Honorable Mike K. Nakagawa
United States Bankruptcy Judge

Entered on Docket
May 18, 2018

UNITED STATES BANKRUPTCY COURT

DISTRICT OF NEVADA

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In re: DREW LEVY, Debtor.	Case No. 17-13504-MKN Chapter 7
WARNER HOLDINGS, LLC, dba SUN VALLEY ELECTRIC SUPPLY COMPANY, Plaintiff, v. DREW LEVY, Defendant.	Adv. Proc. No. 17-01232-MKN Date: May 16, 2018 Time: 3:00 p.m.

ORDER ON PLAINTIFF WARNER HOLDINGS, LLC, d/b/a SUN VALLEY ELECTRIC SUPPLY COMPANY'S MOTION FOR SUMMARY JUDGMENT[1]

On May 16, 2018, the court heard "Plaintiff Warner Holdings, LLC, d/b/a Sun Valley Electric Supply Company's Motion for Summary Judgment" ("MSJ"). The appearances of counsel were noted on the record. After arguments were presented, the matter was taken under

[1] In this Order, all references to "Section" are to the provisions of the Bankruptcy Code, 11 U.S.C. §§ 101-1532. All references to "FRBP" are to the Federal Rules of Bankruptcy Procedure. All references to "FRCP" are to the Federal Rules of Civil Procedure. All references to "FRE" are to the Federal Rules of Evidence. All references to "NRCP" are to the Nevada Rules of Civil Procedure. All references to "ECF No." are to the numbers assigned to the documents filed in the above-captioned bankruptcy case as they appear on the docket maintained by the clerk of the court. All references to "AECF No." are to the numbers assigned to the documents filed in the above-captioned adversary proceeding ("Adversary Proceeding").

submission.

BACKGROUND

On June 28, 2017, Drew Levy ("Levy") filed a voluntary Chapter 7 petition, formerly doing business as, *inter alia*, Summerlin Energy LLC ("Summerlin Energy"). (ECF No. 1).

On September 6, 2017, this Adversary Proceeding was commenced on behalf of Warner Holdings, LLC ("Plaintiff"). In its complaint ("Adversary Complaint"), Plaintiff alleges that prior to the commencement of the bankruptcy proceeding, Plaintiff had obtained a default judgment ("Default Judgment") against Levy from the Eighth Judicial District Court, Clark County, Nevada ("State Court"). (AECF No. 1). The Default Judgment had been entered in a civil proceeding brought by Plaintiff against Summerlin Energy, Levy, and other named parties, denominated Case No. A-16-731758-C ("State Action"). The Default Judgment is alleged to be in the principal amount of $278,834.67. This Adversary Proceeding seeks to establish that the debt reflected by the Default Judgment in the State Action is excepted from discharge in Chapter 7 pursuant to Section 523(a)(2).

On October 30, 2017, Levy filed an answer to the Adversary Complaint. (AECF No. 6).

On January 16, 2018, an order was entered scheduling a bench trial to be held on June 4, 2018, with a pretrial conference to be conducted on May 24, 2018. (AECF No. 25).

On March 20, 2018, Plaintiff filed the instant MSJ (AECF No. 27), accompanied by a supporting Statement of Undisputed Facts ("SUF"). (AECF No. 28).

On April 10 and 11, 2018, Levy filed an opposition to the MSJ ("Opposition") as well as a response to the SUF. (AECF Nos. 31 and 32).

On April 24, 2018, Plaintiff filed replies to both responses from Levy. (AECF Nos. 33 and 34).

On May 7, 2018, Levy filed a Declaration of David A. Riggi in support of his opposition. (AECF No. 35).

On May 16, 2018, Levy filed a Supplemental Declaration of David A. Riggi in support of his opposition. (AECF No. 37).

APPLICABLE LEGAL STANDARDS

For a prepetition debt to be excepted from discharge under Section 523(a)(2)(A),[2] the creditor has the burden of proving each of the following elements: "(1) misrepresentation, fraudulent omission or deceptive conduct by the debtor; (2) knowledge of the falsity or deceptiveness of his statement or conduct; (3) an intent to deceive; (4) justifiable reliance by the creditor on the debtor's statement or conduct; and (5) damage to the creditor proximately caused by its reliance on the debtor's statement or conduct." Turtle Rock Meadows, etc. v. Slyman (In re Slyman), 234 F.3d 1081, 1085 (9th Cir. 2000); Sachan v. Huh (In re Huh), 506 B.R. 257, 262 (B.A.P. 9th Cir. 2014). The "intent to defraud is a question of fact," and the "intent to deceive can be inferred from the surrounding circumstances." Cowen v. Kennedy (In re Kennedy), 108 F.3d 1015, 1018 (9th Cir. 1997).

Issue preclusion applies in dischargeability proceedings, see Grogan v. Garner, 498 U.S. 279, 284 n.11 (1991), but not claim preclusion. See Brown v. Felson, 442 U.S. 127, 133-139 (1979). "[A] federal court must give to a state-court judgment the same preclusive effect as would be given that judgment under the law of the State in which the judgment was rendered." Migra v. Warren City Sch. Dist. Bd. of Educ., 465 U.S. 75, 81 (1984); White v. City of Pasadena, 671 F.3d 918, 926 (9th Cir. 2012); Robi v. Five Platters, Inc., 838 F.2d 318, 322 (9th Cir. 1988).

Under Nevada law, issue preclusion requires the presence of the following: (1) the issue decided in the prior litigation must be identical to the issue presented in the current action, (2) the prior ruling must have been on the merits and have become final, (3) the party against whom the judgment is asserted must have been a party or in privity with a party in the prior litigation, and (4) the issue must have been actually and necessarily decided. See Five Star Capital Corp. v. Ruby, 194 P.3d 709, 713 (Nev. 2008) (emphasis added). In Howard v. Sandoval (In re Sandoval), 232 P.3d 422 (Nev. 2010), the Nevada Supreme Court answered a question certified by this bankruptcy court as to the preclusive effect to be given in a nondischargeability

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[2] At oral argument, Plaintiff clarified that it is seeking a determination under Section 523(a)(2)(A), and not a determination of nondischargeability under Section 523(a)(2)(B).

proceeding to a prior default judgment issued by a Nevada trial court.[3] Nevada's highest court concluded that default judgments cannot be given issue preclusive effect because the underlying factual and legal issues were not actually litigated. 232 P.3d at 425.[4]

A motion for summary judgment filed in an adversary proceeding is governed by FRCP 56 and made applicable by FRBP 7056. See Silva v. Smith's Pac. Shrimp, Inc. (In re Silva), 190 B.R. 889, 891 (B.A.P. 9th Cir. 1995). The party moving for summary judgment bears the burden of demonstrating the absence of any genuine dispute of material fact. See Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). "The court may consider any material that would be admissible or usable at trial..." 10A Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, FEDERAL PRACTICE & PROCEDURE: CIVIL, § 2721 (4th ed. 2016). A motion for summary judgment should be granted if "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." FED.R.CIV.P. 56(a). If the moving party having the burden of proof at trial fails to demonstrate that there are no genuine disputes of material fact, the responding party is not required to produce evidence and summary judgment must be denied. However, if the moving party satisfies its initial burden, the burden of proof shifts to the non-moving party to designate specific facts demonstrating the existence of genuine issues for trial. See Celotex Corp., 477 U.S. at 323-326.

Determinations of intent or credibility are generally ill-suited for disposition by summary judgment. See Fogel Legware, etc. v. Wills (In re Wills), 243 B.R. 58, 65 (B.A.P. 9th Cir. 1999). See also Reaves v. Thurston (In re Thurston), 2013 WL 3497674, at *6 (B.A.P. 9th Cir. 2013); Osz v. Spilsbury (In re Spilsbury), 2011 WL 606776, at *2 (Bankr. S.D. Cal. 2011);

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[3] The default judgment at issue in Sandoval was obtained in a civil proceeding in which the debtor was served by publication. 232 P.3d at 422-23. The subsequent dischargeability claim was based on willful and malicious injury under Section 523(a)(6). 232 P.3d at 423.

[4] At oral argument, Plaintiff emphasized the decision in In re A-1 24 Hour Towing, Inc., 33 B.R. 281 (Bankr.D.Nev. 1983), where then-bankruptcy, now federal district court Judge Jones examined a prebankruptcy default judgment entered against a corporate debtor by the State Court. The A-1 24 Hour Towing decision, however, pre-dated the U.S. Supreme Court's directive in Migra to apply state law principals of res judicata, as well as the Nevada Supreme Court's holding in Sandoval that default judgments issued by Nevada courts should not be given issue preclusive effect.

Rollins v. Neilson (In re Cedar Funding, Inc.), 408 B.R. 299, 313 (Bankr. N.D. Cal. 2009). See, e.g., Lichtenegger v. Bank of Montreal (In re SK Foods, L.P.), 693 Fed.Appx. 655, 656 (9th Cir. 2017) (bankruptcy court erroneously made credibility determinations based on supporting declarations of individuals).

DISCUSSION

To meet its burden of establishing the absence of genuine disputes of material fact, Plaintiff attaches seven exhibits to the MSJ, which also serve as the basis for the items set forth in the SUF. Those exhibits, consisting of copies,[5] are as follows: (1) the Default Judgment entered in the State Action, (2) Levy's motion to set aside the Default Judgment ("Set Aside Motion"), (3) Plaintiff's opposition to that motion ("Set Aside Opposition"), (4) the State Court order denying that motion ("Set Aside Order"), (5) the court docket from a state criminal action against Levy ("Criminal Docket"), (6) a transcript of the deposition of Levy taken on February 13, 2018 ("Deposition Transcript"), and (7) the Declaration of Erica Jenkins ("Jenkins Declaration") in support of the MSJ.

Plaintiff seeks summary judgment based on the Default Judgment entered in the State Action. See MSJ at 12:21 to 17:9. Plaintiff also argues that because Levy asserted the Fifth Amendment privilege against self-incrimination during his February 13, 2018, deposition testimony, adverse inferences should be drawn against him. Id. at 17:10 to 19:19. Because of the default judgment in the State Action and the adverse inferences that may be drawn, Plaintiff concludes that its debt is nondischargeable under Section 523(a)(2). Id. at 19:20 to 21:22.[6]

In response, Levy correctly asserts that an issue of fact must be actually litigated for a prior determination to be given issue preclusive effect. See Opposition at 2:15-28. Because Levy never answered the State Court complaint, he argues that none of the elements required to

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[5] The copies are not authenticated by a supporting affidavit or declaration as required by FRE 901, but no objection has been raised as to their admissibility.

[6] Plaintiff also argues that the debt may be nondischargeable under Section 523(a)(4) and Section 523(a)(6). See MSJ at 20 n.3. Neither of those claims are alleged in the Adversary Complaint and neither of those claims were raised at the hearing. Accordingly, neither of those claims are addressed in this order.

establish a claim under Section 523(a)(2)(A) were actually litigated and determined in the State Action.

Plaintiff argues, however, that Levy did participate in the State Action by filing the Set Aside Motion and therefore the factual issues raised in the State Court complaint were actually litigated. See MSJ at 4:3 to 5:3. Plaintiff's argument is without merit. A motion for relief from a default judgment under NRCP 55(c) and NRCP 60 is not a trial on the merits of the underlying proceeding, but is simply a determination whether a defaulting party should be excused for failing to respond to a pleading. See, e.g., Intermountain Lumber and Builders Supply, Inc. v. Glens Falls Insurance Company, 83 Nev. 126, 129 (Nev. 1967) (failure of counsel's inexperienced staff to transcribe a reply to a counterclaim and counsel's busy schedule did not require a default judgment on the counterclaim to be set aside). As illustrated by actual contents of the Set Aside Motion and the Set Aside Opposition, neither Levy nor the Plaintiff raised any factual or legal issues as to the merits of the underlying complaint, but only whether Levy should be permitted to defend. Indeed, nothing in the Set Aside Order suggests that Levy was permitted to present any evidence at the hearing on which any issues could be "actually litigated." Under these circumstances, the Default Judgment cannot be given issue preclusive effect.

Plaintiff is correct that Levy's assertion of the Fifth Amendment privilege at his deposition can have consequences in his bankruptcy proceeding. See, e.g., Leonard v. Coolidge (In re National Audit Defense Network), 367 B.R. 207 (Bankr.D.Nev. 2007). Adverse inferences may be drawn from a litigant's assertion of the privilege, however, only where independent evidence exists of facts to which the litigant refuses to testify. Id. at 216, citing, e.g., Doe ex rel. Rudy-Glanzer v. Glanzer, 232 F.3d 1258, 1264 (9th Cir. 2000). The Deposition Transcript sets forth the numerous instances in which Levy asserted the privilege, including his refusal to testify concerning the factual allegations made in the State Action.

As independent evidence supporting the factual allegations, Plaintiff offers the Jenkins Declaration. See MSJ at 11:24-25. That declaration consists of 12 paragraphs, almost all of which are statements made on information and belief. See Jenkins Declaration, ¶¶ 3, 4, 5, 6, 7, 8, 9, and 11. None of those statements are based on personal knowledge and would not be

admissible. See Fed.R.Evid 602. More important, the portion of the declaration addressing the factual elements material to Plaintiff's claim under Section 523(a)(2)(A), see Jenkins Declaration, ¶ 10, simply asserts what the State Court found in connection with the Default Judgment. In other words, the Jenkins Declaration provides no independent evidence whatsoever that would permit this court to draw adverse inferences from Levy's assertion of the Fifth Amendment privilege.

Based on the foregoing, the court concludes that the Default Judgment cannot be given preclusive effect for any factual determination necessarily made by the State Court because none of the factual issues were actually litigated. The court also concludes that no adverse inferences can be drawn at this time from Levy's assertion of the Fifth Amendment privilege because Plaintiff has offered no independent evidence of the facts[7] to which Levy refused to testify.[8] Moreover, because a claim under Section 523(a)(2)(A) requires a finding of malign conduct by the debtor, i.e., knowledge of falsity and intent to deceive, summary judgment otherwise is inappropriate.

IT IS THEREFORE ORDERED that Plaintiff Warner Holdings, LLC, d/b/a Sun Valley Electric Supply Company's Motion for Summary Judgment, Adversary Docket No. 27, be, and the same hereby is, **DENIED**.

Copies sent to all parties via CM/ECF ELECTRONIC FILING

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[7] Similarly, the Default Judgment does not provide independent evidence of the facts because it cannot be given preclusive effect.

[8] Based on an entry in the Criminal Docket, Plaintiff argues that the state criminal proceeding was "statistically closed" and that Levy is no longer under threat of criminal prosecution. As a result, Plaintiff maintains that the assertion of the Fifth Amendment privilege against self-incrimination is inappropriate. The issue is immaterial with respect to the MSJ inasmuch as the Plaintiff has provided no independent evidence of the facts to which Levy refused to testify, nor did Plaintiff request the imposition of a discovery sanction.