



SO ORDERED.

SIGNED this 22 day of December, 2004.

Dale L. Somers

Dale L. Somers
UNITED STATES BANKRUPTCY JUDGE

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF KANSAS**

In re:

**ROBERT TERRY COLBERT,

DEBTOR.**

**CASE NO. 02-24865-7
CHAPTER 7**

ORDER DENYING MOTION FOR RECONSIDERATION

This matter is before the Court on the Debtor's motion for reconsideration of the September 1, 2004, order indicating the Court's willingness to approve his waiver of discharge only if he accepted a condition on the effect his waiver could have in a malpractice suit he has brought against his former attorney. The Debtor appears by counsel Ian H. Taylor; he had also appeared by John P. Barelli, but Mr. Barelli has now withdrawn from the representation. Interested parties Steven G. Bolton and Steven G. Bolton, P.A. (collectively "Bolton"), appearing by counsel Richmond M. Enochs and

Thomas M. Franklin, have objected to the motion. No other responses have been filed. The Court has reviewed the relevant pleadings and is now ready to rule.

The thrust of the Debtor's motion is that the Court's order sought to restrict the evidence he could present in the malpractice suit. Apparently, the Court did not adequately explain its intent. The Court's concern was not that the Debtor would use his waiver of discharge as evidence, but that he might hope or intend to rely on it to establish through the legal theories of claim or issue preclusion (traditionally known as *res judicata* and collateral estoppel) that Bolton's alleged negligence had caused him to lose his discharge. Consideration of the elements of legal malpractice may help make this distinction more clear. Under Kansas law, to prove a claim for legal malpractice, a plaintiff must show: "(1) the duty of the attorney to exercise ordinary skill and knowledge, (2) a breach of that duty, (3) a causal connection between the breach of duty and the resulting injury, and (4) actual loss or damage."¹ The Debtor could certainly rely on his waiver of discharge as evidence to prove the fourth element of his malpractice claim, that he suffered loss or damage. What the Court tried to do by conditioning its approval of the Debtor's waiver of discharge was make sure that the Debtor understood that the waiver would not establish the third element of his malpractice claim, that Bolton's breach of duty had caused him to lose his discharge. That is, the waiver will not bar Bolton from trying to prove that the Debtor would have

¹*Bergstrom v. Noah*, 266 Kan. 847, 874 (1999).

obtained his discharge if he had not waived it. The Court did not mean to suggest that Bolton would be free to rely on the waiver to bar the Debtor from trying to prove that he waived his discharge in order to mitigate the damages that Bolton's alleged malpractice caused.

The contention in the Debtor's motion that Bolton do not have standing to object to his waiver of discharge implicitly recognizes the reason why claim or issue preclusion should not prevent Bolton, if they wish, from asserting that the Debtor would in fact have obtained a discharge if he had not waived it. If Bolton's alleged lack of standing meant that the Court should not have conditioned approval of the waiver of discharge in the manner it did, then the lack of standing also would mean that claim or issue preclusion could not apply to bar Bolton from disputing that his alleged malpractice caused the Debtor to lose his discharge because Bolton would not have had the opportunity to litigate the question before this Court. Claim preclusion bars relitigation of issues that were or should have been raised in prior litigation, and issue preclusion bars relitigation of issues that a party did raise and have a full opportunity to litigate in prior proceedings.² A party without standing to raise issues in a proceeding could not be bound by any resolution of those issues in the proceeding.

²*Park Lake Resources, L.L.C., v. United States Dept. of Agriculture*, 378 F.3d 1132, 1135-36 (10th Cir. 2004).

In short, the condition included in the Court's prior order was intended to answer for the Debtor, Bolton, and the court where the malpractice suit is pending the question whether the Debtor's waiver of discharge could be considered to have resolved the causation element of the Debtor's claim against Bolton. The Court remains convinced that the condition should stand, and will not approve the waiver of discharge unless the Debtor indicates that he accepts that condition. The Debtor's motion to reconsider is hereby denied.

#