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3-29-05 JD

UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF GEORGIA  
ATLANTA DIVISION

IN RE: : CASE NO. A04-93340-REB

CHARLES FRANKLIN, SR., :  
Debtor. :

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JESS BLACK, :  
Plaintiff, :

ADVERSARY PROCEEDING  
NO. 04-9134

v. :  
CHARLES FRANKLIN, SR., :  
Defendant. :

CHAPTER 7

JUDGE BRIZENDINE

**ORDER DENYING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT**

Before the Court is the motion of Plaintiff for summary judgment on his complaint herein seeking a determination that a certain state court judgment entered in favor of Plaintiff and against Defendant-Debtor in the total sum of \$75,000 is excepted from discharge in accordance with 11 U.S.C. § 523(a)(2)(A). In response to the motion, Debtor contends Plaintiff has failed to set forth an adequate statement of the undisputed material facts upon which he asserts entitlement to relief. Based upon a review of the record and applicable case law, this Court concludes that the motion should be denied, but that Plaintiff should be granted an additional period of time to amend the record.

Plaintiff's complaint and motion refer to a state court action (*Jess Black v. Mike Franklin, et al.*, Civil Action No. 2001-SV-1413) decided by judgment entered after a bench trial in the State

Court of Rockdale County, Georgia on August 13, 2002. Plaintiff has provided an uncertified copy of the judgment wherein Plaintiff was awarded \$25,000 for the loss of a vehicle, \$25,000 for lost profits, and \$20,000 as punitive damages. Although the judgment recites that Defendant “committed acts which constituted negligence, breach of contract, and fraud,” the precise grounds of liability in relation to the component parts of the aforesaid award of damages are not indicated therein.

The matter raised in Plaintiff’s complaint herein was scheduled for trial before this Court on January 26, 2005, but during conversation with counsel on the record, Plaintiff offered and argued, in effect, a motion for a judgment on the pleadings. Debtor, through counsel at said hearing, conceded that the state court found against Debtor on the basis of fraud in fact. (Transcript, 8).<sup>1</sup> Given this admission in judicio, the only remaining issue before this Court is whether the state court judgment should be apportioned according to the various legal grounds cited in the judgment. Plaintiff argues that because the total damages award arose from a single transaction, which was determined to be fraud, the judgment should be attributed entirely to fraud and thus nondischargeable in its full amount on grounds of collateral estoppel. At the conclusion of the hearing, the Court allowed Plaintiff additional time to file a motion for summary judgment with sufficient facts and law to support his argument.

Upon review of the motion and accompanying documents, the Court finds that Plaintiff has failed to present sufficient undisputed material facts, properly demonstrated through affidavits or other documentary evidence such as the state court complaint or transcript, as would entitle

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Only fraud in fact, as opposed to constructive fraud, falls within the fraud exception to discharge. See *McClellan v. Cantrell*, 217 F.3d 890, 894 (7<sup>th</sup> Cir. 2000).

Plaintiff to summary judgment. This deficiency is not cured by Plaintiff's affidavit which is conclusory in nature. Without a copy of the state court complaint or other competent evidence, this Court is simply unable to determine the specific factual basis upon which Plaintiff is relying to support the claim that the entire damage award arose from a single transaction. Absent same, this Court cannot avoid a further trial on the issue of apportionment of said award among the several findings of liability in the state court judgment and whether the law supports Plaintiff's argument concerning a single transaction under the facts presented in this case.

Cases such as *Lusk v. Williams (In re Williams)*, 282 B.R. 267, 276 (Bankr. N.D.Ga. 2002), quoting *In re Bukowski*, 266 B.R. 838, 846 (E.D.Wis. 2001), in this Court's view, do not stand for the proposition that if fraud is among other causes of action for relief, the entire award is automatically presumed to be for fraud. Rather, if fraud is shown to have been one basis proved, the fact that other non-tort causes of action such as breach of contract may also arise from the same transaction, does not alter the conclusion that each cause may support the entire recovery. *See also St. Laurent v. Ambrose (In re St. Laurent)*, 991 F.2d 672 (11<sup>th</sup> Cir. 1993). In other words, the presence of counts not sounding in tort does not undermine the essentiality of the tort finding in the state court for purposes of collateral estoppel. Thus, although the transaction in issue supports legal grounds for relief beyond those sounding in tort and the presence of such other grounds do not diminish the fact that the fraud count may support the entire recovery, the underlying facts supporting relief based on tort must be shown to have been proved in connection with the entire judgment to satisfy the requirements for collateral estoppel and nondischargeability herein with regard to same.

In sum, Plaintiff has failed to demonstrate on the current record that the total damages

awarded by the state court are based upon fraud and to provide authority supporting his argument that same should be presumed as an award based upon a single transaction. Thus, the Court concludes that Plaintiff is not entitled to summary judgment at this time. Accordingly, it is

**ORDERED** that Plaintiff's motion for summary judgment be, and hereby is, **denied** but that Plaintiff is allowed **ten (10) days** from entry of this Order to amend the record to supply further evidence and authority regarding the grounds upon which the state court awarded judgment against Debtor. Debtor is allowed **twenty (20) days** thereafter to file a response.<sup>2</sup>

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 28<sup>th</sup> day of March, 2005.



ROBERT E. BRIZENDINE  
UNITED STATES BANKRUPTCY JUDGE

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Subsequent to the hearing before this Court, but prior to the entry of this Order, Plaintiff filed a statement of material facts as to which there is no genuine issue to be tried. The facts needed to support entry of summary judgment in Plaintiff's favor, however, are those upon which the state court judgment was entered -- not just the mere fact that a judgment was entered. As previously stated, unless such facts are brought to the attention of the Court within the time frame set forth above, the Court will set this matter down for trial.