IT IS ORDERED as set forth below:

Date: May 8, 2015

Wendy L. Hagenau

Wendy L. Hagenau
U.S. Bankruptcy Court Judge

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

IN RE: ROBERT GAWRYS, Debtor.	Case No. 13-71446-WLH Chapter 7
ARKADIUSZ LASKI, Plaintiff, v. ROBERT GAWRYS, Defendant.	AP No. 14-5006

ORDER ON PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT BASED ON CONSENT ORDER AND SUFFICIENCY OF DEBTOR'S ANSWER

This matter is before the Court on Arkadiusz Laski's ("Laski") Motion for Summary Judgment, or in the Alternative, for Partial Summary Judgment ("Motion") against Robert

Gawrys ("Debtor"). Laski's Motion seeks summary judgment on all claims for relief and that those claims of Laski against the Debtor are non-dischargeable under 11 U.S.C. § 523(a)(2)(A), (a)(4), and/or (a)(6). Laski has also moved for summary judgment as to all claims for relief in Debtor's "Answer and Counterclaim" ("Answer"). In support of his Motion, Laski relies on the (i) complaint ("Complaint") filed in this Court and Debtor's Answer; (ii) Laski's requested admissions ("Request for Admissions"); and (iii) a consent order between the parties ("Consent Order") entered in state court. This matter is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(I) and the Court has jurisdiction over this adversary proceeding pursuant to 28 U.S.C. § 157 and 28 U.S.C. § 1334.

This order only addresses the effect of the Consent Order executed by the parties and the sufficiency of the Debtor's Answer. The Court has issued an "Order to Show Cause and Notice of Hearing" directing the parties to appear before the Court and show cause as to whether the Request for Admissions should be deemed admitted (Docket No. 27). The outcome of that hearing is necessary before the Court can rule on the entire Motion. A hearing is also scheduled on Plaintiff's motion to dismiss Debtor's counterclaim, which may resolve any other issues with respect to the Debtor's Answer.

I. Overview

Debtor and Laski were former business partners. At some point during the business relationship, disputes arose between the parties that eventually led to litigation in Gwinnett County Superior Court ("Superior Court"). On the day of the trial, the parties settled. The terms of the settlement agreement were memorialized in a Consent Order dated October 5, 2009, which provided for dismissal of the Superior Court lawsuit, in exchange for certain promises of Debtor to make payments in the future.

The Consent Order also contemplated the possibility of Debtor filing bankruptcy. It permitted Laski to pursue in bankruptcy court the claims asserted by Laski in Superior Court. It also set out amounts that were meant to be non-dischargeable in the event of bankruptcy. The Consent Order provided that if the Debtor filed bankruptcy: (i) before October 5, 2011, the non-dischargeable amount would be $0; (ii) between October 6, 2011 and October 5, 2012, the non-dischargeable amount would be $100,000; (iii) between October 6, 2012 and October 5, 2013, the non-dischargeable amount would be $150,000; and (iv) between October 6, 2013 and October 5, 2014, the non-dischargeable amount would be $200,000. If, by October 5, 2014, Debtor had neither made full payment nor filed for bankruptcy protection, Laski could move for entry of a judgment in the Superior Court in the amount of $400,000. The Consent Order further provided:

> Gawrys agrees that these amounts relate to claims brought against him for fraud, conversion, theft and breach of fiduciary duty, and since these amounts are based on such claims, all obligations identified as "non-dischargeable" in this Consent Order are hereby deemed non-dischargeable under 11 U.S.C. 523(a)(2)(A), 11 U.S.C. 523(a)(4) or other applicable provision of the U.S. Bankruptcy Code. Gawrys further agrees not to contest the amount of claim listed above, or to assert that such claim amount is dischargeable.

Debtor filed for bankruptcy relief on September 30, 2013. On January 6, 2014, Laski filed this complaint objecting to dischargeability of his claim. Laski moves for summary judgment that, at a minimum, he has a non-dischargeable claim in the amount of $150,000 pursuant to the Consent Order.

II. Standard for Summary Judgment

Summary judgment is appropriate when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a

matter of law". Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986); Fed. R. Civ. P. 56(c); Fed. R. Bankr. P. 7056(c). "The substantive law [applicable to the case] will identify which facts are material." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). The party moving for summary judgment has the burden of proving there are no disputes as to any material facts. Hairston v. Gainesville Sun Pub. Co., 9 F.3d 913, 918 (11th Cir. 1993). A factual dispute is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Anderson, 477 U.S. at 248. When reviewing a motion for summary judgment, a court must examine the evidence in the light most favorable to the nonmoving party and all reasonable doubts and inferences should be resolved in favor of the nonmoving party. Hairston, 9 F.3d at 918.

III. Sufficiency of Debtor's Answer

Laski contends that under Fed. R. Civ. P. 8(b), all of the allegations in the Complaint are deemed admitted because the Debtor's Answer fails to "admit or deny the allegations asserted" with a denial that is responsive "to the substance of the allegation". The Court finds the Debtor's Answer is sufficient under Rule 8; thus, the allegations in the Complaint are not conclusively established, unless the Debtor admitted them.

Rule 8 simply requires that an answer "state in short and plain terms its defenses." Debtor's *pro se* Answer alleges that he does not owe Laski any money because he paid a portion of any debt owed via check, he transferred certain property in Poland to Laski in partial satisfaction of any debt, and, at some point, Laski supposedly refused to accept payments from the Debtor. Moreover, "[i]t is well established that *pro se* litigants are afforded some degree of flexibility in pleading their actions." Friedlander v. Onsa, 2008 WL 2746299, at *3 (E.D.N.Y.

July 14, 2008) (refusing to strike *pro se* answer under Rule 8). Thus, Debtor's Answer is sufficient to inform Laski of the basis for his defenses.

IV. The Consent Order and Non-Dischargeability

The Consent Order purports to designate a particular sum to be non-dischargeable in any subsequent bankruptcy case. Exceptions to discharge are narrowly construed and the burden is on the creditor to prove non-dischargeability by a preponderance of the evidence. Duncan v. Bucciarelli (In re Bucciarelli), 429 B.R. 372, 375 (Bankr. N.D. Ga. 2010). Prepetition waivers of dischargeability, such as the Consent Order, are not enforceable in a debtor's bankruptcy case. Such waivers are against the provisions of the Bankruptcy Code and are also against public policy. See, e.g., Bank of China v. Huang (In re Huang), 275 F.3d 1173, 1177 (9th Cir. 2002); Infinity Grp. LLC v. Lucas (In re Lucas), 477 B.R. 236, 245-46 (Bankr. M.D. Ala. 2012) (collecting cases). "The courts unanimously hold that prepetition stipulations to waive discharge, if allowed, would eviscerate the protections of the Bankruptcy Code." In re Lucas, 477 B.R. at 246. "If it were that easy to avoid a discharge in bankruptcy, every creditor would insert a clause waiving discharge into every contract, promissory note, and lease." Id. Furthermore, a prepetition consent judgment or other court order which stipulates to non-dischargeability under Sections 523(a)(2), (a)(4), or (a)(6) is not binding in a subsequent bankruptcy case, because bankruptcy courts have exclusive jurisdiction to determine dischargeability of debts under those sections. 11 U.S.C. § 523(c)(1); see also Whitehouse v. LaRoche, 277 F.3d 568, 576 (1st Cir. 2002). Consequently, the designation of the debt as non-dischargeable in this Consent Order is ineffective as a matter of law.

As with any other order or judgment, though, a consent order may be entitled to preclusive effect under the doctrine of collateral estoppel as to issues other than non-

dischargeability. If the order establishes facts which would allow a bankruptcy court to determine such a debt was non-dischargeable, then the usual rules of issue preclusion apply. In other words, the only way in which a prepetition order or judgment that purports to waive the discharge of a debt in bankruptcy can have any effect in the bankruptcy case is if the order would i) meet the requirements of collateral estoppel under the applicable law, and ii) the order contained enough information for the bankruptcy court to independently determine the debt was non-dischargeable after comparing the findings contained in that prepetition order to the elements to state a claim of non-dischargeability. The elements of collateral estoppel under Georgia law are: "(1) an identical issue, (2) between identical parties, (3) [that] was actually litigated and (4) necessarily decided, (5) on the merits, (6) in a final judgment, (7) by a court of competent jurisdiction." Cmty. State Bank v. Strong, 651 F.3d 1241, 1264 (11th Cir. 2011) (citation omitted).

Consent orders, like the one here, are essentially contracts to resolve disputes and avoid litigation. City of Centerville v. City of Warner Robins, 270 Ga. 183, 184 (1998). As such, under Georgia law, the rules of collateral estoppel differ. Pioneer Constr., Inc. v. May (In re May), 518 B.R. 99, 117 (Bankr. S.D. Ga. 2014) (citations omitted). A consent order may be entitled to preclusive effect where the parties intended the consent order to act as a final adjudication of the case on the merits that would be binding in subsequent litigation. See Brown & Williamson Tobacco Corp. v. Gault, 280 Ga. 420, 424 (2006) (citation omitted).

The Consent Order at issue here is not a final adjudication on the merits. The Consent Order by its terms permits Laski to pursue all claims asserted in the event of bankruptcy. Moreover, the Consent Order requires Laski or his counsel to move for an entry of judgment if

Debtor defaults under the Consent Order. Thus, the Consent Order is not, and is not intended to be, a final adjudication on the merits and is not entitled to collateral estoppel effect.

Even if the Consent Order was a final adjudication of the Superior Court case, the Court would still be unable to determine whether the debt was non-dischargeable based on the Consent Order, because it i) lists a single amount due, that varies only with the date of payment; ii) contains no factual findings; and iii) relates to every count in the Superior Court complaint. See Tobin v. Labidou (In re Labidou), 2009 WL 2913483, at *6 (Bankr. S.D. Fla. Sept. 8, 2009); see also In re May, 518 B.R. at 117. If any one of the counts in the Superior Court complaint could support the Consent Order, but would not give rise to a claim that is non-dischargeable, then there is no basis upon which this Court could conclude the non-dischargeable counts were "necessarily decided" by the Consent Order. See Flemm v. Trexler (In re Trexler), 2015 WL 1508703, at *6 (Bankr. N.D. Ga. Mar. 30, 2015).

The Superior Court complaint includes eleven counts: (i) fraud; (ii) breach of fiduciary duty; (iii) constructive fraud; (iv) breach of contract; (v) breach of contract (duty of good faith); (vi) fraudulent transfer; (vii) conversion; (viii) theft; (ix) violation of Georgia's Racketeer Influenced and Corrupt Organizations ("RICO") statute by engaging in two acts of racketeering; (x) punitive damages; and (xi) fees and costs. Several of the counts that could have formed the basis of the Consent Order would not meet the elements for non-dischargeability under Sections 523(a)(2)(A), (a)(4), or (a)(6). For example, the counts related to breach of fiduciary duty, breach of contract, or constructive fraud could have underpinned the Consent Order, but such claims would most likely be dischargeable in Debtor's bankruptcy. See Hot Shot Kids Inc. v. Pervis (In re Pervis), 497 B.R. 612, 640 (Bankr. N.D. Ga. 2013) (partners are not fiduciaries for purposes of Section 523(a)(4)); Dominie v. Jones (In re Jones), 306 B.R. 352, 356-57 (Bankr.

N.D. Ala. 2004) (shareholders in closely held corporations are not fiduciaries under Section 523(a)(4)); In re May, 518 B.R. at 124-25 (noting the very narrow circumstances under which breach of contract may constitute a non-dischargeable claim); Bracciodieta v. Raccuglia (In re Raccuglia), 464 B.R. 477, 485 (Bankr. N.D. Ga. 2011) (constructive fraud is insufficient to state a claim under Section 523(a)(2)(A)).

V. Conclusion

The Debtor's Answer is sufficient to contest certain allegations in the Complaint. The Consent Order here is nothing more than a contractual waiver of the dischargeability of a debt. As such, it is unenforceable. It also does not satisfy any of the requirements for collateral estoppel, so it is ineffective to establish any of the elements of Laski's claims. Based upon the foregoing, it is hereby

ORDERED that Laski's Motion as it relates to the Consent Order and the sufficiency of Debtor's Answer is DENIED. The remaining claims will be held in abeyance until the Court rules on the Show Cause Order.

END OF DOCUMENT

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