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UNITED STATES BANKRUPTCY COURT
DISTRICT OF VERMONT

US BANKRUPTCY COURT
DISTRICT OF VERMONT
AUG - 1 2001
FILED & ENTERED ON DOCKET
BY: KATHLEEN A. FORD

In re:

Charlie J. Garland,
Debtor.

Chapter 7
Case # 99-10120

Charlie Garland,
Plaintiff,
v.
Terry Lawton and Jill Garland,
Defendants.

Adversary Proceeding
 # 99-1076

#471

Appearances:

Christopher O'C. Reis, Esq.
Randolph, VT
Attorneys for Plaintiff

William J. McCarty, Esq.
Brattleboro, VT
Attorneys for Movant Defendant

MEMORANDUM OF DECISION

This matter is before the Court regarding the Complaint filed by the Plaintiff, Charlie J. Garland, against the Defendants, Terry Lawton and Jill Garland, on November 24, 1999, seeking declaratory relief and a determination that the defendant, Terry Lawton, violated the automatic stay; and the Defendant Lawton's Motion for Non-Discharge and Dismissal dated May 31, 2000 [Dkt. # 21-1]. A final hearing was held October 5, 2000. This Court has jurisdiction pursuant to 28 U.S.C.. §§ 157 and 1334. Based upon the record, testimony taken and exhibits entered, the Court renders the following findings of fact and conclusions of law.

Factual and Procedural Background

On January 29, 1999, the plaintiff/ debtor filed a voluntary petition under chapter 7 of title 11 U.S.C. ("the Bankruptcy Code"). Previously, on December 15, 1998, the debtor had been served with a Summons and Complaint in the state court action of Terry Lawton v. Charles Garland d/b/a T.A.G.

Trucking and Jill R. Garland d/b/a T.A.G. Trucking, Dkt. No. 436-12-98, Windham County, Superior Court of Vermont. The state court action sought compensatory and punitive damages based upon allegations of breaches of contract, consumer fraud and conversion against both defendants.

In the state court action, Terry Lawton alleged that the defendants, individually and doing business together as T.A.G. Trucking, made false representations to him in order to induce him to part with two motor vehicles without full payment. Additionally, Mr. Lawton alleges that he was further induced by Charlie and Jill Garland, through acts of consumer fraud, deceptive and unfair business practices, and misrepresentations under 9 V.S.A. 2453 (i.e., the Vermont "Consumer Fraud Act"), to provide them with his truck for repair, and they then failed to repair the truck. Rather, Mr. Lawton contends that the Garlands disassembled the truck, and then committed a conversion by refusing to either repair or return it upon demand.

A default judgment was granted by the state court in favor of Terry Lawton and against both defendants due to their non-appearance on or about February 10, 1999. After a hearing on damages, a state court Judgment Order was entered July 26, 1999 in the total amount of $20,308.39, with accruing interest, against both defendants, individually and doing business as T.A.G. Trucking. While the debtor disputes the amount of the claim asserted by Terry Lawton, the debtor has stipulated that he did owe some amount to Terry Lawton [Dkt. # 45-1]. A writ of execution was issued by the state court and served on October 11, 1999. On October 15, 1999, the debtor filed an amended Schedule F to list the claim of Terry Lawton for the first time, listed the amount of $20,000.00 and designated as "disputed." Previously, on May 21, 1999, the Court had granted a discharge in favor of the debtor pursuant to 11 U.S.C. §727. The Court (J. Conrad) subsequently set aside the discharge on July 17, 1999 to allow for entry of a reaffirmation agreement between the debtor and a different creditor, with the discharge then reinstated. On November 24, 1999, shortly after the debtor was served with the state court writ of execution, he initiated this adversary proceeding against his wife, Jill Garland, and Terry Lawton. The three count Complaint alleges

that Terry Lawton, by and through his legal counsel, William M. McCarty, Esq., violated the 11 U.S.C. §362 automatic stay as of the date the petition was filed (on January 29, 1999) and seeks an award of damages arising from the stay violation and declaratory relief determining that the state court judgment is void in its entirety.

The debtor alleges in Count I that the stay was violated when Attorney McCarty communicated directly with the debtor regarding the subject claim in February, 1999 and, despite being advised at that time by the debtor that he had filed a bankruptcy petition, proceeded with the suit. The debtor further alleges that Attorney McCarty again communicated with him in "the summer of 1999" regarding prosecution of the state court action and the debtor again advised him of the pending bankruptcy and directed him to contact the debtor's bankruptcy counsel. Additionally, the debtor alleges that the defendant Lawton and Attorney McCarty proceeded to request and obtain a default judgment against the debtor and his wife in the state court action, notwithstanding notice of the bankruptcy.

In Count II, the debtor alleges that pursuant to his post-petition collection efforts against the debtor, Mr. Lawton consciously and intentionally asserted claims against the debtor's wife, defendant Jill Garland, with knowledge that Mrs. Garland had no liability for the claim and that these efforts were a post-petition effort to collect upon a debt that the debtor alone owed to defendant Lawton.

In Count III, the debtor seeks declaratory relief that the state court judgment is void in its entirety because it was obtained in violation of the automatic stay. Lastly, the debtor requests that this Court declare that any amounts owed to Mr. Lawton under the claim arising from the state court action are owed solely by the debtor, and not Jill Garland.

In his Answer and Affirmative Defenses, defendant Lawton denies that any of the alleged communications between the debtor and Attorney McCarty ever occurred [Answer, at para. 6, 7 and 8], denies that the state court legal action against Jill Garland was an effort to collect upon a debt owed solely by the debtor and maintains that Jill Garland was liable to Mr. Lawton because she "obtained assets and

received monies from Mr. Garland and his business." [Answer, at para. 11]. Defendant Lawton also states that at no time did either he or his legal counsel have knowledge of the pending bankruptcy and that the debtor "refused to respond or advise anyone of the bankruptcy." [Answer, at para. 7]. In response to the claim for declaratory relief, defendant Lawton states that the state court judgment is effective due to the debtor's unclean hands and the debtor's failure to notify either Mr. Lawton or his counsel of the pending bankruptcy at any time, or to initially list Mr. Lawton as a creditor even though he had received notice of the claim; and alleges that the debtor actually undertook to conceal his bankruptcy from the defendant and his counsel.

As affirmative defenses, defendant Lawton asserts that the state court action was undertaken in good faith and without any notice or knowledge by the defendant or his counsel of the pending bankruptcy. Despite the debtor being served with the Summons and Complaint in the state court action in December, 1998 and receiving several demand letters from Mr. Lawton's counsel shortly before being sued, the defendant alleges that the debtor acted unlawfully, in bad faith, with unclean hands and "in mockery of the judicial process" by not scheduling the defendant as a creditor or otherwise notifying the bankruptcy court of the claim until after being served with the writ of execution on October 11, 1999.[1]

On May 31, 2000, after engaging in various pretrial proceedings, discovery and the pretrial conference, defendant Lawton filed a "Motion for Non-Discharge and Dismissal" in this adversary proceeding. The defendant contends, by motion, that the subject claim should be deemed non-dischargeable because the debtor acted fraudulently in obtaining the debt. The defendant also asserts that this adversary proceeding should be dismissed as a matter of law on the grounds that the defendant did not violate the automatic stay in proceeding to judgment in the state court action. In support of the requested relief, the defendant sets forth a litany of unverified factual assertions regarding the subject transaction and

[1] Despite being named as a defendant and served with the Complaint in this adversary proceeding, Jill Garland has not appeared or filed any pleading or papers, although she did testify at the final hearing as discussed more fully below.

his denial of notice of the pending bankruptcy, supported by case law references he deems applicable to the controversy.

In response, the plaintiff filed a Request to Refrain from Scheduling Hearing on June 1, 2000, stating that the motion for non-discharge fails to comply with the procedural requirements of Part 7 of the Federal Rules of Bankruptcy Procedure. Specifically, the debtor complains that no complaint has been filed regarding the discharge issue as required nor was the issue raised pursuant to a counterclaim. Rather than constituting a motion to dismiss under Bankruptcy Rule 7012, the debtor contends that the dismissal request is, in effect, a disguised summary judgment motion based upon the defendant's various factual assertions of no wrongdoing. Even as a summary judgment motion, the debtor contends that the requested relief fails because it is not in affidavit form and is not otherwise ripe for summary judgment. Because it purportedly constitutes a "frivolous and defective pleading," the debtor requested that the motion be denied outright and without anyone spending further time or incurring further expense.

In reply, the defendant argues, without legal support, that the "intent" of Bankruptcy Rule 4007 requiring the filing of a dischargeability complaint within 60 days of the creditors' meeting was "upheld" by filing the instant motion for non-discharge, notwithstanding that the defendant was added as a creditor in the amended Schedule F over seven months ago on October 15, 1999, the first date set for the meeting of creditors was scheduled over a year earlier on March 18, 1999, and no request for extension of time was filed by the creditor. Because the debtor purportedly acted badly and he still has legal counsel, the creditor contends that it would be "inequitable" for the Court to reject his motion for non-discharge. Regarding the motion to dismiss, the debtor indicates that it is what it is, and since it was never intended to serve as a summary judgment motion no affidavits were required.

On August 18, 2000, defendant Lawton's counsel filed a motion to withdraw as counsel; a telephonic hearing was held on August 22, 2000 regarding the motion and scheduling issues; it was indicated at the hearing that the motion to withdraw would itself be withdrawn; the parties filed their

respective trial briefs thereafter through their existing legal counsel; and the hearing on the Motion for Non-Discharge and Dismissal was scheduled in conjunction with the final hearing on October 5, 2000.

During the final evidentiary hearing, the plaintiff testified at length regarding the subject transaction giving rise to the state court litigation and his conduct before and after filing for bankruptcy relief. He explained that T.A.G. Trucking was his hauling business and that he had engaged in the business of motor vehicle repairs in 1999. He also testified that Garland Maintenance Company was a separate business operated by his wife, Jill Garland, involving lawn maintenance. While the two businesses maintained separate business books and were engaged in different business activities, he acknowledged that he sometimes worked in both businesses, that he used the Garland Maintenance Company name in his business dealings in Vermont, and that the two businesses occasionally advertise together, as evidenced by a year 2000 local school calendar. He maintained that his wife was not involved in the business transaction with Mr. Lawton.

Concerning the alleged post-petition contacts between the defendant or defendant's legal counsel, the plaintiff testified that he spoke with Attorney McCarty in February, 1999 when he received a notice to appear in the state court proceeding. The debtor stated that he told Attorney McCarty that he had filed bankruptcy and provided him with the debtor's attorney's name. Mr. Garland further testified that he again spoke with Attorney McCarty after he received a state court notice by mail sometime in June, 1999. According to the debtor, he contacted Attorney McCarty in this latter instance to inquire why he needed to appear in state court when he had a pending bankruptcy. The debtor could not explain why he had failed to list Mr. Lawton as a creditor at any time prior to being served with the writ of execution. While the debtor reiterated his prior testimony concerning his communications with Attorney McCarty in February and June, 1999, he nonetheless stated that no notice was provided to Mr. Lawton of his pending bankruptcy until the debtor filed his Amended Schedule F on October 15, 1999, three days after he had been served with the writ of execution regarding the state court judgment. There is no allegation of any further contact

directly between the debtor and either the defendant or his counsel after the amended schedule was filed. The debtor also testified at length regarding prior business dealings, loan transactions, his employment history, and other individuals who worked in the family's hauling and lawn care business which, although consistent with this ruling and duly considered by this Court, are not pertinent to the outcome of this case.

The plaintiff next presented the testimony of Jill Garland, who essentially complemented the testimony of the debtor. She confirmed that the hauling and lawn maintenance businesses were separate business activities since approximately 1997, with the debtor managing the hauling business and Mrs. Garland operating the lawn business. She acknowledged looking at the two cars with the debtor before they were purchased, but denied any conversation with Mr. Lawton regarding their acquisition or any involvement in the transaction involving the truck. She testified credibly that she keeps separate business and personal records from the debtor, and that her business customers do not interact with the debtor. Mrs. Garland testified that although Garland Maintenance included some car repair business when she took over the business in 1992, she has always attempted to convey to the public that the two companies were separate entities. She emphasized that she has had no business dealings with Mr. Lawton, she never promised to pay Mr. Lawton for the two vehicles, and she had no role in the truck repair transaction.

In his testimony, Mr. Lawton stated that he had lived in the area for 15-20 years and that he had always presumed that Charlie and Jill Garland were in business together based upon combined business advertisements he had seen. He explained that his understanding that the Garlands were in business together combined with both being present when the two cars were inspected led him to conclude that the purchase transaction was a joint undertaking by both Garlands. Mr. Lawton acknowledged, however, that he believed Jill Garland had no role in the truck repair transaction beyond the fact that the Garlands were generally in business together. Regarding the debtor's bankruptcy, Mr. Lawton said he had seen the debtor around the community over an extended period of time, but the debtor never advised him that a bankruptcy had been filed until he served the Amended Schedule F upon him in October, 1999, and he had no

knowledge of the bankruptcy case from any other source prior to that time. He testified at length regarding the circumstances of the sale of the two vehicles and the anticipated truck repair. Although these circumstances are considered by the Court, they are not material to a disposition of this case.

Mr. John Carton also testified as a witness on behalf of the defendant, primarily regarding his employment history with the Garlands. Mr. Carton is Mr. Lawton's stepson. While he worked on occasion for both Garlands' business ventures, he testified that he received his paycheck from the same source, Garland Maintenance Company, regardless of which of the Garlands utilized his services, what type of work he did, or who managed his work. He testified that the debtor never instructed him regarding his lawn maintenance activities and Jill Garland never instructed him regarding his truck hauling activities. Mr. Carton's remaining testimony has been considered by the Court, but is not material to a disposition of this dispute.

In reaching its determination, this Court has carefully considered the record, the exhibits entered into evidence, and the demeanor, candor and relative interests of the witnesses who testified at the evidentiary hearing.

Findings of Fact and Conclusions of Law

1. Lift Stay Violation

Counts I and II of the Complaint seek recovery of damages based upon allegations that the defendant, Terry Lawton and/ or his legal counsel, violated the automatic stay in effect in this case. Section 362(h) of the Bankruptcy Code states: "An individual injured by any willful violation of a stay provided by this section shall recover actual damages, including costs and attorneys fees, and, in appropriate circumstances, may recover punitive damages". An award of damages under section 362(h) must have a sufficient factual foundation. *See* Archer v. Macomb County Bank, 853 F.2d 497 (6th Cir. 1988).

Furthermore, the moving party has the burden of proof in order to prevail on an action for violation of the automatic stay. *See* In re Hooker Investments, Inc., 116 B.R. 375, 381 (Bankr. S.D.N.Y. 1990); *see also* In re Sammon, 253 B.R. 672, 680 (Bankr. D.S.C. 2000)(and cases cited therein). The burden is on the party seeking to recover for an alleged violation of the automatic stay to prove the following elements: (1) that a bankruptcy petition was filed; (2) that the debtors are "individuals" under the automatic stay provisions; (3) that the creditors received notice of the petition; (4) that the creditor's actions were in willful violation of the stay; and (5) that the debtors suffered damages. *See* In re Sammon, 253 B.R. at 680; In re Skeen, 248 B.R. 312 (Bankr. E.D. Tenn. 2000); In re Flack, 239 B.R. 155, 162-63 (Bankr. S.D.Ohio 1999).

It is also important to note that a debtor is under a duty to exercise due diligence in protecting and pursuing his or her rights and in mitigating any damages with regard to a creditor's violation of the automatic stay. *See* In re Sammon, 253 B.R. 672 (Bankr. D.S.C. 2000). A debtor may not remain "stealthily silent" while a creditor unknowingly violates the automatic stay in order to reap strategic or monetary advantage. *See* In re Smith, 876 F.2d 524 (6th Cir. 1989); In re Calder, 907 F.2d 953 (10th Cir. 1990).

Pursuant to the credible evidence presented during the final hearing and based upon the demeanor of the witnesses, whom this Court had the opportunity to observe firsthand while they are testifying in this matter, the plaintiff merely established the first two elements, namely that a bankruptcy petition was filed and that the debtor is an "individual" under the automatic stay provisions. The plaintiff did not present credible evidence sufficient to establish the remaining three elements necessary to recover for a claim of violation of the automatic stay.

Pursuant to the credible evidence presented during the final hearing, the plaintiff failed to establish that the creditor, Terry Lawton, or his legal counsel received notice of the filing of their bankruptcy petition prior to October 14, 1999. While the plaintiff testified that he was contacted by Attorney McCarty in

February, 1999, that he contacted the Attorney McCarty in June, 1999 and that the pending bankruptcy was discussed in both instances, the evidence does not support the contention under all the circumstances. Despite being aware of the Lawton claim since being served pre-petition with the suit papers in the state court proceeding in December, 1998, along with earlier demand letters, the debtor never listed the creditor on his schedules until well after the default judgment was entered in the state action, and not until after the final step - the writ of execution - was served upon him.

Moreover, despite being represented by experienced and capable bankruptcy counsel, it appears that the debtor failed to disclose the existence of this claim to his counsel until the Amended Schedule F was filed by the debtor thereafter. While refraining from making an affirmative finding in this regard, the conduct of the debtor in failing to disclose the existence of the Lawton claim, not to mention any alleged impermissible conduct by Attorney McCarty in violation of the automatic stay, borders on keeping "stealthily silent" in the face of what would have been a known stay violation.

Even assuming *arguendo* that Mr. Lawton and his counsel proceeded to pursue the state court action with knowledge of the bankruptcy, it is clear that the debtor failed to act with due diligence in protecting and pursuing his rights and in mitigating any damages with regard to the creditor's purported violation of the automatic stay. Whatever conversations may have occurred post-petition between the debtor and Attorney McCarty, if any, the credible evidence simply does not rise to the level necessary to show that the bankruptcy was ever discussed or that the creditor and his counsel proceeded after notice.

While the state court action indeed proceeded post-petition, plaintiff has not established that the creditor's actions were in willful violation of the stay or that the debtors suffered actual damages. It appears that any violation by Mr. Lawton in pursuing the state court action against the debtor was technical and does not subject the creditor to sanction. *See* In re Freunscht, 53 B.R. 110 (Bankr. D.Vt. 1985); *see also* In re Cruz, 254 B.R. 801 (Bankr. S.D.N.Y. 2000)(creditor in commencing post-petition state court action relying on fact that it had not been scheduled and had received no notice of a debtor's bankruptcy

case exhibited no bad faith or similar motive worthy of sanction). Pursuant to the credible evidence presented during the final hearing, the Court finds there was no related actual injury to plaintiff even assuming that these contested post-petition contacts occurred. *See* In re Freunscht, 53 B.R. 110 (Bankr. D.Vt. 1985).

Based upon the foregoing, plaintiff has failed to provide sufficient credible evidence to warrant a finding of a compensable violation of the automatic stay as set forth in Counts I and II of the Complaint.

Regarding the declaratory relief requested in Count III, however, the Court does find that the judgment obtained post-petition against the debtor by Mr. Lawton did constitute a technical violation of the automatic stay. An automatic stay is effective at the moment that a bankruptcy petition is filed, and whether a creditor has knowledge of the debtor's bankruptcy filing is immaterial to a determination of whether the creditor has violated the stay. *See* In re Siskin, 231 B.R. 514 (Bankr. E.D.N.Y. 1999); *see also* In re Peia, 204 B.R. 310 (Bankr. D. Conn. 1996)(any action taken against a debtor in violation of the automatic stay is void). Therefore, the state court final judgment, as it pertains to the debtor, is null and void and without legal force and effect.

Lastly, it is well-settled that, absent unusual circumstances, the automatic stay is available only to the bankrupt and not to a non-debtor third party or co-defendants. *See* In re Siskin, 231 B.R. 514 (Bankr. E.D.N.Y. 1999)(absent special circumstances, the automatic stay does not afford protection or relief for debtor's family or their property); In re Fuel Oil Supply and Terminaling, Inc., 30 B.R. 360 (Bankr. N.D. Tex. 1983); *see also* Duval v. Gleason, 1990 WL 261364 (N.D. Cal. 1990). Moreover, there was no evidence presented of any unusual circumstances or that the debtor would be required to indemnify Jill Garland for any adverse money judgment entered in favor of Mr. Lawton. Therefore, the existence of the automatic stay in favor of the debtor does not preclude whatever legal effect the default judgment has under Vermont law concerning his co-defendant, Jill Garland, a non-debtor third party. Any remedy on behalf of Jill Garland regarding the default judgment would reside solely with the state court.

2. Non-dischargeability Claim

It is well recognized in this District and elsewhere that exceptions to discharge pursuant to 11 U.S.C. §523 must be strictly construed against an objecting creditor and liberally in favor of the debtor in order to be consistent with the liberal spirit that has always pervaded the entire bankruptcy system to allow a debtor a fresh start. In re Gallaudet, 46 B.R. 918 (Bankr.D.Vt. 1985); *see also* In re Bonnanzio, 91 F.3d 296 (2nd Cir. 1996); In re Miller, 39 F.3d 301 (11th Cir. 1994); In re Menna, 16 F.3d 7 (1st Cir. 1994). Therefore, bankruptcy courts narrowly construe exceptions to discharge and a creditor bears the burden of proving grounds for an objection to discharge. *See* In re Barrup, 37 B.R. 697 (Bankr.D.Vt. 1983); *see also* Fed. R. Bankr. P. 4005; In re Kelly, 135 B.R. 459, 461 (Bankr.S.D.N.Y. 1992)(plaintiff bears burden of proving grounds for objection to discharge).

As noted above, the defendant filed a "motion" seeking to object to the dischargeability of the subject claim. No complaint or counterclaim was filed in this regard, and the debtor has objected on grounds of improper procedure and timeliness. The creditor was identified in the amended Schedule F over seven months before the motion was filed, and the first date set for the meeting of creditors was scheduled over a year earlier on March 18, 1999. No request for extension of time was filed by the creditor. Extraordinary equitable relief is not warranted under the circumstances. The objection is improperly before the Court as a "motion" and is untimely. *See* Bankruptcy Rules 4007 and 7001; *see also* In re Shaheen, 174 B.R. 424 (E.D. Va. 1994)(creditor omitted from initial schedules has 30 days to file non-dischargeability complaint); In re CCR Financial Planning, Ltd., 199 B.R. 347 (Bankr. E.D. Va. 1996); In re Bozeman, 219 B.R. 253 (Bankr. W.D. Ark. 1998). Therefore, the "non-dischargeability motion" is denied.

Even assuming *arguendo* that the objection to discharge was procedurally curable, it would fail on the merits. To establish that a claim is subject to the discharge exception for actual fraud, a plaintiff must

prove, by a preponderance of the evidence, that (1) the debtor made a false representation, (2) with the intent to deceive the creditor, (3) that the creditor relied on the false representation, (4) that the creditor's reliance was justifiable, and (5) that the false representation resulted in damages to the creditor. *See* In re Denbleyker, 251 B.R. 891 (Bankr. D. Colo. 2000). In this instance, while there was arguably some evidence of poor judgment or business skills on the part of the debtor in his dealings with Mr. Lawton, the creditor failed to demonstrate that the debtor acted with the requisite intent to deceive regarding either the sale of the two vehicles or the aborted repair of the subject truck to prevail in an action for actual fraud.

Alternatively, collateral estoppel or *res judicata* principles may apply in non-dischargeability proceedings under 11 U.S.C. §523(a) in appropriate circumstances. *See* Grogan v. Garner, 498 US 279, 111 S.Ct. 654 (1991). Collateral estoppel, or issue preclusion, may prohibit relitigation of issues that have already been adjudicated in a prior action and allow a prior state court judgment to have a binding effect in a subsequent bankruptcy case. *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 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 standard of proof in the prior case is at least as stringent as the standard of proof in the subsequent action. *See* Sheehan v. Department of Employment and Training, 733 A.2d 88, 169 Vt. 304 (1999); Farrell v. Mountain Folk, Inc., 730 A.2d 597 (Vt. 1999); *see also* Rezzonico v. H & R Block, Inc., 182 F.3d 144 (2nd Cir. 1999)(discussing Vermont law regarding collateral estoppel); Northern Oil Co. v.

Socony Mobil Oil Co., 368 F.2d 384 (2nd Cir. 1966)(applying Vermont law and holding that reasonable doubt as to what was decided by a prior judgment should be resolved against using it as an estoppel).

In this instance, the question of the debtor's fraud was neither fully nor necessarily decided in the subject state court litigation. As noted above, there were various grounds for liability asserted against the debtor in the state proceedings, including breaches of contract, which were determined by a default judgment and not by a trial on the merits. There were no findings of fact regarding the basis of liability entered in the state court proceedings, nor were there verified pleadings that would arguably substantiate an inevitable determination of fraud. Therefore, the creditor is not entitled to having the underlying state court action constitute a finding of fraud on behalf of the debtor. *See* In re Raynor 922 F.2d 1146 (4th Cir. 1991)(issue of fraud was not actually litigated in state court proceedings resulting in entry of default judgment in action for breach of contract and fraud). Thus, the subject claim is dischargeable.

Based upon the foregoing, the debtor's complaint seeking a determination that the creditor intentionally violated the stay and should be assessed sanctions is DENIED, and the creditor's motion to have the subject debt declared non-dischargeable is DENIED both on procedural grounds and on the merits.

July 31, 2001
Rutland, Vermont

Hon. Colleen A. Brown
United States Bankruptcy Judge

NOTE:
Although the movant may have designated additional parties to receive this document, the court has served copies of this document only on the parties named below. If a designated party is not listed, they are not in the court's database as a party to this case.

Notice sent to:

Christopher O'C Reis
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William Michael McCarty Jr
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U S Trustee
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BAE SYSTEMS
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CERTIFICATE OF SERVICE

District/off: 0210-1 User: kaf Page 1 of 1 Date Rcvd: Aug 01, 2001
Case: 99-01076 Form ID: #15 Total Served: 3

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aty-pla +Christopher O'C Reis, 6 N Main St, Randolph , VT 05060-1127
cr U.S. Trustee, 74 Chapel St #200, Albany, NY 12207
aty-def +William Michael McCarty, P. O. Box 735, Brattleboro , VT 05302-0735

The following entities were served by electronic transmission.
NONE. TOTAL: 0

***** BYPASSED RECIPIENTS *****
NONE. TOTAL: 0

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I, Joseph Speetjens, declare under the penalty of perjury that I have served the attached document on the above listed entities in the manner shown, and prepared the Certificate of Service and that it is true and correct to the best of my information and belief.

Date: Aug 03, 2001 **Signature:** Joseph Speetjens