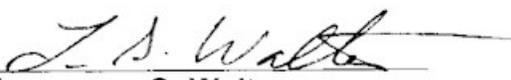


**This document has been electronically entered in the records of the United States Bankruptcy Court for the Southern District of Ohio.**

**IT IS SO ORDERED.**



  
Lawrence S. Walter  
United States Bankruptcy Judge

**Dated: September 06, 2012**

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**UNITED STATES BANKRUPTCY COURT  
FOR THE SOUTHERN DISTRICT OF OHIO  
WESTERN DIVISION AT DAYTON**

In re: KERT S. ALEXAKIS,

*Debtor*

Case No. 10-37871

Adv. No. 11-3164

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DAVID CHANDLER  
ANNETTA CHANDLER,

*Plaintiffs*

Judge L. S. Walter  
Chapter 7

v.

KERT S. ALEXAKIS,

*Defendant*

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**DECISION OF THE COURT DENYING PLAINTIFFS'  
MOTION FOR SUMMARY JUDGMENT**

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This matter is before the court on Plaintiffs' Motion for Summary Judgment [Adv. Doc. 36]; Defendant's Memorandum in Opposition [Adv. Doc. 39]; and the Plaintiffs' Reply

Memorandum [Adv. Doc. 42]. The court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157(a) and 1334, and the standing General Order of Reference in this District. This matter is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(I).

Plaintiffs David and Annetta Chandler (collectively “the Chandlers”) filed an adversary complaint requesting that a judgment debt owed to them by Defendant-Debtor Kert Alexakis (“Debtor”) be determined nondischargeable pursuant to 11 U.S.C. §§ 523(a)(2)(A) and/or (a)(6). On summary judgment, the Chandlers assert that the nondischargeability of the debt may be decided as a matter of law based on the preclusive effect of the findings in the state court judgment determining the Debtor’s liability and quantifying damages. After reviewing the submissions of the parties and relevant case law, the court concludes that the Chandlers failed to demonstrate that the state court judgment conclusively establishes the nondischargeability of the debt as a matter of law. However, this does not mean that the state court judgment is without effect. While the nondischargeability of the debt must proceed to trial, the state court judgment does set the Debtor’s liability for and the amount of the debt.

### **FACTUAL AND PROCEDURAL BACKGROUND**

The following facts are undisputed for purposes of summary judgment. In the early part of 2006, the Chandlers fell behind on their residential mortgage payments and their lender, Wells Fargo, filed a foreclosure complaint against them. In an effort to save their house, the Chandlers formed a relationship with a business known as Foreclosure Alternatives which had sent them a mailer. Initially, the Chandlers spoke with an employee named Lance Baker and, later, they signed an agreement and other documents allowing Foreclosure Alternatives to assist the Chandlers with problems arising from their mortgage delinquency and foreclosure situation.

At some point, David Chandler learned through reading an article in a newspaper that his house was set for sheriff’s sale and he tried to reach Baker. However, Baker had been

terminated or resigned. David Chandler and the Debtor dispute whether David Chandler then spoke directly with the Debtor who admits to being, at the very least, a statutory agent of Foreclosure Alternatives and someone who performed non-essential administrative tasks for the business. The parties do agree that on or about Friday, October 20, 2006, the Debtor called the Chandlers and left a voice message stating that they would have to pay \$7,000.00 to the lender to prevent the imminent sheriff's sale from going forward. The Chandlers were unable to provide the funds and their house was sold at sheriff's sale on the following Monday, October 23, 2006.

Subsequently, on April 4, 2007, the Chandlers filed a lawsuit against the Debtor, Baker, Foreclosure Alternatives and other defendants in the Court of Common Pleas of Hamilton County, Ohio. The Chandlers' claims included: 1) unauthorized practice of law; 2) violations of the Consumer Sales Practices Act; 3) breach of contract; 4) negligent misrepresentation; 5) negligence; 6) fraud; 7) unjust enrichment; and 6) civil conspiracy. The Debtor participated in the state court matter by hiring an attorney and filing an answer to the Chandlers' complaint as well as cross-claims against several co-defendants. The Debtor also filed other documents in the state case. However, on November 19, 2008, the Debtor's attorney withdrew from the case and the Debtor proceeded without representation.

A pretrial conference was held on October 1, 2010 and the trial in the state court matter was held on October 12, 2010. Although notices of the pretrial conference and trial were mailed to the Debtor, the Debtor did not attend either the pretrial conference or the trial.

Although the Debtor did not attend, the trial went forward and the Chandlers presented evidence including their own testimony and portions of a transcript of the Debtor's prior testimony before the Ohio Supreme Court Disciplinary Council [Adv. Doc. 36, App. G]. Following the presentation of evidence, the state court judge made oral findings on the record that are also encapsulated in the court's *Order Regarding Damages and Attorney's Fees* ("State

Court Judgment”) entered on October 12, 2010 [Adv. Doc. 36, App. G, pp. 66-71 and App. H].<sup>1</sup>

The findings in the State Court Judgment relevant to Debtor<sup>2</sup> state as follows:

This cause came on to be heard upon the complaint filed by David and Annetta Chandler, the default judgments entered against Foreclosure Alternatives and Daniel Jones, the evidence presented at trial by the Chandlers, and the arguments of counsel. The Court, having considered all these matters, finds as follows:

The Court finds that Defendant, Kert Alexakis, violated the terms of [ ] the Ohio Consumer Sales Practices Act (OCSPA); made a false statement to the Chandlers and/or he made [ ] statements that he did not have a reasonable basis to believe were true; acted knowingly; and caused damages to the Chandlers; so therefore, Alexakis: (1) is liable to the Chandlers on the Ohio Consumer Sales Practices Act in the amount of \$ 82,320.00 ; (2) and is liable in attorney’s fees in the amount of \$ 69,000.00.

\* \* \*

The Court finds that Defendant, Kert Alexakis, violated the elements of negligent misrepresentation and caused damages to the Chandlers; so therefore, Alexakis is liable on the negligent misrepresentation claims in the amount of \$82,320.00.

\* \* \*

The Court finds that Defendant, Kert Alexakis violated the elements of fraud with willful and malicious conduct and caused damages to the Chandlers; so therefore Alexakis: (1) is liable to the Chandlers on the fraud claim in the amount of \$ 82,320.00; (2) is liable for punitive damages in the amount of \$ 50,000.00; and (3) is liable for attorney’s fees in the amount of \$ 69,000.00.

\* \* \*

The Court finds that Kert Alexakis violated the elements of civil conspiracy and caused damages to the Chandlers; so therefore, Alexakis is liable to the Chandlers in the amount of \$ 82,320.00.

\* \* \*

Defendants to pay costs.

IT IS SO ORDERED.

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<sup>1</sup> With the exception of a few introductory words of no particular relevance, the oral findings made at trial and the findings in the written State Court Judgment are substantially identical.

<sup>2</sup> For sake of brevity, the court omits the findings in the State Court Judgment against the Debtor’s co-defendants.

[Adv. Doc. 36, App. H].

Following entry of the State Court Judgment, Debtor filed a Chapter 13 bankruptcy petition on December 15, 2010 and a notice converting the case to Chapter 7 on February 3, 2011. The Chandlers subsequently filed their adversary complaint in this action on May 9, 2011, and amended it on September 8, 2011, seeking to have the judgment debt determined nondischargeable in bankruptcy.

## **LEGAL ANALYSIS**

### **A. Standard for Summary Judgment**

The appropriate standard to address the Chandlers' motion for summary judgment is contained in Fed. R. Civ. P. 56 and incorporated in bankruptcy adversary proceedings by reference in Fed. R. Bankr. P. 7056. Rule 56(a) provides that summary judgment is to be granted by the court "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a).

In order to prevail, the moving party, if bearing the burden of persuasion at trial, must establish all elements of its claim. *Celotex Corp. v. Catrett*, 477 U.S. 317, 331 (1986).

Thereafter, the opposing party "must come forward with 'specific facts showing that there is a genuine issue for trial.'" *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87 (1986) (citations omitted); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249-251 (1986).

All inferences drawn from the underlying facts must be viewed in a light most favorable to the party opposing the motion. *Matsushita*, 475 U.S. at 586-88.

The procedures for asserting facts or demonstrating a dispute of facts are set forth in Rule 56(c):

**(1) *Supporting Factual Positions.*** A party asserting that a fact cannot be or is genuinely disputed must support the assertion by:

(A) citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials; or

(B) showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact.

Fed. R. Civ. P. 56(c). “If a party fails to properly support an assertion of fact or fails to properly address another party’s assertion of fact as required by Rule 56(c), the court may . . . consider the fact undisputed for purposes of the motion.” Fed. R. Civ. P. 56(e)(2).

**B. Applicability of Preclusionary Principles to the State Court Judgment**

On summary judgment, the Chandlers argue that the State Court Judgment against the Debtor should have preclusive effect in this adversary proceeding. Under 28 U.S.C. § 1738, federal courts are directed to give the same “full faith and credit” to a state court judgment as would be given that judgment under the law of the state in which it is rendered. *Bay Area Factors v. Calvert (In re Calvert)*, 105 F.3d 315, 317 (6<sup>th</sup> Cir. 1997); *Sill v. Sweeney (In re Sweeney)*, 276 B.R. 186, 189 (B.A.P. 6<sup>th</sup> Cir. 2002) (citing *Markowitz v. Campbell (In re Markowitz)*, 190 F.3d 455, 461 (6<sup>th</sup> Cir. 1999)). Consequently, in order for a judgment rendered in an Ohio state court to have preclusive effect in a bankruptcy adversary proceeding, it must be entitled to such effect under Ohio’s preclusionary principles.

Ohio recognizes the dual preclusionary doctrines of res judicata (also known as claim preclusion) and collateral estoppel (or issue preclusion). Of these doctrines, it is collateral estoppel that applies to determine whether specific facts or issues determined in a prior state court judgment bar relitigation of those same facts or issues in a separate bankruptcy dischargeability proceeding. *Grogan v. Garner*, 498 U.S. 279, 284 n.11 (1991) (noting that it is collateral estoppel principles that apply in discharge exception proceedings pursuant to § 523(a)).

“The doctrine of collateral estoppel ‘precludes relitigation of issues of fact or law actually litigated and decided in a prior action between the same parties and necessary to the judgment, even if decided as part of a different claim or cause of action.’” *Markowitz v. Campbell (In re Markowitz)*, 190 F.3d 455, 461 (6<sup>th</sup> Cir. 1999) (quoting *Sanders Confectionery Products, Inc. v. Heller Financial, Inc.*, 973 F.2d 474, 480 (6<sup>th</sup> Cir. 1992)).

Under Ohio law, there are four prerequisites to the application of collateral estoppel:

- 1) A final judgment on the merits in the previous case after a full and fair opportunity to litigate the issue;
- 2) The issue must have been actually and directly litigated in the prior suit and must have been necessary to the final judgment;
- 3) The issue in the present suit must have been identical to the issue in the prior suit;
- 4) The party against whom estoppel is sought was a party or in privity with the party to the prior action.

*Sweeney*, 276 B.R. at 189; *Miller v. Grimsley (In re Grimsley)*, 449 B.R. 602, 609 (Bankr. S.D. Ohio 2011).

In the case at hand, no one disputes that the fourth element was met by the fact that the Debtor was a party to the state court action. Also satisfied is the first element: that the state court judgment order is a final judgment rendered after a full and fair opportunity to litigate. Indeed, the Debtor does not dispute the final nature of the state court judgment nor does he dispute that he answered the complaint and received proper notice of the trial date. While the Debtor attests to reasons why he did not attend the trial, including no funds to pay his attorney and an inoperable vehicle [Adv. Doc. 40, Aff. of Kert Alexakis], those reasons are of no consequence. “It is only necessary that the opportunity to fully and fairly litigate an issue be available; it is not required that the party have exercised that opportunity.” *Sloan Dev., LLC v. Gill (In re Gill)*, 2012 WL 909513, at \*3 (Bankr. N.D. Ohio March 15, 2012). Because the Debtor was given notice of the trial date and an opportunity to litigate the issues, the court concludes that the first element is met.

Next the Chandlers must demonstrate that the facts or issues on which preclusion is sought were actually, directly and necessarily litigated in the state court. In his opposition memorandum, the Debtor argues that the issues determined by the state court judge should not be considered actually litigated because the Debtor did not appear for trial making the state court judgment more akin to one rendered by default. It is true that, ““under Ohio law, a default judgment obviates the plaintiff’s burden to prove the elements of the claims alleged.”” *Sweeney*, 276 B.R. at 193 (further citations omitted); *Longbrake v. Rebarckek (In re Rebarckek)*, 293 B.R. 400, 406 (Bankr. N.D. Ohio 2002). Consequently, for determinations in a default judgment to be given preclusive effect as “actually litigated,” there must be proof that the plaintiff submitted admissible evidence, apart from the pleadings, from which the state court made express findings of facts and conclusions of law. *Sweeney*, 276 B.R. at 193-94

While this requirement limits the preclusive effect of true default judgments, the state court judgment at issue in this case was not one rendered by default. Under Ohio Rules of Civil Procedure, a default judgment may only be rendered when a defendant has failed to plead or otherwise answer the complaint. Ohio R. Civ. P. 55. *See also Rebarckek*, 293 B.R. at 406. When, instead, the defendant answers the complaint but subsequently fails to attend the trial, a default judgment is not proper and affirmative proof of a plaintiff’s claims is required at trial. *Rebarckek*, 293 B.R. at 406 (citing *Ohio Valley Radiology Assocs., Inc. v. Ohio Valley Hosp. Ass’n*, 28 Ohio St.3d 118, 121-22, 502 N.E.2d 599, 602-03 (1986)). In the case at hand, the Debtor answered the Chandlers’ state court complaint. Consequently, a trial was held on October 12, 2010. Although the Debtor did not attend, the trial went forward and the Chandlers presented evidence to support their claims. Because the state court judgment was rendered upon evidence submitted at trial, the court concludes that the issues determined by the state court were “actually litigated” meeting the second requirement for the application of collateral estoppel.

The court moves to the third requirement of Ohio's collateral estoppel test which is also the most difficult in this case. Pursuant to this prong of the test, the Chandlers must demonstrate that the facts and/or issues determined in state court and upon which preclusive effect is to be afforded are identical to those necessary to determine the debt nondischargeable in this adversary proceeding. To determine whether the issues are identical, the court must compare the proof required for the nondischargeability claims with that required to prove the claims determined by the state court:

If the same facts or evidence would sustain both, the two actions are considered the same . . . . If however, the two actions rest upon different states of facts, or if different proofs would be required to sustain the two actions, a judgment in one is no bar to the maintenance of the other.

*Ed Schory & Sons, Inc. v. Francis (In re Francis)*, 226 B.R. 385, 389 (B.A.P. 6<sup>th</sup> Cir. 1998) (citing *Monahan v. Eagle Picher Indus.*, 21 Ohio App.3d 179, 181; 486 N.E. 2d 1165, 1168 (1984)).

In this adversary proceeding, the Chandlers bring two claims of nondischargeability under the provisions of 11 U.S.C. § 523. Exceptions from discharge are to be narrowly construed in favor of the Debtor and the Chandlers carry the burden of proof on these claims by a preponderance of the evidence. *Monsanto Co. v. Trantham (In re Trantham)*, 304 B.R. 298, 306 (6<sup>th</sup> Cir. B.A.P. 2004).

The Chandlers' first claim is based on fraud pursuant to 11 U.S.C. § 523(a)(2)(A). This provision of the Bankruptcy Code excepts from discharge a 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[.]

11 U.S.C. § 523(a)(2)(A). Pursuant to this provision, the Chandlers must prove:

. . . (1) the debtor obtained money through a material misrepresentation that, at the time, the debtor knew was false or made with gross recklessness as to its truth; (2) the debtor intended to deceive the creditor; (3) the creditor justifiably relied on the false representation; and (4) its reliance was the proximate cause of loss.

*Rembert v. AT&T Universal Card Services, Inc. (In re Rembert)*, 141 F.3d 277, 280-81 (6th Cir. 1998).

While the elements identified in *Rembert* are substantially similar to those required to prove fraud under Ohio law,<sup>3</sup> there is an additional requirement under § 523(a)(2)(A). More specifically, to except a debt from discharge under § 523(a)(2)(A), the evidence must establish “the threshold showing that the debt at issue was ‘obtained by’ fraud.” *Aslakson v. Freese (In re Freese)*, 472 B.R. 907, 917-18 (Bankr. D. N.D. 2012). In other words, the Chandlers must demonstrate that the Debtor committed a fraudulent act or misrepresentation at the inception of the debt to induce the Chandlers to part with their money, property or services. *Id.* Misrepresentations made subsequent to the creation of the debt have no effect upon dischargeability of a debt, since the false representation did not cause the creditor to part with money, property or services. *Id. See also Montgomery Bank, N.A. v. Steger (In re Steger)*, 472 B.R. 533, 536 (B.A.P. 8<sup>th</sup> Cir. 2012) (concluding that the debt was dischargeable under § 523(a)(2)(A) due to the lack of evidence to support that the debtor made a false statement to the bank prior to the bank advancing funds); *Wilcoxon Constr., Inc. v. Woodall (In re Woodall)*, 177 B.R. 517, 523-24 (Bankr. D. Md. 1995); *Macaulay v. Shields (In re Shields)*, 147 B.R. 627, 629-30 (Bankr. D. Mass. 1992) (debtor’s false statement made subsequent to the creation of the debt

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<sup>3</sup> The elements of a common law fraud claim in Ohio are: “(1) a representation or, where there is a duty to disclose, concealment of a fact, (2) which is material to the transaction at hand, (3) made falsely, with knowledge of its falsity, or with such utter disregard and recklessness as to whether it is true or false that knowledge may be inferred, (4) with the intent of misleading another into relying upon it, (5) justifiable reliance upon the representation or concealment, and (6) a resulting injury proximately caused by the reliance.” *Unencumbered Assets, Trust v. JP Morgan Chase Bank (In re Nat’l Century Fin. Enter., Inc., Inv. Litig.)*, 604 F. Supp.2d 1128, 1149 (S.D. Ohio 2009) (citing *Russ v. TRW, Inc.*, 59 Ohio St.3d 42, 49, 570 N.E.2d 1076, 1083–84 (Ohio 1991)).

intended to placate the plaintiffs does not support nondischargeability pursuant to § 523(a)(2)(A); instead, money must be obtained by the false representation).

Looking to the State Court Judgment at issue in this case, it includes findings that the Debtor knowingly made false statements to the Chandlers and “violated the elements of fraud” in a manner that damaged the Chandlers [Adv. Doc. 36, App. H]. However, it is bereft of any finding that the Debtor’s fraud and/or misrepresentations *induced* the Chandlers to part with money, property or services, a requirement for nondischargeability under § 523(a)(2)(A).<sup>4</sup> Moreover, Mr. Chandler’s testimony during the state court trial does not support such a finding. While Mr. Chandler testified that he was induced to make payments to Foreclosure Alternatives following discussions with employees Lance Baker and Daniel Jones, Mr. Chandler testified to no contact with the Debtor until after that money was paid [Adv. Doc. 36, App. G, pp. 13-26)].<sup>5</sup> Because the State Court Judgment does not establish that the Debtor’s fraud or misrepresentation induced the Chandlers to part with money, property or services, the judgment cannot be given preclusive effect on this requirement of § 523(a)(2)(A). Therefore, summary judgment is denied on this claim.

Alternatively, the Chandlers claim that the judgment debt meets the requirements for nondischargeability pursuant to 11 U.S.C. § 523(a)(6). This provision excepts from discharge

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<sup>4</sup> One of the difficulties in affording collateral estoppel effect to the State Court Judgment is its lack of factual findings to support the conclusory legal determinations of the court. Although the Chandlers try to provide that detail through citations to the transcript and exhibits submitted, it is very difficult to decipher what facts the state court considered fundamental to the judgment against the Debtor and upon which to give preclusive effect in this dischargeability proceeding.

<sup>5</sup> The Chandlers have not raised any argument for holding the debt nondischargeable based on fraudulent statements made by the Debtor’s state court co-defendants, some of which may have induced the Chandlers to turn over funds to Foreclosure Alternatives. Although the State Court Judgment includes a determination that the Debtor violated the elements of civil conspiracy, possibly opening the door to such a theory, the Chandlers did not argue what, if any, preclusive effect this determination should have. See *Youngstown Osteopathic Hosp. Assoc. v. Pathways Center for Geriatric Psychiatry, Inc. (In re Youngstown Osteopathic Hosp. Assoc.)*, 280 B.R. 400, 412-13 (Bankr. N.D. Ohio 2002) (describing the elements of civil conspiracy under Ohio law). If the Chandlers intend to pursue this avenue, that nondischargeability may be based on the acts or statements of other individuals imputed to the Debtor, then the Chandlers should be prepared to provide factual and legal support for this argument at trial.

any debt “for willful and malicious injury by the debtor to another entity or to the property of another entity.” 11 U.S.C. § 523(a)(6). Significantly, the Supreme Court has concluded that the language of § 523(a)(6) requires, among other things, proof of a deliberate or intentional *injury* and not merely a deliberate or intentional *act* that leads to an injury. *Kawaauhau v. Geiger*, 523 U.S. 57, 61, 118 S.Ct. 974, 977 (1998). In the context of giving a state court judgment preclusive effect on this issue, it is not sufficient that the judgment state that a debtor engaged in willful or intentional conduct; instead, there must be a finding that the debtor intended to cause the injury or was substantially certain that such harm would result. *Markowitz*, 190 F.3d at 463-64.

In making their argument for preclusive effect of the State Court Judgment, the Chandlers rely on language finding that the Debtor “violated the elements of fraud with willful and malicious conduct and caused damages to the Chandlers” [Adv. Doc. 36, App. H]. The finding that the Debtor engaged in willful and malicious *conduct* is not sufficient to determine that the Debtor intended the Chandlers’ injury, or was substantially certain that such harm would result, as required for a finding of nondischargeability under 11 U.S.C. § 523(a)(6). Consequently, the state court judgment cannot be given preclusive effect on this issue.

Because the court is unable to conclude that the State Court Judgment is entitled to preclusive effect on the elements of nondischargeability, the matter must proceed to trial. However, that does not mean that the State Court Judgment has no impact on these proceedings. Pursuant to the doctrine of res judicata or claim preclusion as well as *Rooker-Feldman* principles, this court cannot revisit the Debtor’s liability for the judgment debt nor the amount of damages awarded to the Chandlers by the state court as those matters have been conclusively determined in the State Court Judgment. *See Sliva v. May (In re May)*, 321 B.R. 462, 466-67 (Bankr. N.D. Ohio 2004) (noting that the determination of liability and damages by a state court

is not an “issue” decided by the state court but, instead, must be viewed as a determination of the underlying “claim” making res judicata the applicable doctrine). Consequently, the only matter left for trial is the determination of whether that judgment debt is excepted from discharge.

**CONCLUSION**

On summary judgment, the court cannot conclude that the State Court Judgment preclusively establishes the elements of nondischargeability under 11 U.S.C. § 523(a)(2) or § 523(a)(6). As such, the Chandlers’ motion for summary judgment is denied and this matter will proceed to trial.

**SO ORDERED.**

cc:

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