UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
GAINESVILLE DIVISION

IN RE:	:	CASE NO. G09-23920-REB
GRANT S. SMERECZYNSKY and DONITA S. SMERECZYNSKY,	:	
Debtors.	:	
	:	ADVERSARY PROCEEDING
EAMONN FOLEY and CHRISTY FOLEY,	:	NO. 10-2064
Plaintiffs,	:	
v.	:	CHAPTER 7
GRANT S. SMERECZYNSKY,	:	
Defendant.	:	JUDGE BRIZENDINE

ORDER GRANTING PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

Before the Court is the motion of Plaintiffs named above for summary judgment filed herein on September 12, 2012. Plaintiffs commenced this adversary proceeding through the filing of a complaint on February 12, 2010 to determine the dischargeability of a certain prepetition debt in the total amount of $58,459.00 under 11 U.S.C. § 523(a)(2)(A) and § 523(a)(6). Defendant-Debtor has not responded to or otherwise opposed the motion.[1] Upon review of Plaintiffs' motion, statement of undisputed material facts, legal brief, accompanying affidavit, as well as the record as a whole, and based upon the

[1] Previously, the Court denied Debtor's motion to dismiss the complaint by Order entered herein on January 31, 2011, after which Debtor filed his answer on February 10, 2011. The Court also granted Debtor a continuance by Order entered on September 15, 2011.

following reasons, the Court concludes that Plaintiffs' motion for summary judgment should be granted.[2]

Summary judgment may be granted pursuant to Federal Rule of Civil Procedure 56, applicable herein by and through Federal Rule of Bankruptcy Procedure 7056, if "there is no genuine issue as to any material fact and... the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). In deciding a motion for summary judgment, the court "is not to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249, 106 S.Ct. 2505, 2511, 91 L.Ed.2d 202, 212 (1986). Presumptions or disputed inferences from a limited factual record cannot support entry of summary judgment as the court cannot choose between competing inferences. *See Allen v. Tyson Foods, Inc.*, 121 F.3d 642, 646 (11th Cir. 1997); *Raney v. Vinson Guard Serv., Inc.*, 120 F.3d 1192, 1196 (11th Cir. 1997). This conclusion is especially true when questions of intent are presented that ordinarily are not appropriate for disposition on summary judgment. All reasonable doubts should be resolved in favor of the non-moving party, and "if reasonable minds could differ on any inferences arising from undisputed facts, summary judgment should be denied." *Twiss v. Kury*, 25 F.3d 1551, 1555 (11th Cir. 1994), citing *Mercantile Bank & Trust Co. v. Fidelity & Deposit Co.*, 750 F.2d 838, 841 (11th Cir. 1985).

As the party moving for summary judgment, Plaintiffs have the burden of supporting their motion by identifying materials that demonstrate the absence of a genuine issue of material fact. This dispute arises out of a construction agreement entered into between the parties for the building of a residence, upon which Plaintiffs filed suit asserting various claims for relief in the Superior Court of Hall County,

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[2] This case was commenced by the filing of an involuntary petition, and an Order for Relief granting same was entered on October 22, 2009. An Order allowing for the substantive consolidation of this case with G09-24446-REB was entered on May 11, 2010. This case was converted to a case under Chapter 13 by Order entered on May 12, 2010, and was reconverted to a case under Chapter 7 by Order entered on August 24, 2010.

Georgia.[3] Having found the arbitration clause in the parties' agreement valid, the state court directed the parties' attendance at arbitration. In this bankruptcy adversary proceeding, Plaintiffs primarily rely on the Arbitration Award, a copy of which is attached to Plaintiffs' complaint as filed herein as Exhibit "C," entered by Construction Arbitration Associates, Ltd. in Case No. 09-2810 in August of 2009. In the Award, the arbitrator specifically found that Debtor and Co-Defendant Building Systems Network, LLC, "made false representations to Claimants [Plaintiffs herein]," and further, that they "wrongfully converted Claimants' funds." Based on these findings, the Plaintiffs were awarded the sum of $58,459.00, none of which amount has allegedly been paid by either defendant to date. Plaintiffs assert that the Arbitration Award and its corresponding findings are entitled to preclusive effect in this proceeding under the doctrine of collateral estoppel. Combined with the uncontested affidavit of Co-Plaintiff Christine Foley, Plaintiffs contend they have established sufficient grounds for entry of relief in their favor on their motion for summary judgment on their complaint.

Exceptions to discharge are narrowly construed and must be proven by a preponderance of the evidence. *See Terkune v. Houser (In re Houser)*, 458 B.R. 771, 776 (Bankr. N.D.Ga. 2011). As mentioned above, Plaintiffs argue for application of collateral estoppel, also known as issue preclusion, in this dischargeability proceeding. The Eleventh United States Circuit Court of Appeals has explained this doctrine as follows:

> Collateral estoppel, or issue preclusion, bars relitigation of an issue previously decided in judicial or administrative proceedings if the party against whom the prior decision is asserted had a 'full and fair opportunity' to litigate that issue in an earlier case. Collateral estoppel principles apply to dischargeability proceedings. If the prior judgment was rendered by a state court, then the collateral estoppel law of that state must be applied to determine the judgment's preclusive effect...however, the ultimate issue of

[3] The state court law suit is styled *Christy Foley and Eamonn Foley v. Building Systems Network, LLC, and Grant Smereczynsky*, Civil Action File No.: 2006-CV-3269.

> dischargeability is a legal question to be addressed by the bankruptcy court in the exercise of its exclusive jurisdiction to determine dischargeability.

St. Laurent v. Ambrose (In re St. Laurent), 991 F.2d 672, 675 (11th Cir. 1993) (cites omitted); *see also Houser*, 458 B.R. at 777-78. As Plaintiffs have observed, in this circuit arbitration awards may be given preclusive effect. *See Greenblatt v. Drexel Burnham Lambert, Inc.*, 763 F.2d 1352, 1360 (11th Cir. 1985); *see also Tower Oak, Inc. v. Selmonosky (In re Selmonosky)*, 204 B.R. 820 (Bankr. N.D.Ga. 1996). In deciding whether collateral estoppel applies in this adversary proceeding, this Court will refer to the law of Georgia as the law of the state in which the Award was rendered.[4] Under Georgia law, the following elements are also required to establish a claim of collateral estoppel:

> 1) There must be an identity of issues between the first and second actions; 2) the duplicated issue must have been actually and necessarily litigated in the prior court proceeding; 3) determination of the issue must have been essential to the prior judgment; and 4) the party to be estopped must have had a full and fair opportunity to litigate in the course of the earlier proceeding.

Houser, 458 B.R. at 777, citing *League v. Graham (In re Graham)*, 191 B.R. 489, 495 (Bankr. N.D.Ga.1996). Based upon a review of these standards and the record presented, the Court concludes that the findings of the arbitrator are entitled to preclusive effect herein.

Under Section 523(a)(2)(A), as alleged in Count I of the complaint, Plaintiffs must prove facts

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[4] In addition, as this Court has stated on a previous occasion:

> [t]he actual determination of the preclusive effect of factual findings supporting an arbitration award must occur on a case-by-case basis centered on an evaluation of certain criteria designed to protect the federal interest in the federal proceeding. *Greenblatt,* 763 F.2d at 1360–61. These criteria are as follows: (1) the nature of the federal interests at issue; (2) expertise of the arbitrator and scope of his authority; and (3) procedural adequacy of the arbitration proceeding.

Selmonosky, 204 B.R. at 825 (cites omitted).

that Debtor "committed positive or actual fraud involving moral turpitude or intentional wrongdoing."[5] To succeed on this claim, Plaintiffs must establish that the Debtor obtained money, property, or credit from Plaintiffs: (1) by false representation, pretense, or fraud; (2) knowingly made or committed; (3) that occurred with the intent to deceive the Plaintiffs or to induce their acting on same; (4) upon which Plaintiffs actually and justifiably relied; and (5) that Plaintiffs suffered damages, injury, or loss as a result thereof. *HSSM # 7 Ltd. Pshp. v. Bilzerian (In re Bilzerian)*, 100 F.3d 886, 892 (11th Cir. 1996); *Sterling Factors, Inc. v. Whelan (In re Whelan)*, 245 B.R. 698, 705-06 (N.D.Ga. 2000); *Lusk v. Williams (In re Williams)*, 282 B.R. 267, 272 (Bankr. N.D.Ga. 2002). As argued by Plaintiffs, the legal standard to support a finding of fraud under Georgia law is substantially similar to the federal standard described above and requires that "[a] plaintiff who claims fraud must show: (1) a false representation by defendant; (2) scienter; (3) an intention to induce the plaintiff to act or refrain from action; (4) justifiable reliance by the plaintiff; and (5) damages." *See Harden v. Vertex Assoc.*, 226 Ga.App. 322, 323, 487 S.E.2d 12 (Ga.Ct.App. 1997) (cites omitted).

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[5] *Bracciodieta v. Raccuglia (In re Raccuglia)*, 464 B.R. 477, 485 (Bankr. N.D.Ga. 2011). Section 523(a)(2)(A) provides in pertinent part as follows:

> (a) A discharge under section 727 ... does not discharge an individual debtor from any debt—
>
> > (2) for money, property, services, or an extension, renewal, or refinancing of credit, to the extent obtained by -
> >
> > > (A) false pretenses, a false representation, or actual fraud, other than a statement respecting the debtor's or an insider's financial condition ....

11 U.S.C. § 523(a)(2)(A). As mentioned above, these elements must be proven by a preponderance of the evidence. *See Grogan v. Garner*, 498 U.S. 279, 291, 111 S.Ct. 654, 661, 112 L.Ed.2d 755 (1991); *Graham*, 191 B.R. at 493; *accord City Bank & Trust Co. v. Vann (In re Vann)*, 67 F.3d 277 (11th Cir. 1995).

Applying these tests, the Court concludes that Plaintiffs have established an entitlement to relief under Section 523(a)(2)(A) with respect to the Arbitration Award. It appears both sides eventually desired and participated in the arbitration proceedings as represented by counsel, and no one has questioned the expertise of the arbitrator or whether the findings in the Award exceeded the scope of the arbitrator's authority. The arbitrator found that Debtor and his Co-Defendant made false representations and wrongfully converted Plaintiffs' funds as initially paid over pursuant to the construction agreement between the parties. The Court perceives these findings to be: specific; rendered in full satisfaction of all claims and demands as set forth in connection with Plaintiffs' state court law suit; and determined to have been sufficient to support an award of damages under applicable state law in favor of Plaintiffs. Further, they directly pertain to the matters alleged in their complaint for nondischargeability herein.[6]

Based upon a review of the pleadings of record, the Court concludes that Plaintiffs have demonstrated their entitlement to relief under Count I of the complaint and, accordingly, it is

ORDERED that the motion of Plaintiffs for summary judgment be, and the same hereby is, **granted**; and, therefore, the obligation of Debtor as owed to Plaintiffs based upon the Arbitration Award as entered by Construction Arbitration Associates, Ltd., Case No. 09-2810, in August of 2009 in the amount of $58,459.00 is **excepted** from discharge in this Chapter 7 case pursuant to 11 U.S.C. §

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[6] In reference to Plaintiffs' demand for arbitration, in their adversary complaint Plaintiffs describe the claims they were asserting in the state court litigation, which included "Fraud and Conversion." *See* Complaint, ¶ 36. From among those claims, in the Award the arbitrator cited false representations and wrongful conversion as the grounds for liability. Whereas Plaintiffs herein certainly could have set out the alleged elements they contend have been determined with respect to each of the required elements under Section 523(a)(2)(A) more specifically in their statement of undisputed material facts, the Court concludes from a review of the record that same have been established for purposes of their current motion.

523(a)(2)(A).[7]

A separate written judgment will be entered contemporaneously herewith.

The Clerk is directed to serve a copy of this Order upon counsel for Plaintiffs, counsel for Defendant-Debtor, the Chapter 7 Trustee, and the United States Trustee.

IT IS SO ORDERED.

At Atlanta, Georgia this 21st day of December, 2012.

ROBERT E. BRIZENDINE
UNITED STATES BANKRUPTCY JUDGE

[7] Because the Court is entering relief under Section 523(a)(2)(A), there is no need to further address Plaintiffs' claim in Count II under Section 523(a)(6) at this time. In addition, under the circumstances presented, the Court will not grant the requested relief for attorney's fees and costs under Count III.