

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

IN RE:)	
)	
CRESS COLT YOUNKER,)	Case No. 02-10063
LESLEE JOANNE YOUNKER,)	Chapter 7
)	
Debtors.)	
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)	
ULTRAMAR DIAMOND SHAMROCK CORP., dba TOTAL)	
Plaintiff,)	
)	
v.)	Adversary No. 02-5111
)	
LESLEE JOANNE YOUNKER,)	
)	
Defendant.)	
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ORDER GRANTING SUMMARY JUDGMENT

The plaintiff Ultramar Diamond Shamrock Corp., d/b/a Total, moves the Court for entry of summary judgment on its dischargeability complaint brought pursuant to 11 U.S.C. § 523(a)(2)(A).¹ The plaintiff seeks to except from discharge a debt owed by debtor-defendant in the amount of \$3,651.12. The debt arises from a series of worthless checks issued by defendant Leslee Joanne Younker and prepetition state court default judgments entered against the defendant with respect to those checks. The defendant now appears *pro se* in this adversary and has failed to file a response to the summary judgment motion.

¹ All statutory references are to the Bankruptcy Code, 11 U.S.C. § 101, et seq. unless otherwise specified.

Jurisdiction

The Court has jurisdiction over this case.² This is a core proceeding.³ Fed. R. Bankr. P. 7056 makes applicable to adversary proceedings the rules for summary judgment as found in Fed. R. Civ. P. 56.

Factual Statement⁴

The Court makes the following findings of fact. In 2000, prior to the filing of bankruptcy, the defendant issued a series of checks payable to plaintiff that were returned for insufficient funds. In total, there were eleven checks written by defendant for \$391.48. Plaintiff pursued defendant for the worthless checks and eventually commenced eight lawsuits in Sumner County District Court to collect the worthless checks.⁵

Paragraph 2 of the petition in each of the state court cases alleged:

That defendant issued said check deceitfully and with intent to defraud the plaintiff since the defendant knew that at the time said check was presented said defendant did not have sufficient funds in the account for said check to be honored and paid.

In addition to the amount of the unpaid check, service charges, damages, attorney fees and court costs,

² 28 U.S.C. § 157(a) and § 1334.

³ 28 U.S.C. § 157(b)(2)(I).

⁴ The court makes its findings of fact and accepts as true the properly supported statements of fact set forth by the plaintiff in his summary judgment motion and uncontested by the defendant. The defendant has waived her right to controvert the statements of fact by her failure to respond. *See* Fed. R. Civ. P. 56; *Reed v. Bennett*, 312 F.3d 1190, 1195 (10th Cir. 2002). The court also adopts as true the plaintiff's requests for admission served upon defendant. Defendant has likewise failed to respond to the requests for admission and pursuant to Fed. R. Civ. P. 36(a), made applicable in adversary proceedings by Fed. R. Bankr. P. 7036, the matters are deemed admitted.

⁵ Each state court action was to collect a single check. From the record before this Court, it appears that no state court action was commenced to collect three of the eleven checks.

the plaintiff's prayer in each of the state court actions expressly sought a finding "that the defendant obtained goods and services from the plaintiff through actual fraud."

On July 5, 2001 and August 30, 2001 a journal entry of judgment by default was entered against defendant in each of the eight state court cases. Each of those journal entries is consistent with the relief sought in the petitions and contains the express finding by the state court that "the defendant obtained goods and services from the plaintiff through actual fraud."

The defendant filed bankruptcy on January 7, 2002. On January 25, 2002 plaintiff filed its proof of claim in the amount of \$3,651.12 regarding the eleven worthless checks.⁶ On April 8, 2002, the plaintiff filed an adversary complaint pursuant to section 523 and sought a determination that plaintiff's claim related to the worthless checks was non-dischargeable.⁷ Plaintiff alleged that defendant obtained property by means of false pretenses, false representations and actual fraud.⁸

Defendant, at that time represented by counsel, filed her answer to the complaint. She admitted the state court judgments entered against her but denied that she had obtained property by fraud.⁹ On August 15, 2002 defendant's attorney moved to withdraw as counsel. An order was entered granting defendant's attorney's motion to withdraw from the adversary on September 10, 2002.

On August 30, 2002, prior to the order granting the defendant's attorney's motion to withdraw, the plaintiff served requests for admission upon defendant's counsel. Highly summarized, the requests

⁶The amount of plaintiff's proof of claim is comprised of the eight state court judgments obtained by plaintiff and, for the three remaining checks not included in the state court proceedings, the face amount of the checks together with a \$30 service charge.

⁷The plaintiff has included all eleven worthless checks in its dischargeability complaint.

⁸ See 11 U.S.C. § 523(a)(2)(A).

⁹ It appears to this Court from the answer filed by defendant that she does not dispute the amount of plaintiff's claim.

sought admissions from defendant that she signed the eleven checks in question, that she knew the checks would not be honored when presented for payment, that she obtained merchandise and services from plaintiff in exchange for the checks, and that she knew her bank account had insufficient funds to pay the checks at the time they were issued. The requests further sought admissions from defendant regarding the eight state court cases brought against her, that proper service of the petitions was made in those cases, that she defaulted and failed to appear in the state court actions, that default judgments were entered against her, that the allegations in each of the petitions were true, and that the state court made a specific finding that defendant obtained goods and services from plaintiff by actual fraud. The defendant failed to respond to the requests for admission or seek an extension of time to respond thereto.

On December 27, 2002, the plaintiff filed a motion for summary judgment and supporting memorandum on its adversary complaint.¹⁰ It attached as supporting exhibits, the unanswered requests for admission, the petitions and journal entries of judgment in each of the eight state court cases, and an affidavit of counsel regarding the requests for admission. The defendant has filed no response to plaintiff's summary judgment motion.

Analysis

Notwithstanding the defendant's failure to respond to the summary judgment motion and controvert the plaintiff's statements of fact, this court is required to determine whether those uncontroverted statements of fact entitle plaintiff to judgment as a matter of law on its adversary complaint.¹¹ As applied to this case, then, the question is whether the statement of material facts,

¹⁰ Dkt. 16.

¹¹ *Reed v. Bennett*, 312 F.3d 1190, 1194-95 (10th Cir. 2002).

which this Court accepts as true, establish as a matter of law the fraud discharge exception as provided in § 523(a)(2)(A). The plaintiff has the burden of proving by a preponderance of evidence that the debt falls within the fraud discharge exception.¹²

Section 523(a)(2)(A) provides, in relevant part:

A discharge under section 727 . . . does not discharge an individual debtor from any debt – (2) for money, property, services . . . to the extent obtained by – (A) false pretenses, a false representation, or actual fraud, other than a statement respecting the debtor’s or an insider’s financial condition.

The elements of an actual fraud discharge exception were recited in *In re Abraham*¹³ as (1) the debtor made a representation to the creditor; (2) the debtor knew it was false at the time it was made; (3) debtor intended to deceive creditor; (4) the creditor justifiably relied on the representation; and (5) the creditor was damaged by the false representation. As discussed below, the plaintiff has established all of these elements of actual fraud by either the requests for admission or the application of collateral estoppel.

The plaintiff moves for summary judgment based, in part, upon the doctrine of collateral estoppel. Namely, plaintiff seeks to use the fraud determinations from the state court judgments to except defendant’s debt from discharge under § 523(a)(2)(A).

The United States Supreme Court in *Grogan v. Garner*¹⁴ held that collateral estoppel principles apply in § 523(a) nondischargeability proceedings under the Bankruptcy Code. The Tenth

¹² *Grogan v. Garner*, 498 U.S. 279, 284 n. 11, 111 S.Ct. 654, 112 L.Ed. 2d 755 (1991).

¹³ 247 B.R. 479, 483 n.12 (Bankr. D. Kan. 2000).

¹⁴ 498 U.S. 279, 284 n. 11, 111 S.Ct. 654, 112 L.Ed. 2d 755 (1991) (prior fraud judgment would be given preclusive effect in § 523(a)(2) proceeding; nondischargeability governed by preponderance of the evidence standard).

Circuit Court of Appeals has likewise applied collateral estoppel to bar relitigation of the facts underlying the determination of dischargeability of a debt. In *In re Wallace*¹⁵, the court stated:

Although the bankruptcy court in a dischargeability action under section 523(a) ultimately determines whether or not a debt is dischargeable, we believe that the doctrine of collateral estoppel may be invoked to bar relitigation of the factual issues underlying the determination of dischargeability . . . Consequently, collateral estoppel is binding on the bankruptcy court and precludes relitigation of factual issues if (1) the issue to be precluded is the same as that involved in the prior state action, (2) the issue was actually litigated by the parties in the prior action, and (3) the state court's determination of the issue was necessary to the resulting final and valid judgment.

The creditor in *Wallace* moved for summary judgment on its dischargeability complaint, invoking collateral estoppel and a prior state court judgment, to establish the nondischargeability of the debtor's debt. The court granted summary judgment, holding that collateral estoppel principles established the debtor's embezzlement debt and precluded relitigation of the state court embezzlement determination.¹⁶

Here, collateral estoppel precludes this Court from rehearing and determining that the defendant engaged in actual fraud when she issued the worthless checks. The state court has already made this determination, at least with respect to eight of the eleven checks.¹⁷ This court will not disturb that factual determination. Moreover, a reading of the state court petitions and judgments establish that defendant's debt for fraud is within the purview of § 523(a)(2)(A). Thus, \$3,445.82 of defendant's debt to plaintiff is excepted from discharge by application of collateral estoppel.

This leaves the remaining three worthless checks that comprise \$205.30 of plaintiff's claim

¹⁵ 840 F. 2d 762, 764-65 (10th Cir. 1988).

¹⁶ See also *In re Audley*, 275 B.R. 383 (10th Cir. BAP 2002); *In re Horst*, 151 B.R. 563 (Bankr. D. Kan. 1993).

¹⁷ From an examination of plaintiff's proof of claim filed in the bankruptcy case, it appears that all but \$205.30 of its \$3,651.12 claim is attributable to the eight worthless checks encompassed by the state court judgments.

against defendant. Plaintiff cannot invoke collateral estoppel with respect to this amount since plaintiff did not obtain state court fraud judgment as to these three checks. Instead, plaintiff seeks to establish defendant's actual fraud through the requests for admission.

Each of plaintiff's requests for admission is deemed admitted by defendant's failure to either admit or deny the matters stated.¹⁸ These admissions establish each of the elements of an actual fraud discharge exception. Specifically, requests 1 through 5 and 24 establish that defendant signed each of the eleven worthless checks, that she obtained merchandise from plaintiff by the issuance of the worthless checks, and that she knew at the time the checks were presented to the plaintiff that they would not be paid due to insufficient funds in her bank account.¹⁹ Request for admission number 6 establishes plaintiff's reliance upon the validity of the checks presented by defendant. Request number 7 establishes the defendant's intent to deceive. Request for admission numbers 26 and 27 establish that defendant has failed to pay the worthless checks or the state court judgments and that plaintiff has been damaged. Plaintiff, through the requests for admission, has proven each of the elements for an actual fraud discharge exception.

The Court therefore concludes that defendant's debt for the worthless checks in the amount of \$3,651.12 should be and is hereby excepted from discharge under § 523(a)(2)(A). The plaintiff's motion for summary judgment is GRANTED.

Dated this 24th day of April, 2003.

¹⁸ See Fed. R. Civ. P. 36.

¹⁹ See *In re Newell*, 164 B.R. 992, 995 (Bankr. E.D. Mo. 1994) (Where circumstances show that debtor knew insufficient funds existed in account on which she wrote checks, debtor knew that representations were false when made for purposes of § 523(a)(2)(A)).

ROBERT E. NUGENT
CHIEF BANKRUPTCY JUDGE
UNITED STATES BANKRUPTCY COURT
DISTRICT OF KANSAS

CERTIFICATE OF SERVICE

The undersigned certifies that copies of the **Order Granting Summary Judgment** were deposited in the United States mail, postage prepaid on this 24th day of April, 2003, to the following:

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