UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

In re

HERBERT LEE TANNER,

Debtor.

Chapter 7
Case No. 92-32261-X

BIOGEN DISTRIBUTORS, INC.,

Plaintiff,

v.

Adv. Proc. No. 94-0777

HERBERT LEE TANNER, the above-named debtor,

Defendant.

MEMORANDUM AND ORDER RE PLAINTIFF'S RENEWED MOTION FOR SUMMARY JUDGMENT ARISING OUT OF ITS COMPLAINT TO DETERMINE THE DISCHARGEABILITY OF A DEBT UNDER 11 U.S.C. § 523(a)

In this adversary proceeding the plaintiff, Biogen Distributors, Inc. ("Biogen"), seeks a nondischargeable judgment against the defendant, Herbert Lee Tanner, the above-named chapter 7 debtor, under the provisions of 11 U.S.C. § 523(a)(4) and (6) and FED. R. BANKR. P. 4007.

By virtue of 28 U.S.C. § 157(b)(2)(I) these are core proceedings; and the court has jurisdiction under 28 U.S.C. §§ 1334 and 157(a) and Miscellaneous District Court Order No. 84-30 entered on July 11, 1984. The following shall constitute the court's findings of fact and conclusions of law in accordance with FED. R. BANKR. P. 7052.

The following background facts are not in substantial dispute and may be briefly summarized as follows: On or about October 14, 1988, Biogen and Dynatel Telecommunications, Inc. ("Plaintiffs") filed a complaint in the Dade County, Florida Circuit Court, being case number 88-

43333, ("State Court Suit") naming Herbert Tanner, d/b/a Tanner & Associates ("Mr. Tanner"), FED Trust, and Garon Vail as defendants. The state court suit alleged fraud, conversion, civil theft, and violations of the Florida RICO act for which the plaintiffs sought actual damages, treble damages, and punitive damages. On October 28, 1988, Mr. Tanner, acting pro se, filed an answer to the state court suit generally denying all relevant allegations. On November 15, 1988, Mr. Tanner filed an amendment to his answer asserting that he had no contact with the State of Florida and that personal jurisdiction was lacking. In December 1988, Mr. Neil Carver, Esquire, of Coral Gables, Florida entered an appearance as attorney of record for Mr. Tanner. Mr. Carver thereafter sought leave of court to allow Mr. Tanner to amend his answer accordingly, but was ultimately unsuccessful in this regard. After substantial activity in the state court suit including, for example, a motion for sanctions against Mr. Tanner, a motion for a protective order filed by Mr. Tanner, a motion for relief from sanctions filed by Mr. Tanner, and a motion for summary judgment filed by the state court plaintiffs, Mr. Carver subsequently was authorized by the Florida court to withdraw as counsel for Mr. Tanner by order dated February 9, 1989.

On March 17, 1989, the Dade County, Florida Circuit Court signed a "Final Judgment" granting the plaintiffs' motions for summary judgment and awarding Biogen a judgment against Mr. Tanner for $125,416.20 consisting of $113,866.20 for treble compensatory damages and $11,550.00 for prejudgment interest. On May 23, 1989, Mr. Tanner, again acting pro se, filed a notice of appeal wherein he sought review of the judgment of the Dade County Circuit Court. The Florida District Court of Appeals dismissed the appeal on July 21, 1989, as being untimely. On December 12, 1990, Biogen enrolled the Florida judgment in the Chancery Court for Davidson County, Tennessee.

On November 9, 1992, Mr. Tanner filed an original petition under chapter 7 of the Bankruptcy Code. The case was later converted to a case under chapter 11 of the Bankruptcy Code on November 8, 1993. On August 12, 1994, Biogen timely filed a complaint in the bankruptcy court to determine the dischargeability of its particular debt alleging that the conduct which gave rise to the entry of the judgment in the Florida State court suit was fraudulent and that the judgment debt is nondischargeable pursuant to 11 U.S.C. § 523(a)(4) and (6).

Biogen moved for summary judgment in the Bankruptcy Court on December 16, 1994; and the court granted that motion on February 14, 1995, apparently on the sole basis that the motion was uncontested by Mr. Tanner. Mr. Tanner filed a notice of appeal of the Bankruptcy Court's February 14, 1995 Order. The United States District Court for the Western District of Tennessee, on February 1, 1996, reversed the Bankruptcy Court's order granting Biogen's motion for summary judgment and remanded the appeal to the Bankruptcy Court for it to consider the summary judgment motion on the merits rather than granting the motion solely on the basis of its uncontested nature.

Counsel for Biogen thereafter renewed Biogen's motion for summary judgment. At a status conference conducted by this court, Biogen's renewed motion for summary judgment was scheduled for oral arguments on May 7, 1996. This memorandum and order addresses Biogen's renewed motion for summary judgment in accordance with the District Court's February 1, 1996 remand order.

Where a prepetition claim is based on a prior judgment, such judgment, for allowance and distribution purposes, may be challenged in the bankruptcy court on one of two narrow equitable grounds.

(1) want of jurisdiction of the court rendering the judgment over the parties or the subject matter of the suit; and

(2) procurement of the judgment by collusion or fraud. *Heiser v. Woodruff*, 327 U.S. 726, 736 (1946); *see also Margolis v. Nazareth Fair Grounds & Farmers Market*, 249 F.2d 221, 223-25 (2d Cir. 1957); *Kelleran v. Andrijevic*, 825 F.2d 692 (2d Cir. 1987).

In recognizing these two narrow equitable grounds for challenging a prior state court judgment in the bankruptcy court, the Supreme Court expressly held that the bankruptcy court is bound by the principle of res judicata. *Heiser v. Woodruff*, 327 U.S. at 737. "Congress has specifically required all federal courts to give preclusive effect to state-court judgments whenever the court of the State from which the judgments emerged would do so...." *Allen v. McCurry*, 449 U.S. 90, 96 (1980) (citing 28 U.S.C. § 1738). Bankruptcy courts fall within the Congress' mandate. See, for example, *In re Farrell*, 27 B.R. 241, 243 (Bankr. E.D.N.Y. 1982). Under the circumstances existing here the bankruptcy court is bound to give preclusive effect to the judgment obtained in the Florida State court by Biogen's to the same extent as would a Florida court.

Neither of the aforesaid two exceptions applies here. Mr. Tanner unsuccessfully contended in the State court - which considered and rejected his assertions - that the State court lacked jurisdiction over the parties or the subject matter of the state court litigations. No contention has been made that Biogen's prepetition judgment was procured by collusion or fraud. Accordingly and with respect to the "liability" and damage issues here, the principles of res judicata and full faith and credit (28 U.S.C. § 1738) mandate that Mr. Tanner not be permitted to challenge Biogen's prepetition state-court judgment in this court.

Having determined that the principles of res judicata and full faith and credit apply regarding the liability-damage issue, this court now will address the remaining "dischargeability" issue (i.e., whether or not Biogen's prepetition judgment against Mr. Tanner is "dischargeable" under 11 U.S.C. § 523(a)(4) and (6)).

In *Grogan v. Garner*, 498 U.S. 279, 284, n.11 (1991), the Supreme Court held that the doctrine of collateral estoppel is applicable in bankruptcy dischargeability proceedings.[1] The Sixth Circuit Court of Appeals has squarely addressed the issue of collateral estoppel in bankruptcy dischargeability proceedings and set forth the requirements for application of the doctrine in this Circuit. *See, for example, Spilman v. Harley,* 656 F.2d 224 (6th Cir. 1981); *Wheeler v. Laudani*, 783 F.2d 610 (6th Cir. 1986); and *Rally Hill Prods., Inc. v. Bursack (In re Bursack)*, 65 F.3d 51 (1995). *Spilman* succinctly states that "[c]ollateral estoppel requires that the precise issue in the later proceedings have been raised in the prior proceeding, that the issue was actually litigated, and that the determination was necessary to the outcome." 656 F.2d at 228. *See also, for example, Wood v. Dealers Fin. Servs., Inc. (In re Wood),* _____ B.R. _____, 1996 WL 434430 (E.D. Mich. 1996).

It expressly is emphasized that there has been a great deal of controversy concerning whether the doctrine of collateral estoppel bars the relitigation of issues previously determined pursuant to a state court default judgment that was necessary to support nondischargeability actions under 11 U.S.C. § 523(a). See, for example, *Bar Area Factors v. Calvert (In re Calvert)*, 177 B.R. 583

[1]The court notes that it is well settled that the doctrine of res judicata or claim preclusion is inapplicable in bankruptcy dischargeability proceedings. *Brown v. Felsen*, 442 U.S. 127, 139 (1979).

(Bankr. W.D. Tenn. 1995),[2] and *Harris v. Byard (In re Byard)*, 47 B.R. 700 (Bankr. M.D. Tenn. 1985).

This court notes that in this case the chapter 7 trustee previously commenced, among others, adversary proceeding number 95-1371 seeking a general denial of Mr. Tanner's discharge under 11 U.S.C. § 727(a)(2) through (5), and that a trial on the merits is scheduled for November 6, 1996. Thus, at this time, related parallel litigation is pending in the bankruptcy court. As a case management technique or tool, bankruptcy courts ordinarily decide litigation under 11 U.S.C. § 727(a) (general objections to discharge) before addressing litigation under 11 U.S.C. § 523(a) (exceptions to the general discharge of particular debts).

It perhaps would be inefficient at this time for the court to determine the dischargeability of Biogen's particular debt under 11 U.S.C. § 523(a) when the chapter 7 trustee has pending a complaint objecting to Mr. Tanner's general discharge under 11 U.S.C. § 727(a). If the trustee is successful in objecting to Mr. Tanner's general discharge, all of Mr. Tanner's debts will be nondischargeable including Biogen's. Accordingly, there would be no reason for the court to consider Biogen's dischargeability complaint under 11 U.S.C. § 523(a). Additionally, if the court were to determine at this time that Biogen's debt is nondischargeable under 11 U.S.C. § 523(a)(4) or (6), the automatic stay would be, ipso facto, modified as to that debt and Biogen would be free to pursue collection from Mr. Tanner. *Boatman's Bank of Tennessee v. Embry (In re Embry)*, 10 F.3d 401 (6th Cir. 1993). Allowing Biogen such a "head start" in its collection efforts at this time does not

[2] *In re Calvert* was affirmed on appeal to the District Court, being Civil No. 95-2270-H and decided on November 21, 1995, and currently is on appeal to the Sixth Circuit Court of Appeals under 28 U.S.C. § 1292(b), being No. 95-8549.

serve one of the primary goals of the Bankruptcy Code – that of equality of treatment among creditors.

For the reasons set forth above, the court grants Biogen's renewed motion for summary judgment as it relates to the underlying liability and damages issues, but will reserve at this time a determination as to the "dischargeability" of the prepetition judgment debt awaiting resolution of the chapter 7 trustee's pending complaint under 11 U.S.C. § 727(a). The reservation of this portion of Biogen's summary judgment motion (i.e., the portion involving the triggering of the doctrine of collateral estoppel for dischargeability purposes) is without prejudice to Biogen requesting in the Bankruptcy Court, based on changed circumstances, a more expedited ruling or this court acting sua sponte.

Based on the foregoing,

IT IS ORDERED and NOTICE IS HEREBY GIVEN THAT:

1. Biogen's renewed motion for summary judgment is granted as to the liability and damage issues consistent with the prepetition Florida State court judgment.

2. In accordance with the foregoing, the court reserves at this time a judicial determination regarding the "dischargeability" of Biogen's judgment debt awaiting a final determination of the chapter 7 trustee's pending 11 U.S.C. § 727(a) complaint objecting to the debtor's general discharge (or other appropriate event).

3. The Bankruptcy Court Clerk is authorized to administratively close this adversary proceeding, subject to it being reopened later upon written request of a party in interest without charge or the court sua sponte.

BY THE COURT

David S. Kennedy
Chief United States Bankruptcy Judge

Date: August 27, 1996

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