

SEP 29 2006

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

IN THE MATTER OF:	:	CASE NUMBER: A05-71433-PWB
	:	
JOEL STEVEN TEMPLES	:	
and LINDA HOFFMAN TEMPLES,	:	
	:	IN PROCEEDINGS UNDER
	:	CHAPTER 7 OF THE
Debtors.	:	BANKRUPTCY CODE
<hr/>		
DAVID HUTCHINS	:	
and JANICE HUTCHINS,	:	
	:	
Plaintiffs	:	ADVERSARY PROCEEDING
	:	NO. 05-9134
v.	:	
	:	
JOEL STEVEN TEMPLES	:	
and LINDA HOFFMAN TEMPLES,	:	
	:	
Defendants.	:	

ORDER ON CROSS MOTIONS FOR SUMMARY JUDGMENT

The Plaintiffs seek a determination in this dischargeability proceeding that their debt as set forth in the "Stipulated And Agreed Final Judgment" entered in *David Hutchins and Janice Hutchins v. Alamo Contract Builders of Destin, Inc., a Florida Corporation, Alamo Contract Builders, Inc., a Georgia corporation, J. Steven Temples, and Bill Hoffman*, Case Number 2002-CA 000348 in the Circuit Court of Walton County, Florida on September 7, 2004, is nondischargeable as to both Debtors pursuant to 11 U.S.C. § 523(a)(2)(A). At issue in these motions for summary judgment is whether the state court judgment and settlement agreement obtained by the Plaintiffs is entitled to collateral estoppel effect (as to either or both debtors), rendering the underlying debt nondischargeable in bankruptcy. The Debtors oppose the application of collateral estoppel and seek summary judgment on the dischargeability of the debt

as to Linda Hoffman Temples, as well as dismissal of the Plaintiffs' claim under § 523(a)(11).

According to the pleadings filed in the Florida litigation, the Plaintiffs entered into a contract in August 2001 with Alamo Contract Builders of Destin, Inc. ("Alamo of Destin") for the construction of a home on property in Walton County, Florida.¹ The complaint alleges that the Debtor, Joel Steven Temples, was the sole director and officer of Alamo of Destin and represented Alamo of Destin in its dealings with the Plaintiffs. The Plaintiffs allege that approximately 7 months later, Alamo of Destin ceased all work and caused subcontractors to cease all work thus abandoning the construction project.

The Plaintiffs filed suit against the defendants listed above in the Superior Court of Walton County, Florida, alleging breach of contract and fraud. The allegations with respect to fraud contained in Count II of the first amended complaint in the state court action are as follows:

16. Alamo of Destin and Temples affirmatively represented to the [Plaintiffs] and to the [Plaintiffs'] construction lender that Alamo of Destin was a duly licensed contractor in the state of Florida, as shown by a copy of a portion of the [Plaintiffs'] construction loan agreement

17. The [Plaintiffs] justifiably relied upon this representation in entering into [the contract] with Alamo of Destin, and in borrowing monies to fund the construction described in [the contract.]

18. In fact, neither Alamo of Destin or Temples is a licensed contractor.

19. At the time of making the representations described in paragraph 16 above, Alamo of Destin and Temples knew that Alamo of Destin was not a licensed contractor, and made such representations notwithstanding such knowledge.

20. As a direct and proximate result of the false and fraudulent representations by Alamo of Destin and Temples, the [Plaintiffs] have been damaged.

¹A copy of the Plaintiffs' First Amended Complaint in the Florida action is attached as Exhibit 4 to the Plaintiffs' Brief in Support of Motion for Summary Judgment filed April 3, 2006.

On September 7, 2004, the Circuit Court entered a “Stipulated and Agreed Final Judgment” between the Plaintiffs and Alamo of Destin, Alamo Contract Builders and Steven Temples which provided that “the plaintiffs shall have judgment against defendants Alamo Contract Builders of Destin, Inc., Alamo Contract Builders, Inc., and J. Steven Temples on Counts I, II, and III of the First Amended Complaint in the principal amount of \$252,544.51 which amount shall accrue simple interest after August 2, 2004 until paid at the rate of 7.00 %.” (Plaintiffs’ Brief, Exhibit 2). The Judgment was entered pursuant to a separate Settlement Agreement executed by the parties, but not recorded with the Judgment. (Plaintiffs’ Brief, Exhibit 3). The Settlement Agreement contains a provision that states “the parties agree and understand that the judgment including claims for fraud which may not be dischargeable in a bankruptcy proceeding [sic].” (Settlement Agreement, ¶ 5).

This Order deals with three issues. The Plaintiffs seek summary judgment on its complaint that the judgment debt is nondischargeable pursuant to 11 U.S.C. § 523(a)(2)(A) based upon principles of collateral estoppel. The Debtors oppose the application of issue preclusion with respect to Joel Steven Temples. The Debtors seek summary judgment that (1) the Plaintiffs state no claim under § 523(a)(11); and (2) that the Debtor Linda Temples is entitled to a discharge of the debt at issue because she was not a party to the Final Judgment or Settlement Agreement.

Issue Preclusion

The doctrine of collateral estoppel, or issue preclusion, applies to dischargeability proceedings. *Grogan v. Garner*, 498 U.S. 279, 284, n.11 (1991); *see also In re Bilzerian*, 100 F.3d 886, 892 (11th Cir. 1996). When determining the preclusive effect of a state court judgment, a bankruptcy court must first look to the issue preclusion law of that state. *In re St. Laurent*, 991 F.2d 672, 676 (11th Cir. 1993). Under Florida law, issue preclusion applies only where the parties

and issues are identical and where a particular matter has been fully litigated and determined in a prior litigation which has resulted in a final decision in a court of competent jurisdiction. *Mobil Oil Corp. v. Shevin*, 354 So.2d 372 (Fla. 1977).

The primary issue before the Court is whether a consent judgment is entitled to issue preclusive effect. At the heart of this inquiry is whether a consent judgment meets the requirement that a matter be “fully litigated and determined.” A consent judgment may be reached by parties for a variety of reasons, including a desire to limit the costs of litigation and the general public policy favoring settlements. In such a case, however, it is often difficult to determine the extent to which issues have been actually litigated and determined unless factual findings are included in the consent judgment or settlement agreement. Neither party has cited any Florida case addressing this issue.

The Eleventh Circuit addressed the issue preclusive effect of a state court consent judgment in a bankruptcy proceeding in *Halpern v. First Georgia Bank (In re Halpern)*, 810 F.2d 1061 (11th Cir. 1987). In *Halpern*, the debtor and creditor entered into a consent judgment in a Georgia state court on the creditor’s fraud claim, among other claims. The consent judgment made specific factual findings regarding the debtor’s fraudulent conduct and stated that “these Findings of Fact and Conclusions of Law will collaterally estop [the debtor] from denying any of the facts or law established herein.” *Halpern*, 810 F.2d at 1062. When the debtor filed bankruptcy, the creditor sought a determination that its debt as commemorated in the consent judgment was nondischargeable. The bankruptcy court found that facts admitted in the state court judgment satisfied the elements of fraud as required by § 523(a)(2)(A) and declared the debt nondischargeable; the district court affirmed. On appeal, the Eleventh Circuit affirmed the application of issue preclusion to the facts of the case.

In discussing the “actually litigated” element of issue preclusion, the *Halpern* court observed that such a requirement is “altered somewhat in the context of consent decrees” in that “the very purpose of [consent] decrees is to avoid litigation, so the requirement of actual litigation necessary to preclusion always will be missing.” *Id.* at 1064 (*quoting Barber v. International Brotherhood of Boilermakers*, 778 F.2d 750, 757 (11th Cir. 1985)). Instead, the Court concluded, the “central inquiry in determining the preclusive effect of a consent judgment is the *intention of the parties as manifested in the judgment or other evidence.*” *Id.* (citations omitted) (emphasis added). The *Halpern* court concluded that the factual findings in the consent judgment were sufficiently detailed to evidence the parties intent that the consent judgment operate as a final adjudication of the factual issues contained in it. This intent was further established by the debtor’s express consent in the judgment that the Findings of Fact and Conclusions of Law in the consent judgment would collaterally estop him from denying the facts or law established therein.

Thus, *Halpern* illustrates that issue preclusion may apply to a consent judgment if the “factual findings in the consent judgment are sufficiently detailed to leave little doubt as to their meaning.” *Halpern*, 810 F.2d at 1064. This position is supported by the Restatement (Second) of Judgments on issue preclusion which states that “in 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. The judgment may be conclusive, however, with respect to one or more issues, if the parties have entered an agreement manifesting such an intention.” RESTATEMENT (SECOND) OF JUDGMENTS § 27, cmt. *e* (1982).²

²Although the parties have cited no Florida cases regarding the issue of whether a Florida court would apply issue preclusive effect to a consent judgment, the Florida Supreme Court has cited with approval, RESTATEMENT (SECOND) OF JUDGMENTS § 51(4), cmt. *f* (“a judgment by consent, though it terminates the claim to which it refers, is not an actual adjudication”) when it held that a voluntary dismissal of an active tortfeasor with prejudice

In this case there are no such factual findings regarding fraud either in the Final Judgment or in the Settlement Agreement. The Final Judgment states that the Plaintiffs shall have judgment as to each count of the First Amended Complaint, which includes the fraud count. There are no factual findings with respect to the fraud allegations, however, and the Court cannot conclude as a matter of fact or law based on the record before it that the parties intended the Final Judgment and Settlement Agreement to be a final adjudication the factual issues raised in the action.

Further, the Court concludes that the provision in the Settlement Agreement that “the parties agree and understand that the judgment including claims for fraud which may not be dischargeable in a bankruptcy proceeding [sic]” does not satisfy the requirements of issue preclusion with respect to the fraud claim. Determining the effect of these words is difficult because they are not a complete sentence. If the intention was to commit the Debtor to an agreement that the debt would be nondischargeable in a future bankruptcy case, such an agreement is not enforceable. It is settled law that a prepetition waiver of a discharge of a particular debt or of all debts is against public policy and unenforceable. If it was not intended as a prepetition waiver, then the provision merely states the obvious - that a claim for fraud “*may* not be dischargeable in a bankruptcy proceeding.” If it establishes anything material to this proceeding, it establishes only that the parties did not intend that the settlement would have an effect on either of them in dischargeability litigation.

Because circumstances here do not support an application of issue preclusion in this dischargeability proceeding, the Plaintiff’s motion for summary judgment is denied.

pursuant to a settlement agreement of the parties is not the equivalent of an adjudication on the merits that would bar continued litigation against a passive tortfeasor. *JFK Medical Center, Inc. v. Price*, 647 So.2d 833, 834 n.1 (Fla. 1994).

Section 523(a)(11)

The Debtors seek entry of summary judgment on their contention that the Plaintiffs have no claim under § 523(a)(11) and that this count of their complaint should be dismissed for failure to state a claim for relief. Section 523(a)(11) excepts from discharge a debt

provided in any final judgment, unreviewable order, or consent order or decree entered in any court of the United states or of any State, issued by a Federal depository institutions regulatory agency, or contained in any settlement agreement entered into by the debtor, arising from any act of fraud or defalcation while acting in a fiduciary capacity committed with respect to any depository institution or insured credit union.

There is no factual allegation in the complaint to support a claim of nondischargeability under § 523(a)(11) against the Debtors inasmuch as the alleged conduct does not include acts committed with respect a depository institution or insured credit union. Accordingly, the Court will grant summary judgment in favor of the Debtors on this count.

Liability of Linda Temples

The Defendants move for partial summary judgment granting Linda Hoffman Temples a discharge of the debt at issue. In its original complaint, the Plaintiffs named both Joel Steven Temples and Linda Hoffman Temples as defendants in the action and requested that the Court find their claim is “not dischargeable as to both Joel Steven Temples and Linda Hoffman Temples.” (Complaint, ¶ 10). Linda Hoffman Temples, however, is not a party to the Final Judgment or Settlement Agreement, nor was she even a named party in the Florida state court action. Even if the Court found that the consent judgment was entitled to preclusive effect as to Joel Steven Temples (which it does not), there would be no basis for its application to Linda Hoffman Temples.

In the Plaintiffs' brief in support of their motion for summary judgment, the Plaintiffs allege that she has an ownership interest in Alamo Contract Builders, Inc. and Alamo Contract Builders of Destin, Inc., which were defendants in the Florida action and parties to the Final Judgment and Settlement Agreement. However, even accepting this as true, there is no evidence that Linda Hoffman Temples signed the Settlement Agreement in any capacity as a representative of these corporations. Moreover, the Plaintiffs have made no specific allegations regarding the actions or conduct of Linda Hoffman Temples to support a claim against her pursuant to 11 U.S.C. § 523(a)(2)(A). Finally, the Plaintiffs have not responded to the Defendants' cross-motion for summary judgment on this issue. Based on the foregoing, the Court will grant summary judgment in favor of Linda Hoffman Temples and dismiss her as a defendant in this action.

In conclusion, the Court finds that the lack of specific factual findings in the Final Judgment and Settlement Agreement prevents the application of issue preclusion in this case. Thus, the Plaintiffs must prove at trial that the claim underlying the judgment is nondischargeable as to Joel Steven Temples pursuant to 11 U.S.C. § 523(a)(2)(A). In addition, the Court concludes the Plaintiffs have no claim against the Defendants under § 523(a)(11) and that they have failed to state a claim against Linda Hoffman Temples who shall be dismissed as a defendant in this action.

It is

ORDERED that the Plaintiffs' motion for summary judgment is denied and that the Defendants' motion for summary judgment is granted in part. It is

FURTHER ORDERED that Linda Hoffman Temples is dismissed as a defendant in this action. It is

FURTHER ORDERED that the Plaintiffs' § 523(a)(11) claim is dismissed. The sole remaining claim for trial is whether the Plaintiffs' claim is nondischargeable under § 523(a)(2)(A)

as to Joel Steven Temples only. It is

FURTHER ORDERED AND NOTICE IS HEREBY GIVEN that the Court shall hold a status conference in this proceeding on November 7, 2006, at 11:00 a.m. in Courtroom 1401, U.S. Courthouse, 75 Spring Street, S.W., Atlanta, Georgia, to consider any outstanding pre-trial issues and the scheduling of this matter for trial.

The Clerk is directed to serve copies of this Order on the persons on the attached Distribution List.

At Atlanta, Georgia, this 29 day of September, 2006.



PAUL W. BONAPFEL
UNITED STATES BANKRUPTCY JUDGE

DISTRIBUTION LIST

Lawrence R. Landry
Suite 325
6000 Lake Forrest Drive, NW
Atlanta, GA 30328

Robert McDonald
Alan Y Saltzman
Montlick & Associates
17 Executive Park Drive
Suite 300
Atlanta, GA 30347-0406