United States Bankruptcy Court
Western District of Wisconsin

Cite as: [Unpublished]

County of Dane, Plaintiff v. Robin Smith-Parham, Defendant
(In re Robin Smith-Parham, Debtor)
Bankruptcy Case No. 98-34809-7, Adv. Case No. 98-3308-7

United States Bankruptcy Court
W.D. Wisconsin, Madison Division

June 14, 1999

Arnold N. Rusky, Assistant Corporation Counsel, Madison, WI, for the plaintiff.
Michael J. Rynes, Bankruptcy Law Services, Madison, WI, for the debtor-defendant.

Robert D. Martin, United States Bankruptcy Judge

MEMORANDUM DECISION

The debtor received public assistance (including AFDC, medical assistance and food stamps) from November 12, 1985 to May 31, 1987. The debtor was eligible for those benefits based on her income, assets and family situation. At the initiation of the assistance payments, the debtor's family consisted of herself and two children.

In June 1987, the debtor's public assistance was terminated following an allegation that the children's father had been living in the debtor's home since April 1986. The state agency had issued a request for information related to the allegation to which the debtor did not respond. After the debtor's public assistance case was closed, the debtor appealed the cancellation of benefits. After an administrative appeal hearing, the presiding examiner found against the debtor stating:

> 1. [Debtor] was not eligible for AFDC, medical assistance, or food stamps after May 31, 1987, because of her failure to provide income information on Chad Parham requested by the agency more than 30 days prior to closure.

2. The agency may recover as much of the assistance issued to [debtor]'s assistance case during the period April 1, 1986 through May 31, 1987, as proves to be an overpayment after review of the eligibility of the case during that period.

The examiner's findings were based implicitly on the fact that the children's father was present in the debtor's home from April 1, 1986 and explicitly on the debtor's failure to report this change in circumstances.

The examiner remanded the case to the Dane County Department of Social Services with instructions to review the amount of overpayment. The department determined the amount of overpayment to be $8,423.00. The debtor never contested the determination of overpayment. Partial restitution has been made through application of income tax returns to the obligation.

Debtor filed a chapter 7 petition on September 25, 1998 and received her discharge on January 21, 1999. On December 28, 1998, Dane County initiated an adversary proceeding to determine the dischargeability of the obligations related to the overpayment of public assistance. The county asserts that the debt is nondischargeable under §523(a)(2)(B)[1] as a debt in the nature of welfare fraud. On April 27, 1999, the county filed a motion for summary adjudication of the proceeding. The county asserts that the administrative hearing resolved the issue of fraud and should be given preclusive effect by this court.

However, summary judgment cannot be granted. The complaint states that the debt is nondischargeable under §523(a)(2)(B). Section 523(a)(2)(B) excepts from discharge debts obtained by:

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[1]In all likelihood, the stated section is an error and the county is arguing non-dischargeability under §523(a)(2)(A). Section 523(a)(2)(B) requires a writing with fraudulent information. The county has provided no evidence that a fraudulent writing exists.

(B) use of a statement in writing—
  (i) that is materially false;
  (ii) respecting the debtor's or an insider's financial condition;
  (iii) on which the creditor to whom the debtor is liable for such money, property, services, or credit reasonably relied; and
  (iv) that the debtor caused to be made or published with intent to deceive[.]

The county has neither argued nor provided evidence that the debtor used a writing in the alleged welfare fraud.

Even if the complaint were made under §523(a)(2)(A), the hearing officer's decision would not have preclusive effect. There are four requirements for the application of issue preclusion in federal courts:

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.

See, e.g., People Who Care v. Rockford Bd. of Educ., 68 F.3d 172 (7th Cir. 1995). The issue in the present action is whether the debt was incurred as the result of the debtor's fraud. The prior action merely determined that the debtor was not entitled to receive benefits for the period from April 1, 1986 to May 31, 1987. There was no explicit finding of fraud nor even a discussion of fraud in the decision. Thus the first requirement for applying issue preclusion has not been met.

The county would have the court infer a finding of fraud from the facts found by the hearing examiner and the language of a statute then in force. The relevant statute, Wis. Stat. §49.12(9), stated:

> If any person obtains for himself or herself, or for any other person or dependants or both, assistance under this chapter on the basis of facts stated to authorities charged with the responsibility of furnishing assistance and fails to notify said authorities within

> 10 days of any change in the facts as originally stated and continues to receive assistance based on the originally stated facts such failure shall be considered a fraud . . .. The negotiation of a check . . . received in payment of such assistance by the recipient . . . after such change in facts which would reorder the person ineligible for such assistance shall be prima facie evidence of fraud in any such case.

Thus, if the county showed that the debtor had negotiated an assistance check there would exist prima facie evidence of fraud. The county has not yet offered such evidence nor did the hearing officer determine that any checks had in fact been negotiated. While the step is an easy one to take, neither party to the prior hearing appears to have sought to establish fraud. Because the fraudulent nature of the debtor's actions was not actually litigated in the prior hearing, the decision fails the second requirement for applying preclusion.

The hearing examiner determined that the debtor was not entitled to receive public assistance from April 1, 1986 to May 31, 1987. There are many potential grounds for such a determination, and a finding of fraud is in no reasonable manner necessary to a finding of lack of entitlement. Thus the third requirement for application of issue preclusion is not met.

The debtor was present at the prior hearing representing herself. Debtor now asserts that this representation was inadequate because she could not retain an attorney and was unable to adequately represent herself. Thus, the fourth requirement for application of issue preclusion is not intended to test the competence of the representation, rather to test the opportunity to protect one's interests. The debtor had a full and fair opportunity to protect her interests and the decision clearly indicated her right to appeal the decision. The fourth requirement presents no barrier to application of issue preclusion, although the failure to meet any of the other requirements does.

The decision presented by the county is not entitled to preclusive effect. This conclusion would not change if the decision had been entered by a court or other judicial body. As the decision was

entered by a quasi-judicial hearing examiner, it may not have been entitled to preclusive effect even if the four requirements were satisfied. Wisconsin law is not clear on the subject. See State of Wisconsin v. Cole, Case No. 98-30426-7, Adv. Pro. No. 98-3070-7 (Bankr. W.D. Wis. Dec. 23, 1998).

Additionally, Wisconsin courts apply a test of "fundamental fairness" when issue preclusion is used offensively. *See* Michelle T. v. Crozier, 173 Wis.2d 681, 495 N.W.2d 327 (1993). The factors to be considered by a court include:

> (1) could the party against whom preclusion is sought, as a matter of law, have obtained review of the judgment;
> (2) is the question one of law that involves two distinct claims or intervening contextual shifts in the law;
> (3) do significant differences in the quality or extensiveness of proceedings between the two courts warrant relitigation of the issue;
> (4) have the burdens of persuasion shifted such that the party seeking preclusion had a lower burden of persuasion in the first trial than in the second; or
> (5) are matters of public policy and individual circumstances involved that would render the application of collateral estoppel to be fundamentally unfair, including inadequate opportunity or incentive to obtain a full and fair adjudication in the initial action?

Michelle T. at 173 Wis.2d at 689, 495 N.W.2d at 330-31. This fundamental fairness test is essentially a substitute for the basic test for applying issue preclusion. Application of issue preclusion in Wisconsin imposes a threshold requirement that "the issue sought to be precluded . . . have been actually litigated previously." Lindas v. Cady, 183 Wis.2d 547, 559, 515 N.W.2d 458, 463 (1994). The hearing examiner's decision fails this test as well.

Because the prior decision is not entitled to preclusive effect, the county's motion for summary judgment cannot be granted. It shall be so ordered.