

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
SAN ANGELO DIVISION

IN RE:	§	
	§	
RUCK SCOTT WHEELER,	§	CASE NO. 03-60125-RLJ-7
	§	
Debtor	§	
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ELLIS WOLBE and GARY KANER,	§	
	§	
Plaintiffs	§	
	§	
VS.	§	ADVERSARY NO. 03-6003
	§	
RUCK SCOTT WHEELER,	§	
	§	
Defendant	§	

MEMORANDUM OPINION AND ORDER

The court considers the motion for summary judgment filed by the plaintiffs Ellis Wolbe and Gary Kaner. The court has jurisdiction of this matter under 28 U.S.C. §§ 1334 and 157(b). This is a core proceeding pursuant to 28 U.S.C. § 157(b)(1) and (b)(2)(I). This Memorandum Opinion contains the court’s findings of fact and conclusions of law. FED. R. BANKR. P. 7052 and FED. R. BANKR. P. 9014.

I. BACKGROUND

Ellis Wolbe and Gary Kaner (“Wolbe-Kaner”) filed suit against Tom Bransford (“Bransford”) and Ruck Scott Wheeler (“Wheeler”) in the County Court at Law Number 4 of Dallas County, Texas. The suit was based on allegations that Bransford and Wheeler had wrongfully misappropriated funds of Wolbe-Kaner in connection with a business relationship

between Wolbe-Kaner and an entity controlled by Bransford and Wheeler. The following causes of action were asserted in the state court litigation: (1) conversion, (2) unjust enrichment, (3) violation of the Texas Theft Liability Act, and (4) common law fraud. After a bench trial on these issues, Wolbe-Kaner obtained an award from the state court judge on May 6, 2002. The judgment included an award of \$161,221.81, pre-judgment interest at the rate of 10% from June 2, 2000, \$9,950 in attorney fees, and post-judgment interest at the rate of 10%. Bransford and Wheeler were held to be jointly and severally liable on the judgment.

On April 1, 2003, Wheeler filed his Chapter 7 petition in this court. On July 7, 2003, Wolbe-Kaner filed this adversary complaint. By the complaint, Wolbe-Kaner contend that the debt resulting from the May 6, 2002 judgment should be declared nondischargeable under sections 523(a)(2)(A), 523(a)(4), and 523(a)(6) of the Bankruptcy Code (11 U.S.C.). Wolbe-Kaner seek summary judgment on their dischargeability complaint, contending that the determinations of the prior state court bars re-litigation of the issue of dischargeability in this court. Wolbe-Kaner specifically claim that the prior state court proceeding and judgment establishes, under principles of collateral estoppel, that the judgment debt is nondischargeable under either (1) section 523(a)(2) of the Code as money that Wheeler obtained by false pretenses, false representations, or actual fraud, or (2) under 523(a)(4) of the Code as debt that arose as a result of embezzlement or larceny committed by Wheeler. Wheeler argues that Wolbe-Kaner have failed to meet their burden on the issue and thus summary judgment should be denied.

II. DISCUSSION

Summary judgment is proper if the presented summary judgment evidence shows there is

no genuine issue of material fact and that the movant is entitled to judgment as a matter of law. FED. R. CIV. PROC. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986); *Meadowbriar Home, Inc. v. Gunn*, 81 F.3d 521, 533 (5th Cir. 1996). The burden of proof on a summary judgment rests with the same party who bears the burden of proof at trial. *Celotex*, 477 U.S. at 324. Wolbe-Kaner must, therefore, articulate and prove an entitlement to summary judgment in this case.

Collateral estoppel is available in dischargeability proceedings in bankruptcy court. *See, e.g. Sheerin v. Davis (In re Davis)*, 3 F.3d 113, 114 (5th Cir. 1993). A prior state court judgment may render the resulting debt nondischargeable in bankruptcy if (1) the law of the state in which the judgment was rendered would give preclusive effect to the issues contained in the judgment, and (2) there is no exception to application of the full faith and credit statute. *Vikings Dynamic Ltd. (In re O'Neill)*, 260 B.R. 122, 126 (Bankr. E.D. Tex. 2001) (citing *Pollock v. Marx (In re Marx)*, 171 B.R. 218, 221 (Bankr. N.D. Tex. 1994). Other relevant considerations are whether the record of the prior proceeding meets the federal test for the application of collateral estoppel, whether the prior proceeding was conducted in such a manner as to predetermine dischargeability issues, and whether each component of the judgment debt should be excepted from discharge. *Id.*

In Texas, the elements of collateral estoppel are: (1) the facts sought to be litigated in the second case were fully and fairly litigated in the prior case, (2) such facts were essential to the judgment in the prior case, and (3) the parties were cast as adversaries in the prior case. *Logan v. McDaniel*, 21 S.W.3d 683, 687 (Tex. App.—Austin 2000). The prior case was ‘fully and fairly’

litigated by the parties in this case. Texas law applies the preclusive effect of a judgment as long as the prior court conducted a hearing in which the plaintiff was forced to put on sufficient evidence and to meet his evidentiary burden. *Pancake vs. Reliant Ins. Co. (In re Pancake)*, 106 F.3d 1242, 1244 (5th Cir. 1997); *O'Neil*, 260 B.R. at 127 (discussing *Garner v. Lehrer (In re Garner)*, 56 F.3d 677 (5th Cir.1995)). Here, the record establishes that Bransford and Wheeler, as defendants in the state court action, filed an answer to Wolbe-Kaner's petition, participated in the trial, and thus put Wolbe-Kaner to their burden of proof. Additionally, Wheeler does not contest whether the parties were 'adversaries' in the prior case.

The main issue to be resolved in this case is whether this court can discern what factual issues were actually decided by the state court judge in favor of Wolbe-Kaner. The only competent evidence with which to discern the factual issues that are subject to collateral estoppel is the Plaintiffs' Second Amended Petition and the Final Judgment of the trial court judge. Collateral estoppel will bar re-litigation of those factual issues which the evidence can establish were ultimate issues of fact that were necessarily decided by the trier of fact. *Tarter v. Metropolitan Sav. and Loan Ass'n*, 744 S.W.2d 926, 928 (Tex. 1988). Wolbe-Kaner alleged four different causes of action in the prior state court proceeding. *Id.* The prior state court proceeding was a bench trial in which the trial judge issued an order awarding plaintiffs a sum of money. No findings of fact by the trial judge have been introduced into evidence. Such findings are generally needed for the judgment to have any res judicata or collateral estoppel effect. *See, e.g. In re Texas Extrusion Corp.*, 836 F.2d 217, 220 (5th Cir. 1988). Additionally, neither the record of the prior state court proceeding, nor portions thereof, have been introduced into evidence. Accordingly, without

the record or some substitute, it is impossible for this court to discern what evidence was considered at the bench trial. *Sheerin v. Davis (In re Davis)*, 3 F.3d 113, 114-16 (5th Cir. 1993) (allowing collateral estoppel to be applied even though no record of the prior proceeding was submitted, when other evidence of the proceeding was available through the jury charge and the court's opinion).

The only way that this court could possibly hold that any factual issue decided in the prior state court proceeding precludes Wheeler from litigating the dischargeability complaint is if this court could find that a particular factual issue necessary to a finding of nondischargeability was also necessary to the state court judge's ruling. If all four of the causes of action asserted by Wolbe-Kaner in the state court case shared a similar element, then the element necessarily would have been found by the trier of fact. If the element necessarily found by the state court judge established a similar element on one of the grounds of nondischargeability asserted by Wolbe-Kaner, then this court could hold that the particular element is established by collateral estoppel. However, this court is unable to do so on either of the section 523 grounds asserted by Wolbe-Kaner.

1. Section 523(a)(2)

Section 523(a)(2) provides for the nondischargeability of a debt for money obtained by false pretenses, a false representation, or actual fraud, other than a statement respecting the debtor's financial condition. This provision expressly excludes any such wrongful conduct in connection with a representation of the debtor's financial condition. 11 U.S.C. § 523(a)(2). Again, neither the record of the state court trial, nor the state court judge's findings of fact have been provided to this court. This court cannot determine whether the evidence introduced at trial

and relied upon by the trier of fact established false pretenses, a false representation, or actual fraud. The court cannot, therefore, hold that the general verdict of the state court judge establishes the elements of section 523(a)(2).

2. Section 523(a)(4)

At the hearing held on the summary judgment, Wolbe-Kaner argued that summary judgment was particularly appropriate under section 523(a)(4) of the Code, which provides for nondischargeability of a debt resulting from embezzlement or larceny. Wolbe-Kaner submits that the state court's award of attorney's fees implied that the state court's award must be based on Wheeler's violation of the Texas Theft Liability Act which, Wolbe-Kaner contends, is the only cause of action of the ones asserted that allows a recovery of attorney's fees. A violation of the Texas Theft Liability Act establishes embezzlement or larceny for purposes of section 523(a)(4), Wolbe-Kaner argue. While this may be true, this court cannot necessarily assume that the entirety of the state court award was based on the Texas Theft Liability Act.

3. Unjust Enrichment Prevents Collateral Estoppel

Pleading unjust enrichment in the state court proceeding prevents application of collateral estoppel in this case. Unjust enrichment is a theory of recovery that requests the court to impose an implied or quasi-contractual relationship between the parties. *Mowbray v. Avery*, 76 S.W.3d 663, 679 (Tex. App.–Corpus Christi 2002, pet. denied). Recovery is possible under unjust enrichment without a showing of particular wrongdoing on the part of the opposing party. *Id.* (citing *Oxford Fin. Co., Inc. v. Velez*, 807 S.W.2d 460, 465 (Tex. App.–Austin 1991, writ denied). A party may recover by merely showing that the equities of the case dictate such a result.

Id. (citing *Zapata Corp. v. Zapata Gulf Marine Corp.*, 986 S.W.2d 785, 788 (Tex. App.–Houston [1st Dist.] 1999, no pet.). Recovery under an unjust enrichment claim would not raise a nondischargeability claim. Here, this court cannot rule out the possibility that the state court trial judge based his ruling, at least in part, on unjust enrichment.

Upon the foregoing, it is ORDERED that the motion for summary judgment of plaintiffs Ellis Wolbe and Gary Kaner is denied.

SIGNED December 16, 2003.

s/ Robert L. Jones
ROBERT L. JONES
UNITED STATES BANKRUPTCY JUDGE

The Clerk shall provide copies to:

Attorney for Plaintiffs: R. Spencer Shytles, Graham, Bright & Smith, 5420 LBJ Frwy., Suite 300, Dallas, TX 75240; and

Attorney for Defendant: Bruce M. Badger, 3400 Ave. H., 2nd Floor, Rosenberg, TX 77471; and

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