


Honorable Mike K. Nakagawa
United States Bankruptcy Judge



Entered on Docket
September 30, 2019

UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEVADA

In re:)	
ARAKSI BEKHLOYAN,)	Case No.: 18-16476-MKN
)	Chapter 7
Debtor.)	
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MICHAEL G. YORK dba LAW OFFICES)	Adv. Proc. No.: 19-01007-MKN
OF MICHAEL G. YORK,)	
Plaintiff,)	Date: September 11, 2019
)	Time: 9:30 a.m.
vs.)	
ARAKSI BEKHLOYAN,)	
Defendant.)	
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ORDER ON AMENDED MOTION TO DISMISS AND FOR AN AWARD OF ATTORNEY’S FEES AND COSTS¹

On September 11, 2019, the court heard the Amended Motion to Dismiss And for an Award of Attorney’s Fees and Costs (“Amended Motion”). The appearances of counsel were noted on the record. After arguments were presented, the matter was taken under submission.

¹ In this order, all references to “ECF No.” are to the number assigned to the documents filed in the above-captioned Chapter 7 proceeding as they appear on the docket maintained by the clerk of court. All references to “AECF No.” are to the documents filed in the above-captioned adversary proceeding. All references to “Section” are to the provisions of the Bankruptcy Code, 11 U.S.C. §§ 101-1532. All references to “FRCP” are to the Federal Rules of Civil Procedure.

BACKGROUND

1
2 On October 30, 2018, Araksi Bekhloyan (“Debtor”) filed a voluntary Chapter 7 petition.
3 (ECF No. 1). On the same date, a Notice of Chapter 7 Bankruptcy Case was entered
4 establishing, inter alia, a deadline of February 1, 2019, for creditors to file complaints under
5 Section 523(a) objecting to dischargeability of debts.

6 On January 22, 2019, Michael G. York dba Law Offices of Michael G. York (“Plaintiff”)
7 filed a complaint (“Adversary Complaint”) commencing the above-captioned adversary
8 proceeding. (AECF No. 1). Attached to the Adversary Complaint is a copy of a first amended
9 complaint that the Plaintiff filed in June 2017 in California (“California Complaint”). The
10 Adversary Complaint alleges that the fifth cause of action in the California Complaint was based
11 on fraud committed by the Debtor. Also attached to the Adversary Complaint is a copy of a
12 Judgment by Default (“Default Judgment”) entered in favor of the Plaintiff and against the
13 Debtor on the California Complaint. The only claim for relief alleged in the Adversary
14 Complaint is labeled as one for (Fraud), but it does not identify any applicable provision of
15 Section 523(a). The prayer seeks a determination that the Debtor’s debt to Plaintiff is
16 nondischargeable.

17 On February 21, 2019, Debtor filed an initial motion seeking to dismiss the Complaint
18 pursuant to FRCP 9(b) and FRCP 12(b)(6), as well as for relief under Section 523(d). (AECF
19 No. 6).

20 On March 18, 2019 and March 26, 2019, Debtor filed the Amended Motion seeking the
21 same relief as the initial motion. (AECF Nos. 10 and 13). Debtor noticed the Amended Motion
22 to be heard on April 24, 2019. (AECF Nos. 11 and 14).

23 On April 10, 2019, Plaintiff filed an opposition. (AECF No. 16).

24 On April 24, 2019, the Amended Motion was called on the court’s calendar, but only the
25 Plaintiff appeared telephonically. As a result, the Amended Motion was denied for lack of
26 appearance.

27 On May 22, 2019, an order was entered denying the Amended Motion. (AECF No. 17).
28

1 On June 7, 2019, Debtor filed a motion to reconsider the order denying the Amended
2 Motion based on a mistake of counsel. (AECF No. 18).

3 On July 8, 2019, Plaintiff filed an opposition. (AECF No. 21).

4 On July 15, 2019, Debtor filed a reply. (AECF No. 23).

5 On July 17, 2019, the court heard arguments on the motion to reconsider, granted the
6 requested relief, and directed Debtor to pay \$400.00 in attorney's fees and costs to the Plaintiff.

7 On August 5, 2019, an order was entered granting the motion and allowing Debtor to re-
8 notice the Amended Motion for hearing. (AECF No. 25). On the same date, Debtor re-noticed
9 the Amended Motion to be heard on September 11, 2019. (AECF No. 24).

10 On August 26, 2019, Plaintiff filed another opposition to the Amended Motion that
11 merely attaches a copy of the prior opposition ("Opposition"). (AECF No. 28).

12 DISCUSSION

13 The Amended Motion appears to argue that the Adversary Complaint fails to state a
14 claim for which relief may be granted, but neither the Debtor nor the Plaintiff even mention
15 FRCP 12(b)(6). Debtor challenges the adequacy of any allegations of fraud under FRCP 9(b),
16 see Amended Motion at 4:18 to 5:4, but Plaintiff essentially maintains that the sufficiency of the
17 allegations is no longer at issue. The Amended Motion also makes the factual assertion that the
18 alleged debt is owed by a separate entity rather than the Debtor. Id. at 4:7-12.² Debtor also
19 maintains that the California Complaint was never properly served, and therefore the default
20 judgment "should be overturned." Id. at 4:12-15.³ It also seeks an award of costs and attorney's
21 fees under Section 523(d), id. at 6:6-14, but does not explain how the alleged debt encompassed
22 by the Adversary Complaint is a consumer debt.

23 Although the language of the Adversary Complaint does not identify the statutory basis
24 for which a nondischargeability determination is being requested, the Adversary Proceeding

25
26 ² Factual assertions are not resolved at the pleading stage.

27 ³ Even if Debtor establishes factually that service of the California Complaint was
28 ineffective, this court has no authority to vacate or overturn the Default Judgment. Such relief
must be sought from the California court.

1 Cover Sheet attached to the Adversary Complaint checked the box under Section 523(a)(2).
2 Plaintiff acknowledges that the Adversary Complaint mistakenly refers to the fifth cause of
3 action in the California Complaint rather than allegations in the sixth cause of action. See
4 Opposition at 2:19-20. Paragraphs 21 and 22 of the California Complaint contains allegations of
5 fraud on which Plaintiff apparently relies for purposes of a claim under Section 523(a)(2).⁴
6 Plaintiff maintains, however, that the allegations of fraud contained in the California Complaint
7 are conclusive as a result of the Default Judgment. Id. at 3:8-12.

8 The court having considered the arguments of counsel, concludes that the Amended
9 Motion should be granted with leave to amend.

10 As an initial matter, a bankruptcy court is permitted to give preclusive effect to a state
11 court judgment, see Grogan v. Garner, 498 U.S. 279, 280 (1991), but must apply the preclusion
12 rules of the state that entered the judgment. See Bugna v. McArthur (In re Bugna), 33 F.3d
13 1054, 1057 (9th Cir. 1994). Under California law, a default judgment may be conclusive as to
14 the matters determined by the court. See O'Brien v. Appling, 133 Cal.App.2d 40, 42 (2nd Dist.
15 1955). Also under California law, however, a default judgment is given issue preclusive effect
16 only if the issues “must have been necessarily litigated in the action resulting in the default
17 judgment.” Harmon v. Kobrin (In re Harmon), 250 F.3d 1240, 1246 n.5 (9th Cir. 2001), citing
18 Williams v. Williams (In re Williams' Estate), 223 P.2d 248, 252 (Cal.1950). Compare Howard
19 v. Sandoval (In re Sandoval), 232 P.3d 422 (Nev. 2010) (prior default judgment under Nevada
20 law is not entitled to preclusive effect in dischargeability proceeding brought under Section
21 523(a)(6) because the factual issues were not actually or necessarily litigated).

22 In the instant case, the prayer of the California Complaint seeks \$91,020.55 for breach of
23 contract, and the same amount of damages for each of the other causes of action. The Default

24 ⁴ In order to establish a claim for actual fraud under Section 523(a)(2)(A), a creditor may
25 prove: “(1) misrepresentation, fraudulent omission or deceptive conduct by the debtor; (2)
26 knowledge of the falsity or deceptiveness of his statement or conduct; (3) an intent to deceive;
27 (4) justifiable reliance by the creditor on the debtor’s statement or conduct; and (5) damage to the
28 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).

1 Judgment attached to the Adversary Complaint does not include any findings of fact, does not
2 specify whether the judgment awards damages on any specific cause of action (much less the
3 sixth cause of action), and does not award any punitive damages. Thus, it does not appear that
4 adjudication of the allegations of fraud set forth in the sixth cause of action was necessary to the
5 Default Judgment at all. Compare Cal-Micro, Inc. v. Cantrell (In re Cantrell), 329 F.3d 1119,
6 1124-25 (9th Cir. 2003) (award of punitive damages under a multi-claim California default
7 judgment must have included an implicit finding of fraud to be nondischargeable under Section
8 523(a)(4)).⁵ Under California law, it appears that the “necessarily litigated” requirement is
9 absent, and the Default Judgment is not conclusive on the issue of fraud.

10 Paragraphs 21 and 22 of the California Complaint allege only that the Debtor made
11 promises to pay the Plaintiff for his legal services to other parties and that Debtor made those
12 promises without intention of performing and with the intention to defraud. FRCP 9(b) requires
13 that a party “state with particularity the circumstances constituting fraud.” See Vess v. Ciba-
14 Geigy Corp. USA, 317 F.3d 1097, 1103 (9th Cir. 2003). Moreover, allegations of fraud must be
15 accompanied by “the who, what, when, where, and how” of the wrongful conduct alleged. Id. at
16 1106. A plaintiff must state more than the basic facts necessary to identify the transaction and
17 instead must state what is false or misleading about a statement, and why it is false along with
18 providing dates of the occurrences. Id. at 1106-7.

19 Because the Adversary Complaint incorporates only the bare allegations set forth in
20 Paragraphs 21 and 22 of the California Complaint, it does not state with particularity the
21 circumstances constituting fraud. Those paragraphs certainly allege that the Debtor made
22 promises, but those paragraphs do not specify what was said, when and where the promises were

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24 ⁵ In O’Brien v. Appling, there were two causes of action alleged in the subject complaint,
25 but the first cause of action for money had and received was voluntarily dismissed. 133
26 Cal.App.2d at 41. Plaintiff obtained a default judgment on the remaining cause of action
27 alleging that the defendant made certain representations to obtain funds, and made the
28 representations and promises with no intention of keeping them. Id. The appellate court had no
difficulty concluding that the truth of the allegations underlying the only remaining cause of
action had been confessed by the defaulting defendant. Id. at 42. In other words, because there
was only one cause of action remaining to be decided, its factual allegations were necessarily
decided in favor of the plaintiff to warrant entry of default judgment.

1 made, and how the promises were conveyed. The Adversary Complaint therefore fails to satisfy
2 the requirements of FRCP 9(b).

3 A motion to dismiss a complaint or claim under FRCP 9(b) for failure to plead with
4 particularity is the functional equivalent of a motion to dismiss under FRCP 12(b)(6) for failure
5 to state a claim. See Vess v. Ciba-Geigy Corp., 317 F.3d at 1107. Accordingly, as with FRCP
6 12(b)(6) dismissals, FRCP 9(b) dismissals ordinarily should be without prejudice, and leave to
7 amend should be granted if it appears at all possible that the plaintiff can correct the defect. Id.
8 at 1108.

9 **IT IS THEREFORE ORDERED** that Amended Motion to Dismiss And for an Award
10 of Attorney's Fees and Costs, Adversary Docket No. 13, be, and the same hereby is, **GRANTED**
11 **WITH LEAVE TO AMEND.**

12 **IT IS FURTHER ORDERED** that Plaintiff must file and serve an amended adversary
13 complaint no later than **October 28, 2019**. In the event Plaintiff fails to file the amended
14 complaint, Defendant Araksi Bekhloyan may submit an ex parte application to dismiss the
15 above-captioned adversary proceeding with prejudice.

16 **IT IS FURTHER ORDERED** that in the event Plaintiff timely files an amended
17 complaint, the scheduling conference on November 13, 2019, at 9:30 a.m., will proceed.

18 **IT IS FURTHER ORDERED** that no later than **October 7, 2019**, counsel for the
19 Defendant must submit a notice specifying the date of compliance with the payment requirement
20 specified in the order entered August 5, 2019, Adversary Docket No. 25.

21
22 Copies sent via CM/ECF ELECTRONIC FILING

23 Copies sent via BNC to:
24 MICHAEL G. YORK
25 LAW OFFICES OF MICHAEL G. YORK
1301 DOVE STREET, SUITE 1050
NEWPORT BEACH, CA 92660-2416

26 # # #

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