

**UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF TENNESSEE
EASTERN DIVISION**

IN RE

William Ray Browning,

Case No. 01-15789

Debtor.

Chapter 7

Rogers Group Inc.,

Plaintiff,

v.

Adv. Pro. No. 02-5083

**William Ray Browning
dba Earth Movers,**

Defendant.

**MEMORANDUM OPINION AND ORDER GRANTING
PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT**

The Court heard arguments in this matter on September 18, 2002. FED. R. BANKR. P. 9014. Pursuant to 28 U.S.C. § 157(b)(2), this is a core proceeding. After reviewing the briefs of the parties and the record as a whole, the Court makes the following findings of facts and conclusions of law. FED. R. BANKR. P. 7052.

I. FINDINGS OF FACT

At issue in this matter is whether or not a state court judgment for conversion and civil conspiracy to defraud entitles the plaintiff to summary judgment on their complaint objecting to discharge under 11 U.S.C. § 523(a)(2)(A), (4) and (6). On August 7, 2001, the Chancery Court of Davidson County awarded the plaintiff in this matter, Rogers Group, ("Rogers"), a judgment in the amount of \$60,350.00 against the debtor, William Ray Browning, ("Browning" or "debtor") for the torts of conversion and civil conspiracy to defraud.

The particular pattern of behavior which led to the state court judgment is rather lengthy and, for purposes of this memorandum opinion and order, need only be summarized. From 1993 until 1996, Browning sold used equipment to and bought used equipment from Rogers. In every one of the sales, Browning worked with Jefferson Lee Harrington, a Rogers employee. At some point during these

transactions, Harrington decided to start defrauding Rogers by taking a cut of the sales' prices.¹ The Chancery Court found that, based upon the evidence as presented to it, Browning eventually learned of this fraud and helped Harrington further his fraudulent behavior. The Chancery Court further found that Browning, at least on one occasion, received \$5,000.00 more than his asking price for a piece of equipment as a result of Harrington's fraudulent behavior.

In ruling on the case, the Chancery Court drew several conclusions about Browning's behavior during the course of his interaction with Harrington. The relevant passages from the Chancery Court's Memorandum and Order are as follows:

The Court therefore concludes that as of June 10, 1994, the plaintiff has tipped the balance in its favor and has shown that the defendant knew or should have known that Mr. Harrington was not telling his boss at Rogers the dollar amount the defendant was willing to buy or sell the equipment for. In continuing to deal with Mr. Harrington the defendant was participating in a fraud on Rogers.

In the case at bar, as of June 10, 1994, there was at least a tacit understanding between the defendant and Mr. Harrington that Mr. Harrington was misrepresenting and inflating prices to Rogers and by that fraud the defendant was able to accomplish his purpose of dealing with Rogers.

In the case at bar, the court has found that the defendant knew or should have known as of June 10, 1994, that he was dealing in Roberts' goods and moneys at prices inflated by Mr. Harrington. Given the defendant's knowledge, his actions constitute conversion--- assuming control over property that is inconsistent with the rights of the owner. Therefore, based on the theories of conversion and civil conspiracy, the Court finds that the defendant is liable to the plaintiff in the amount of commissions received by Mr. Harrington from June 10, 1994, through May 13, 1996, in the amount of \$60,350.00.

While the plaintiff has demonstrated by a preponderance of the evidence that from June 10, 1994, forward in time the defendant knew or should have known that Mr. Harrington was defrauding Rogers of money on equipment sales, and nevertheless, the defendant assumed control over Rogers' property and facilitated Mr. Harrington's fraud, the plaintiff has not carried the more onerous burden required to award punitive damages. [The other pieces of evidence introduced at the trial] cause the Court to conclude that the proof falls short of clear and convincing that the defendant acted intentionally, maliciously or with reckless disregard.

¹Harrington pled guilty to the felony of theft of Rogers' property over \$60,000.00 in October 1996.

Rogers Group, Inc., v. Ray Browning dba Earth Movers, No. 99-3319-III, slip op. 8-9 (Chancery Court Davidson County, August 7, 2001).

Browning filed for chapter 7 relief in this Court on December 19, 2001. Rogers filed the instant adversary proceeding against the debtor on March 11, 2002, alleging that its debt was nondischargeable pursuant to 11 U.S.C. § 523(a)(2)(A), (4), and/or (6). On June 21, 2002, Rogers filed a motion for summary judgment in which it alleged that the August 7, 2001, Chancery Court judgment entitles it to a judgment of nondischargeability as a matter of law. Browning objected to this motion.

In the briefs submitted in support of its motion for summary judgment, as well as at the hearing on its motion, Rogers made the following allegations:

1. Browning was found liable for civil conspiracy to defraud by the Chancery Court.
2. Browning is collaterally estopped from re-litigating the findings of fact and conclusions of law reached by Davidson County Chancery Court.
3. Pursuant to *Alworth v. Levy (In re Levy)*, 250 B.R. 638 (Bankr. W.D.Tenn. 2000), the elements of fraud in state court are the same as in a § 523(a)(2)(A) exception to discharge matter.
4. Pursuant to *Dale v. Thomas H. Temple Co.*, 208 S.W.2d 344 (Tenn. 1948), once you are found guilty or liable as a participant in a civil conspiracy to defraud, you are liable for all of the consequences of the act as if you had done it yourself.

In reply to Rogers' allegations, Browning argued that:

1. He was found liable under a theory of conspiracy only and not actual fraud.
2. The Chancery Court was using the word "fraud" in its memorandum and order in a descriptive sense and not a legal sense.
3. The Chancery Court made an affirmative finding that he did not act willfully or maliciously.

II. CONCLUSIONS OF LAW

The plaintiff in this matter has filed a motion for summary judgment alleging that (1) the doctrine of collateral estoppel bars the debtor from relitigating the issues decided by the Chancery Court and (2) the state court imposition of liability on Brown for conspiracy entitles it to a judgment as a matter of law. The debtor, on the other hand, alleges that the Chancery Court did not find the debtor liable for fraud and, therefore, summary judgment is inappropriate.²

²Because the Chancery Court concluded that there was not clear and convincing evidence that the defendant acted intentionally, maliciously or with reckless disregard, the Court finds that summary judgment under § 523(a)(6) is not appropriate in this matter.

As this Court has previously stated, 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). "In determining whether the non-moving party has raised a genuine issue of material fact, [t]he evidence of [the non-moving party] is to be believed, and all justifiable inferences are to be drawn in [his] favor.'" *PSI Repair Servs., Inc. v. Honeywell, Inc.*, 104 F.3d 811, 814 (6th Cir.1997) (quoting *Eastman Kodak Co. v. Image Technical Servs., Inc.*, 504 U.S. 451, 456, 112 S.Ct. 2072, 2076, 119 L.Ed.2d 265 (1992)).

There are two cases which this Court finds instructive in deciding the summary judgment issue in the case at bar. The first is the case of *Alworth v. Levy (In re Levy)*, 250 B.R. 638 (Bankr. W.D.Tenn. 2000). In this case, a creditor alleged that she was entitled to summary judgment based on a Chancery Court's pre-petition judgment holding the debtor liable for fraud. In support of her motion, the creditor alleged that the doctrine of collateral estoppel precluded the debtor from relitigating the Chancellor's finding of fraud. In deciding that summary judgment was appropriate in the case, Judge Brown discussed both collateral estoppel and the Rooker-Feldman doctrine.

In discussing the applicability of collateral estoppel to the *Levy* case, Judge Brown set forth a thorough explanation of the doctrine:

The principle of collateral estoppel applies in bankruptcy dischargeability proceedings as it does in other courts. *Grogan v. Garner*, 498 U.S. 279, 284 n. 11, 112 S.Ct. 654, 658 n. 11, 112 L.Ed.2d 755 (1991). Although this is not a pre-bankruptcy, default-judgment scenario, the discussion of preclusion found in the Sixth Circuit's *Rally Hill Productions, Inc. v. Bursack (In re Bursack)* 65 F.3d 51 (6th Cir.1995), is instructive. First, the bankruptcy court must 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." *Id.* at 53 (quoting 28 U.S.C. § 1738). Second, although a fraud-based dischargeability determination under 11 U.S.C. § 523(a)(2)(A) lies exclusively in the bankruptcy court, *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." *In re Bursack*, 65 F.3d at 53 (quoting *Marrese v. American Academy of Orthopaedic Surgeons*, 470 U.S. 373, 380, 105 S.Ct. 1327, 1332, 84 L.Ed.2d 274 (1985)). Third, "[i]n cases involving claims within the exclusive jurisdiction of the federal courts, a court determining whether or not to apply collateral estoppel first must determine if a state court judgment would receive preclusive effect in the state where it was rendered." *Id.* (citing *Marrese*, 470 U.S. at 386, 105 S.Ct. at 1334-35). "If the answer to this question is yes, the court must give that judgment preclusive effect unless it determines that an exception to § 1738 should apply." *Id.* This third prong of the test

typically comes into play when the pre-bankruptcy judgment is based upon a default rather than a trial on the merits.

Levy, 250 B.R. at 641-642. Because the debtor had participated in the chancery court hearing, Judge Brown concluded that Tennessee courts would give the "chancery court's fraud-based judgment preclusive effect, as 'collateral estoppel bars relitigation of an issue if it was raised in an earlier case between the same parties, actually litigated, and necessary to the judgment of the earlier case.'" *Id.* at 642 (citing *Maresse*, 470 U.S. at 386, 105 S.Ct. at 1334-35). Judge Brown further concluded that the elements necessary to prove fraud under Tennessee law did not differ from the elements necessary to prove fraud under § 523(a)(2)(A). *Levy*, 250 B.R. at 642.

_____ After discussing the applicability of collateral estoppel to the *Levy* case, Judge Brown went on to address the debtor's assertions that at least part of the state court judgment was not based on fraud:

. . . the Debtor is attempting to collaterally attack the Chancellor's findings and judgment, in an effort to say that a portion of that judgment may not be fraud-based. Apparently, the Debtor chose to file for bankruptcy relief rather than appeal the Chancery Court judgment. The state appellate courts were the appropriate courts in which to attack that judgment. The Supreme Court has made it clear in *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), that "the federal trial courts have only original subject matter, and not appellate, jurisdiction [and] ... may not entertain appellate review of [or collateral attack on] a state court judgment." *Singleton v. Fifth Third Bank of Western Ohio (In re Singleton)*, 230 B.R. 533, 536 (6th Cir. BAP 1999) (quoting *In re Johnson*, 210 B.R. 1004, 1006 (Bankr.W.D.Tenn.1997).

Levy, 250 B.R. at 643. Once a state court has made a ruling with regard to certain behavior, the Rooker-Feldman doctrine prohibits a federal court from going behind that judgment and acting as an appellate court.

The second case which provides guidance for the Court is *M.P. Industries, Inc., v. Holzman (In re Holzman)*, 62 B.R. 218 (Bankr. S.D. Fla. 1986). In that case, the debtor had been found liable by a state court for conspiracy to defraud. Once the debtor filed for bankruptcy relief, the judgment creditor filed an adversary proceeding pursuant to § 523(a)(2)(A). In ruling on the creditor's subsequent motion for summary judgment, the bankruptcy court held that the state court judgment for conspiracy to defraud was a debt for "money obtained by false pretenses, a false representation, or actual fraud on the debtor's part and [the] debt is, therefore, excepted from discharge under § 523(a)(2)(A)." *Id.* at 221. The

Holzman court also found that based on the principles of collateral estoppel, summary judgment was appropriate in the case. *Id.*

In the case at bar, the Chancery Court found the debtor liable for conspiracy to defraud Rogers. Browning participated in that hearing and this Court finds that courts in Tennessee would give the chancery court's fraud-based judgment preclusive effect. The Court further concludes that, despite Browning's allegations that the Chancery Court used the word "fraud" in a descriptive sense and not a legal one, the Chancery Court found Browning liable for fraudulent behavior. The Chancery Court explicitly stated that "in continuing to deal with Mr. Harrington, [Browning] was participating in a *fraud* on Rogers" and "by that *fraud*, [Browning] was able to accomplish his purpose of dealing with Rogers." It seems clear to this Court that "fraud," in both the descriptive and legal sense, is what the Chancery Court felt Browning was guilty of. If Browning felt that the Chancellor did not really mean "fraud," he should have appealed the Chancery Court judgment. It would be highly inappropriate for this Court to now take the Chancellor's words and alter their meaning. Additionally, the *Holzman* court found conspiracy to defraud liability to be non-dischargeable under § 523(a)(2)(A) and this Court agrees with that finding.

Based on the forgoing conclusions, this Court finds that summary judgment in favor of the plaintiff is appropriate in this matter.

III. ORDER

It is therefore **ORDERED** that the Plaintiff's Motion for Summary Judgment is **GRANTED**. It is **FURTHER ORDERED** that the Plaintiff is granted a non-dischargeable judgment against the debtor in the amount of \$60,350.00.

IT IS SO ORDERED.

By the Court,

G. Harvey Boswell
United States Bankruptcy Judge

Date: October 30, 2002