UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF GEORGIA
ATHENS DIVISION

In the Matter of:	:	Chapter 7
FRANK E. MOORE, aka, MOORE'S TRUCKING, FRANK E. MOORE CONSTRUCTION COMPANY,	:	
Debtor	:	Case No. 00-30917 RFH
HAROLD H. OZBURN,	:	
Plaintiff	:	
vs.	:	
FRANK E. MOORE,	:	
Defendant	:	Adversary Proceeding No. 00-3033

BEFORE

ROBERT F. HERSHNER, JR.
CHIEF UNITED STATES BANKRUPTCY JUDGE

COUNSEL:

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MEMORANDUM OPINION

Harold H. Ozburn, Plaintiff, filed on September 13,

2000, a Complaint to Determine Dischargeability of Debt. Frank E. Moore, Defendant, filed an answer on October 12, 2000. Plaintiff and Defendant filed cross-motions for summary judgment on January 8, 2001. Defendant filed on January 10, 2001, an amendment to his motion for summary judgment. The Court, having considered the motions for summary judgment and the responses, now publishes this memorandum opinion.

The following facts are not in dispute. Plaintiff, in 1971, sold Defendant 210 acres of land in Newton County, Georgia, for $143,000. Defendant planned to develop a subdivision on the land. Defendant made a down payment and executed a promissory note, agreeing to pay the balance of the purchase price in installments. Defendant defaulted on the 1974 and 1975 installments. Plaintiff then learned that the deed to secure debt had not been recorded. Plaintiff contends, and Defendant denies, that Defendant was responsible for recording the deed to secure debt. The promissory note and the deed to secure debt are "lost."

In September of 1976, Plaintiff filed a complaint against Defendant and three other defendants[1] in the Superior Court of Jasper County, Georgia. Plaintiff contended that Defendant knowingly defrauded Plaintiff by misrepresenting

[1] The other named defendants were Frank E. Moore Construction Company, Decatur Federal Savings and Loan Association, and Georgetown Land Corporation.

that Defendant had executed and recorded a deed to secure debt. Plaintiff contended that Defendant failed to make installment payments in 1974 and 1975 as required by the promissory note. Plaintiff also contended that Defendant was "liable for anticipatory breach of contract . . . ." Defendant failed to file a response to Plaintiff's complaint.

In January of 1977, the superior court entered a default judgment in favor of Plaintiff against Defendant and another defendant for the principal amount of $95,908.80, interest of $15,534.57, and attorney's fees of $16,716.51. A writ of fieri facias was issued and recorded to enforce the judgment.

In February of 1983, Plaintiff filed a Notice of Bona Fide Public Effort by Plaintiff in FiFa. to Enforce Execution in the Courts. The notice was filed in the Office of the Clerk of Superior Court of Jasper County. In November of 1991, Plaintiff filed a Petition For Scire Facias to Revive Judgment with the Superior Court of Jasper County. The petition for scire facias was served on Defendant by leaving a copy of the petition with Defendant's son, Frank E. Moore, Jr., at Defendant's residence.

In January of 1992, the Superior Court of Jasper County entered an Order Reviving Dormant Judgment. The order provided, in part, "That a scire facias was duly issued on December 3, 1991, and served upon the defendants." The order

was served on Defendant on January 14, 1992. Pursuant to the order, a writ of fieri facias was issued and recorded on February 4, 1992. The fieri facias was renewed and rerecorded on January 13, 1999.

Defendant filed a petition under Chapter 7 of the Bankruptcy Code on July 31, 2000. Plaintiff contends that the state court judgment is nondischargeable under section 523(a)(2)(A), (4) and (6) of the Bankruptcy Code.[2] Plaintiff

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[2] 11 U.S.C.A. § 523(a)(2)(A), (4), and (6) (West Supp. 2000). This section provides, in part:

> **§ 523. Exceptions to discharge**
>
> (a) A discharge under section 727, 1141, 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt—
>
> . . . .
>
> (2) for money, property, services, or an extension, renewal, or refinancing of credit, to the extent obtained by—
>
> (A) false pretenses, a false representation, or actual fraud, other than a statement respecting the debtor's or an insider's financial condition;
>
> . . . .
>
> . . . .
>
> (4) for fraud or defalcation while acting in a fiduciary capacity, embezzlement, or larceny;
>
> . . . .
>
> (6) for willful and malicious injury by the debtor to another entity or to the property of

and Defendant have filed cross-motions for summary judgment.

STANDARD FOR SUMMARY JUDGMENT

Rule 56(c)[3] of the Federal Rules of Civil Procedure provides, in part, that summary judgment will be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c).

"[A] party seeking summary judgment always bears the initial responsibility of informing the district court of the basis for its motion, . . . which it believes demonstrate the absence of a genuine issue of material fact." Celotex Corp. v. Catrett, 477 U.S. 317, 323, 106 S. Ct. 2548, 2553, 91 L. Ed. 2d 265 (1986). "[T]he substantive law will identify which facts are material. Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. Factual disputes that are irrelevant or unnecessary will not be counted." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248,

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another entity; . . . .

[3] Fed. R. Civ. P. 56(c). This Rule applies in adversary proceedings. Fed. R. Bankr. P. 7056.

106 S. Ct. 2505, 2510, 91 L. Ed. 2d 202 (1986). Because the moving party has the burden of showing the absence of a genuine issue as to any material fact, any doubts regarding a material fact "must be viewed in the light most favorable to the opposing party." Adickes v. S.H. Kress & Co., 398 U.S. 144, 157, 90 S. Ct. 1598, 1608, 26 L. Ed. 2d 142 (1970). The court shall grant summary judgment "if there is no genuine issue as to any material fact and if the moving party is entitled to judgment as a matter of law." Anderson, 477 U.S. at 250, 106 S. Ct. at 2511.

A. Plaintiff's Motion for Summary Judgment

Plaintiff contends that collateral estoppel should apply to the 1977 default judgment issued by the state court as to the issue of Defendant's fraud.

Collateral estoppel principles apply in dischargeability of debt proceedings under section 523 of the Bankruptcy Code. Grogan v. Garner, 498 U.S. 279, 285, 111 S. Ct. 654, 658 n.11, 112 L. Ed. 2d 755 (1991).

In St. Laurent v. Ambrose (In re St. Laurent),[4] the Eleventh Circuit stated:

> If the prior judgment was rendered by a state court, then the collateral estoppel law of that state must be applied to determine the judgment's preclusive effect. . . . While collateral estoppel may bar a bankruptcy court

[4] 991 F.2d 672 (11th Cir. 1993).

> from relitigating factual issues previously decided in state court, however, the ultimate issue of dischargeability is a legal question to be addressed by the bankruptcy court in the exercise of its exclusive jurisdiction to determine dischargeability.

991 F.2d at 675-76.

Two conditions must be satisfied for collateral estoppel to be applied to a state court judgment: "first, that the courts of the state from which the judgment emerged would do so themselves; and second, that the litigants had a 'full and fair opportunity' to litigate their claims and the prior state proceedings otherwise satisfied 'the applicable requirements of due process.'" Shields v. Bellsouth Advertising and Publishing Co., 228 F.3d 1284, 1288 (11th Cir. 2000).

In Sterling Factors, Inc. v. Whelan,[5] the United States District Court for the Northern District of Georgia stated:

> The following elements are required to establish a claim of collateral estoppel under Georgia law: (1) There must be an identity of issues between the first and second actions; (2) the duplicated issue must have been actually and necessarily litigated in the prior court proceeding; (3) determination of the issue must have been essential to the prior judgment; and (4) the party to be estopped must have had a full and fair opportunity to litigate the issue in the course of the earlier proceeding. See In re Graham, 191 B.R. 489, 495 (Bankr. N.D. Ga. 1996). . . .

[5] 245 B.R. 698 (N.D. Ga. 2000).

245 B.R. at 704-05.

Plaintiff bears the burden of proving that the necessary elements of collateral estoppel have been met. Usher v. Johnson, 157 Ga. App. 420, 422, 278 S.E.2d 70, 72 (1981); Dixie National Life Insurance Co. v. McWhorter (In re McWhorter), 887 F.2d 1564, 1566 (11th Cir. 1989).

"In order to successfully plead collateral estoppel (or 'estoppel by judgment,' as it is sometimes called [)], one must prove that the contested issues, even though arising out of a different claim, were actually litigated and decided and were necessary to the prior decision." Boozer v. Higdon, 252 Ga. 276, 278, 313 S.E.2d 100, 102 (1984).

"Moreover, when the prior judgment is a default judgment it will almost always be difficult, if not impossible, to determine in retrospect which allegations of the unanswered complaint were 'essential.' Notice pleading does not require that the plaintiff elaborate on the reasons for, the essential nature of, or the necessity for the particular allegations included in the complaint." American States Insurance Co. v. Walker, 223 Ga. App. 194, 196, 477 S.E.2d 360, 363 (1996).

The Supreme Court of Georgia in Waldroup v. Greene County Hospital Authority[6] stated:

[6] 265 Ga. 864, 463 S.E.2d 5 (1995).

> [C]ollateral estoppel only precludes those issues that actually were litigated and decided in the previous action, or that necessarily had to be decided in order for the previous judgment to have been rendered. Therefore, collateral estoppel does not necessarily bar an action merely because the judgment in the prior action was on the merits. Before collateral estoppel will bar consideration of an issue, that issue must actually have been decided.

463 S.E.2d at 7-8.

Turning to the case at bar, the Court is not persuaded that the issue of Defendant's fraud was actually and necessarily litigated in the state court's default judgment. The Court is not persuaded that a determination of fraud was essential to the relief that Plaintiff received. The default judgment makes no findings of fact. The default judgment does not state under which cause of action, whether for fraud or anticipatory breach of contract, the judgment was entered. The default judgment grants none of the equitable relief sought in Plaintiff's state court complaint. The default judgment simply makes an award of money damages. The Court is not persuaded that a determination of fraud was essential to the state court making its award of money damages.

The Court is not persuaded that the state court's default judgment satisfies the requirements for collateral estoppel to apply as to the issue of Defendant's fraud. Therefore, the Court shall deny Plaintiff's motion for summary judgment.

B. Defendant's Motion for Summary Judgment

The state court entered a default judgment in favor of Plaintiff in 1977. Georgia law provides that a judgment becomes dormant after seven years from the date of the last entry upon the general execution docket, but can be revived by a scire facias within the next three years. O.C.G.A. §§ 9-12-60,-61 (1993). Plaintiff contends that he made a bona fide public effort to collect the judgment in 1983. See O.C.G.A. § 9-12-60(a)(3) (1993). Plaintiff contends that the default judgment was revived by a scire facias in 1992.

Defendant contends that the default judgment is unenforceable because Defendant was not personally served with the petition for scire facias. Defendant contends that the scire facias was served on his son at Defendant's residence. See Atwood v. Hirsch Brothers, 123 Ga. 734, 51 S.E. 742 (1905) (holding that a scire facias must be personally served on the defendant unless another mode of service is especially provided for by statute); Dunn v. Dunn, 221 Ga. 368, 144 S.E.2d 758 (1965); Green v. Spires, 189 Ga. 719, 7 S.E.2d 246 (1940).

The Superior Court of Jasper County entered an Order Reviving Dormant Judgment on January 14, 1992, reviving the 1977 default judgment. The order was served on Defendant on January 14, 1992.

"State court decisions 'shall have the same full

faith and credit in every court within the United States . . . as they have by law or usage in the courts of such State . . . from which they are taken.' 28 U.S.C. § 1738. Furthermore, this mandate of 'full faith and credit' applies in dischargeability proceedings just as it does in any other court action." League v. Graham (In re Graham), 191 B.R. 489, 494 (Bankr. N.D. Ga. 1996).

Under Georgia law, "[e]very presumption will be indulged in favor of the validity of a judgment rendered by a court having jurisdiction of the subject-matter and the parties; and until set aside in a manner prescribed by law, will be given effect." Mitchell v. Arnall, 203 Ga. 384, 385, 47 S.E.2d 258, 259 (1948). See Rowell v. Rowell, 214 Ga. 377, 379, 105 S.E.2d 19, 21 (1958); McRae v. Boykin, 73 Ga.App. 67, 72, 35 S.E.2d 548, 551 (1945), cert. denied. Furthermore, in Wilkinson v. Udinsky,[7] the Georgia Court of Appeals stated "[o]n the issue of improper service, the court is the trier of fact, and in the absence of legal error, we are without jurisdiction to interfere with a verdict supported by some evidence." 530 S.E.2d at 216.

The Court is persuaded that the Order Reviving Dormant Judgment entered by the Superior Court of Jasper County is entitled to "full faith and credit." Therefore, the

[7] 242 Ga. App. 464, 530 S.E.2d 215 (2000).

Court shall deny Defendant's motion for summary judgment.

An order in accordance with this memorandum opinion will be entered this date.

DATED the 8th day of March, 2001.

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ROBERT F. HERSHNER, JR.
Chief Judge
United States Bankruptcy Court