United States Bankruptcy Court
Western District of Wisconsin

Cite as: [Unpublished]

In re Cheryl L. Theis, Plaintiff, v.
Michael R. Hartman, Defendant
(In re Michael Ray and Susan Joan Hartman)
Bankruptcy Case No. MM7-89-03037, Adv. Case No. 90-0004-7

United States Bankruptcy Court
W.D. Wisconsin

June 12, 1990

Robert D. Martin, United States Bankruptcy Judge.

MEMORANDUM DECISION

On December 1, 1989 Defendant, Michael Hartman, and his spouse filed a petition under chapter 7 of the Bankruptcy Code. On January 4, 1990 Plaintiff, Cheryl Theis, filed a complaint pursuant to 11 USC § 523(a)(6) to determine the dischargeability of a debt which had been reduced to a state court judgment against the Defendant. On April 20, 1990 Plaintiff filed her motion for summary judgment.

Plaintiff asserts that case law allows this Court to make the dischargeability determination either by applying the doctrine of collateral estoppel or by examining the record as a whole. Plaintiff believes that under either method, the Court must find that there exists no genuine issue of material fact and that Defendant's debt to Plaintiff is nondischargeable as a matter of law.(1)

On February 10, 1978 Plaintiff was patronizing RG Patches Bar when she was struck and injured by a gunshot fired by Defendant. On February 8, 1980 Plaintiff filed a complaint against Defendant in a Wisconsin circuit court; her complaint alleged, inter alia, that Defendant had acted wilfully, wantonly, and maliciously resulting in injuries for which Plaintiff demanded both compensatory and punitive damages.

On April 10, 1981 the circuit court entered its order for default judgment as to Defendant's liability. On February 16, 1982 the circuit court held an evidentiary hearing on damages. The attorney who represented himself as having been retained by the Defendant, and who, among other things, had filed an answer on Defendant's behalf, appeared only for purposes of withdrawing from the case. Defendant did not appear, although the court record contains the withdrawing attorney's statement that he had advised Defendant of Defendant's right to appear pro se to present evidence and to cross-examine Plaintiff's witnesses. On February 25, 1982 the circuit court entered its findings of fact, conclusions of law, and judgment, and on March 5, 1982 the notice of entry of judgment was filed. Judgment was entered against Defendant in the amount of $451.98 for out-of-pocket expenses, $5,000.00 for pain and suffering, and $8,500.00 for punitive damages. As of December 4, 1989 the amount due on the judgment equalled $27,616.24.

In response to Plaintiff's motion for summary judgment, Defendant has filed an affidavit dated May 8, 1990 in which he asserts that he was "extremely intoxicated" at the time of the shooting, and that he "believed that the pistol was loaded with bird shot that would merely lodge in the side of the building at Patches' (which side of building once contained a door which had been boarded over) and cause no personal injury." He contends that he "did not deliberately or intentionally injure the Plaintiff."

Defendant further asserts that he never retained anyone to represent him in the circuit court action, and that he never received any notice from any source of the February 16, 1982 damages hearing. This affidavit at least partially contradicts Defendant's affidavit dated June 30, 1980 in which he stated that he had indeed retained the attorney who appeared on his behalf in the circuit court action. This Court determines that the attorney who represented the Defendant in the circuit court action was in fact retained by the Defendant.(2)

On these facts, the Plaintiff is not entitled to summary judgment.

DISCUSSION

Plaintiff seeks a determination that the debt represented by the circuit court judgment is nondischargeable pursuant to 11 USC § 523(a)(6), as a debt "for willful and malicious injury by the debtor to another entity or to the property of another entity." The circuit court awarded punitive damages after finding (presumably upon a "clear and convincing evidence" standard), the Defendant's acts to have been "wanton, willful, malicious" and "done with the total disregard of the rights of plaintiff," thereby constituting "gross and outrageous conduct." Plaintiff essentially contends that the doctrine of collateral estoppel applies to preclude relitigation in the bankruptcy court of the wilfulness and maliciousness of Defendant's actions, as that determination has already been litigated in the circuit court.

"Congress has specifically required all federal courts to give preclusive effect to state court judgments whenever the courts of the State from which the judgments emerged would do so: * * * 28 U.S.C. § 1728 * * *." Allen v McCurry, 449 US 90, 101 S Ct 411, 415-16, 66 L Ed 2d 308 (1980). In Landess v Schmidt, 115 Wis 2d 186, 197, 340 NW2d 213 (App 1983), the Wisconsin Court of Appeals cited the Restatement (Second) of Judgments § 27 (1982), for the basic principle of collateral estoppel, noting that the Wisconsin Supreme Court had previously adopted the Restatement of Judgments § 68(1) (1942), and concluding that "[b]ecause § 27 of the Restatement (Second) of Judgments is almost identical to § 68(1) of the Restatement of Judgments,(3) we determine that § 27 is applicable to this appeal." Landess, 115 Wis 2d at 197-98 n 3. Restatement (Second) of Judgments § 27 (1982) provides:

When an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or a different claim.

Restatement (Second) of Judgments § 27 Comment e (1982), provides, in relevant part, that "[i]n the case of a judgment entered by confession, consent, or default, none of the issues is actually litigated. Therefore, the rule of this Section does not apply with respect to any issue in a subsequent action."(4) Although no Wisconsin state courts appear to have considered whether collateral estoppel applies where the prior judgment was taken by default, the Seventh Circuit Court of Appeals, citing Restatement (Second) of Judgments § 27 Comment e (1982), stated that "a default judgment is not a proper basis for collateral estoppel." Grip-Pak, Inc. v Illinois Tool Works, Inc., 694 F2d 466, 469 (7th Cir 1982), cert denied 461 US 958 (1983); see also Matter of Cassidy, 892

F2d 637, 640 n 1 (7th Cir 1990) ("default judgments do not have collateral estoppel effect"); In re Brink, 27 Bankr 377, 379 (Bankr W D Wis 1983) ("Where the prior judgment was procured by default, the relevant issue has not been actually litigated"); In re Anderson, 49 Bankr 655, 656 (Bankr W D Wis 1984) ("A default judgment is not an adjudication on the merits for collateral estoppel purposes because it is not the result of actual litigation").

In Franks v Thomason the Georgia district court hearing the case noted that "[t]he preponderant view is that a default judgment has no collateral estoppel effect. This has been applied to bankruptcy dischargeability proceedings." Franks v Thomason, 4 Bankr 814, 821 (N D Ga 1980) (citations omitted). The court further indicated that:

> Although prior cases leave some doubt as to whether a party's failure to appear for trial after an answer has been filed constitutes a default under Rule 55, Fed.R.Civ.P., (citations omitted), especially where the trial court proceeds to hear evidence from the party who appears and to render judgment upon it, (citation omitted), this court is convinced that the scope of default that is contemplated under the principles of collateral estoppel is broader than that applicable to the rules of procedure. The requirement that the issues sought to be estopped must have been "actually litigated" in the prior proceeding contemplates something more than a one-sided presentation of facts. Thus, even if the district court did hear evidence concerning liability prior to rendering judgment, this court would deny collateral estoppel effect to those issues necessary to that judgment, on the ground that they were not actually litigated.

Franks v Thomason, 4 Bankr at 821-22; see also In re Clay, 64 Bankr 313 (Bankr N D Ga 1986).

In the circuit court case, the judgment concerning Defendant's liability to Plaintiff was taken by default, and the judgment concerning damages was taken after a one-sided presentation of the facts by the Plaintiff at an evidentiary hearing of which Defendant may or may not have had notice. As the previously-cited case law establishes, the liability and damages issues involved in the circuit court proceeding cannot be said to have been "actually litigated," and they accordingly have no collateral estoppel effect in the present dischargeability determination.(5)

Plaintiff also contends that she is entitled to summary judgment absent collateral estoppel, on the basis of the record as a whole. As has been indicated, in order to except a debt from discharge pursuant to 11 USC § 523(a)(6), the debt must be "for willful and malicious injury by the debtor to another entity or to the property of another entity." In Matter of Wagner this Court stated:

> Under section 523(a)(6), an injury may be malicious "if it was wrongful and without just cause or excessive, even in the absence of personal hatred, spite or ill-will. The word 'willful' means 'deliberate or intentional,' a deliberate and intentional act which necessarily leads to injury."

Matter of Wagner, 79 Bankr 1016, 1020 (Bankr W D Wis 1987), citing 3 Collier on Bankruptcy ¶ 523.16[1] (15th ed 1983) (footnote omitted).

In ruling on Plaintiff's motion for summary judgment, this Court must make all factual inferences in favor of Defendant. Defendant has sworn that at the time of the shooting he was extremely intoxicated and believed that in firing the gun, bird shot would become lodged in a boarded-over door of the tavern. A material question of fact arises with respect to whether Defendant's actions satisfy the requirements of wilfulness and maliciousness under 11 USC § 523(a)(6).

Neither collateral estoppel nor the record as a whole establishes the absence of any genuine issue of material fact. Plaintiff is not entitled to judgment as a matter of law, and her motion for summary judgment must be denied.

END NOTES:

1. In ruling on the motion for summary judgment "[a]ll factual inferences are to be taken against the moving party and in favor of the opposing party." International Administrators, Inc. v Life Ins Co of North America, 753 F2d 1373, 1378 (7th Cir 1985), citing Adickes v S.H. Kress & Co., 398 US 144, 157, 90 S Ct 1598, 1608, 26 L Ed 2d 142 (1970). Thus, in our case, all factual inferences must be taken against Plaintiff and in favor of Defendant.

2. With regard to the use of affidavits in summary judgment proceedings, the Tenth Circuit Court of Appeals has stated:

> There is authority for the proposition that in determining whether a material issue of fact exists, an affidavit may not be disregarded because it conflicts with the affiant's prior sworn statements. (citations omitted). In assessing a conflict under these circumstances, however, courts will disregard a contrary affidavit when they conclude that it constitutes an attempt to create a sham fact issue. (citations omitted). . . .
>
> Factors relevant to the existence of a sham fact issue include . . . whether the earlier testimony reflects confusion which the affidavit attempts to explain. (citations omitted).

Franks v Nimmo, 796 F2d 1230, 1237 (10th Cir 1986). In our case, Defendant has made no attempt to explain why he now states that he never retained the attorney whom ten years previously Defendant swore he had retained. Furthermore, there would not appear to be any reasonable grounds for confusion concerning whether a person had or had not retained an attorney for his or her benefit.

3. Restatement of Judgments § 68(1) (1942) provides:

> Where a question of fact essential to the judgment is actually litigated and determined by a valid and final judgment, the determination is conclusive between the parties in a subsequent action on a different cause of action, except as stated in secs. 69, 71 and 72.

4. See also J. Moore, W. Taggart & J. Wicker,1B Moore's Federal Practice ¶ 0.444[2] at 798 (2d ed 1983), stating that "[a]s a general proposition, a default judgment has no collateral estoppel effect. To invoke the doctrine of collateral estoppel in default causes is not only an oppressive application of the doctrine, but it misconceives the nature of the default judgment."

5. This conclusion is reinforced by consideration of the Seventh Circuit Court of Appeal's standards for collateral estoppel:

> [T]here are four requirements for collateral estoppel: 1) the issue sought to be precluded must be the same as that involved in the prior action, 2) the issue must have been actually litigated, 3) the determination of the issue must have been essential to the final judgment, and 4) the party against whom estoppel is invoked must be fully represented in the prior action.

Klingman v Levinson, 831 F2d 1292, 1295 (7th Cir 1987) (citations omitted). In our case, Defendant was not fully represented in the prior action, as his attorney withdrew from the case before the hearing on damages. Accordingly, the Seventh Circuit would deny collateral estoppel to the issues litigated in state circuit court.