

IN THE UNITED STATES BANKRUPTCY COURT

FOR THE

SOUTHERN DISTRICT OF GEORGIA  
Augusta Division

IN RE:	)	Chapter 7 Case
	)	Number <u>00-10568</u>
TANYA L. FALLER	)	
	)	
Debtor	)	FILED
_____	)	at 8 O'clock & 30 min. A.M.
	)	Date: 2-9-01
MEDIACOMM MARKETING,	)	
	)	
Plaintiff	)	
	)	
vs.	)	Adversary Proceeding
	)	Number <u>00-01045A</u>
TANYA L. FALLER,	)	
	)	
Defendant	)	

**ORDER**

The Plaintiff, MediaComm Marketing, by motion seeks summary judgment on the issue of dischargeability of their debt. Plaintiff asserts that the default judgment based on breach of contract, negligence, and fraud entered against the Defendant, Tanya L. Faller, is nondischargeable pursuant to 11 U.S.C. §523(a)(2)(A).<sup>1</sup>

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<sup>1</sup>Plaintiff's complaint asserts both §523(a)(2) and §523(a)(11) grounds. In Plaintiff's brief in support of its motion for summary judgment §727(a)(4) is first raised as grounds for relief against the Defendant. Section 727 may not now be asserted. The 60-day

Plaintiff argues that Defendant is now collaterally estopped from denying that the debt arose through fraud. The Defendant asserts that collateral estoppel does not apply because the fraud issue was not actually litigated and that the Colorado court lacked personal jurisdiction over her. Because Defendant was not afforded a fair opportunity to participate in the Colorado case, Plaintiff's motion for summary judgement is denied. Defendant filed a cross motion for

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time limit, as required by Federal Rule of Bankruptcy Procedure (FRBP) 4004, has passed. The meeting of the creditors was held on April 12, 2000 and the sixty day limit expired. Therefore any §727 claim may not now be raised as this court lacks subject matter jurisdiction to hear it. In re Ginn, 179 B.R. 349 (Bankr.S.D. Ga. 1995); Community Bank of Johnson County v. Patty Dollar a/k/a Patty Price (In re Dollar) Chapter 7 case No. 99-30628, adv. pro. No. 00-03020A; 2001 WL 32838 at \*1 (Bankr.S.D.Ga. January 4, 2001 Dalis, J.) (a timely filed complaint under §727 may not be amended after the sixty day limit of FRBP 4007(c) to raise a challenge to discharge of a particular debt under §523(a)(6)). Furthermore, § 523(a)(11) is inapplicable to this case because Plaintiff is not a depository institution or insured credit union. Therefore, the motion is confined to 11 U.S.C. §523(a)(2)(A) which provides:

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;

summary judgement asserting that the award of treble damages is dischargeable because this debt is not to "the extent obtained by . . . false representation or actual fraud" required in §523. Defendant's motion for summary judgment is also denied.

The relevant undisputed facts are as follows. On September 25, 1996, a contract was entered into requiring Plaintiff to provide marketing services for Real Estate Education Seminars ("REES"). The contract price was \$8,000.00 for two-ten minute interview segments and four-sixty second commercials. On the same day, the full amount was paid by check drawn on REES' account at SouthTrust bank. The check was dishonored by SouthTrust bank, marked "NSF" and returned to Plaintiff.

Plaintiff filed suit against Defendant, the signer of the check, in the state district court of Jefferson County, Colorado. Defendant failed to file responsive pleadings. Defendant hired a Florida attorney who filed a motion to allow special appearance to contest personal jurisdiction over Defendant. The attorney was denied admittance pro hoc vice for failure to comply with a Colorado court rule requiring association with a member in good standing of the Colorado bar. The district court entered a default judgement against Defendant on June 20, 1997. The award was for \$8,000.00 in actual damages on Plaintiff's claims for breach of contract,

negligence, and fraud and \$24,000.00 in treble damages pursuant to Colorado Revised Statute (C.R.S.) §13-21-109. Defendant listed this debt in her Chapter 7 bankruptcy and Plaintiff has now objected to its discharge.

Federal Rule of Bankruptcy Procedure 7056 incorporates Rule 56 of the Federal Rules of Civil Procedure. Under Rule 56, this Court will grant summary judgment only if "...there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). The moving party has the burden of establishing its right of summary judgment. See Clark v. Coats & Clark, Inc., 929 F.2d 604, 608 (11<sup>th</sup> Cir. 1991). The evidence must be viewed in a light most favorable to the party opposing the motion. See Adickes v. S.H.Kress & Co., 398 U.S. 144, 57, 90 S.Ct. 1598, 1608, 26 L.Ed. 2d 142 (1970). The Court has jurisdiction to hear this matter as a core bankruptcy proceeding under 28 U.S.C. § 157(b)(2)(A) & (I) and 28 U.S.C. § 1334.

Bankruptcy affords a debtor the opportunity for a fresh start by discharging the burden of debt. See Grogan v. Garner, 498 U.S. 279, 286, 111 S.Ct. 654, 659, 112 L.E.2d 755 (1991). The bankruptcy code limits this opportunity, refusing discharge to certain types of debt. 11 U.S.C. § 523. One type of debt which

cannot be discharged under Chapter 7 is debt for money, property or services obtained by fraud. 11 U.S.C. § 523(a)(2)(A).

Whether a debt is for money, property or services obtained by fraud may be determined by a judgment of the bankruptcy court. 28 U.S.C. § 157(b)(2)(A) & (I). In addition, an adjudication of fraud made by a state or federal court may have collateral estoppel effect in bankruptcy courts, rendering the debt nondischargeable. See Grogan, 498 U.S. at 284-85 & n.11. Collateral estoppel bars relitigation of issues previously adjudicated. See Bush v. Balfour Beatty Bahamas. Ltd. (In re Bush) 62 F.3d 1319, 1322 (11<sup>th</sup> Cir. 1995). A default judgment issued by a state or federal court may also have collateral estoppel effect in a bankruptcy court. See e.g. id. at 1324-25; In re Austin, 93 B.R. 723, 728 (Bankr. D. Colo. 1988); Chisholm v. Stevens (In re Stevens), Chapter 7 case No. 95-41828, Adv. Proc. 95-4158, slip op. at 1 (Bankr.S.D. Ga. May 17, 1996) (Davis, J.).

In determining whether a prior judgment is to be accorded collateral estoppel effect, the bankruptcy court must apply the law applicable to the court issuing the prior judgment. See Bush, 62 F.3d at 1323 n.6 (applying federal law to determine whether federal court default judgment had collateral estoppel effect and noting that state court judgment would be reviewed under law of that

state); But see Angus v. Wald (In re Wald), 208 B.R. 516, 520 (Bankr. N.D. Ala. 1997) (finding bankruptcy courts required to apply federal law of collateral estoppel to determine whether a state court default judgment has preclusive effect). In any court, judicial records and proceedings of another court must be given the full faith and credit that they would have received in the originating court. 28 U.S.C. §1738. Thus, a default judgment rendered by a state district court of Colorado must be given the same effect in federal bankruptcy court as it would have carried in a Colorado state court proceeding. Therefore, the Court will apply Colorado law of collateral estoppel to determine whether a default judgment rendered by a Colorado state court precludes discharge of a debt under 11 U.S.C. 523(a)(2)(A). See e.g. id.; Bolling v. City & County of Denver, Colo., 790 F.2d 67, 68 (10<sup>th</sup> Cir. 1986) (federal court must "give to a state court judgment the same preclusive effect as would be given that judgment under the law of the state in which the judgment was rendered"); See Wilcox v. Hritz (In re Hritz), 197 B.R. 702, 705 (Bankr. N.D. Ga. 1996) (applying Georgia law of collateral estoppel to determine whether a Georgia default judgment precludes the discharge of a debt).

Collateral estoppel is a discretionary doctrine. See In re Austin, 93 B.R. 723, 728 (Bankr. D. Colo. 1988) (Court must look

to see if default judgment was obtained by fraud, mistake, clerical error, lack of due process, or denial of a full and fair opportunity to litigate). A bankruptcy court must evaluate whether applying collateral estoppel furthers both bankruptcy and general judicial policies. In determining whether a state court default judgment precludes discharge of debt, the court's decision must be consonant with both the policies driving bankruptcy law and the case law of the state of Colorado.

Colorado case law employs a four-part test to determine whether a prior judgment has collateral estoppel effect:

First, there must exist an identity of issues between the first and second actions. Second, the issue was finally adjudicated on the merits. Third, the party against whom the doctrine is invoked was a party or in privity with a party to the prior adjudication. Fourth, the party against whom the doctrine is raised had a full and fair opportunity to litigate the issue in the prior action. (Citations omitted)

In re Austin, 93 B.R. 723, 728 (Bankr.D. Colo. 1988).

The first part of the test, identity of issues, is satisfied in this case because both the state court action and the section 523(a)(2)(A) dischargeability action concern allegations of fraud in the procurement of services giving rise to the complained of debt. Fraud, under Colorado law, consists of four elements:

- (1) a fraudulent misrepresentation of material fact;

(2) the plaintiff relied on the misrepresentation; (3) the plaintiff had the right to rely on, or was justified in relying on, the misrepresentation; and (4) the reliance resulted in damages.

Balkind v. Telluride Mtn. Title Co., 8 P.2d 581, 587 (Colo. App. 2000). More specifically, "any person, knowing he has insufficient funds with the drawee, who, with intent to defraud, issues a check for the payment of services, wages, salary, commissions, labor, rent, money, property, or other thing of value, commits fraud by check." C.R.S. §18-5-205. Bankruptcy law has a virtually identical definition of fraud as Colorado's common law fraud. See, 4 Collier on Bankruptcy ¶ 523.08[1][e] Lawrence P. King ed., 15<sup>th</sup> ed. rev. 1998). Section 523(a)(2)(A) fraud requires "justifiable" reliance as does Colorado's definition of fraud. Field v. Mans, 516 U.S. 59, 73-75, 116 S.Ct. 437, 445-46, 113 L.Ed.2d 351 (1995). Default judgment was rendered against Defendant for check fraud which is more onerous than the bankruptcy definition of fraud. Therefore, a determination of check fraud under Colorado law necessarily satisfies the requirements for fraud under bankruptcy law.

Defendant argues that no determination of fraud could have been made because no evidence of fraud was presented. However, the

default judgment under Plaintiff's amended complaint includes recovery for all three claims for relief, including fraud. This judgment provides a basis in fraud. Therefore, the default judgment for fraud issued by the District Court, Jefferson County, Colorado against Defendant has the requisite identity of issue with this adversary proceeding in bankruptcy for nondischargeability of debt due to fraud to meet the first prong of the test for application of collateral estoppel.

Under the second factor, I must consider whether the prior action has been finally adjudicated. Colorado law holds that a default judgment is equivalent to a final judgment on the merits and entitled to collateral estoppel protection. See Colorado Rules of Civil Procedure Rules 54, 55, & 60; Ortega v. Bd. of County Comm'rs, 683 P.2d 819 (Colo. App. 1984) (giving default judgments preclusive effect). The issue is actually litigated if properly presented to the court. See Matter of Lombard, 739 F.2d 499, 502 (10<sup>th</sup> Cir. 1984) (holding collateral estoppel did not apply because issue had not been presented to the court); In re Austin, 93 B.R. at 728.

Defendant points out that the issue of fraud was not actually litigated and cites the Bush case for the proposition that the bankruptcy issue must have been actually litigated. Bush 62 F.3d at 1319. Bush is distinguishable because it applied the federal rule

of collateral estoppel to a federal default judgment, whereas here I must apply Colorado law of collateral estoppel. The general federal rule is that default judgments ordinarily will not be given collateral estoppel effect because the issue was not actually litigated. Bush 62 F.3d at 1322. Under Colorado law, since a default judgment is a final adjudication, absence of litigation does not bar a default judgment from having collateral estoppel effect. Lombard, 739 F.2d at 502; Austin, 93 B.R. at 727 (actual trial is not imperative for collateral estoppel to apply). Therefore the second prong of the test is satisfied.

The third prong of the test, identity of parties, is easily met in this case. Plaintiff and Defendant the named parties in the Colorado state court proceeding are the parties to this action.

The final part of the test, requires that the party against whom collateral estoppel is raised had a full and fair opportunity for hearing. In this instance Defendant was denied that opportunity. Collateral estoppel is precluded. Default judgments that are the result of a denial of an opportunity to a full and fair trial are not entitled to collateral estoppel protection. Austin, 93 B.R. at 728. As stated supra, collateral estoppel is a discretionary doctrine and the court must look at the totality of the circumstances. See id. I have previously used my discretion

to allow collateral estoppel where a default judgment was entered where a defendant had not cooperated in discovery and stymied the judicial process. Branton v. Hooks (In re Hooks), Adversary Proceeding No. 97-03013A (Bankr. S.D. Ga September 10, 1999) (Dalis, J.). The court in Austin, also utilized collateral estoppel to estop the relitigation of dischargeability issues before the bankruptcy court where the defendant had three different trial dates and failed to show up in the prior action, there were clear and certain findings of fraud, and the bankruptcy court had designated two opportunities for the issues raised to be tried in state court and both were avoided by defendant who knowingly consented to a default judgment. Austin, 93 B.R. at 728. Such is not the case in the present action. Defendant has not thwarted the judicial process. Defendant attempted to attack the personal jurisdiction of the Colorado state court. Defendant was denied the opportunity because her out of state attorney failed to associate with a member in good standing of the Colorado bar. Cases applying collateral estoppel to a default judgment involve a defendant's own conduct where defendant had control of the events leading up to the default judgment. See e.g. Bush, 62 F.3d at 1324; Austin, 93 B.R. at 728; Branton v. Hooks (In re Hooks), adversary proceeding No. 97-03013A (Bankr. S.D. Ga September 10, 1999) (Dalis, J.).

Looking at the facts in the light most favorable to Defendant, Defendant made a good faith effort to contest the personal jurisdiction of the Colorado court. Inaction in the face of a court order is not a good faith effort. However, here, Defendant acted and made an effort to contest the case brought against her. Defendant tried to contest jurisdiction and through no fault of her own, her attorney did not comply with the requirements to appear before the court. A full and fair opportunity to litigate requires that the court have personal jurisdiction over the defendant and this Defendant was not afforded that opportunity to contest personal jurisdiction. See International Shoe Co. v. Washington, 326 U.S. 310, 66 S.Ct. 154 (1945); Austin, 93 B.R. at 728. Viewing all the surrounding circumstances, I conclude Defendant was not given a full and fair opportunity to litigate and therefore, the judgment of the Colorado court is denied collateral estoppel effect in this case. Plaintiff's motion for summary judgment is denied.

Defendant seeks summary judgment claiming the award of treble damages is dischargeable.<sup>2</sup> Defendant's motion for summary judgment is denied. The United States Supreme Court in Cohen v. De La Cruz,

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<sup>2</sup>Defendant amended her counterclaim seeking attorneys fees under C.R.S. 13-21-109(6). I do not address the counterclaim because there is no motion for summary judgment pending on the counterclaim.

523 U.S. 213, 118 S.Ct. 1212 (1998), held that treble damages awarded on account of fraud in obtaining rent from tenants were within the discharge exception of §523(a)(2)(A). 118 S.Ct. at 1215. In Cohen, looking at the statute as a whole and the history of the fraud exception in §523, the Court explained that the term "debt" encompasses treble damages and the phrase "to the extent obtained by" modifies "money, property, services, or . . . credit" and that "debt for" means a debt "as a result of," or "by reason of" and therefore an award of treble damages is a debt as a result of fraud and is excepted from discharge. 118 S.Ct. at 1217. Because the award of treble damages falls within the scope of the §523(a)(2)(A) exception, Defendant's motion is denied.

It is, therefore, ORDERED that both motions for summary judgment are denied.

JOHN S. DALIS  
CHIEF UNITED STATES BANKRUPTCY JUDGE

Dated at Augusta, Georgia

this 8<sup>th</sup> Day of February, 2001.