In the United States Bankruptcy Court

for the Northern District of Iowa

Western Division

CHARLES BRONSON d/b/a Bronson Automotive and LINDA BRONSON *Debtor(s).*	Bankruptcy No. 96-31750XF Chapter 7
PAUL E. SUSSMAN *Plaintiff(s)* vs. CHARLES BRONSON d/b/a Bronson Automotive *Defendant(s)*	Adversary No. 96-3138XF

ORDER RE: MOTION FOR SUMMARY JUDGMENT

The matter before the court is the plaintiff's motion for summary judgment. Telephonic hearing was held May 21, 1997. T.J. Braunschweig appeared for plaintiff Paul E. Sussman. Eldon J. Winkel appeared for defendant Charles Bronson, d/b/a Bronson Automotive.

Sometime in 1992, Sussman delivered a 1957 Chevrolet Bel Aire, a vehicle valued at more than $14,000, to Bronson. Bronson agreed to restore the vehicle and received $14,520 from Sussman for the work. The vehicle was not restored. (Pretrial Statement, Uncontested Facts.) On February 5, 1996, in Cook County, Illinois, Sussman filed a complaint making claims for breach of contract, fraud and negligence. (Attachment to Motion for Summary Judgment.) On April 10, 1996, the state court entered default judgment and awarded compensatory and punitive damages. The order was filed the next day in Kossuth County, Iowa. (Attachment to Motion for Summary Judgment.)

On July 16, 1996, Bronson filed a Chapter 7 bankruptcy petition. On August 13, 1996, Sussman filed a complaint alleging, among other things, that Bronson's debt is nondischargeable under § 523(a)(2)(A). On March 18, 1997, Sussman filed a motion for summary judgment stating that the issue of fraud is "res judicata" by virtue of the Cook County judgment. Sussman requests summary judgment that the amounts awarded for the fraud claim ($14,520) and for punitive damages ($14,930) are nondischargeable debts.

On March 31, 1997, Bronson filed a resistance to the motion for summary judgment. The attached affidavit made statements relating to his financial inability to defend a lawsuit in Cook County, the not guilty verdict on a theft charge in Kossuth County, and his intent in receiving and using money from Sussman.

DISCUSSION

Sussman refers to the terms "res judicata," "claim preclusion," and "issue preclusion." "Res judicata" has been used as a broad term referring to the preclusive effects of a judgment. The preclusion concept consists of two distinct doctrines, sometimes called "res judicata" and "collateral estoppel," but now more commonly referred to as "claim preclusion" and "issue preclusion." See generally 18 Wright, Miller & Cooper, Federal Practice & Procedure, § 4402 (terminology of res judicata) (1981). In Marrese v. American Academy of Orthopaedic Surgeons, the United States Supreme Court provided brief definitions:

> [W]e use the term "claim preclusion" to refer to "res judicata" in a narrow sense, i.e., the preclusive effect of a judgment in foreclosing litigation of matters that should have been raised in an earlier suit. In contrast, we use the term "issue preclusion" to refer to the effect of a judgment in foreclosing relitigation of a matter that has been litigated and decided.

470 U.S. 373, 376, 105 S.Ct. 1327, 1330 n.1 (1985). See also S & S Automotive v. Checker Taxi Co., 166 Ill.App.3d 6, 8, 520 N.E.2d 929, 930 (1988) (collateral estoppel, or issue preclusion, bars relitigation of particular issues actually litigated between the parties, whereas res judicata (claim preclusion) bars a "subsequent action involving the same cause of action, and is conclusive as to every matter raised and every matter which might have been raised").

The full faith and credit statute, 28 U.S.C. § 1738, requires federal courts to give the same preclusive effect to judgments of state courts that would be given by the state courts where the judgment was rendered. Marrese, 470 U.S. at 380, 105 S.Ct. at 1331-32; Bay Area Factors v. Calvert (In re Calvert), 105 F.3d 315, 317 (6th Cir. 1997).

Sussman does not argue that the Cook County court made a determination that the debt is nondischargeable in bankruptcy. Claim preclusion does not bar a bankruptcy court's determination of the dischargeability of a debt that a creditor has reduced to judgment pre-petition. Calvert, 105 F.3d at 318 n.4, citing Brown v. Felsen, 442 U.S. 127, 99 S.Ct. 2205 (1979). Claim preclusion may be used, however, to establish the validity of a creditor's claim. Calvert, 105 F.3d at 318. The Court in Grogan v. Garner, 498 U.S. 279, 284, 111 S.Ct. 654, 658 n.11 (1991), affirmed that the principles of issue preclusion apply in bankruptcy proceedings. Sussman contends that the default judgment against Bronson was a valid judgment and that Bronson is precluded from relitigating the issue of fraud. His argument requires the court to examine Illinois law on the preclusive effect of a default judgment. Calvert, 105 F.3d at 317.

Under Illinois law, a default judgment is generally a valid judgment. Housing Authority for LaSalle County v. YMCA of Ottawa, 101 Ill.2d 246, 254, 461 N.E.2d 959, 963 (1984) (default judgment has same "res judicata" effect as any other judgment); In re Marriage of Donnellan, 90 Ill.App.3d 1032, 1035-36, 414 N.E.2d 167, 170-71 (1980) (because "res judicata" bars litigation of matters a party had opportunity to litigate in former action, default judgment is as valid as trial on the merits); Menconi v. Davison, 80 Ill.App.2d 1, 6, 225 N.E.2d 139, 142 (1967) (default judgment has same validity as judgment after trial). Giving claim preclusive effect to a default judgment permits a party to surrender without incurring litigation costs and gives effect to default as a sanction. 18 Wright, Miller & Cooper, § 4442 at 373-74.

Validity of a default judgment is the effect of claim preclusion. Sussman refers to the following passage from Menconi v. Davison:

> A prior adjudication between the same parties is conclusive upon them, not only as to matters actually determined but as to every other thing within the knowledge of the parties which might have been set up as a ground for relief for defense. ... Judgments by default have the same validity and force as those rendered upon a trial of the issues.

Menconi v. Davison, 80 Ill.App.2d at 6, 225 N.E.2d at 142. Sussman argues this language shows that Illinois courts give issue preclusive effect to a default judgment. However, the quoted language, which appears in a discussion of the rule against piecemeal litigation, refers to claim preclusion. This is made clear from the definition of claim preclusion in S & S Automotive v. Checker, 166 Ill.App.3d at 8, 520 N.E.2d at 930, using similar language. See also Navab v. Barzegar (In re Barzegar), 189 B.R. 864, 869 (Bankr. N.D. Ga. 1995) (statement under Maryland law that judgment default "is conclusive as to every fact necessary to uphold it" is an aspect of claim preclusion).

The preclusive effect of a default judgment is different under the doctrine of issue preclusion. The Restatement (Second) of Judgments states the general rule of issue preclusion:

> When an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or a different claim.

Restatement (Second) of Judgments § 27 (1982). The Restatement view is that in the case of a default judgment "none of the issues is actually litigated." Id., comment *e;* see also 18 Wright, Miller & Cooper, § 4442 at 373-76 (stating same view).

Illinois courts follow the Restatement view of issue preclusion. They require evidence that an issue has actually been litigated in a prior action before applying the doctrine. S & S Automotive v. Checker Taxi Co., 166 Ill.App.3d at 8, 520 N.E.2d at 930. Both the Illinois Appellate Court and Illinois Supreme Court have cited the Restatement, comment *e*, in support of the proposition that a default judgment does not meet the actual litigation requirement. S & S Automotive v. Checker, 166 Ill.App.3d at 9-10, 520 N.E.2d at 931-32; Housing Authority for LaSalle County v. YMCA of Ottawa, 101 Ill.2d at 254, 461 N.E.2d at 963 (distinguishing preclusive effect of each doctrine). These courts also follow the Seventh Circuit view that a default judgment generally may not be the basis for issue preclusion.

S & S Automotive v. Checker, 166 Ill.App.3d at 10, 520 N.E.2d at 932; Housing Authority v. YMCA, 101 Ill.2d at 254, 461 N.E.2d at 963 (both citing Grip-Pak, Inc. v. Illinois Tool Works, Inc., 694 F.2d 466, 469 (7th Cir. 1982)).

In some cases, equity may require a court to give issue preclusive effect to a default judgment. In In re Barzegar, 189 B.R. at 871, the court discussed a decision of the Eleventh Circuit.

> Where a party has substantially participated in an action in which he had a full and fair opportunity to defend on the merits, but subsequently chooses not to do so, and even attempts to frustrate the effort to bring the action to judgment, it is not an abuse of discretion for a district court to apply the doctrine of collateral estoppel.

Id., quoting Bush v. Balfour Beatty Bahamas (In re Bush), 62 F.3d 1319, 1325 (11th Cir. 1995). The court understands from the Cook County order and from Bronson's affidavit that he did not defend the case at all. This type of default judgment for failure to answer the complaint is generally not a basis

for issue preclusion because no issues have been "actually litigated." Gober v. Terra + Corp. (Matter of Gober), 100 F.3d 1195, 1204 (5th Cir. 1996).

Sussman has cited two circuit cases holding that a state court default judgment entered after the defendant's failure to file an answer has preclusive effect on the issue of fraud in a complaint under 11 U.S.C. § 523(a)(2): Bay Area Factors v. Calvert (In re Calvert), 105 F.3d 315 (6th Cir. 1997); Gayden v. Nourbakhsh (In re Nourbakhsh), 67 F.3d 798 (9th Cir. 1995). The authors of a leading treatise have criticized cases applying issue preclusion in dischargeability proceedings when the debtor has not "substantially participated" in the prior action. 4 Collier on Bankruptcy 523.06 at 523-21 (15th ed. rev.). In any event, Calvert and Nourbakhsh applied the preclusion law of California and Florida, respectively; neither is helpful in this case which requires application of Illinois law.

In Sussman's case against Bronson in Cook County, the issue of fraud was not "actually litigated." Illinois would ordinarily not give issue preclusive effect to a default judgment. Sussman has not made an argument why the court should make an exception in this case. Sussman may not rely on the Cook County judgment for proof of fraud or entitlement to punitive damages in this proceeding under 11 U.S.C. § 523(a)(2). Sussman's obtaining a second default judgment, in Iowa, compels no different outcome. Accordingly,

IT IS ORDERED that the plaintiff's motion for summary judgment is denied.

SO ORDERED THIS 9th DAY OF JUNE, 1997.

William L. Edmonds
Chief Bankruptcy Judge

I certify that on I mailed a copy of this order by U.S. mail to: T.J. Braunschweig, Eldon J. Winkel, Michael C. Dunbar, U.S. Trustee.