

**In the United States Bankruptcy Court
for the
Southern District of Georgia
Savannah Division**

In the matter of:)	
)	Adversary Proceeding
ANTHONY JERRY MARTIN, SR.)	
(Chapter 7 Case <u>99-43536</u>))	Number <u>00-4009</u>
)	
<i>Debtor</i>)	
)	
)	
ALETHIA WELLS JONES)	
)	
<i>Plaintiff</i>)	
)	
v.)	
)	
ANTHONY JERRY MARTIN, SR.)	
)	
<i>Defendant</i>)	

ORDER ON MOTION FOR SUMMARY JUDGMENT

Plaintiff seeks a determination of dischargeability of a judgment of the Superior Court of Chatham County, Georgia, awarding \$5,190.49 actual damages, \$15,000.00 as general damages, and \$20,000.00 as punitive damages. The award arises out of litigation over a forged deed by which one Charles Drummond purported to obtain title to property. He then sold a portion of it to Ms. Jones who suffered damages when it was discovered that, due to the forgery, Mr. Drummond did not have clear title to the property. The Debtor, Anthony Jerry Martin, Sr., was named as a third party defendant in that action in part because he served as a witness to the forged signatures on the document through

which Mr. Drummond purported to have clear title. The Superior Court entered certain findings of fact and conclusions of law, some of which are of particular relevance to this case:

- 1) The Court found factually “there was no evidence at the trial of the case that any of the parties, except the Plaintiff (Drummond), knew, prior to the conveyances as to Ms. Jones and Ms. Grant, that the ‘partition agreement’ contained forged signatures.” Order at p.4.
- 2) “Martin assumed the Defendants had in fact signed the agreement and witnessed the agreement to assist the Plaintiff.” Order at p. 3.
- 3) “Criminal charges of forgery were made against Plaintiff (Drummond) and he pled guilty to such charges.” Order at p.4.

The Court also reached the following conclusion of law:

Plaintiff (Drummond) and third party Defendant Martin committed intentional acts of forgery and fraud, which they admitted, in order to give the appearance that Plaintiff owned fee simple marketable title to Lots 1 and 2 of the subject property, according to a subdivision plat Plaintiff had prepared without the consent of the other owners. The entire litigation arose because of their fraudulent conduct.

Order at p.7.

Martin testified at trial that he had overheard a conversation between Mr. Drummond and one Louise Dawkins, also a party to the underlying State Court litigation, whereby there had been some agreement as to the partitioning of the property which was the subject of this lawsuit. He further admitted the following: “No, I did not see anybody sign their name, and when they was talking about having it divided, Mr. Drummond mentioned he had sent Henry and them the papers to sign, and by being a close family as we was, I just automatic took it for granted that they had signed the papers, and it was going to be split, Drummond half and Jefferson half, and he came and told me, said, I need a witness, and I signed my full name, Anthony J. Martin, as a witness.” Transcript p.73.

Based on this record the Plaintiff herein asks that the Court grant summary judgment declaring the Superior Court judgment to be non-dischargeable by virtue of the Defendant’s violation of applicable provisions of 11 U.S.C. § 523(a)(2), (4), and (6).

11U.S.C. §523 provides for exceptions to discharge in the following circumstances:

- (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. . . 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 another entity;

Federal Rule of Civil Procedure 56(c), applicable to this Bankruptcy Court under Federal Rule of Bankruptcy Procedure 7056, states that this Court can grant summary judgment only if “there is no general 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). A fact is material if it might affect the outcome of a proceeding under the governing substantive law. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202 (1986). The moving party has the burden of establishing its right to summary judgment, and the court will read the opposing party’s pleadings liberally. *See Clark v. Coats & Clark, Inc.*, 929 F.2d 604, 608 (11th Cir. 1991); *Clark v. Union Mut. Life Ins. Co.*, 692 F.2d 1370, 1372 (11th Cir. 1982); *Anderson*, 477 U.S. at 249, 106 S.Ct. at 2510-11.

To determine if there is a genuine issue of material fact, the Court must view the evidence in the light most favorable to the party opposing the motion. *See Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 90 S.Ct. 1598, 1608, 26 L.Ed.2d 142 (1970); *Rosen v. Biscayne Yacht and Country Club, Inc.*, 766 F.2d 482, 484 (11th Cir. 1985). After a *prima facie* showing that the moving party is entitled to judgment as a matter of law, the party opposing the motion must go beyond the pleadings and demonstrate that there is a material issue of fact which precludes summary judgment. *See Martin v. Commercial Union Ins. Co.*, 935 F.2d 235, 238 (11th Cir. 1991).

This Court must first determine whether the doctrine of collateral estoppel will prevent the Debtor from receiving his discharge.¹ Collateral estoppel bars the re-litigation of issues that have been previously decided in judicial or administrative proceedings if the party against whom the prior decision is asserted had a “full and fair opportunity” to litigate the issue in an earlier case. See Chisholm v. Stevens (In re Stevens), Chap. 7 No 95-41828, Adv. Proc. 95-4158, slip op. (Bankr. S.D.Ga. May 17, 1996); Allen v. McCurry, 449 U.S. 90, 95, 101 S.Ct. 411, 415, 66 L.Ed.2d 308 (1980); United States v. Irvin, 787 F.2d 1506, 1515 (11th Cir. 1986); Sorrells Constr. Co. v. Chandler Armentrout & Roebuck, P.C., 214 Ga. App. 193, 447 S.E.2d 101 (1994).

Courts recognize the applicability of collateral estoppel in section 523(a) dischargeability actions. Grogan v. Garner, 498 U.S. 279, 284 n. 11, 111 S.Ct. 654, 658 n. 11, 112 L.Ed.2d 755 (1991). “While collateral estoppel may bar a bankruptcy court from re-litigating 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.” In re St. Laurent, II, 991 F.2d 672, 676 (11th Cir. 1993). The Court must apply the collateral estoppel law of the state to determine the judgment’s preclusive effect. Id. at 675-676; In re Hooks, 238 B.R. 880, 884

¹The doctrine of Res Judicata provides that when a final judgment has been entered on the merits of a case, “[i]t is a finality as to the claim or demand in controversy concluding parties and those in privity with them, not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose.” Nevada v. United States Truckee-Carson Irrigation District, 463 U.S. 110, 129, 103 S.Ct. 2906, 2918 (1983). Res Judicata operates as a defense when “there exists an identity of claim or cause of action in successive court proceedings.” In re Gill, 181 B.R. 666, 670 (Bankr. N.D. Ga. 1995). For example, the Court in Gill stated that res judicata would not foreclose a bankruptcy proceeding under 523(a) because it is a cause of action separate from a state court fraud action and that instead, the doctrine of collateral estoppel applies in such proceedings. Id. at 670. As such, the doctrine of collateral estoppel will control this proceeding.

(Bankr. S.D.Ga. 1999)(stating that bankruptcy courts apply Georgia law of collateral estoppel to determine whether a default judgment rendered by a Georgia state court precludes discharge of a debt under 11 U.S.C. §523(a)(2)(A)).

O.C.G.A. § 9-12-40 states in relevant part:

A judgment of a court of competent jurisdiction shall be conclusive between the same parties and their privies as to all matters put in issue or which under the rules of law might have been put in issue in the cause wherein the judgment was rendered until the judgment is reversed or set aside.

O.C.G.A. §9-12-40. Georgia law provides for four necessary elements to establish a claim for collateral estoppel:

- 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.

Sterling Factors, Inc. v. Schaner, 245 B.R. 698 (N.D.Ga. 2000)(citing In re Graham, 191 B.R. 489, 495 (Bankr. N.D.Ga. 1996) and In re Gunnin, 227 B.R. 332, 336 (Bankr. N.D.Ga. 1998)).

The Debtor contends that Section 523(a)(2) is inapplicable because it requires a showing that the Debtor obtained money from the Plaintiff based upon false pretenses, false representations or actual fraud. I agree that, inasmuch as there is no evidence that the Defendant, Anthony Jerry Martin, obtained any money, property, or services from the Plaintiff, Section 523(a)(2) is not applicable as that issue was not actually litigated in the prior court proceeding.

As to Section 523(a)(4), which provides for exceptions to discharge in cases in which fraud or defalcation occur while the Debtor is acting in a fiduciary capacity, or in cases where embezzlement or larceny are present, the Defendant/Debtor correctly points out that there was no showing that the Defendant was in any way acting in a fiduciary capacity. Therefore, although there may have been a finding by the trial court that fraud was committed, the lack of proof of any fiduciary capacity negates the Plaintiff's recovery on this ground as this matter was not actually litigated in the prior court proceeding, precluding the use of collateral estoppel by the Plaintiff. The Plaintiff's contention that the Defendant was guilty of larceny, while it might be proven at the trial in this Court, was not actually litigated in the Superior Court action and therefore is not a matter which the Debtor is prohibited from litigating in this Court under doctrine of collateral estoppel.

Finally, as to Section 523(a)(6), excepting discharge in cases where the debtor willfully and maliciously injures another entity or the property of another entity, I

agree with the Debtor's contention that summary judgment is inappropriate. While in its conclusions of law the Superior Court joined Mr. Martin with Mr. Drummond as having committed "intentional forgery and fraud," that legal conclusion is not binding on this Court. The factual determinations upon which the legal conclusions were founded, however, are binding and this Court must determine if those factual conclusions also lead inescapably to a finding that the debt is non-dischargeable.

As noted above, factually the Court held that only Drummond knew that the document was forged and that Martin assumed the deeds had been legally signed and was only attempting to help Mr. Drummond. That conclusion is more than adequately borne out by the Debtor's testimony, excerpted in this Order, which shows that while he may have acted foolishly, he did so after overhearing a conversation in which the legitimacy of the deed seemed to be corroborated. Because of that conversation, and his belief in Mr. Drummond's veracity in telling him that the document had been legally executed by the parties whose signature he agreed to witness, the Debtor's conduct, as established, falls short of the criteria necessary to grant summary judgment on this matter.

Based on that I find there is a genuine issue of material fact as to whether the Debtor committed a willful and malicious injury within the meaning of Section 523(a)(6). Accordingly, the Motion for Summary Judgment is denied and the case will be set for a formal pre-trial conference by the Clerk. The parties will be directed by separate order to file a joint consolidated pre-trial stipulation in advance of that pre-trial

hearing.

Lamar W. Davis, Jr.
United States Bankruptcy Judge

Dated at Savannah, Georgia

This ____ day of August, 2000.

Give Judge a scheduling order - give them 45 days for discovery and 15 days after that to file their statement and get it on the pre-trial calendar then for October.