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UNITED STATES BANKRUPTCY COURT
DISTRICT OF VERMONT

IN RE:

MARYANN L. TILLOTSON

Debtor.

Chapter 7
Case No. 00-10198

SUSAN STOWE, INC.,

Plaintiff,

v.

MARYANN L. TILLOTSON

Defendant.

Adversary Proceeding
No. 00-01032

DOC# 25-1

Appearances:
Christopher O'C. Reis, Esq., Box 104B, Randolph, VT 05060 for Susan Stowe, Inc.

L. Randolph, Amis, Esq., 110 Main Street, P.O. Box 238, Burlington, VT 05402 for Maryann L. Tillitson

MEMORANDUM OF DECISION
GRANTING PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT

A *Motion for Partial Summary Judgment* was filed by the Plaintiff, Susan Stowe, Inc., dated October 4, 2000, whereby the Plaintiff seeks partial summary judgment regarding the nondischargeability of her debt pursuant to 11 USC § 523(a)(2)(A) and responds to the affirmative defenses of set-off and unjust enrichment asserted by the Debtor/Defendant, MaryAnn L. Tillotson. A *Motion for Partial Summary Judgment* has also been filed by the Debtor/Defendant, dated October 5, 2000, seeking a

determination of entitlement to a partial discharge of Plaintiff's debt by virtue of her two above-referenced affirmative defenses. A *Joint Stipulation of Material Facts* executed by the parties was filed on November 13, 2000. Based upon the foregoing pleadings, applicable law and the matters filed of record in this case, this Court grants the Plaintiff's *Motion for Partial Summary Judgment* and denies the Defendant's *Motion for Partial Summary Judgment* for the reasons set forth below.

JURISDICTION

This Court has jurisdiction over this adversary proceeding under 28 U.S.C. §§ 157 and 1334.

FACTS

On or about December 5, 1994, Debtor/Defendant sold a business, Sophisticated Silk, Inc., to the Plaintiff. In 1995, the Plaintiff sued Defendant and Sophisticated Silk in Florida State Court for intentional misrepresentation, breach of contract, for an accounting and rescission based upon allegations of material misrepresentation and fraud in the inducement. On May 19, 1998, the Florida State Circuit Court (Wennet, J.) entered an order as follows:

Finding that the Defendants, MaryAnn L. Tillotson and Sophisticated Silk, committed fraud in the sale of the subject business to the Plaintiff and awarded damages of $71,097.70;

Adjudging that the Defendants were individually and jointly liable to the Plaintiff for the damages award; and

Ruling that the Defendants' counterclaim for breach of a promissory note was denied.

On February 25, 2000, the Defendant filed for relief under Chapter 7 of Title 11 USC, and listed the judgment debt of Plaintiff on Schedule F in the amount of $71,098, and did not designate the debt as "disputed."

SUMMARY JUDGMENT STANDARD

It is axiomatic that summary judgment is proper only if the record shows that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c); Bankr. R. 7056. A genuine issue exists only when "the evidence is such that a reasonable [trier of fact] could return a verdict for the nonmoving party." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202 (1986); *see also* Celotex Corp. v. Catrett, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986)(movant need only illustrate by reference to record plaintiff's failure to introduce evidence in support of essential element of claim). "The substantive law will identify which facts are material. Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." Liberty Lobby, 477 U.S. at 247, 106 S.Ct. at 2509. Factual disputes that are irrelevant or unnecessary are not material. Id. Furthermore, materiality is determined by assessing whether the fact in dispute, if proven, would satisfy a legal element under the theory alleged or otherwise affect the outcome of the case. Id. The court must view all the evidence in the light most favorable to the nonmoving party, Valley Liquors, Inc. v. Renfield Importers, Ltd., 822 F.2d 656, 659 (7th Cir.), *cert. den.*, 484 U.S. 977 (1987), and draw all inferences in the nonmovant's favor. Santiago v. Lane, 894 F.2d 218, 221 (7th Cir. 1990). Lastly, the court is not obligated in our adversary system to "scour the record" in search of a factual dispute on behalf of a nonmoving party. *See* Waldridge v. American Hoechst Corp., 24 F.3d at 922; *see also* Monahan v. New York City Department of Corrections, 214 F.3d 275, 292 (2d Cir. 2000)(while trial court has discretion to conduct an assiduous review of the record in determining if summary judgment warranted, "it is not required to consider what the parties fail to point out").

DISCUSSION

Collateral estoppel principles apply in nondischargeability proceedings under 11 USC §523(a). *See* Grogan v. Garner, 111 S.Ct. 654, 498 US 279 (1991). Collateral estoppel, or issue preclusion, prohibits relitigation of issues that have already been adjudicated in a prior action. *See* Montana v. United States, 440 U.S. 147, 99 S. Ct. 970 (1979); Bush v. Balfour Beatty Bahamas, Ltd., 62 F.3d 1319 (11th Cir. 1995). State collateral estoppel law must be applied to determine the preclusive effect of a prior judgment rendered by a state court. *See* St. Laurent v. Ambrose, 991 F.2d 672 (11th Cir. 1993). Under Florida law, collateral estoppel applies if the issue at stake is identical to an issue decided in prior litigation, if the issue was actually litigated, if the prior determination of the issue was a critical and necessary part of the judgment entered in the prior decision, and if the standard of proof in the prior case is at least as stringent as the standard of proof in the subsequent action. Id. at 676; *see also* Mobil Oil Corp. v. Shevin, 354 So. 2d 372, 374 (Fla. 1977).

In this instance, the question of the debtor's fraud was fully and necessarily decided in the prior state court litigation consistent with and under an evidentiary standard at least as stringent as employed in determining dischargeability under §523(a). Therefore, the Defendant is precluded from relitigating the issue of fraud regarding the underlying debt. *See* Nourbakhsh v. Gayden, 162 B.R. 841 (9th Cir. BAP 1994) and In re Cornell, 178 B.R. 45 (Bankr. D. Conn. 1995).

Pursuant to the affirmative defenses of unjust enrichment and set-off, the Defendant seeks to have the value, if any, of the business assets sold by the Defendant to the Plaintiff subtracted from the Plaintiff's damages as determined by the underlying state court's final judgment. Set-off and unjust enrichment are affirmative defenses that should have been plead and proven in the state court proceedings. *See* In re

Auricchio, 196 B.R. 279, 288-289 (Bankr. D. NJ 1996); Lynch Austin Realty, Inc. v. Engler, 647 So. 2d 988 (Fla. 2d DCA 1994); Fortenberry v. Mandell, 271 So. 2d 170 (Fla. 4th DCA 1972); *see also* Goldberger v. Regency Highland Condominium Ass'n, 452 So. 2d 583 (Fla. 4th DCA 1984)(failure to plead an affirmative defense waives the defense in subsequent proceedings). In this instance, the burden was on the Debtor/Defendant to plead and prove the value of any property or business assets retained by the Plaintiff by way of set-off or other reduction in the Plaintiff's damages for fraud in the underlying state court trial. Therefore, the Debtor is precluded from litigating or relitigating the issue as the Defendant in these proceedings.

Based upon the foregoing, the *Plaintiff's Motion for Partial Summary Judgment* is GRANTED. The judgment in the amount of $71,097.70 is nondischargeable pursuant to 11 USC § 523(a)(2)(A). The *Defendant's Motion for Partial Summary Judgment* is DENIED accordingly. The trial scheduled for November 20, 2000 on the adversary proceeding complaint is therefore cancelled.

November 20, 2000
Rutland, Vermont

/s/ Colleen A. Brown
Colleen A. Brown
United States Bankruptcy Judge