United States Bankruptcy Court
Western District of Wisconsin

Cite as: [Unpublished]

Naly Phaboriboune, f/k/a Naly Phouthavong, Plaintiff, v.
Samrit Sasopa, f/k/a Samrit Rousch, Defendant
(In re Samrit Sasopa, f/k/a Samrit Rousch, Debtor)
Bankruptcy Case No. 98-35054-7, Adv. Case. No. 99-3013-7

United States Bankruptcy Court
W.D. Wisconsin

March 2, 2000

Janet E. Haakenson, Bidwell, Haakenson & Haakenson, Janesville, WI, for plaintiff.
R. Alan Bates, Feingold & Bates, LLP, Janesville, WI, for defendant.

Robert D. Martin, United States Bankruptcy Judge.

MEMORANDUM DECISION

The plaintiff filed a Motion for Summary Judgment, claiming that as a matter of law, she is entitled to judgment finding the debtor's debt to her non-dischargeable under § 523(a)(6). On July 20, 1996, the debtor, Samrit Sasopa, attacked the plaintiff by grabbing and pulling her hair, kicking her in the groin area, biting off the plaintiff's second finger on the left hand at the joint, and then spitting the finger out. It is undisputed that the debtor was charged in state court under Wis. Stat. § 940.19(5) with aggravated battery with intent to cause substantial bodily harm. On January 21, 1997, the debtor pled guilty to this crime and was sentenced to 120 days in jail, three years probation and alcohol and drug treatment. On July 2, 1998, plaintiff commenced an intentional tort action against the debtor in state court. On October 9, 1998, the debtor filed for Chapter 7 bankruptcy.

The plaintiff argues that there are no issues of material fact for this court to determine. Furthermore, the plaintiff argues that under the doctrine of collateral estoppel, the debtor is precluded from re-litigating the issue of whether her actions were willful and malicious. The debtor argues that there was a large brawl and that the debtor was merely defending herself. Further, the debtor alleges that there is no physical evidence that the debtor caused the injury to the plaintiff. Finally, the debtor argues that collateral estoppel does not apply in this case.

The standard for summary judgment in the Seventh Circuit was outlined by this court in In re Cole, 234 B.R. 417, 418 (Bankr. W.D. Wis. 1999):

The movant has the burden to demonstrate that there is no genuine issue of material fact in dispute. Celotex v. Catrett, 477 U.S. 317, 322, 106 S.Ct. 2548, 2552, 91 L.Ed. 2d 265 (1986). Furthermore, the evidence offered by the movant is viewed in a light most favorable to the non-moving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249, 106 S.Ct. 2505, 2510, 91 L.Ed. 2d 202 (1986). However, once the Motion for Summary Judgment has been made and properly supported, Celotex, 477 U.S. at 324, 106 S.Ct at

2553, the party opposing the motion may not rely on the mere allegations and denials contained in its pleadings, but must submit countervailing evidence to show that a genuine issue exists for trial. Fed. R. Civ. P. 56(e). No genuine issue for trial exists if the record, taken as a whole, does not allow a rational trier of fact to find for the nonmoving party. Matsushita Elec. Ind. Co. v. Zenith Radio Corp., 475 U.S. 574, 587, 106 S.Ct. 1348, 1356, 89 L.Ed. 538 (1986).

Id. *citing* In re Balay, 113 B.R. 429, 434 (Bankr. N.D. Ill. 1990). The plaintiff bears the burden of proving that there is no issue of material fact to be tried. The facts must be viewed in the light most favorable to the debtor.

Plaintiff's argues that the debtor is estopped from relitigating the issue of debtor's willfulness and maliciousness on the ground of collateral estoppel, also known as issue preclusion. Section 523(a)(6) provides:

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...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). "The standard of proof for the dischargeability exceptions in 11 U.S.C. § 523(a) is the ordinary preponderance-of-the-evidence standard." *See* In re Cole, 234 B.R. at 418 *citing* Grogan v. Gardner, 111 S.Ct. 654, 661 (1991).

In In the Matter of Wagner, 79 B.R. 1016, 1022 (Bankr. W.D. Wis. 1987), I outlined the elements necessary to give preclusive effect to a state court judgment. I stated:

First, it is necessary to examine state preclusion law in determining the preclusive effect of a state court judgement. "Only if state law indicates that a particular claim or issue would be barred" is it necessary to move to the second part of the test-whether an exception to section 1738 should apply....Under Wisconsin law four basic requirements must be satisfied before collateral estoppel can be applied:

1. The prior judgment must be valid and final on its merits;

2. There must be identity of issues;

3. There must be identity or privity of parties,

4. The issues in the prior action asked to be invoked must have been actually litigated and necessarily determined.

Id. at 1019-1020. In Wagner, I found that collateral estoppel could be applied to Wagner and granted the plaintiff's Motion for Summary Judgment:

The issue of the willfulness and malice of the injury to Conrad was thoroughly litigated. The verdict, based on jury instructions which are essentially identical to the standards required in section 523(a)(6), found that a battery had been committed. There is no doubt that Wagner's actions on February 12, 1983, constituted a willful and malicious injury to Conrad. Thus, Wagner is barred from relitigating that issue in this forum.

Id. at 1022. The principal difference between this case and Wagner is that in Wagner, a jury found the debtor liable for battery. In this case, the debtor pled guilty to battery; therefore, there was no criminal trial or jury verdict. Further, there has been no jury verdict in a civil trial, and the debtor argues that the issue of willful and malicious injury has not been actually litigated.

In Crowall v. Heritage Mutual Insurance Co., 118 Wis. 2d 120, 122, 346 N.W.2d 327,

329 (Wis. Ct. App. 1984), the Court of Appeals stated in a footnote that a plea of guilty or nolo contendere cannot be given a preclusive effect:

A plea of guilty or nolo contendere in the criminal suit does not draw any issues into controversy and does not support the use of collateral estoppel. Similarly, an acquittal cannot be asserted as collateral estoppel because it only means that the proof did not overcome all reasonable doubt of guilt.

Id. Although the Wisconsin Supreme Court has not affirmatively adopted the Crowall footnote, it also has not affirmatively ruled that pleas of guilty or nolo contendere should be given preclusive effect. In Michelle T. v. Crozier, 173 Wis. 2d 681, 687, 495 N.W.2d 327, 330 (Wis. 1993) the Wisconsin Supreme Court stated:

While we do not decide the preclusionary effect had Crozier pleaded guilty or nolo contendere we point out that the Restatement (Second) of Judgments recites that:

The rule of this Section presupposes that the issue in question was actually litigated in the criminal prosecution....Accordingly the rule of this Section does not apply where the criminal judgment was based on a plea of nolo contendere or a plea of guilty. A plea of nolo contendere by definition obviates actual adjudication and under prevailing interpretation is not an admission. A defendant who pleads guilty may be held to be estopped in subsequent civil litigation from contesting facts representing the elements of the offense. Restatement (Second) of Judgments, Sec. 85, comment b at 296.

We note that the court of appeals in Crowall...states that "[a] plea of guilty or nolo contendere in the criminal suit does not draw any issues into controversy and does not support the use of collateral estoppel." We are not confronted with this problem in this case. Accordingly, we do not by relying generally on the principle holding of Crowall give our imprimatur to the dicta set forth in that footnote.

Id.

This court will not make state law. Although Wisconsin law permits the use of offensive collateral estoppel, the absence of a clear statement by the Wisconsin Supreme Court stating that a plea of guilty has been actually litigated, precludes this court from finding that a plea of guilty satisfies the requirement that a controversy be "actually litigated" for collateral estoppel to apply. I note also that in a § 523(a)(6) dischargeability determination, the bankruptcy court for the eastern district of Wisconsin held that a default judgment had not been "actually litigated" where liability was imposed on the debtor without hearing any evidence. *See* Conway v. Stoll, 148 B.R. 881, 889 (Bankr. E.D. Wis. 1992, J. Ihlenfeldt).

Summary judgment is inappropriate in this case for two reasons: First, the court may not apply the doctrine of collateral estoppel because the issue of the debtor's willfulness and maliciousness has not been actually litigated. Second, there are issues of material fact. The plaintiff and her husband have submitted affidavits stating that the debtor acted maliciously in attacking the plaintiff. However, the debtor has submitted an affidavit stating that she was only defending herself after the plaintiff attacked her. Viewing the evidence in a light most favorable to the debtor, as the non-moving party, it is clear that there are issues of material fact that must be decided at trial.