

authority regarding the grounds upon which the state court awarded judgment against Debtor.

Previously, Debtor through counsel conceded in open court that the state court found against Debtor on the basis of fraud in fact. Therefore, based upon this admission in *judicio*, the only remaining issue before this Court concerns whether the entire state court judgment in terms of its finding of fraud should be accorded preclusive effect under collateral estoppel for purposes of this Court's determination of nondischargeability under Section 523(a)(2)(A), or whether a trial is needed to apportion the damage award based on the various legal grounds cited in the judgment.²

Based upon a review of the state court complaint as now provided and, compared with the judgment, this Court concludes that the finding of fraud by the state court trial judge, in addition to the allegations of conversion (*see* O.C.G.A. §§ 44-12-77, -65) and negligence, as set forth in the complaint, indicates that the state court found more than a breach of contract under a bailment theory. Although an action for misfeasance may be brought under either contract or tort, "it is not every breach of contract [that gives rise] to a cause of action in tort"-- for if the breach amounts solely to a neglect of a duty of care or nonfeasance, the suit must be brought in contract. *A.A.A. Parking, Inc. v. Bigger*, 113 Ga.App. 578, 580-81, 149 S.E.2d 255, 258 (1966); compare *Rich's, Inc. v. Kirwan Bros., Inc.*, 97 Ga.App. 58, 60-61, 102 S.E.2d 648, 650 (1958). The fact that the state court added a finding of fraud to its judgment beyond that prayed in the complaint suggests that the liability in issue was more than nonfeasance, but included misfeasance, at a minimum, and possibly even malfeasance. Clearly, relief was based upon more than a neglect of duty by Debtor

² Under Georgia law, collateral estoppel is appropriate if the following are shown: (1) identity of parties; (2) identity of issues; (3) actual and final litigation of the issue(s); (4) essentiality of the prior adjudication; and (5) full and fair opportunity to litigate the issue(s). *See Lusk v. Williams (In re Williams)*, 282 B.R. 267, 272 (Bankr. N.D.Ga. 2002) (cites omitted).

under a theory of contract or nonfeasance and incorporated culpability under tort. Furthermore, in addition to awarding compensatory damages, which could be awarded under contract or tort or both, the state court awarded punitive damages, which requires a finding of actual fraud. See generally *Alford v. Oliver*, 169 Ga.App. 865, 315 S.E.2d 299 (1984); compare *So. Bell Tel. & Tel. Co. v. Earle*, 118 Ga. 506, 45 S.E. 319, 321 (1903).

After reviewing the state court record, and given the finding of a certain level of impropriety or moral fault on the part of Debtor, it appears that the determination of fraud in terms of Debtor's concealment of the vehicle's disappearance extended to the conditions of the loss itself. Similarly, even though the transaction can be described in three stages as argued by Debtor, the award of lost profits along with compensatory and punitive damages further indicates the state court's decision to place the total award within the overall finding of fraud in connection with the entirety of Debtor's misconduct for both the loss of Plaintiff's automobile and the active concealment of same from Plaintiff. Compare *Williams*, 282 B.R. 267, 276; *Kirwan Bros.*, 97 Ga.App. at 60-61, 102 S.E.2d at 650. Debtor's conduct effectively caused the loss and prevented Plaintiff from recovering his property or initiating a timely effort to locate same.

As observed in *Williams*, 282 B.R. at 275-76, 278, the same set of facts can support multiple grounds for recovery if they are not inconsistent. Moreover, if the conduct of a debtor falls within the discharge exceptions of Section 523, the presence of other viable theories of relief arising from said conduct, other than fraud, does not render issue preclusion inapplicable on the basis of essentiality for as in this case, the finding of fraud can still support the entire award. 282 B.R. at 276. Similarly, along with the Plaintiff's allegations and the intent of the state court trial judge, even if liability for parts of the judgment could also rest on grounds in addition to fraud, the

damages in their entirety are the result of Debtor's conduct, which the state court has deemed fraudulent. Compare *Williams*, 282 B.R. at 276. Hence, this Court is precluded from relitigating the issue of apportionment of damages on grounds of collateral estoppel.

For these reasons, the Court concludes, based upon the record presented, that the finding of fraud supports the entire state court judgment, and the Court further concludes that the award is nondischargeable in its entirety and Plaintiff is entitled to summary judgment regarding same.

Accordingly, it is


ORDERED that Plaintiff's motion for summary judgment be, and hereby is, **granted** and the entire award set forth by judgment entered after a bench trial in the State Court of Rockdale County, Georgia on August 13, 2002, *Jess Black v. Mike Franklin, et al.*, Civil Action No. 2001-SV-1413, wherein Plaintiff was awarded \$25,000 for the loss of a vehicle, \$25,000 for lost profits, and \$20,000 as punitive damages, is **excepted** from discharge and same is nondischargeable under 11 U.S.C. § 523(a)(2)(A).

A separate judgment is entered contemporaneously herewith.

The Clerk is directed to serve a copy of this Order upon Plaintiff's counsel, Debtor's counsel, the Chapter 7 Trustee, and the U.S. Trustee.

IT IS SO ORDERED.

At Atlanta, Georgia this 25th day of May, 2005.



ROBERT E. BRIZENDINE
UNITED STATES BANKRUPTCY JUDGE