In the United States Bankruptcy Court

for the Northern District of Iowa

Western Division

MAHENDRA R. PATEL and SHARAD M. PATEL Debtors.	Bankruptcy No. X92-00871S Chapter 7
DAVID A. VRBANICH Plaintiff vs. MAHENDRA R. PATEL Defendant.	Adversary No. 92-5166XS

ORDER RE: DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Defendant Mahendra R. Patel moves for summary judgment seeking dismissal of plaintiff's complaint. Plaintiff David A. Vrbanich resists the motion. Oral argument was held September 29, 1993 in Sioux City. On November 12, 1993, the court reopened the record for the submission of additional documentary evidence. None was submitted. The record is now closed. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(I).

I.

Mahendra R. Patel (PATEL) filed his chapter 7 petition on May 1, 1992. The main thrust of David R. Vrbanich's (VRBANICH) complaint against Patel is to establish a claim arising from fraud and to have the claim determined to be nondischargeable under 11 U.S.C. § 523(a)(2)(A).

Vrbanich contends that Patel, as an officer and director of Western Investors Co. (WESTERN), participated in defrauding Vrbanich out of $57,000.00 which Vrbanich invested in Western in 1989. Vrbanich claims he was given false financial information about the company in order to induce his investment of his life savings. He alleges that Patel helped to prepare the information. Vrbanich also says he has claims against Patel arising from the same conduct under the South Dakota Uniform Securities Act and Securities Exchange Act of 1934. He contends these claims are nondischargeable.

Patel says he is entitled to summary judgment dismissing the complaint. First, Patel argues that on the undisputed facts, he is entitled to judgment as a matter of law. He says it is undisputed that prior to his investment, Vrbanich had no contact with Patel, that he played no part it convincing Vrbanich, or anyone else, to invest in Western, and that although he participated in preparing various financial documents showing Western's condition, there was no attempt by him to prepare misleading documents.

Second, Patel argues that Vrbanich's complaint must be dismissed because a prior judgment entered against Vrbanich and in favor of Western on the same claim precludes this action against Patel.

II.

Western is an Iowa corporation which, at times relevant to this dispute, owned fast-food restaurants. Vrbanich was

employed in Sioux Falls, South Dakota, where he worked with Peter Bernard, President of Western. Several discussions between Vrbanich and Bernard in late 1989 led to Vrbanich's investing $57,000.00 in Western on December 14, 1989. Patel was Vice President of Finance at Western from August, 1989, to December, 1989, and was Secretary and a Director at Western from December, 1989, to June, 1990.

Vrbanich was assured by Bernard that an investment in Western was a good one. Bernard gave Vrbanich Western's "Business Plan" sometime in October or November, 1989 (Vrbanich's Affidavit, Exhibit 9, Appendix G). Patel and others involved with Western provided information for the Plan. Relying on his conversations with Bernard and the information in the Business Plan, Vrbanich says he made the investment. Vrbanich says that Bernard told him he relied from time to time on the advice of Patel (Vrbanich Affidavit, Exhibit 9, 3).

In mid-February, 1990, Vrbanich flew to Tucson, Arizona to inspect one of the fast-food restaurants owned by Western. During that trip, he learned information which caused him great concern about the financial soundness of Western. After the trip, Vrbanich acquired documents which, he says, indicated that Western was in very bad financial condition at the time he invested.

Vrbanich contends that Patel, as well as other officers, directors and employees of Western, fraudulently induced him to invest in the failing company by providing him with false financial information about Western. He contends that these persons participated in the preparation of the Business Plan, that it contained false information, that these persons knew the information was false but they submitted it to him intending to deceive him about the financial health of the company so that he would invest, which he did.

It is undisputed that prior to his investment, Vrbanich dealt only with Bernard and had no personal contact with Patel. Patel claims that he had never heard Vrbanich's name prior to the investment and that he never discussed Vrbanich's possible investment with anyone, including Bernard. (Patel Affidavit, Docket No. 27).

Western filed a chapter 11 bankruptcy petition in 1991 in the United States Bankruptcy Court for the District of Arizona. Vrbanich filed an adversary complaint against the corporation seeking to establish his claims against the company and seeking to have them held nondischargeable (Vrbanich v. Western Investors Co. (In re Western Investors Co.), Adversary No.

91-00916-TUC-LO). (Defendant's Exhibit E).

His complaint in that action is nearly identical to the one filed in this court against Patel. It is so similar that it appears that Vrbanich redrafted the Arizona complaint for this proceeding, but failed to make all the necessary changes to have the pending complaint make complete sense. For example, in the complaint pending before this court, references to "Debtor" refer more accurately to Western. Nonetheless, the claims pled appear identical--fraud based on the false Business Plan, and violations of state and federal securities laws. Both complaints relate to the same injury, Vrbanich's loss of his $57,000.00 investment in Western.

Vrbanich's complaint against Western came on for trial before the Bankruptcy Court on December 5, 1991. Because the Western bankruptcy case was pending as a chapter 11 case and the debtor was attempting to reorganize as a going concern, the bankruptcy judge, the Honorable Lawrence Ollanson, questioned Vrbanich's counsel about the purpose of a complaint to determine dischargeability based on fraud. He would have raised the question because, if a non-liquidation, reorganization plan were approved for Western, even a nondischargeable debt would have been discharged under 11 U.S.C. 1141(d). If a liquidating plan were approved, there would be no discharge of any corporate debt, regardless of how it arose. See 11 U.S.C. § § 1141(d)(3) and 727(a)(1). Thus, trial of Vrbanich's fraud claim against Western may not have seemed to Judge Ollanson to be particularly pressing, or material to the bankruptcy case.

Vrbanich's counsel responded that the complaint had been brought "just for the purpose to show that this debt was obtained by fraud." (Exhibit F, trial transcript, p. 2, lines 23-24). Vrbanich's counsel also told the court that Vrbanich would be suing the corporation's principals individually and that a judgment against the corporation would be "res judicata" against them on the claim or issue of fraud. (Exhibit F, page 20).

There was no live testimony at the Arizona trial. Exhibits were admitted, and counsel orally argued the merits. It is clear

from the transcript that the basis of Vrbanich's claim for fraud against the corporation was the use of the allegedly false Business Plan to fraudulently induce Vrbanich to invest his money in the corporation. (Exhibit F, page 3, lines 19-25 through page 8, line 24). In particular, Vrbanich's counsel argued that Vrbanich relied not only on Bernard's oral statements but on the Business Plan. (Exhibit F, page 6, lines 19-25). It is also clear that Vrbanich was asserting that the owners of Western withheld the correct information and instead furnished him with false financial information. (Exhibit F, page 8, lines 5-23).

On December 23, 1991, the Bankruptcy Court issued a "JUDGMENT" "finding in favor of [Western] and against [Vrbanich]" and stating that the plaintiff had "failed to carry his burden of proof on the issue of fraud." (Exhibit C). The court directed the defendant to lodge proposed findings of fact and conclusions of law. There is no evidence that this was done or that any findings and conclusions were issued by the court. There is no file-stamp on Exhibit C showing that the Judgment was filed or docketed by the Clerk of Court. The exhibit shows that the Judgment was served on the parties by a deputy clerk.

III.

Patel contends that the judgment entered in Bankruptcy Court for the District of Arizona bars Vrbanich from relitigating the same claims against Patel. The doctrine of res judicata, or claim preclusion, "bars relitigation of a claim if: (1) the prior judgment was rendered by a court of competent jurisdiction; (2) the prior judgment was final judgment on the merits; and (3) the same cause of action and the same parties or their privies were involved in both cases." Armstrong v. Norwest Bank, Minneapolis, N.A., 964 F.2d 797, 802 (8th Cir. 1992).

The first issue confronting the court is whether, for purposes of this doctrine, the Bankruptcy Court in Arizona rendered a judgment. There is no dispute regarding that court's jurisdiction.

A "judgment" is any decree or appealable order. Fed.R.Bankr.P. 7054, incorporating Fed.R.Civ.P. 54. "Rendering" is the pronouncement of the judgment. Weedon v. Gaden, 419 F.2d 303, 305 (D.C. Cir. 1969). Judgments entered in bankruptcy adversary proceedings must be "set forth on a separate document." Fed.R.Bankr.P. 9021. In determining whether the separate document is a judgment, the primary consideration is the intention of the judge. In re Forstner Chain Corp., 177 F.2d 572, 576 (1st Cir. 1949).

The "JUDGMENT" entered in the bankruptcy court in Arizona appears to this court to be a judgment within the meaning of Fed.R.Bankr.P. 7054 and 9021, and it appears to be final. The judge called it a "JUDGMENT." It was a separate document, which did not contain a recital of pleadings. Upon consideration of the entire record, the court found in favor of defendant and against the plaintiff on the complaint. It appears that the intent of the trial judge was to terminate plaintiff's claim on the merits. The court merely left to a future document the explanation of the judgment through findings of fact and conclusions of law. Vrbanich has cited no authority to the court which would support the proposition that the trial court's failure to issue findings and conclusions prevented the judgment from being final. Findings are not a jurisdictional requirement for an appeal. Morris v. Williams, 149 F.2d 703, 706 (8th Cir. 1945).

To be effective, a judgment in an adversary proceeding must be entered as provided in Fed.R.Bankr.P. 5003. Fed.R.Bankr.P. 9021, incorporating Fed.R.Civ.P. 58. Rule 5003 requires the clerk of the bankruptcy court to enter judgment on the docket of the case. There is no dispute that the "JUDGMENT" is an authentic document executed by the judge presiding over the case. It is the clerk's duty to enter such judgment upon the docket. The possessing and docketing of the judgment by the clerk would be a foundational element to the admission of the judgment. Inasmuch as the judgment was admitted into evidence without objection, the court presumes that there is no dispute that the judgment was docketed by the clerk. Moreover, the performance of that regular duty may be presumed. The court concludes that the United States Bankruptcy Court for the District of Arizona was a court of competent jurisdiction and that its JUDGMENT rendered in the case of Vrbanich v. Western was a final judgment on the merits.

IV.

The final requirement for res judicata to bar litigation of Vrbanich's claim is that the two adversary proceedings involve the same causes of action and the same parties or their privies. An examination of the complaints shows that Vrbanich asserted the same claims against Western and Patel. As pointed out previously, it is obvious that Vrbanich merely edited

his Arizona complaint against Western for filing against Patel. His allegations are the same in both cases; his arguments are the same in both cases. He intended that they be, for as he argued to the court in Arizona, the purpose of his action there was to establish fraud against Western and use that finding against the principals of the corporation in other suits in other jurisdictions. The causes of action are the same because they arise "out of the same nucleus of operative facts." See Lane v. Peterson, 899 F.2d 737, 742 (8th Cir. 1990) cert. denied 111 S.Ct. 74 (1990).

The critical issue here is not whether the causes of action are the same, but rather whether a non-party to the Arizona action can use the doctrine of res judicata to preclude the defeated party in that action from litigating the claim against him. Generally, one "who is not a party to an action is not bound by or entitled to the benefits of the rules of res judicata. . . ." Restatement (Second) Judgments § 34(3) (1982). It is also the general rule that a person injured by "the concurrent or consecutive acts of two or more persons . . . has a claim against each of them." Comment, Restatement (Second) Judgments § 49 (1982). "[A] judgment for or against one obligor does not result in merger or bar of the claim that the injured party may have against another obligor." Id. An injured person's option to bring separate actions against joint obligors extends to situations where one of the obligors is vicariously liable, as master, for the acts of his servant. Id.

However, the Restatement provides an exception to the rule that a non-party to an action is not entitled to the benefits of res judicata. It states in part:

> If two persons have a relationship such that one of them is vicariously responsible for the conduct of the other, and an action is brought by the injured person against one of them, the judgment in the action has the following preclusive effects against the injured person in a subsequent action against the other.
>
> 1. A judgment against the injured person that bars him from reasserting his claim against the defendant in the first action extinguishes any claim he has against the other person responsible for the conduct unless:
>
>   a. The claim asserted in the second action is based upon grounds that could not have been asserted against the defendant in the first action; or
>   b. The judgment in the first action was based on a defense that was personal to the defendant in the first action.
>
> * * *

Restatement (Second) Judgments § 51 (1982).

The foregoing principle was discussed by the Eleventh Circuit in Citibank, N.A. v. Data Lease Financial Corp., 904 F.2d 1498 (11th Cir. 1990):

> This Circuit has not yet addressed claim preclusion in a case in which the party seeking its benefit is related by vicarious liability or respondeat superior to a defendant in a prior lawsuit or, as here, is so related to a defendant in the same lawsuit against whom claims have been dismissed with prejudice. However, as the Fifth Circuit has noted in Lubrizol Corp. v. Exxon Corp., 871 F.2d 1279, 1288 (5th Cir. 1989):
>
> > Most other federal circuits have concluded that employer-employee or principal-agent relationships may ground a claim preclusion defense, regardless which party to the relationship was first sued. See Fiumara v. Fireman's Fund Ins. Co., 746 F.2d 87, 92 (1st Cir. 1984); Lambert v. Conrad, 536 F.2d 1183, 1186 (7th Cir. 1976); Lober v. Moore, 417 F.2d 714 (D.C. Cir. 1969); Spector v. El Ranco, Inc., 263 F.2d 143, 145 (9th Cir. 1959). But see Morgan v. City of Rawlins, 792 F.2d 975, 980 (10th Cir. 1986).

In Lober v. Moore, 417 F.2d at 717-18, Judge Robinson wrote:

> We need not, however, enter the debate on the relative merits of mutuality and nonmutuality, or explore the question whether either deserves exclusivity in this jurisdiction. For mutuality is not ironbound in the law of res judicata but, like so many other broad legal concepts, is subject to well defined exceptions. One such

> exception obtains where defendant's responsibility is derivative or secondary and it has been judicially determined that the situation is lacking in one or more of the conditions giving rise to it. Consequently it is settled that a judgment exonerating a servant or agent from liability bars a subsequent suit on the same cause of action against the master or principal based solely on respondeat superior. And conversely, it is the prevailing rule in the federal and state courts that a judgment excusing the master or principal from liability on the ground that the servant or agent was not at fault forecloses a subsequent suit against the latter on the same claim.

Similarly, in Spector v. El Ranco, Inc., 263 F.2d at 145, the Ninth Circuit noted that

> [w]here, as here, the relations between two parties are analogous to that of principal and agent, the rule is that a judgment in favor of either, in an action brought by a third party, rendered upon a ground equally applicable to both, is to be accepted as conclusive against the plaintiff's right of action against the other.

Citibank, N.A. v. Data Lease Financial Corp., 904 F.2d 1498, 1502-03 (11th Cir. 1990) (footnotes omitted). See also Landess v. Schmidt, 115 Wis.2d 186, 340 N.W.2d 213, 218 (Wis. App. 1983); DePolo v. Greig, 338 Mich. 703, 62 N.W.2d 441, 443-44 (1954).

Vrbanich would be barred by the Arizona judgment from reasserting his claim against Western. Iowa Electric Light & Power Co. v. Mobile Aerial Towers, Inc., 723 F.2d 50, 53 (8th Cir. 1983); Gatzemeyer v. Vogel, 589 F.2d 360 (8th Cir. 1978). The court is satisfied also that neither of the Restatement exceptions would apply to prevent the application of res judicata in this case. There is no allegation or argument that the claim against Patel is based on grounds that could not have been asserted in the first action, and there is no allegation or argument that the determination of the case against Western was based on a defense personal to Western. An allegation which might meet both exceptions would be that Patel acted outside the scope of his responsibilities in preparing his part of the Business Plan. However, there is no evidence supporting the existence of such a fact. Even the possibility of this factor was not argued here or in argument to the court in Arizona. Indeed, Vrbanich, having lost his claim against Western in Arizona, made no allegation in his pending complaint that Patel had acted outside the scope of his authority.

Plaintiff has had his "day in court." In the Arizona bankruptcy action, he failed to prove that Western had committed fraud or had violated state or federal securities laws. He now seeks to establish the liability of a servant of the corporation based on the same allegations of wrongdoing. The court concludes that he is foreclosed from doing so by the doctrine of res judicata.

Accordingly, defendant's motion for summary judgment will be granted, and plaintiff's complaint will be dismissed.

Defendant has filed, as part of his answer, a request for sanctions. The court has considered the request and concludes it should be denied.

ORDER

IT IS ORDERED that the motion for summary judgment filed by Mahendra R. Patel is granted.

IT IS ORDERED that the complaint of David A. Vrbanich is dismissed.

IT IS ORDERED that defendant's motion for sanctions is denied.

IT IS ORDERED that costs are taxed to the plaintiff. Judgment shall enter accordingly.

SO ORDERED ON THIS 21st DAY OF DECEMBER, 1993.

William L. Edmonds
Chief Bankruptcy Judge

I certify that on _____ I mailed a copy of this order and a judgment by U. S. mail to: Alvin J. Ford, Robert A. Christenson and U. S. Trustee.