UNITED STATES BANKRUPTCY COURT
DISTRICT OF VERMONT

In re:
David Kantorski, **Chapter 7 Case**
Debtor. **# 00-11040 cab**

Robert & Winona Shannon,
Plaintiffs,
v. **Adversary Proceeding**
David Kantorski, **# 00-1070 cab**
Defendant.

MEMORANDUM OF DECISION GRANTING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

The matter before the Court is the plaintiffs' Motion for Summary Judgment [Dkt. #12-1] filed by Robert and Winona Shannon on May 25, 2001. This Court has jurisdiction pursuant to 28 U.S.C. §§ 157 and 1334. Based upon the record, the plaintiffs' motion for summary judgment, relying upon a default judgment entered against the defendant/ debtor in state court, is hereby granted for the reasons set forth below.

ISSUE

The issue raised here is whether the plaintiffs are entitled to summary judgment, thereby rendering their claim against the debtor non-dischargeable, based on the state court judgment rendered against the defendant, under Rule 56, Fed.R.Civ.Proc., and Bankruptcy Rule 7056, Fed.R.Bankr.P.

BACKGROUND

The debtor/ defendant, David Kantorski, filed for voluntary bankruptcy relief pursuant to chapter 7 of title 11 U.S.C. ("the Bankruptcy Code") on September 19, 2000. The plaintiffs filed this adversary proceeding on December 14, 2000, objecting to the debtor's discharge on the grounds that the plaintiffs had previously obtained a state court judgment against the debtor based upon a claim that the defendant had breached his contract with the plaintiffs and otherwise obtained money from them using fraudulent

and deceptive business practices in violation of the Vermont Consumer Fraud Act, 9 V.S.A. §2451, *et seq.* It is undisputed that after initially appearing through legal counsel and filing an answer, the defendant defaulted in the state court proceedings by failing to appear either with alternative counsel or *pro se.* After initially adjourning an evidentiary hearing on damages in order to ensure that the defendant had proper notice, an evidentiary hearing was conducted, testimony was taken, and the Rutland County Superior Court for the State of Vermont entered a Judgment Order on February 9, 2000 in favor of the plaintiffs. The damages award of $24,286.25 included compensation for actual damages incurred, as well as a treble damages and attorneys fees awarded pursuant to the Vermont Consumer Fraud Act. The final judgment was not appealed.

On May 25, 2001, the plaintiffs filed the instant motion for summary judgment, supporting memorandum of law, affidavit, and statement of undisputed facts. On July 26, 2001, following a hearing, this Court entered an Order On Motion to Withdraw, granting defendant's counsel leave to withdraw and ordering that if the defendant did not appear with counsel or enter his appearance *pro se* within ten (10) days, the pending summary judgment would go forward unopposed. The defendant has not retained counsel, appeared *pro se* or otherwise filed any response to the summary judgment papers filed by the plaintiffs.[1] This repeats the chronology of the state court proceedings: the defendant's attorney has withdrawn and the defendant has not appeared to oppose the requested relief. In their summary judgment motion, the plaintiffs contend that the state court judgment, which underlies their claim herein, is based upon a finding of fraud and, therefore, entitles them to a determination that their claim be deemed non-dischargeable pursuant to 11 U.S.C. § 523(a)(2)[2] in accordance with principles of claim preclusion.

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[1] While the defendant's failure to respond to plaintiffs' motion for summary judgment, and particularly their statement of undisputed facts, constitutes an independent basis for granting the plaintiffs' summary judgment motion, *cf.* In re Fowler, 250 B.R. 828 (Bankr. Conn. 2000), this Court has elected to review the record and reach the same result on the merits.

[2] Although plaintiffs' complaint raises claims of non-dischargeability under 11 U.S.C. §§ 523(a)(2) and 727, the motion for summary judgment is based solely upon §523(a)(2) and this Court declines to reach the merits of any §727 claim accordingly.

DISCUSSION

1. Summary Judgement Standard

It is well settled that summary judgment is proper only if the record shows that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c); Fed. R. Bankr. P. 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 non-movant's favor. Santiago v. Lane, 894 F.2d 218, 221 (7th Cir. 1990). However, if the evidence is merely colorable, or is not significantly probative or merely raises "some metaphysical doubt as to the material facts," summary judgment may be granted. Liberty Lobby, 477 U.S. at 249-50, 106 S.Ct. at 2510-11; Matsushita Electric Industries Co. v. Zenith Radio Corp., 475 U.S. 574, 586, 106 S.Ct. 1348, 1355, 89 L.Ed.2d 538 (1986). In making its determination, the court's sole function is to determine whether there is any material dispute of fact that requires a trial. *See* Waldridge v. American Hoechst Corp., 24 F.3d 918 (7th Cir. 1994). 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 the 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").

2. Entitlement to Relief Based Upon State Court Judgment

Collateral estoppel principles apply in non-dischargeability proceedings under 11 USC §523(a). *See* Grogan v. Garner, 498 US 279, 111 S.Ct. 654 (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* In re St. Laurent, 991 F.2d 672 (11th Cir. 1993). Under Vermont 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 application of issue preclusion in the subsequent action would be fair. *See* State v. Pollander, 706 A.2d 1359 (Vt. 1997); Lorrain v. Lorrain Carpets, 705 A.2d 536 (Vt. 1997). The concept of *res judicata*, as referenced by the plaintiffs, embraces two doctrines, claim preclusion and issue preclusion, that bar, respectively, subsequent action or subsequent litigation of a particular issue because of the adjudication of the prior action. *See* In re Quechee Lakes Corp., 580 A.2d 957 (Vt. 1990).

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). A claim of liability for fraudulent and deceptive business practices under the Vermont Consumer Fraud Act was specifically pled and there was a specific finding of liability thereunder as evident by the trial court's granting of treble damages and attorneys fees under the Act. The action in state court involved the same allegations and the same parties as are before the Court in this adversary proceeding. The plaintiffs proved the statutory requirements of the Consumer Fraud Act

[9 V.S.A. § 2461] and persuaded the state court that the debtor obtained money from the plaintiff by false pretenses. The fact that the state court judgment was a default entered after the defendant initially appeared through legal counsel and subsequently failed to appear in defense of the claim does not preclude this Court from giving the state court judgment collateral estoppel effect. *See* Kelleran v. Andrijevic, 825 F.2d 692 (2nd Cir. 1987); *cf.* In re Roberti, 201 B.R. 614, 618-619 (Bankr. D. Conn. 1996). Moreover, bankruptcy courts are bound by the liability determinations of a state court unless the party opposing acceptance of the state court default judgment demonstrates that the judgment was procured by fraud or collusion. *See* Kelleran v. Andrijevic, *supra*. There is no allegation of fraud or collusion in the procurement of the instant state court default judgment raised by the defendant in his responsive pleading. This Court also finds that application of principles of issue preclusion would likewise be fair under the particular circumstances of this matter. Therefore, the defendant is precluded from relitigating the issue of fraud regarding the underlying debt. *See* In re Nourbakhsh, 162 B.R. 841 (9th Cir. BAP 1994); In re Cornell, 178 B.R. 45 (Bankr. D. Conn. 1995).

This Court specifically finds that (1) it must accept and enforce the state court's judgment under the specific circumstances presented by this case; (2) the state court judgment made all of the findings required for a determination under 11 U.S.C. § 523(a)(2); and (3) based upon the findings of the state court after an evidentiary hearing upon notice to defendant of an award of treble damages and attorney's fees pursuant to the Vermont Consumer Fraud Act, the criteria of 11 U.S.C. § 523(a)(2) are satisfied.

Based upon the foregoing, the plaintiffs' Motion for Summary Judgment is GRANTED. The judgment in the amount of $24,487.25 is held to be non-dischargeable pursuant to 11 USC § 523(a)(2).

Rutland, Vermont
September 5, 2001

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