

In the United States Bankruptcy Court

for the Northern District of Iowa

Western Division

VICKIE L. WILSBACHER X89-00422S

Bankruptcy No.X89-00422S

Debtor(s).

Chapter 7

JOHN M. WILSBACHER

Adversary No. X89-0069S

Plaintiff(s)

vs.

VICKIE L. WILSBACHER

Defendant(s)

ORDER RE: MOTION TO QUASH AND MOTION IN LIMINE

The matters before the court are defendant's Motion to Quash Subpoenas and defendant's Motion in Limine. The court, having heard the arguments of counsel and having considered the evidence, now issues findings and conclusions as required by Bankr. R. 7052.

Defendant Vickie L. Wilsbacher, has filed a chapter 7 bankruptcy case. Her former husband, John M. Wilsbacher, has brought this adversary proceeding seeking the judgment of this court that Vickie Wilsbacher's indebtedness to him not be discharged. His claim is in two parts--both are premised on a dissolution decree which the Iowa District Court entered on or about February, 1989. This decree dissolved the marriage of the Wilsbachers, awarded child custody, established visitation rights and provided for child support and the division of marital property.

The decree was based upon the stipulation of the parties. So far as property settlement was concerned, the stipulation and decree awarded the family home to Mrs. Wilsbacher. In consideration of that award, Mr. Wilsbacher was to receive payment of \$5,000.00 on January 1, 2005. The payment was to be secured by a lien on the property until this amount was paid.

Paragraph 11 of the stipulation provided that Mr. Wilsbacher would receive various items of personal property including all his power tools including boxes, benches, hooks, stands and supplies for his work.

In late November, 1989, based upon an application filed by John Wilsbacher, the State Court, the Honorable Dewie J. Gaul presiding, issued a modification decree which included findings of fact and conclusions of law. Most of the findings and conclusions involved a dispute between the parties over visitation rights with the children.

But the modification decree contained also the following finding on page 3, paragraph 4:

The stipulation and decree provided respondent should "get" all his hand and power tools. He testified he did not. The petitioner testified she does not know what became of them and she does not have them. The respondent pled the petitioner has sold or given away said tools. The evidence does not show this is true. The respondent took some personal property from the home. Whether what he did not get was stolen is not shown, but the court does not find that the petitioner has the tools or is responsible for their being gone.

The court's conclusions of law in paragraph B stated:

Conversion is the act of wrongful control or dominion over another's personal property in denial of or inconsistent with such other's possessory right to the property. Kendall/Hunt Pub. Co. v. Rowe, 424 N.W.2d 235, 247 (Iowa 1988). A person who claims another has converted his property has the burden of proof to show the conversion and must prove some affirmative wrongful act by the alleged converter. See. 89 C.J.S. 611, Trover and Conversion Section 118b; 18 Am. Jur.2d 159, Conversion Section 26; Harlan Production Credit Ass'n. v. Schroeder Elev. Co., 253 Iowa 345, 112 N.W. 320, 322 (1961) .

The court order relative to conversion was that:

The relief asked by respondent in divisions III and IV of the application filed March 31, 1989, is denied, it not being shown that petitioner has or is responsible for any disappearance of the tools awarded to the respondent by the decree of February 6, 1989.

In his complaint filed in bankruptcy court on April 19, 1989, Mr. Wilsbacher alleges the award of the personal property in the dissolution proceeding and alleges that Vickie Wilsbacher has violated the state court decree by refusing to turn over certain items of personal property which are listed in exhibits c-1, c-2, c-3 and c-4 of the complaint. These items, mostly tools, are alleged to have a value of \$13,374.97.

John Wilsbacher asks that this court enter a judgment that Vickie Wilsbacher's debt to him not be discharged because she has wrongfully withheld the property awarded to him or has wrongfully converted it. He asks to be awarded this property and if she cannot return it, that he have judgment against her for the value of \$13,374.97. Plaintiff also asks that the court's judgment be determined non-dischargeable. John Wilsbacher amended his complaint on May 10, 1989 to also allege that his lien against the debtor's homestead is not dischargeable in bankruptcy.

In her answer, filed May 24, 1989, Vickie Wilsbacher states in paragraph 7 that:

"Defendant further states that plaintiff's complaint of April 19, 1989 was filed in the district court for the State of Iowa and plaintiff now seeks to have this court award judgment in that complaint."

John Wilsbacher replied to defendant's answer and his paragraph 2 contained the following sentence:

"That it is true that the plaintiff has stated in state court that the debtor has taken his tools and has failed to return them to the plaintiff."

Trial is scheduled for 2:00 P.M. tomorrow, May 3, 1990. Two motions have been filed by Vickie Wilsbacher. The first is a motion in limine filed April 27, 1990. It alleges the decree of modification entered in state court on November 20, 1989 and argues that the personal property dispute between

the parties is res judicata and that therefore this court has no jurisdiction to decide the issue. The motion seeks to prevent relitigation of already decided factual issues.

Second, Vickie Wilsbacher has filed a Motion to Quash Subpoenas served upon her minor children whom she says are ages 11, 8, 5 and 2. Although proof of service of subpoenas does not yet appear in the adversary file, apparently Mr. Wilsbacher has caused subpoenas to be served on these children, requiring them to testify at tomorrow's trial. Mr. J. Allen Orr, Mr. Wilsbacher's attorney, argues that these children have knowledge of Mrs. Wilsbacher's withholding or conversion of the personal property. Mrs. Wilsbacher says the children are in school or are too young to testify and therefore the subpoenas should be quashed.

MOTION IN LIMINE

This is the second time that Vickie Wilsbacher has attempted to raise the issue of the jurisdiction of this court as it relates to the issue of claim preclusion.

It was done once orally at another hearing, and the court at that time scheduled later oral argument on the jurisdiction issue. As this court recalls its later ruling, it denied the defendant's jurisdictional argument saying that while there may be a preclusion problem with plaintiff's case, it did not deprive the court of jurisdiction.

She now attempts to raise the same legal theory by motion in limine to prevent relitigation of the conversion issue. As an aside, the court points out that a more productive way to have raised issue preclusion would have been by motion for summary judgment. Regardless of the procedural route, this court will now determine the effect on this case of issue preclusion.

The full faith and credit clause of the Constitution, Article IV, Section 1, is implemented by 28 U.S.C. § 1738. Essentially, the law is that the judicial proceedings of the states shall have the same full faith and credit in the courts of the United States as they do in the courts of the respective states.

Federal courts "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 School District Board of Education, 465 U.S. 75, 81 (1984).

While state court judgments have no claim preclusive effect in determining whether a debt is dischargeable, the doctrine of issue preclusion may apply where the state court has decided factual issues identical to those to be decided regarding dischargeability. New York State Department of Social Services v. Perrin (In re Perrin), 55 B.R. 401, 402 (Bankr. N.D. 1985).

Under the doctrine of claim preclusion, a final judgment on the merits bars further claims by parties based on the same cause of action or claim for relief. Iowa Electric Light and Power Co. v. Mobile Aerial Towers, Inc., 723 F.2d 50, 52 (8th Cir. 1983).

Issue preclusion is a related doctrine which provides that once an issue is actually and necessarily determined by a court of competent jurisdiction, that determination is conclusive in subsequent suits based on a different cause of action involving a party to the prior suit. Iowa Electric Power Co. at 52.

The Eighth Circuit Court of Appeals has recognized that Iowa courts have established four prerequisites to the application of issue preclusion. These are:

(1) the issue concluded must be identical; (2) the issue must have been raised and litigated in the prior action; (3) the issue must have been material and relevant to the disposition of the prior action; and (4) the determination made of the issue in the prior action must have been necessary and essential to the resulting judgment.

Yancy v. McDevitt, 802 F.2d 1025, 1028 (8th Cir. 1986); United States v. Rosenberger, 872 F.2d 240, 242 (8th Cir. 1989).

Absent the issue of whether any debt of Vickie Wilsbacher to John Wilsbacher relating to conversion of the tools is dischargeable in bankruptcy, the issues before the district court of the State of Iowa and this court are the same. He seeks here, as in state court, judgment against his former spouse for conversion of the tools awarded to him as part of the property settlement.

Dischargeability is an added issue before this court. The circumstances of this case meet all the prerequisites of issue preclusion. These parties were involved in prior litigation before the State Court of Iowa in which John Wilsbacher sought relief from Vickie Wilsbacher for her withholding or disposition of the tools in contravention of the stipulation and decree. This matter has been decided by the District Court of Iowa. It found that Mrs. Wilsbacher did not convert the tools and denied relief.

Mr. Wilsbacher has testified that at the time of the trial on the modification issues, he was not aware that two men had come to his former home and had removed his tools. The modification hearing was held in November of 1989. Mr. Wilsbacher says he did not learn of the information regarding the removal until he visited with his children in December of 1989. He says there has been a fraud leading to the state court decision and that the bankruptcy court has jurisdiction to arrive at a different result.

It may well be that this court has the jurisdiction and authority based on law to set right the conversion decision entered by the state court of Iowa. In Iowa, judgments may be collaterally attacked on the ground of fraud. Mauer v. Rohde, 257 N.W.2d 489, 496 (Iowa 1977). However, the fraud must be extrinsic. Id. Extrinsic fraud is a fraud which prevents a litigant from presenting his or her case. Id. Intrinsic fraud may be accomplished by perjury. Id. City of Chariton v. J. C. Blunk Construction Co., 112 N.W.2d 829, 835 (Iowa 1962).

This court will not decide which type of fraud may have been involved here or the effect of it. Even assuming that the court has such power, it believes that the state court which entered the modification decree also has such authority and is the more appropriate forum to determine whether the evidence warrants a different determination than was previously made. Here it is not essential that the judgment be collaterally attacked. Mr. Wilsbacher has a direct remedy. Hoverstad v. First National Bank and Trust Co., 74 N.W.2d 48, 52 (S.D. 1955) reh'g, denied (1956).

Iowa R.Civ. P. number 252 clearly permits the state court to correct, vacate or modify a final judgment or grant a new trial for fraud under section (b) of the rule, or for newly discovered material evidence, under section (f). A petition for such relief must be filed in the original action within one year after the rendition of the judgment or order involved. See Iowa R.Civ. P. 252a. Since the modification decree was filed in the Iowa District Court in November, 1989, John Wilsbacher is clearly still within the time period to seek relief in the state court where the alleged fraud took place.

The court, therefore, concludes that the John Wilsbacher claim against Vickie Wilsbacher arising out of the alleged wrongful withholding or conversion of tools is barred by the principle of issue preclusion. The court further concludes that any relitigation or redetermination of the issues involved

based upon fraud or newly discovered evidence, should be determined by the state court issuing the modification decree. The court believes that the automatic stay of 11 U.S.C. § 362 should be modified to permit John Wilsbacher to seek relief in state court. It seems that relief might include retrial of the conversion issues and, if warranted, the granting of monetary or injunctive relief to Mr. Wilsbacher. If relief is granted, and Mr. Wilsbacher is awarded judgment, the bankruptcy court could then exercise its jurisdiction to determine whether John Wilsbacher's resulting claim is dischargeable in bankruptcy.

MOTION TO QUASH

John Wilsbacher has caused to be served subpoenas upon his four children for the May 3 trial. The children are Sandra (age 12), Audra (age 8), Grant (age 6), and Amanda who will be 4 on May 20. Mr. Wilsbacher says their testimony is necessary because two of the children, Grant and Audra, told him that two men had come to the house and removed his tools. The men were recognized as Don Moss and Vickie Wilsbacher's brother, Harold Barker. Sandra and Amanda are arguably needed to corroborate that the other two children gave their father this information. Because of the court's ruling on the motion in limine, the testimony of the children will not be needed. The court, therefore, concludes that the motion to quash should be granted.

ORDER

IT IS ORDERED that the motion in limine is granted. The motion to quash is granted. Trial on this adversary proceeding is continued.

The automatic stay of 11 U.S.C. § 362 is modified to allow John Wilsbacher to seek state court relief from the modification decree.

John Wilsbacher is granted 90 days from the execution of this order to file his petition in state court seeking relief from the modification decree filed November 20, 1989. Plaintiff's counsel shall provide proof to this court of such filing. If the petition is not timely filed, the court will enter an order dismissing the portion of John Wilsbacher's complaint relating to the conversion of tools and shall reschedule the trial on determination of the validity of plaintiff's lien.

SO ORDERED THIS 2nd DAY OF MAY, 1990.

William L. Edmonds
Bankruptcy Judge