

Dated: August 15, 2012
The following is SO ORDERED:




David S. Kennedy
UNITED STATES CHIEF BANKRUPTCY JUDGE

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

In re

Eric DeWayne Cross and
Willene Cross,

Case No. 08-32863

Debtors.

Chapter 7

S.S. No. xxx-xx-6620 and xxx-xx-5299

Shonda Mickel,

Plaintiff.

v.

Adv. Proc. No. 09-00052

Eric Dewayne Cross and
Willene Cross, the above-named
Chapter 7 Debtors.

Defendants.

**MEMORANDUM AND ORDER RE PLAINTIFF’S “MOTION FOR SUMMARY JUDGMENT
AND MOTION FOR JUDGMENT ON THE PLEADINGS” COMBINED WITH NOTICE OF
THE ENTRY THEREOF**

INTRODUCTION

In this adversary proceeding the plaintiff, Ms. Shonda Mickel (“Plaintiff”), filed a motion for summary judgment, pursuant to Fed. R. Bankr. P. 7056, combined with a motion for a judgment on the pleadings, pursuant to Fed. R. Bankr. P. 7012(c), against Mr. Eric Dewayne Cross and Ms. Willene Cross the above-named chapter 7 debtors (“Defendants”). Plaintiff seeks a judicial determination that judgment debts which arose out of civil litigation in the Circuit Court of Madison County, Tennessee, (“State Court”) are non-dischargeable under 11 U.S.C. §§ 523(a)(2)(A) and/or 523(a)(6).

The ultimate issue for judicial determination here is whether particular debts determined by a state court order arising out of a bench trial for breach of contract, conversion, and claims of fraud and misrepresentations under the Tennessee Consumer Protection Act are debts resulting from false pretenses, false representations, or actual fraud and/or are debts resulting from willful and malicious injuries so as to trigger the doctrine of collateral estoppel or issue preclusion and to render such debts to be exceptions to discharge under §§ 523(a)(2)(A) and/or 523(a)(6).

By virtue of 28 U.S.C. § 157(b)(2)(I), this dischargeability action is a core proceeding. The court has subject matter jurisdiction under 28 U.S.C. §§ 1334(a)-(b) and 157(a)-(b) and Miscellaneous Order No. 84-30 of the United States District Court for the Western District of Tennessee. Based on statements of counsel for the parties, review of the State Court complaint, order, and related documents, and this case record as a whole, the following shall constitute the court’s findings of fact and conclusions of law pursuant to Fed. R. Bankr. P. 7052.

BACKGROUND FACTS

The relevant background facts may be briefly summarized as follows. On August 12, 2008, the plaintiff filed a complaint for damages in the State Court against the defendants. The complaint set forth nine claims for which the plaintiff sought judgments including breach of contract, conversion, fraud

and/or misrepresentation, and violations of the Tennessee Consumer Protection Act. Plaintiff entered into contracts with the defendants to invest in two real property developments. Plaintiff paid the defendants an initial investment of \$50,000; however, the defendants never repaid the initial investment nor allowed the plaintiff to share in the profits of the investment as was contracted and represented. On November 17, 2008, the State Circuit Court Judge, the Honorable Roy Morgan, granted a motion for default judgment against the defendant Ms. Cross regarding her liability on all claims but reserving the amount of the damages to be determined later. No order was issued at the time regarding the defendant Mr. Cross. The default judgment order against the defendant Mr. Cross was not appealed and is now a final order.

On December 1, 2008, the defendants filed a joint chapter 7 bankruptcy petition, which imposed the § 362 automatic stay and stayed the pending civil proceedings in State Court. On January 30, 2009, the plaintiff filed the instant adversary proceeding seeking to have her claims against the defendants declared nondischargeable under §§ 523(a)(2)(A) and/or 523(a)(6). Shortly thereafter, the defendants filed an answer to this complaint. At a hearing held on April 21, 2009, and by order entered on May 6, 2009, this bankruptcy court deferred jurisdiction over the issues of liability and damages to the State Court in accordance with 28 U.S.C. § 1334(b), the doctrine of comity, and respect for State law while reserving the issue of dischargeability until the State Court action became final and complete. This adversary proceeding was administratively closed while awaiting final resolution on the liability and damage issues in the State Court.

On November 10, 2010, the State Court judge entered an “Order of Final Judgment” awarding damages totaling \$248,000 in favor of the plaintiff against the defendants. The State Court found the defendants had breached the contracts by a preponderance of the evidence and also found by clear and convincing evidence that the defendants committed fraud/misrepresentations, violations of the Tennessee Consumer Protection Act, and conversion. The State Court awarded compensatory damages of \$76,000, treble damages of \$152,000, and attorney fees of \$20,000. Specifically, the State Court found the actions giving rise to liability were willful and knowing violations and awarded treble damages and attorney fees. See TENN. CODE ANN. §§ 47-18-104(b)(5), (b)(12), and (b)(27), 47-18-109(a)(3), 47-18-109(e)(1)

(representing the authority for such damages under the Tennessee Consumer Protection Act). Defendants appealed the State Court order to the Tennessee Court of Appeals, who dismissed the appeal for lack of jurisdiction. On October 11, 2011, the State Court entered an “Amended Order of Final Judgment” denying prejudgment interest. No further appeal was made and all relevant State Court orders are now final judgments.

On April 19, 2012, the plaintiff filed a “Motion to Reopen Adversary Proceeding,” which sought to reopen the previously administratively closed adversary proceeding to have this bankruptcy court determine whether the State Court awards are nondischargeable in accordance with the initial complaint filed in this adversary proceeding. Defendants promptly objected. On June 12, 2012, the plaintiff filed a motion for summary judgment and a motion for judgment on the pleadings on the issue of dischargeability. Defendants promptly objected to this motion as well. On July 24, 2012, this court heard the motion to reopen, the motion for summary judgment, and the motion for judgment on the pleadings. This court granted the motion to reopen in accordance with this court’s prior order and now addresses the motion for summary judgment and the motion for judgment on the pleadings.

SUMMARY JUDGMENT AND MOTION FOR JUDGMENT ON THE PLEADINGS

Rule 7056 of the Federal Rules of Bankruptcy Procedure provides that Rule 56 of the Federal Rules of Civil Procedure applies in bankruptcy adversary proceedings. A grant of summary judgment requires the court to find that no genuine dispute as to any material fact exists to be tried. Such motions should be granted with caution. Resolving all inferences in favor of the non-moving party, the court traditionally must find that no reasonable grounds for dispute exists on any genuine issue before granting a motion for summary judgment. *See, for example, In re Autostyle Plastics, Inc.*, 269 F.3d 726 (6th Cir. 2001); *see also Matsushita Elec. Ind. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986) and *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986). Rule 7012(b) of the Federal Rules of Bankruptcy Procedure provides, in relevant part here, that Rule 12(c) of the F.R. Civ. P. regarding motions for judgment on the pleading applies in bankruptcy adversary proceedings.

Here, the bankruptcy court must determine whether the findings by the State Court are sufficient to apply the doctrine of collateral estoppel to this dischargeability complaint, and, thus, the motion for summary judgment is appropriate based on the pleadings because no genuine dispute exists as to any material facts.

DOCTRINE OF COLLATERAL ESTOPPEL

The doctrine of collateral estoppel¹ applies in discharge exception proceedings under § 523(a). *Grogan v. Garner*, 498 U.S. 279, 285 n.11 (1991). Federal courts shall refer to the preclusion law of the state in which the judgment is rendered. *Marrese v. American Academy of Orthopaedic Surgeons*, 470 U.S. 373, 379 (1985) (citing 28 U.S.C. § 1738). Collateral estoppel in Tennessee requires proof of the following elements: (1) the issue is identical to the issue decided in an earlier suit; (2) the issue was actually litigated and decided on its merits in the earlier suit; (3) the judgment in the earlier suit is final; (4) the party against whom collateral estoppel is asserted was a party or is in privity with a party to the earlier suit; and (5) the party against whom collateral estoppel is asserted had a full and fair opportunity in the earlier suit to litigate the issue now sought to be precluded. *Beaty v. McGraw*, 15 S.W.3d 819, 824 (Tenn. Ct. App. 1998). If these elements are met, even a default judgment has preclusive effect under Tennessee law. *In re Bursack*, 65 F.3d 51, 54 (6th Cir. 1995) (citing *Lawhorn v. Wellford*, 168 S.W.2d 790, 792 (Tenn. 1943)); *see also In re Calvert*, 105 F.3d 315 (6th Cir. 1997).

Here, the plaintiff asserts collateral estoppel bars the bankruptcy court from rehearing the facts supporting the determination of dischargeability under §§ 523(a)(2)(A) and 523(a)(6) because the State Court resolved all actual and necessarily raised factual disputes when it rendered judgment for breach of contract, conversion, fraud/misrepresentations, and violations of the Tennessee Consumer Protection Act. Defendants argue, among other things, that the factual issues in the State Court judgments are not identical to the facts required to prove dischargeability under § 523(a)(2)(A); therefore, the first element of collateral estoppel cannot be satisfied and a hearing in the bankruptcy court should be scheduled.

¹ Collateral estoppel, issue preclusion, and claim preclusion are alternate legal terms for the same legal idea. This court will refer to this legal idea as collateral estoppel.

Though the parties dispute whether the factual issues are identical, the parties do not dispute any other elements of collateral estoppel. The issues in the State Court were actually litigated. Damages and liability of the defendant, Mr. Cross, were determined after a hearing by the State Court. Liability of the defendant, Ms. Cross, was determined on default judgment, but the associated damages were actually litigated. In Tennessee, a default judgment may have collateral estoppel effect. *In re Calvert*, 105 F.3d 315 (6th Cir. 1997); *In re Bursack*, 65 F.3d at 54. Furthermore, there is no dispute that the State Court judgments at issue here are final and that both parties are asserted parties to both the State Court litigation and the litigation before this bankruptcy court. Therefore, the only collateral estoppel issue that must be determined by this court is whether the issues are identical between violations of the Tennessee Consumer Protection Act and dischargeability under §§ 523(a)(2)(A) and/or 523(a)(6). See also the Full Faith and Credit Statute, 28 U.S.C. § 1738.

The State Court found by clear and convincing evidence that the defendants knowingly and willfully committed the following unlawful acts under the Tennessee Consumer Protection Act: (1) “representing that goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits or quantities that they do not have or that person has a sponsorship approval, status, affiliation or connection that such person does not have,” TENN. CODE ANN. § 47-18-104(b)(5); (2) “representing that a consumer transaction confers or involves rights, remedies or obligations that it does not have or involve or which are prohibited by law,” TENN. CODE ANN. § 47-18-104(b)(12); and (3) “engaging in any other act or practice which is deceptive to the consumer or to any other person . . .,” TENN. CODE ANN. § 47-18-104(b)(27). In comparison, § 523(a)(2)(A) requires debts to be obtained by “false pretenses, a false representation, or actual fraud” in order to be determined nondischargeable. The burden of proof on a § 523(a) complaint is preponderance of the evidence, a lower standard than the clear and convincing standard used by the State Court. *Grogan*, 498 U.S. 279.

This court concludes that knowing and willful violations of the Tennessee Consumer Protection Act are exactly the type of debts that are nondischargeable under § 523(a)(2)(A). A false representation under § 523(a)(2)(A) must be a material statement known to be false or made with gross recklessness. *In*

re McLaren, 3 F.3d, 958, 961(6th Cir. 1993). Actual fraud consists of “any deceit, artifice, trick, or design involving direct and active operation of the mind, used to circumvent and cheat another,” 4 Collier on Bankruptcy ¶ 523.08[1][e], p. 523-46 (16th ed. 2012); *see also McClellan v. Cantrell*, 217 F.3d 890 (7th Cir. 2000) and *In re Vitanovich*, 259 B.R. 873, 877 (6th Cir. B.A.P. 2001). Any knowing and willful effort to deceive and to falsely represent facts must clearly be read as actual fraud and false representation. Knowing and willful misrepresentations of goods under TENN. CODE ANN. § 47-18-104(b)(5) and transactions under TENN. CODE ANN. § 47-18-104(b)(12) satisfy the definition of false representations under § 523(a)(2)(A). Furthermore, knowingly and willfully engaging in any act or practice to deceive a consumer under TENN. CODE ANN. § 47-18-104(b)(27) is, by its very nature, actual fraud under § 523(a)(2)(A). As the State Court found these violations of the Tennessee Consumer Protection Act to be knowing and willful and as these violations are the type of false representations and actual fraud intended under §523(a)(2)(A), the court concludes that the factual issues in this adversary proceeding are identical to the factual issues determined by the State Court, and, thus, the first element of collateral estoppel is satisfied.

As all elements of collateral estoppel in Tennessee are satisfied, the bankruptcy court finds no factual disputes exist to be tried because collateral estoppel bars relitigation of the issues determined by the State Court. The State Court found actions by the defendants resulted in a breach of contract, conversion, fraud/misrepresentation, and willful and knowing violations of the Tennessee Consumer Protection Act. As the State Court went beyond a mere finding of breach of contract and conversion and additionally found that fraud/misrepresentation and willful and knowing violations of the Tennessee Consumer Protection Act resulted, this bankruptcy court will rely on these findings to determine dischargeability of the State Court judgment without relitigating any of the factual disputes already resolved.

DISCHARGEABILITY OF COMPENSATORY DAMAGES

The State Court awarded compensatory damages totaling \$76,000 to the plaintiff payable by the defendants. The State Court found that these damages were the result of fraud/misrepresentation and

willful and knowing violations of the Tennessee Consumer Protection Act. As already discussed, compensatory damages resulting from fraud and misrepresentation are statutorily excepted from discharge under § 523(a)(2)(A); therefore, the court finds that the compensatory damages awarded to Plaintiff are nondischargeable under § 523(a)(2)(A). Plaintiff also sought to have the debts declared nondischargeable under § 523(a)(6), as debts resulting from willful and malicious injuries by Defendants. In such a case, the judgment must be for an injury that is both willful and malicious, and the absence of one will create a dischargeable debt. *In re Markowitz*, 190 F.3d 455, 463 (6th Cir. 1999). As the court has already found the debts to be nondischargeable under § 523(a)(2)(A), the court finds it unnecessary to determine whether willful and knowing violations of the Tennessee Consumer Protection Act are also malicious.

DISCHARGEABILITY OF TREBLE DAMAGES AND ATTORNEY FEES

In addition to the compensatory damages awarded, the State Court awarded treble damages of \$152,000 and attorney fees of \$20,000. A court finding of “false pretenses, false representation or actual fraud” under § 523(a)(2)(A) renders “any debt” traceable from the fraud to be nondischargeable including treble damages and attorney fees. *Cohen v. De La Cruz*, 523 U.S. 213, 223 (1998). *See also In re Grimsley*, 449 B.R. 602, 620-21 (Bankr. S.D. Ohio 2011) (interpreting *Cohen*). The Tennessee Consumer Protection Act specifically allows a court to award treble damages and reasonable attorney fees when the statute has been violated. *See* TENN. CODE ANN. §§ 47-18-109(a)(3) and (e)(1). In this case, Defendants willfully and knowingly committed fraud/misrepresentations that violated this statute; therefore, the court awarded treble damages and attorney fees. These damages and fees are traceable from the knowing and willful fraud found in the State Court. As is such, the treble damages and attorney fees like the compensatory damages are nondischargeable under § 523(a)(2)(A).

CONCLUSION

This court grants the plaintiff’s motion for summary judgment and motion for a judgment on the pleadings and finds that the entire State Court judgment totaling \$248,000 is nondischargeable under §

523(a)(2)(A). Furthermore, this court makes no judgment as regards the motion for summary judgment to determine dischargeability under §523(a)(6), as it is unnecessary to do so.

ORDER AND NOTICE

Based on the forgoing, IT IS ORDERED AND NOTICE IS HEREBY GIVEN the Bankruptcy Court Clerk is directed to cause a copy of this Memorandum, Order, and Notice to be sent to the following persons:

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