In the United States Bankruptcy Court

for the Northern District of Iowa

Western Division

CHARLES BRONSON d/b/a Bronson Automotive *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. 96-3138F

MEMORANDUM DECISION RE: MOTION FOR MODIFICATION OF ORDER

On June 9, 1997, I issued an order denying plaintiff's motion for summary judgment. I concluded that the courts of Illinois generally would not give issue preclusive effect to a default judgment. Such a judgment does not meet the "actually litigated" requirement of the doctrine of issue preclusion. On June 23, 1997, plaintiff Sussman filed a motion to modify the order. The arguments in Sussman's motion do not support a modification of the order. Sussman mixes in the terms "res judicata" and "claim preclusion," which are not at issue. Motion, ¶ 2. This is not a new argument. My order distinguished the issue preclusive effect of a default judgment. Order, pages 5-6.

Sussman states that Bronson had notice of the Cook County proceedings and chose not to participate. Motion, ¶¶ 3, 4. Preclusion of matters that a party had an opportunity to litigate is an effect of the claim preclusion doctrine. S & S Automotive v. Checker Taxi Co., 166 Ill. App.3d 6, 8, 520 N.E.2d 929, 930 (1988) (under claim preclusion, "a final judgment constitutes a bar to 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"). If notice and opportunity to litigate created issue preclusive effect, every default judgment would be entitled to such effect, eliminating the "actual litigation" requirement. Montgomery v. Kurtz (In re Kurtz), 170 B.R. 596, 601 (Bankr. E.D. Mich. 1994).

Further, Sussman argues that references to S & S Automotive v. Checker are dicta because, in that case, the parties were not adversaries in the first action. Motion, ¶ 5. The Order cited S & S Automotive v. Checker, along with Housing Authority for LaSalle County v. YMCA of Ottawa, to show that Illinois courts would look to the Restatement of Judgments for the general rules of issue preclusion. Order, page 6. In S & S Automotive, the court decided the case on the basis of lack of "actual litigation." The alignment of the parties in the first action was an additional equitable reason

not to apply issue preclusion, because their positions affected the parties' incentive to litigate. S& S Automotive, 166 Ill. App.3d at 9-10, 520 N.E.2d at 931-32.

Two Seventh Circuit cases are cited by Sussman for the proposition that a default judgment has issue preclusive effect in Illinois when the parties "could reasonably have foreseen the conclusive effect of their actions." Motion, ¶ 6. The first, Klingman v. Levinson, 831 F.2d 1292 (7th Cir. 1987), was an action under § 523(a) (4). In a prior state court action, Levinson, an attorney, had stipulated as part of a consent decree that his actions constituted defalcation as a fiduciary and expressly agreed that the debt would not be dischargeable in bankruptcy. *Id*. at 1293. The court held that the stipulations in the consent decree satisfied the "actually litigated" requirement; the parties showed an intent to be bound in future bankruptcy proceedings. *Id*. at 1296. The second case, La Preferida Inc. v. Cerveceria Modelo, 914 F.2d 900, 907 (7th Cir. 1990), also involved a consent decree, but the court found its terms ambiguous and declined to
apply issue preclusion. Our case does not involve a consent decree. Sussman has not explained how Bronson "could reasonably have foreseen" any issue preclusive effect of failure to defend the Cook County action.

Sussman argues that the issues of fraud and punitive damages were actually litigated because there was an evidentiary hearing in Cook County. He cites Gober v. Terra + Corporation (Matter of Gober), 100 F.3d 1195, 1205 (5th Cir. 1996), a case applying the law of Texas. Motion, ¶¶ 7, 8. In Gober, the creditor was required to present evidence in state court to prove entitlement to punitive damages. The Fifth Circuit found that the issue of "willful and malicious" conduct had been actually litigated in the damages hearing and could not be relitigated by the debtor in a § 523(a) (6) action. 100 F.3d at 1205. However, the court went on to state that it was not creating a per se rule as to the issue preclusive effect of a default judgment. Gober had "actively participated in the litigation for two years." *Id*. Default judgment on liability was entered as a sanction for litigation abuses. *Id*. A "default judgment for failure to answer the complaint is generally not a basis for issue preclusion because no issues have been 'actually litigated.'" Order, page 7, citing Gober, 100 F.3d at 1204.

Sussman cites Grisanzio v. Bilka, 158 Ill. App.3d 821, 511 N.E.2d 762 (1987), arguing it is an Illinois case giving issue preclusive effect to a default judgment. The case somewhat mixes res judicata and collateral estoppel together, at times discussing them as if they were the same doctrine. Because of several references to barring claims and splitting causes of action, Grisanzio appears to be a claim preclusion case. The only reference to the preclusive effect of a default judgment is in the context of what the court calls "res judicata." 158 Ill. App.3d at 827, 511 N.E.2d at 766.

The case Heflin v. Harris (In re Harris), 1995 WL 476676 (N.D. Ill. 1995), was cited by Sussman for the out-of-context statement that the court found "the issue of maliciousness was actually litigated." *Id*. at * 3. The case actually supports the notion that issue preclusion does not apply if a defendant has not participated at all in the first action. Plaintiffs sued Harris and five others for sexual harassment. Harris did not answer the complaint. Damages were awarded after a week-long jury trial. The Northern District of Illinois said that issue preclusion did not apply to bar relitigation of maliciousness because Harris was not represented at the trial. *Id*.

Having considered Sussman's arguments,

IT IS ORDERED that plaintiff's Application for Modification is denied.

SO ORDERED THIS 25th DAY OF JUNE 1997.

William L. Edmonds

Chief Bankruptcy Judge