceedings by FED. R. BANKR. P. 7056. "The moving party has the burden of proving that no genuine issue as to any material fact exists and that it is entitled to a judgment as a matter of law." *R.S.W.W., Inc., v. City of Keego Harbor*, 397 F.3d 427, 433 (6th Cir. 2005). "A moving party can meets its burden under Rule 56(c) by '"showing"–that is, pointing out to the district court–that there is an absence of evidence to support the nonmoving party's case.'" *Amini v. Oberlin College*, 2006 WL 566871, *5 (6th Cir. 2006) (citing *Celotex Corp. v. Catrett,* 477 U.S. 317, 325, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986)). "Once the moving party has made that showing, the nonmoving party cannot rest on his pleadings but must identify specific facts that can be established by admissible evidence, which demonstrate a genuine issue for trial." *Amini,* 2006 WL at *5. When considering a motion for summary

judgment, a court must view all the facts and make all reasonable inferences in favor of the non-moving party. *Williams v. Mehra*, 186 F.3d 685, 869 (6th Cir. 1999) (citations omitted).

Although not specifically mentioned by the plaintiff, Woodlist is essentially basing its summary judgment argument on the principle of collateral estoppel. This doctrine mandates that a federal court give "the same full faith and credit [to a state court judgment] . . . as they have by law or usage in the courts of such State . . . from which they are taken." 28 U.S.C. § 1738. The principle of collateral estoppel applies in bankruptcy dischargeability proceedings. *Grogan v. Garner*, 498 U.S. 279, 284 n. 11, 111 S.Ct. 654, 658 n. 11, 112 L.Ed. 2d 755 (1991). Although the bankruptcy court has exclusive jurisdiction to determine whether a debt is excepted from discharge under § 523(a)(6), *see* 11 U.S.C. § 523(c), "a state court judgment may in some circumstances have preclusive effect in a subsequent action within the exclusive jurisdiction of the federal courts." *Rally Hill Productions, Inc., v. Bursack (In re Bursack),* 65 F.3d 51, 53 (6th Cir. 1995) (quoting *Marrese v. American Academy of Orthopaedic Surgeons*, 470 U.S. 373, 380, 105 S.Ct. 1327, 1332, 84 L.Ed.2d 274 (1985)).

In deciding whether or not to give full faith and credit to a state court default judgment, a federal court must "'consider first the law of the State in which the judgment was rendered to determine its preclusive effect.'" *Bay Area Factors v. Calvert (In re Calvert)*, 105 F.3d 315, 317 (6th Cir. 1997) (citing *Marrese*, 470 U.S. at 375, 105 S.Ct. At 1329). If the federal court finds that the state would not give the default judgment any preclusive effect, then the federal court may not either. "If, however, the state would accord the judgment preclusive effect, *Marrese*, instructs that the federal court give preclusive effect to the judgment unless Congress has expressly or impliedly created an exception to § 1738 which ought to apply to the facts before the federal court." *Calvert*, 105 F.3d at 317 (citing *Marrese*, 470 U.S. at 386, 105 S.Ct. at 1334-35).

In the case of *Treglia v. MacDonald*, 717 N.E.2d 249 (Mass. 1999), the First Circuit Bankruptcy Appellate Panel certified the following question to the Supreme Judicial Court of Massachusetts:

> When a defendant appears in a civil action, files a motion seeking interlocutory relief, obtains that relief, but does not thereafter answer or defend; and when, after a damage hearing (in which the defendant does not participate), default judgment enters; does Massachusetts law preclude the defendant's litigation of the substantive elements underlying the default judgment in a subsequent action initiated by the same plaintiffs?

The facts in *Treglia* can be summed up quickly. The plaintiffs sold the defendant their house. In exchange, the defendant gave the plaintiffs a promissory note which was secured by a separate piece of property. The defendant defaulted on the note and the Treglias filed suit for fraud and breach of contract. The plaintiffs also filed an ex parte motion for attachment of the real estate. The state court judge

granted that motion and a writ issued. Four months later, the defendant was served with a copy of the state court complaint and the writ. He promptly filed a motion to modify and discharge the attachment order. The judge granted his motion without opposition. The defendant filed another such motion several months later. Aside from those two motions, the defendant did not participate in the state court lawsuit at all. As a result, the state court granted the plaintiffs a default judgment in July 1990. In February 1991, the state court conducted a hearing on damages and awarded the Treglias $94,365.15 for the fraud. The judge was not asked to and did not make any findings.

The defendant filed a chapter 7 bankruptcy petition in October 1991. The Treglias filed an adversary complaint against him under § 523(a)(2)(A). They alleged that under the doctrine of collateral estoppel they were entitled to a judgment as a matter of law. The Bankruptcy judge rejected that claim, allowed the trial on the fraud complaint to go forward, and found that the Treglias had not satisfied their burden of proof. The Bankruptcy judge dismissed the complaint against the debtor. The Treglias appealed the decision to the B.A.P. The B.A.P. noted that "were this a simple no-appearance, no answer default," it would affirm the bankruptcy judge's ruling; however, because the debtor did appear in the state court proceedings and did participate to a limited extent, they were less certain of how to decide the issue. The B.A.P. then certified the above-quoted question to the Massachusetts Supreme Court.

In analyzing the question certified to it, the Massachusetts court stated that "[w]e have held that '[w]hen an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or a different claim.'" *Treglia*, 717 N.E.2d at 252 (citing *Martin v. Ring*, 401 Mass. 59, 61, 514 N.E.2d 663 (1987)). The court went on to state:

> We have not, however, squarely decided whether a default judgment is entitled to the same preclusive effect as any other judgment. In *Martin v. Ring, supra,* we noted that the "guiding principle" in determining whether to allow a party the use of collateral estoppel is whether the party against whom it is asserted had a "full and fair opportunity to litigate the issue in the first action or [whether] other circumstances justify affording him an opportunity to relitigate the issue."

Treglia, 717 N.E.2d at 252-53 (citing *Martin*, 401 Mass. at 62). In the case before them ,the Treglias asserted that MacDonald had a "full and fair" opportunity to litigate the question of fraud in the state court suit and because they received a final judgment, they should not have to relitigate the fraud issue in bankruptcy court.

The Massachusetts Supreme Court relied extensively on the Restatement (Second) of Judgments in deciding the case. "It is generally held that a default judgment does not have preclusive effect on an

issue in a subsequent action because the issues have not been actually litigated." *Treglias*, 717 N.E.2d at 253 (citing the Restatement (Second) of Judgments § 27 comment e):

> We reaffirm that preclusive effect should not be given to issues or claims that were not actually litigated in a prior action. *Martin v. Ring, supra* at 61, 514 N.E.2d 663. We also recognize, for much the same policy reasons expressed by the drafters of the Restatement, that generally in the case of a judgment entered by default, none of the issues is actually litigated or decided. See Restatement (Second) of Judgments, *supra* at § 27 comment e, at 256-257. Cf. *Martin v. Ring, supra* at 62-63, 514 N.E.2d 663 ("record demonstrates that the causation issue was one fully litigated and essential to the findings of the board"). In this case, the Treglias obtained their attachment on MacDonald's property without MacDonald's having an opportunity to be heard. When notified of the attachment, MacDonald sought successfully to modify and discharge it. He did not otherwise attempt to defend himself from the fraud charges made by the Treglias against him. While he filed an appearance in the Superior Court, there is nothing to suggest that the issue of fraud or any other issue of liability was "fully litigated." We agree with the judge in the bankruptcy court that the judge in the Superior Court "received evidence only as to the amount of damages. As to liability, the court received no evidence and made no findings of fact or conclusions of law." On this record, we cannot conclude that the issue of fraud raised by the Treglias was "actually litigated" in the Superior Court.
>
> We caution that, even in the case of a judgment entered by default, there may be some circumstances in which an issue may be given preclusive effect in subsequent litigation between the same parties. We can, for example, envision circumstances in which a litigant may so utilize our court system in pretrial procedures, but nonetheless be defaulted for some reason, that the principle and rationale behind collateral estoppel would apply. See, e.g., *Matter of Gober,* 100 F.3d 1195 (5th Cir.1996) (holding that default judgment based on failure to answer does not support issue preclusion but where default issued as discovery sanction against defendant debtor after two years of litigation in which defendant had answered and denied all allegations of complaint, collateral estoppel applied); *In re Bush,* 62 F.3d 1319, 1324 (11th Cir.1995) (applying collateral estoppel effect to prior default judgment against debtor based on fraud, where debtor "actively participated" in adversary process for almost one year through filing answer, counterclaim, and discovery requests). We need not specify here the circumstances in which our general rule would not be applicable, because the facts of this case fully support the decision of the judge of the bankruptcy court that the application of collateral estoppel is not appropriate to the Treglias' claim of fraud. For the reasons stated, we answer the question certified in the negative.

Id. at 253-54 (footnotes omitted).

A decision by the Bankruptcy Court for the district of Massachusetts reiterates the *Treglia* holding. In *Staniunas v. Delisle (In re Delisle)*, 281 B.R. 457 (Bankr. D. Mass. 2002), the plaintiff filed a state court lawsuit alleging that the debtor failed to make truck payments and that she fraudulently converted funds from a joint account. The debtor failed to answer the lawsuit and the Massachusetts

state court granted a default judgment to the plaintiff and ordered the debtor to pay the plaintiff $80,000 plus interest. The debtor sought to vacate the default judgment but was unsuccessful. The debtor appealed the decision to the Massachusetts Appeals Court. Shortly thereafter, the debtor filed a chapter 7 petition. The state court plaintiff filed an adversary proceeding against the debtor under 11 U.S.C. § 523(a)(4), (a)(2)(A) and 727(a)(2)(A). The plaintiff argued that the state court judgment should have preclusive effect under the doctrine of collateral estoppel.

The Bankruptcy Court ruled that "[t]he principle of collateral estoppel is not applicable to the case at bar, however, because the prior state court proceeding involved a default judgment, and, accordingly, the issues were not actually litigated." *Id.* at 463. The court relied on the case of *Phalon v. Varrasso (In re Varrasso),* 194 B.R. 537 (Bankr. D. Mass. 1996) in making its ruling. In the *Varrasso* case, the debtor did not answer a state court complaint, the court entered a default and assessed damages pursuant to MASS. R. CIV. P. 55(b)(2). The *Varrasso* court relied on the *Treglia* case and found that "when a judgment enters default, the issues raised by the complaint are not actually litigated, such that the judgment can have no preclusive effect in subsequent proceedings." *Id*. at 539 (citing *Treglia*, 717 N.E.2d at 253). The *Delisle* court concluded that "the state court judgment does not have collateral estoppel effect in these bankruptcy proceedings." *Delisle*, 281 B.R. at 463; *see, also, Moore v. Murphy (In re Murphy*), 297 B.R. 332, 348 (Bankr. D.Mass. 2003) (finding that collateral estoppel does not apply in a dischargeability action in the case of a judgment entered by default).

In the case at bar, Woodlist did not present any proof to the Court that a default judgment was in fact entered by the Massachusetts trial court. Based on this lack of evidence, the Court has no other choice but to deny the plaintiff's motion for summary judgment. The Court would like to point out, however, that even if Woodlist had introduced evidence that the Massachusetts court did indeed issue a default judgment against the debtors, the Court would still deny its motion. It is clearly settled under Massachusetts law that Massachusetts courts do not give default judgments any preclusive effect in subsequent litigation. There is no evidence in the case at bar that the debtors ever participated in the state court lawsuit in even the smallest way. In both *Treglia* and *Delisle*, the debtors took some action in the state court suits before a default judgment was granted. Surely if the default judgments in those cases have no preclusive effect, then a default judgment issued in a case in which the defendants had 0% participation would most certainly not be given any either.

ORDER

It is therefore **ORDERED** that the Plaintiff's "Motion for Summary Judgment" is **DENIED.**

IT IS SO ORDERED.

Mailing Information

Timothy Latimer, Attorney for Debtors
Kevin Baskette, Attorney for Woodlist, Inc.
Chapter 7 Trustee