

This document has been electronically entered in the records of the United States Bankruptcy Court for the Southern District of Ohio.

IT IS SO ORDERED.

Dated: August 20, 2012



Jeffery P. Hopkins
Jeffery P. Hopkins
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

In Re

LAURIE L. BAILEY

Debtor

Case No. 11-17168
Chapter 7
Judge Hopkins

**OMEGA PROCESSING
SOLUTIONS, LLC**

Plaintiff

Adversary Case No. 12-1041

vs.

LAURIE L. BAILEY

Defendant

ORDER GRANTING MOTION FOR SUMMARY JUDGMENT

This is a dischargeability action pursuant to 11 U.S.C. § 523(a)(2) and (6). Presently before the Court is a summary judgment motion ("Motion")(Doc. 15) filed by the Plaintiff, Omega Processing Solutions, LLC ("Omega").

Prepetition, Omega obtained a Kentucky state court judgment ("Judgment") against the Defendant, Laurie Bailey.¹ The Judgment is premised upon a finding of "false representations and actual fraud." The issue presented to this Court is whether the Judgment is entitled to preclusive effect in this proceeding. Because Kentucky law gives preclusive effect to the Judgment, it is entitled to the same effect in this proceeding.

KENTUCKY LAW OF ISSUE PRECLUSION

To determine the preclusive effect of a state court judgment, federal courts look to the law of the state in which the judgment was entered. *In re Calvert*, 105 F.3d 315, 317 (6th Cir. 1997). Kentucky law gives preclusive effect to a judgment if the issue: (1) is the same in both cases; (2) was actually litigated in the first case; (3) was actually decided in the first case; and (4) was necessary to the judgment in the first case. *Coomer v. CSX Transportation, Inc.*, 319 S.W.3d 366, 374 (Ky. 2010).

APPLICATION OF KENTUCKY LAW

Applying *Coomer* to the record before the Court, the Judgment is entitled to preclusive effect in this proceeding.

I. Same Issue in Both Cases

This case raises the issue of whether the debt to Omega is nondischargeable under § 523(a)(2)(A). Section 523(a)(2)(A) excepts from discharge debts obtained by "a false representation, or actual fraud." The same issue was raised in the Kentucky case. Count III of the state court complaint is a fraud claim, alleging "false and misleading representations of material fact" and failure "to disclose material facts under . . . a duty to speak." See Doc. 15-2 at Ex. F.

II. Actually Litigated in First Case

The Judgment is a default judgment. That does not, however, preclude a finding of actual litigation. Kentucky law gives preclusive effect to default judgments. See *Davis v. Tuggle's Adm'r.*, 178 S.W.2d 979, 981 (1944); see also *In re Murphy*, 471 B.R. 190, 193 (Bankr. W.D. Ky. 2012).

¹ The judgment is against "Laurie G. Bailey." Ms. Bailey, whose middle initial is the letter L, does not dispute that she is the judgment debtor. See Doc. 18 at 9-10. Moreover, Schedule F filed with Ms. Bailey's bankruptcy petition lists Omega as the holder of a liquidated, undisputed claim in the same amount as the judgment.

III. Actually Decided in First Case

The state court actually decided the fraud issue. The Judgment expressly states that "this judgment amount owed was incurred by Defendants' false representations and actual fraud." See Doc. 1 at Ex. B.²

IV. Necessary to First Judgment

The state court's finding of fraud is necessary to the Judgment. Although the state court complaint asserted four different causes of action, see Doc. 15-2 at Ex. F, the fraud count is the only count upon which the Judgment is expressly predicated.

EXTENT TO WHICH JUDGMENT IS NONDISCHARGEABLE

The Judgment awards the following to Omega: (1) \$36,382.13; (2) post-judgment interest at the rate of 4% per annum; (3) all court costs; and (4) attorney's fees in the amount of \$1,445.00.

Section 523(a)(2)(A) excepts from discharge all liability related to a debt for fraud, including attorney's fees and "other relief that may exceed the value obtained by the debtor." *Cohen v. De La Cruz*, 523 U.S. 213, 223 (1998)(treble damages for fraud excepted from discharge). Therefore, the entire unpaid balance of the Judgment is nondischargeable.

OMEGA'S ATTORNEY'S FEES RELATED TO THIS ACTION

Omega requests an award of its attorney's fees related to the prosecution of this adversary proceeding. In federal litigation, parties are responsible for their own attorney's fees unless a statute or contract provides otherwise. *Alyeska Pipeline Serv. Co. v. Wilderness Soc.*, 421 U.S. 240, 257 (1975); *In re Dow Corning Corp.*, 456 F.3d 668, 684 (6th Cir. 2006)(parties can override general rule by contract).

Omega premises its fee request upon contract. Ms. Bailey, acting as guarantor, signed two contracts between Omega and Bailey Enterprises. See Doc. 15-2 at Ex. F. The contracts served as one of the predicates for the Kentucky state court action.³ In both contracts, the guaranty provides: "Guarantor shall pay Company for all . . . expenses incurred in enforcing this guaranty and underlying Agreement, including Company's reasonable attorney's fees." Therefore, Omega is entitled to an award of the attorney's fees it incurred in this adversary proceeding. See *Dow Corning*, 456 F.3d at 686.

² Although the Judgment is attached to the complaint, it was incorporated into the Motion by the Affidavit of Matthew Chasar. See Doc. 15-2.

³ One of the counts against Ms. Bailey asserted a claim for breach of her guaranty.

COUNTERCLAIM DISMISSED

Ms. Bailey filed a counterclaim for attorney's fees pursuant to 11 U.S.C. § 523(d). See Doc. 4. Section 523(d) provides:

If a creditor requests a determination of dischargeability of a consumer debt under subsection (a)(2) of this section, and such debt is discharged, the court shall grant judgment in favor of the debtor for the costs of, and a reasonable attorney's fee for, the proceeding if the court finds that the position of the creditor was not substantially justified, except that the court shall not award such costs and fees if special circumstances would make the award unjust.

Omega moved for summary judgment on the counterclaim. See Doc. 15 at 11.

Because the debt to Omega will not be discharged, Omega is entitled to summary judgment on the counterclaim.

CONCLUSION

For the foregoing reasons, the Motion is **GRANTED** and the counterclaim filed by Laurie L. Bailey is **DISMISSED**. A nondischargeable judgment will be entered separately.

Within twenty-one days from the entry of this order, counsel for Omega shall file and serve an affidavit itemizing the attorney's fees Omega has incurred in this adversary proceeding. Ms. Bailey shall have twenty-one days from service of the affidavit to file an objection, if any, to the itemized fees. Thereafter, the Court will enter a supplemental order on the issue of attorney's fees to be awarded.

Copies to:

Matthew R. Chasar
mrchasar@reardonchasar.com

Robert F. Holmes
robertfholmes@yahoo.com

###