United States Bankruptcy Court
Western District of Wisconsin

Cite as: [Unpublished]

Minnesota Department of Labor and Industry, Plaintiff and Counter-Defendant, v. Michael Harvey, Defendant and Counter-Claimant
(In re: Michael Harvey, Debtor)
Bankruptcy Case No. 18-13398-7
Adversary Case No. 18-79

August 8, 2019

Christopher M. Kaisershot, Minnesota Attorney General's Office, St. Paul, MN, for Plaintiff
Michael Harvey, Pro se Defendant

Catherine J. Furay, United States Bankruptcy Judge

DECISION

Michael Harvey ("Debtor" or "Harvey") filed a voluntary chapter 7 petition. The Minnesota Department of Labor and Industry ("MNDLI") filed an adversary proceeding objecting to the discharge of a $1,560,311.12 restitution judgment (the "Restitution Judgment") obtained in a Minnesota state court action. Harvey filed an answer seeking to dismiss the adversary proceeding and asserting a counterclaim. MNDLI moves to dismiss the counterclaim.

BACKGROUND

MNDLI is a Minnesota agency with the authority to license and regulate electrical contractors and electricians within Minnesota. Harvey is the founder, owner, registered agent, president, and CEO of Able Energy Corp. ("Able"), a Wisconsin-based corporation. Able was registered to do business in Minnesota. Harvey operated as an installer of residential and commercial solar energy systems. He was also a Minnesota licensed Master Electrician. Able was licensed as an Electrical Contractor.

The day before Able's Electrical Contractor license was set to expire, Harvey submitted a renewal application. MNDLI did not renew the license. It notified Harvey the application was incomplete. Able's license expired.

Five days later, MNDLI issued a licensing order to Harvey and Able seeking to revoke their licenses and impose civil penalties based on a "variety of misconduct." The bases were providing false and misleading information to consumers. Harvey contested the licensing order. This had the effect of staying revocation. The parties conducted

discovery and litigated the dispute over three days before an administrative law judge ("ALJ") at the Minnesota Office of Administrative Hearings ("Licensing Hearing").

In June 2018, before the ALJ decided the licensing order and revocation, MNDLI filed a civil lawsuit (the "State Court Action") against Harvey seeking restitution and injunctive relief.[1] The complaint alleged Harvey and Able made misrepresentations to customers to induce them to sign a contract and make significant advance payments. The asserted misrepresentations included:

(a) Able would install a functional solar energy system timely;
(b) the equipment required for installation was ordered timely;
(c) customers had a certain position in a "job queue" showing their projects would be completed shortly after additional down payments were made;
(d) customers who made larger, up front down payments would receive quicker installation; and
(e) customers would receive timely refunds after submitting rebate applications.

Harvey did not respond to or contest the allegations made in the State Court Action.

The state court granted summary judgment in favor of MNDLI in the State Court Action. The court ordered Harvey to pay the Restitution Judgment of $1,560,311.12 and enjoined him from performing or offering to perform electrical work or accepting payments to install solar energy systems from Minnesota consumers.

In late September 2018, as part of the Licensing Hearing, the ALJ found Harvey and his salespeople made certain misrepresentations and engaged in other deceptive and fraudulent practices. These included providing false and misleading information, collecting down payments with false promises of a starting date, and soliciting consumers to submit rebate applications to a utility under the name of a defunct company owned by Harvey. The ALJ recommended revocation of Harvey's and Able's licenses and penalties of $20,000.00 against Harvey and $30,000.00 against Able. Harvey appeared at the administrative hearing but did not contest the ALJ's recommendation.

In January 2019, MNDLI issued a final order[2] largely adopting the ALJ's findings and conclusions. MNDLI revoked Harvey's and Able's licenses and imposed the recommended penalties.

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[1] The Licensing Hearing and State Court Action are collectively referred to as the "Minnesota Proceedings."

[2] Harvey's bankruptcy did not stay the regulatory actions against him because of the police and regulatory powers' exception to the automatic stay under 11 U.S.C. § 362(b)(4).

Harvey filed bankruptcy. MNDLI filed an adversary seeking a nondischargeability determination for the Restitution Judgment under sections 523(a)(2) and/or (a)(6).

Harvey answered the adversary complaint and filed a counterclaim. Harvey appears to move for dismissal of the adversary under Federal Rule of Bankruptcy Procedure 7012(b), adopting Federal Rule of Civil Procedure 12(b)(6)[3]. He also seeks damages in the approximate amount of $7 million stemming from a host of torts he alleges MNDLI committed, including defamation, negligence, false representation, and fraud in its investigation.

MNDLI denies Harvey's allegations and moves to dismiss the counterclaim on three grounds. First, the MNDLI argues the Court lacks subject-matter jurisdiction under *Rooker-Feldman*. Second, principles of collateral estoppel and res judicata bar the relitigation of issues in the counterclaim. Finally, Harvey fails to state a claim upon which relief can be granted because he did not assert the alleged defamatory statements were false.

Harvey responds arguing collateral estoppel should not apply to nondischargeability proceedings because Congress intended bankruptcy courts to decide such issues. And he filed a counterclaim under a defamation theory not argued in the prior Minnesota Proceedings and that, he says, occurred independent of the Minnesota Proceedings. He asserts he lacked the financial resources to properly defend himself in the Minnesota Proceedings and thus res judicata and collateral estoppel would be inequitable.

DISCUSSION

A. The Complaint States a Claim Sufficient to Defeat a Motion to Dismiss.

A defense to a complaint is that the complaint "fail[s] to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). A complaint attacked by a Rule 12(b)(6) motion need not include detailed factual allegations. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). But a plaintiff must provide more than labels and conclusions. *Id.* "[A] formulaic recitation of the elements of a cause of action will not do." *Id.*

To survive a motion to dismiss, "a complaint must contain sufficient factual matter, accepted as true, 'to state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544,

[3] Mr. Harvey's response to the motion correctly argues this Court has jurisdiction to hear nondischargeability actions. Even so, he argues that based on provisions of the Bankruptcy Act and 1970 amendments there would also be jurisdiction over his counterclaim. The Bankruptcy Code replaced the Bankruptcy Act. The Court will not address arguments based on sections of the Bankruptcy Act. Rather, this Court will apply and consider provisions of the Bankruptcy Code.

570 (2007)). “A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Iqbal*, 556 U.S. at 678. The plausibility standard asks for more than a “sheer possibility” that a defendant has acted unlawfully. *Id.* There are two “working principles” the Supreme Court has set forth in analyzing motions to dismiss:

> First, the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions. Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice. . . . Second, only a complaint that states a plausible claim for relief survives a motion to dismiss. Determining whether a complaint states a plausible claim for relief will . . . be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense. But where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged—but it has not “show[n]”—“that the pleader is entitled to relief.”

Id. at 678-79 (citations omitted).

Section 523(a)(2) provides that a discharge does not apply to any debt for property obtained by “false pretenses, a false representation, or actual fraud, other than a statement concerning the debtor’s . . . financial condition.” Section 523(a)(6) provides that a discharge does not apply to any debt “for willful and malicious injury by the debtor to another entity or to the property of another entity.”

The complaint satisfies the requirements to survive a Rule 12(b)(6) motion to dismiss. It contains detailed factual allegations. The complaint does more than just recite legal conclusions. When considering a motion to dismiss, the Court accepts the facts as true. The factual allegations in the complaint rise above speculation. The Court—accepting the facts alleged in the complaint as true for a motion to dismiss—can draw the reasonable inference Harvey is liable for the alleged misconduct.

The complaint alleges Harvey engaged in fraudulent misconduct that harmed consumers. According to the complaint, Harvey received advance payments totaling $1,560,311.12. He “failed to commence or complete work on more than eighty outstanding solar energy system installation projects.” ECF no. 1 at 3. MNDLI alleges Harvey “diverted payments received from . . . customers for unintended purposes and unrelated projects.” ECF no. 1 at 3. The complaint details specific false representations Harvey allegedly made to consumers to induce them into making advances,

> including that an initial payment was necessary to secure a spot on [the] “job queue,” that significant down payments were necessary to order and receive the parts for their projects from the manufacturer within one to four weeks after signing the contract, that all work would be completed within 6 to 33 weeks after signing the contract, and that prompt installation was imperative to the consumer qualifying for a variety of lucrative tax incentives

> and rebates. Harvey . . . knew that these and other representations were false and, moreover, consumers relied on them to their significant financial detriment.

ECF no. 1 at 3. The complaint goes on to discuss, in great detail, "a nonexclusive list of representative examples of Harvey's . . . misrepresentations and other fraudulent misconduct." ECF no. 1 at 4–8.

MNDLI attached twenty-six exhibits to the complaint. The exhibits include affidavits from those Harvey allegedly defrauded, consumer complaints submitted to the MNDLI, the entry of judgment in the State Court Action, and various communications between Harvey and consumers. Considering these exhibits bolsters the facial plausibility of MNDLI's complaint.

Accepting these facts as true, it is facially plausible the Restitution Judgment could be held nondischargeable under either section 523(a)(2) as a fraud or section 523(a)(6) as a willful and malicious injury. Harvey will be able to contest these facts at trial.

For these reasons, the motion to dismiss the complaint is denied.

B. The Defamation Counterclaim Must be Dismissed Under Rule 12(b)(6).

The same legal analysis under Rule 12(b)(6) also applies to the counterclaim. Defamation is a tort. There are three elements to a defamation claim under Minnesota law: (1) the statement was false; (2) the statement was communicated to someone besides the plaintiff; and (3) the statement tended to harm the plaintiff's reputation and lower him in the estimation of the community. *Keuchle v. Life's Companion P.C.A., Inc.*, 653 N.W.2d 214, 218 (Minn. Ct. App. 2002). True statements are not actionable. *Id.* at 219.

Harvey's defamation claim fails to state a claim upon which relief can be granted. Harvey asserts MNDLI committed defamation when it "communicated to the Minneapolis Star Tribune . . . [that it] botched an investigation years ago, that was previously closed with no action." He does not deny a prior case was filed with MNDLI. That it was closed without action is uncontested. He never alleges the statement was false. His defamation claim thus fails to claim the statement was untrue. This is enough to grant dismissal of the defamation counterclaim under Rule 12(b)(6).

C. The Balance of the Counterclaim is Barred by Collateral Estoppel

The Full Faith and Credit Act requires a federal court to "give the same preclusive effect to a state-court judgment as another court of that [s]tate would give." *Parsons Steel, Inc. v. First Alabama Bank*, 474 U.S. 518, 523 (1986). Section 1738 of title 28 bars federal courts from employing their own rules of preclusion. *Kremer v. Chem. Constr. Corp.*, 456 U.S. 461, 481–82 (1982). Federal courts must adhere to the

preclusion rules chosen by the state from which the judgment is taken. *Id.* at 482. Here, the judgments and determinations at issue come from Minnesota. Therefore, Minnesota preclusion law applies.

Collateral estoppel bars the litigation of specific legal issues that have been adjudicated. *Hauschildt v. Beckingham*, 686 N.W.2d 829, 837 (Minn. 2004). "[A] 'right, question or fact distinctly put in issue and directly determined by a court of competent jurisdiction . . . cannot be disputed in a subsequent suit between the same parties . . . .'" *Id.* (citation omitted).

Courts in Minnesota do not apply collateral estoppel rigidly. *E.g.*, *Wilson v. Comm'r of Revenue*, 619 N.W.2d 194, 198 (Minn. 2000). The doctrine should be invoked only after careful inquiry because it "may govern grounds and defenses not previously litigated" and thus "blockades unexplored paths that may lead to truth." *Brown v. Felsen*, 442 U.S. 127, 132 (1979).

Under Minnesota law, for collateral estoppel to apply, these prongs must be met:

> (1) the issue must be identical to one in a prior adjudication; (2) there was a final judgment on the merits; (3) the estopped party was a party or was in privity with a party to the prior adjudication; and (4) the estopped party was given a full and fair opportunity to be heard on the adjudicated issue.

Care Inst., Inc. v. County of Ramsey, 612 N.W.2d 443, 448 (Minn. 2000).

Harvey complains that MNDLI:

(a) Was careless in its investigation of complaints against him and Able;

(b) Did not present or act on facts he provided in the Licensing Hearing or State Court Action;

(c) Failed to communicate his position that contracts with customers "have no installation timelines"; and

(d) Unjustifiably "pulled the license" that was the subject of expiration and included provisions in a licensing order he believes are not authorized by Minnesota statutes.

The doctrine of collateral estoppel, or issue preclusion, applies in bankruptcy proceedings. *Grogan v. Garner*, 498 U.S. 279, 284 n.11 (1991); *Klingman v. Levinson*, 831 F.2d 1292, 1294–95 (7th Cir. 1987). Thus, "if a court of competent jurisdiction has previously entered judgment against [a] debtor," collateral estoppel may bar the debtor from relitigating "the underlying facts in the bankruptcy court." *Meyer v. Rigdon*, 36 F.3d 1375, 1378 (7th Cir. 1994). This Court will not revisit the facts presented in the State Court Action.

But Harvey seems to argue there were facts not presented either in the Minnesota Proceedings or in contacts by MNDLI with customers of Harvey and Able. Those facts are things he seems to think would have resulted in a different outcome in the Minnesota Proceedings. In other words, there were "known material facts" Harvey gave MNDLI that it did not present at those hearings. ECF no. 11 at 2. Put differently, he says there were facts that would have been a defense in the Minnesota Proceedings if MNDLI had presented them.

The legal system is adversarial. Its basis is that there is a real dispute between the parties. The plaintiff bears the initial burden of proving facts and legal grounds that would allow it to win its claims. A plaintiff is only obligated to plead and prove all facts and elements of its claim. It does not have to anticipate and negate facts or theories that may be raised by the defendant. 29 *Am Jur. 2d Evidence* § 171. The burden then shifts to the defendant to 1) poke holes in the plaintiff's case, or 2) prove one or more defenses to the plaintiff's case. The defenses may be based on fact, law, or both. If defenses are presented, it is then a question of whether the plaintiff produced enough evidence to persuade the judge it should prevail on the claim. 29 *Am. Jur 2d Evidence* § 168.

Harvey says there were facts that were material. He suggests those facts were favorable to him. The facts Harvey says were important were in his possession. He had the burden of proving those facts because he is the one claiming their existence and relevance. He chose not to appear in the State Court Action and present those facts.

The fundamental principle Harvey overlooks is *opportunity*. Harvey had the opportunity to mount a defense against MNDLI's allegations in the Minnesota Proceedings. He had the allegedly exonerating facts in his possession as evidenced by his admission he gave these facts to MNDLI at the time of the proceedings. He simply failed to present these facts in either Minnesota Proceeding. If Harvey failed to present exonerating facts, it is his own fault he suffered damage from an adverse ruling.

Licensing of electricians or contracts is a regulatory matter. Minnesota conducted a proceeding related to Harvey's license and that of Able. Harvey appeared on his own behalf and for Able. He had a chance to present the facts he says were ignored. He did not.

Perhaps the facts would have supported a defense in the State Court Action. Maybe the result of the Licensing Hearing would have changed. Harvey did not present the facts in either.

To the extent any of the actions complained of in the counterclaim rely on factual issues between the same parties that were or could have been litigated in the State Court Action or Licensing Hearing, collateral estoppel bars relitigation. Just as Harvey has his view of the facts, so too was MNDLI entitled to its view of the facts. The essence of litigation is a dispute of fact and applying the law to the facts.

By precluding the relitigation of the same factual issues between the same parties, collateral estoppel preserves judicial resources, lessens the cost and vexation of multiple lawsuits, and prevents the issuance of inconsistent decisions. *Allen v. McCurry*, 449 U.S. 90, 94 (1980); *Sylvester v. Martin (In re Martin)*, 130 B.R. 930, 942 (Bankr. N.D. Ill. 1991).

Harvey is also incorrect in his assertion the State Court Action should not be given preclusive effect because it resulted from a default judgment. In Minnesota, a default judgment has preclusive effect in later actions involving the same issues or claims. *Roberts v. Flanagan*, 410 N.W.2d 884, 886–87 (Minn. Ct. App. 1987) ("The trial court therefore did not err in applying collateral estoppel to those claims determined in the previous default judgment."). Even if the Debtor were correct in his argument about the effect of a default judgment, the same issues were litigated in the Licensing Hearing, where he appeared and contested the allegations against him.

Alternatively, the Court could dismiss the counterclaim under principles of res judicata. "Whereas collateral estoppel concerns issues that were actually litigated, determined, and were essential in a prior action, res judicata concerns circumstances giving rise to a claim and precludes subsequent litigation—regardless of whether a particular issue or legal theory was actually litigated." *Hauschildt*, 686 N.W.2d at 840. Res judicata is a finality doctrine that mandates there be an end to litigation. *Id.*

Res judicata applies when (1) the earlier claim involved the same set of factual circumstances; (2) the earlier claim involved the same parties or their privies; (3) there was a final judgment on the merits; and (4) the estopped party had a full and fair opportunity to litigate the matter.

Here, principles of res judicata and collateral estoppel bar the relitigation of the issues in Harvey's counterclaim (other than the defamation claim). The counterclaim involves the same set of factual circumstances as the Minnesota Proceedings, such as the investigation and litigation of the proceedings themselves. Both Harvey and MNDLI were parties in the Minnesota Proceedings. There was a final judgment on the merits in the Licensing Hearing and State Court Action. Although Harvey did not appear in the State Court Action, the judge made specific factual findings based on an extensive record. Harvey had a full and fair opportunity in the Minnesota Proceedings to litigate the issues he presents in the counterclaim. He appeared in the Licensing Hearing and made the decision not to appear in the State Court Action despite having the chance to.

For these reasons the counterclaims are dismissed.

D. The Balance of the Counterclaim Must be Dismissed Under *Rooker-Feldman*.

MNDLI argues the counterclaim should be dismissed under the *Rooker-Feldman* doctrine. It provides that federal appellate jurisdiction to reverse or modify a state-court judgment is vested only in the United States Supreme Court. *Exxon Mobil Corp. v.*

Saudi Basic Indus. Corp., 544 U.S. 280, 283 (2005). *See also* 28 U.S.C. § 1257. "[I]f a claim is barred by the *Rooker-Feldman* doctrine, a federal court lacks subject matter jurisdiction over the [claim]." *Brokaw v. Weaver*, 305 F.3d 660, 664 (7th Cir. 2002).

Rooker-Feldman "is not limited to just those claims alleging that the state court judgment itself caused the federal [litigant's] injury; the doctrine also precludes federal jurisdiction over claims 'inextricably intertwined' with a state court determination. The doctrine precludes jurisdiction over 'inextricably intertwined' claims even when those claims were never argued in the state court," *Remer v. Burlington Area Sch. Dist.*, 205 F.3d 990, 996 (7th Cir. 2000), "because inextricably intertwined claims require the federal court 'in essence' to review the state court decision." *Wylie v. Bank of N.Y. Mellon*, 856 F. Supp. 2d 837, 843 (E.D. La. 2012) (quoting *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 483 (1983)). The Supreme Court elaborated on the definition of "inextricably intertwined":

> [T]he federal claim is inextricably intertwined with the state-court judgment if the federal claim succeeds only to the extent that the state court wrongly decided the issues before it. Where federal relief can only be predicated upon a conviction that the state court was wrong, it is difficult to conceive the federal proceeding as, in substance, anything other than a prohibited appeal of the state-court judgment.

Pennzoil Co. v. Texaco, Inc., 481 U.S. 1, 25 (1987). *See also Guess v. Bd. of Med. Exam'rs*, 967 F.2d 998, 1002–03 (4th Cir. 1992). Recasting claims under the guise of claims not raised or decided by a state court does not circumvent *Rooker-Feldman* when the claims are inextricably intertwined with the merits of the state court judgment.

The analysis hinges on whether "the district court is in essence being called upon to review the state-court decision." *Feldman*, 460 U.S. at 483–84 n.16. The "pivotal inquiry is 'whether the federal [litigant] seeks to set aside a state court judgment or whether he is, in fact, presenting an independent claim.'" *Long v. Shorebank Dev. Corp.*, 182 F.3d 548, 555 (7th Cir. 1999) (quoting *Kamilewicz v. Bank of Boston Corp.*, 92 F.3d 506, 510 (7th Cir. 1996)). As the Seventh Circuit noted:

> [T]he fundamental and appropriate question to ask is whether the injury alleged by the federal plaintiff resulted from the state court judgment itself or is distinct from that judgment. If the injury alleged resulted from the state court judgment itself, *Rooker-Feldman* directs that the lower federal courts lack jurisdiction. If the injury alleged is distinct from that judgment, i.e., the party maintains an injury apart from the loss in state court and not "inextricably intertwined" with the state judgment, . . . *Rooker-Feldman* does not [apply].

Garry v. Geils, 82 F.3d 1362, 1365–66 (7th Cir. 1996). *See also Exxon Mobil Corp.*, 544 U.S. at 284, and *Homola v. McNamara*, 59 F.3d 647, 650 (7th Cir. 1995).

Harvey is challenging the factual bases for the decision in the State Court Action. And he is challenging the result of the Licensing Hearing. It is impossible to separate the outcomes from the factual underpinnings. The injuries he complains of (other than the defamation claim) stem from the decisions in the Minnesota Proceedings. They are not separate and distinct from the denial of license renewal or the state court judgment. So the Court lacks subject-matter jurisdiction over Harvey's counterclaim pursuant to *Rooker-Feldman*.

Even if there are new claims in the counterclaim, they are "inextricably intertwined" with those argued in the Minnesota Proceedings. The issues in the counterclaim and Minnesota Proceedings cannot fairly be separated. Relief can be predicated only upon a finding that the Minnesota courts were wrong in the Licensing Hearing and State Court Action. And the Minnesota Proceedings and counterclaim involve the same factual record. There are no distinct or new facts to be argued. The facts at issue in the counterclaim were not merely tangential to the decisions in the Minnesota Proceedings. Such facts were litigated in and central to those decisions.

The proper avenue for Harvey to raise these issues was during the Minnesota Proceedings or by appealing to an appellate court in Minnesota. Harvey had this opportunity yet failed to do so. *See* Minn. Stat. § 326B.082, subd. 12(c); Minn. Stat. §§ 14.63–.69; Minn. R. Civ. App. P. 103.01, 103.03, and 104.01. The issues Harvey presents in his counterclaim have been decided, are final, and cannot be appealed. Harvey couches his counterclaim as a set of new claims when, in fact, the counterclaim is an attempt at contesting the Licensing Hearing and State Court Action. The counterclaim is more like a *de facto* appeal to a Federal court of a state court decision.

The damages Harvey alleges do not stem from action independent of the issues decided in the Minnesota Proceedings. Rather, the alleged damages result from the findings against Harvey. By Harvey's own admission, it was "[MNDLI's] suit and licensing order [that] caused great unjust harm" to his income and investment into his company, his reputation, and relationships with customers. Harvey lost in the Minnesota Proceedings. He now seeks to attack the judgment and revocation through a counterclaim in Federal court. *Rooker-Feldman* precludes a finding of jurisdiction in such a scenario.

The Court makes no findings about the merits of MNDLI's nondischargeability action against Harvey. This decision is merely a finding that the Court lacks subject-matter jurisdiction over Harvey's counterclaim.

CONCLUSION

For all these reasons, the Court denies the motion to dismiss the adversary proceeding. The complaint is facially plausible. It rises above mere speculation. It states a claim upon which relief can be granted. The Court grants the Plaintiff's motion to dismiss the counterclaim.

This decision shall constitute findings of fact and conclusions of law pursuant to Bankruptcy Rule 7052 and Rule 52 of the Federal Rules of Civil Procedure.

A separate order consistent with this decision will be entered.