SO ORDERED.

SIGNED this 8th day of June, 2018.

Janice Miller Karlin
United States Bankruptcy Judge

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF KANSAS

In re:

Case No. 14-40212-7

Bruce William Mooney,

Debtor.

State of Kansas, *ex rel.*,
Lana Gordon, Secretary of Labor,

Plaintiff,

vs.

Adversary No. 17-7016

Bruce William Mooney,

Defendant.

Order Denying Plaintiff Kansas Department of Labor's Motion for Summary Judgment

This adversary proceeding is before the Court on the motion for summary

judgment of Plaintiff/Creditor Kansas Department of Labor ("KDOL"),[1] seeking a determination that its claim against Debtor/Defendant Bruce William Mooney is nondischargeable under 11 U.S.C. § 523(a)(2)(A). While Debtor admits nearly every fact necessary for KDOL to prevail, he disputes one key fact. He denies he had the requisite intent to deceive when he made certain statements about his employment. Because Debtor has done just enough, by way of an affidavit, to defeat summary judgment, the Court denies the motion and will hear evidence about intent at a trial to be held July 17, 2018.

I. Findings of Fact

A. Undisputed Facts[2]

KDOL is a government entity authorized to administer the joint state and federal unemployment insurance benefits in Kansas, pursuant to the Kansas Employment Security Law (KESL), K.S.A. § 44-701 *et. seq.* It objected—under 11 U.S.C. § 523(a)(2)—to the discharge of a debt Debtor indisputably owes it. Debtor applied for and received unemployment insurance benefits for the weeks of April 3, 2010 through May 8, 2010 and then again from July 3, 2010 through August 7, 2010. To obtain benefits, Debtor was required to, and did, separately request benefits for each of these work weeks.

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[1] Doc. 16.

[2] These facts are established by the thorough affidavit and exhibits submitted by KDOL in support of its motion for summary judgment, Doc. 16, exhibits 1-11, the stipulation of facts in the pretrial order, Doc. 21, and Debtor's affidavit in support of his response to the motion for summary judgment, Doc. 25.

For each week that benefits were requested, Debtor represented that he had no actual earnings.[3] But that statement was false; Debtor actually received wages from: 1) Felix Chavez & Son Construction during the period from April 3 to May 8, 2010; and 2) Larry Jones Trucking, Inc., during the period from July 3, 2010 to August 7, 2010. The parties agree that Debtor owes (as of July 28, 2017), $1,882.33, consisting of unemployment insurance benefits of $159, Federal Additional Compensation of $200, and interest of $1,523.33.

After discovering the overpayment of benefits, KDOL mailed notice to Debtor at his last known address and advised him that he had a right to appeal the determination that he owed benefits; Debtor did not exercise that right.[4]

B. Disputed Facts

Debtor now admits he misrepresented his wages, but disputes that his misrepresentations were knowing and intentional.[5] Rather, Debtor states that the misrepresentations were the result of mere carelessness. He asserts that his then-girlfriend prepared the unemployment applications at his request, and, confident in her ability to prepare the paperwork correctly, Debtor gave the documents only a cursory review.

Debtor also claims that because he was not living at the address used by KDOL to provide him notice, he did not receive the notices regarding the

[3] Doc. 21.

[4] Doc. 16.

[5] Doc. 25.

overpayment. Debtor claims that when he applied for unemployment benefits he used his father's address, but at the times relevant to these proceedings, he instead lived at various residences in Baldwin, Eudora, and Tonganoxie, Kansas.

In its reply, KDOL has added many facts that relate to whether Debtor actually received the notices, ultimately arguing there is a presumption that he did receive notice of KDOL's agency actions, including its ultimate finding that the misrepresentation was intentional. It then concludes that because Debtor thereafter failed to dispute those findings, the agency's determination that Debtor obtained the overpayment fraudulently is entitled to preclusive effect.

II. Conclusions of Law

No party disputes that this adversary proceeding to determine the dischargeability of a debt is a core proceeding under 28 U.S.C. § 157(b)(2)(I), over which this Court may exercise subject matter jurisdiction.[6]

A. Motion for Summary Judgment Standards

Federal Rule of Civil Procedure 56 requires a court to grant summary judgment "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law."[7] When analyzing a summary judgment motion, the Court draws all reasonable inferences in favor of

[6] 28 U.S.C. § 157(b)(1) and § 1334(b).

[7] Fed. R. Civ. P. 56, incorporated and applied in bankruptcy courts under Fed. R. Bankr. P. 7056.

the non-moving party.[8] An issue is "genuine" if "there is sufficient evidence on each side so that a rational trier of fact could resolve the issue either way."[9] "Material facts" are those that are "essential to the proper disposition of [a] claim" under applicable law."[10]

The moving party bears the initial burden of demonstrating—by reference to pleadings, depositions, answers to interrogatories, admissions, or affidavits—the absence of genuine issues of material fact.[11] If the moving party meets its initial burden, the nonmoving party cannot prevail by relying solely on its pleadings.[12] "Rather, the nonmoving party must come forward with specific facts showing the presence of a genuine issue of material fact for trial and significant probative evidence supporting the allegation."[13]

B. Nondischargeability under 11 U.S.C. § 523(a)(2)(A)[14]

KDOL bears the burden of proof to establish each element of its claim under

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[8] *Taylor v. Roswell Indep. Sch. Dist.*, 713 F.3d 25, 34 (10th Cir. 2013)

[9] *Thom v. Bristol-Myers Squibb Co.*, 353 F.3d 848, 851 (10th Cir. 2003) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)).

[10] *Id.*

[11] *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986).

[12] *United States v. Dawes*, 344 F. Supp. 2d 715, 717–18 (D. Kan. 2004) (citing *Anderson*, 477 U.S. at 256).

[13] *Id.*

[14] All future references to Title 11 of the United States Code will be to section number only.

§ 523(a)(2)(A) by a preponderance of the evidence.[15] Subsection (a)(2)(A) excepts from discharge any debt "for money, property, [or] services . . . obtained by . . . false pretenses, a false representation, or actual fraud." To carry its burden, KDOL must show that: "(1) the debtor made a false representation; (2) the debtor intended to deceive the creditor; (3) the creditor relied on the debtor's conduct; (4) the creditor's reliance was justifiable; and (5) the creditor was damaged as a proximate result."[16]

Through the stipulated facts and Debtor's admissions, KDOL has carried its burden of proof as to the first, third, fourth, and fifth elements. Debtor made false representations when completing and filing the weekly unemployment benefit applications by stating that he was neither employed nor receiving wages during those periods he received unemployment compensation. KDOL relied on those representations, that reliance was reasonable, and KDOL was damaged (in the amount the parties agree Debtor still owes) when it paid unemployment compensation to Debtor as a result.[17]

It is the second element of the § 523(a)(2)(A) test that is so often difficult to prove on summary judgment—that Debtor applied for the benefits he clearly was not entitled to receive with the intent to deceive. While intent "'may be inferred

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[15] *See Grogan v. Garner*, 498 U.S. 279, 287 (1991).

[16] *EZ Loans of Shawnee v. Hodges (In re Hodges)*, 407 B.R. 415, 419 (Bankr. D. Kan. 2009) (citing *Groetken v. Davis (In re Davis)*, 246 B.R. 646, 652 (10th Cir. BAP 2000)).

[17] Doc. 16, Doc. 25.

from the totality of the circumstances,'"[18] it is this Court's duty to consider whether the totality of the circumstances here presents a picture of deceptive conduct by this Debtor that would indicate he intended to deceive this creditor.[19] A totality of the circumstances inquiry is fact specific and hinges on the credibility of witnesses—something that is oftentimes most difficult to ascertain from the four corners of a cold affidavit.[20]

And while it is not *per se* inappropriate to grant summary judgment when intent is an element of proof,[21] it presents a significant hurdle for the movant when the issue requires a determination of the state of mind of a key witness. State of mind issues, such as fraudulent intent under § 523(a)(2)(A), are generally not appropriate for resolution on summary judgment.

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[18] *In re Young*, 91 F.3d 1367, 1375 (10th Cir. 1996) (quoting *In re Gans*, 75 B.R. 474, 486 (Bankr. S.D.N.Y. 1987)).

[19] *In re Davis*, 246 BR. at 652 (quoting 3 NORTON BANKR. LAW & PRACTICE 3D § 57:16 (2016)).

[20] *See, e.g., Prochaskav v. Marcoux*, 632 F.2d 848, 851 (10th Cir. 1980) (noting that "where different ultimate inferences may properly be drawn, the case is not one for summary judgment" because "questions of intent, which involve intangible factors including witness credibility, are matters for consideration of the fact finder after a full trial," but holding that summary judgment was proper where defendant had not proffered his own affirmative response by affidavit or otherwise, setting forth specific facts showing a genuine issue for trial); *see also Compton v. Herman (In re Herman)*, 355 B.R. 287, 291 (Bankr. D. Kan. 2006) (stating that generally "questions involving a person's intent or other state of mind cannot be resolved by summary judgment," but concluding that where there is "conceded or irrefutable evidence" it may make "a trial on the question of the person's state of mind unnecessary.").

[21] *See Colonial Pac. Leasing v. Mayerson (In re Mayerson)*, 254 B.R. 407, 412 (Bankr. N.D. Ohio 2000) (finding that while "state of mind issues . . . are generally not to be disposed of upon summary judgment . . . [t]his . . . does not mean that summary judgment is per se inappropriate with issues concerning a person's state of mind").

Here, Debtor specifically disputes that he made the false statements with the requisite intent to deceive.[22] He claims that the misrepresentations were instead caused by mere carelessness, due to his failure to adequately review the unemployment paperwork his girlfriend prepared.[23] In such instances, "[i]t is important, and ordinarily essential, that the trier of fact have the opportunity to observe the demeanor, during direct and cross-examination, of any witness whose subjective motive is at issue."[24]

C. Issue Preclusion

KDOL argues that this Court should not give Debtor an opportunity to litigate the issue of intent here because he already had that opportunity and declined to participate in the agency proceedings underlying this action. In other words, it argues its agency determination should be given preclusive effect and be deemed a finding by this court of the necessary fraudulent intent to render the debt nondischargeable under § 523(a)(2)(A).

KDOL's argument is that state agency determinations must be given preclusive effect by federal courts, agency determinations are final unless appealed, and that because the notice of the KDOL agency findings of fraudulent receipt of benefits was mailed to the Debtor's last known address, he is presumed to have

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[22] Doc. 25.

[23] *Id*.

[24] *North American Savings Bank v. Downing (In re Downing)*, No. 04-5161, 2005 WL 3299797, at *1 (Bankr. D. Kan. 2005) (*quoting Consolidated Electric*, 355 F.2d at 438-39).

received notice. From this, it concludes that because the Debtor had an opportunity to appeal the findings and elected not to, that issue preclusion, or collateral estoppel, should prevent Debtor from being allowed to relitigate the intent to defraud issue.

Generally, federal courts afford state agency determinations the same preclusive effect a state forum would.[25] Kansas courts apply collateral estoppel to agency determinations.[26] In order for collateral estoppel to apply, three factors must be present: 1) there was a prior judgment on the merits, 2) the prior litigation involved the same parties or parties in privity, and 3) the issue litigated must have been determined and necessary to support the judgment.[27]

Absent from KDOL's briefs is any discussion of whether the underlying agency finding was a determination *on the merits*. The underlying agency determination in this case was, in effect, a default judgment. Courts are reluctant to apply collateral estoppel to issues that have not actually been litigated.[28]

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[25] *Guttman v. Khalsa*, 669 F.3d 1101, 1109 (10th Cir. 2012). *See also* 28 U.S.C. § 1738 (federal courts give full faith and credit to state statutes and judicial proceedings).

[26] *Umhotlz v. Kansas Dept. Of Social and Rehabilitation Services*, 926 F. Supp.2d 1222, 1231 (D. Kan. 2013).

[27] *Id*. In *Umhotlz*, the prior agency determination was not given preclusive effect because it did not address the issue in the subsequent litigation. *See also Arbogast v. Kansas Dept. of Labor*, No. 13-CV-4007, 2014 WL 1308915 (D. Kan. 2014) (finding that the narrow scope of the prior KDOL agency determination that the employee's discharge was reasonable did not include factual findings regarding the employee's request for disability accommodations at issue in the federal litigation, and therefore the issue was not precluded from litigation).

[28] *M & M Transmissions, Inc. v. Raynor (In re Raynor)*, 922 F.2d 1146, 1150 (4th Cir. 1991); *Spilman v. Harley*, 656 F.2d 224, 228 (6th Cir. 1981); *In re Ross*, 602 F.2d 604,

For example, in *Total Petroleum, Inc. v. Turner (In re Turner)*,[29] a creditor brought a § 523(a)(2)(A) nondischargeability complaint based on debtor's issuance of an insufficient funds check many years prior, and a state court default judgment finding debtor liable. The bankruptcy court found that a default judgment, under the majority view, did not satisfy the "actually litigated" requirement.[30] Therefore, the first prong of the collateral estoppel test—that the agency finding was a determination on the merits—is not present.

But what is most important here is whether the Debtor had a real opportunity to "actually litigate" the issue of his intent. Debtor's sworn affidavit states he never received notice of the agency action because KDOL sent notices to an address where he did not live. KDOL responds that because it sent notice of the agency determination to Debtor's last known address, Debtor is *presumed* to have received it under the "mailbox rule."

Presumptions, however, are just that— a legal inference as to the existence or truth of a fact not certainly known. Presumptions can be rebutted. Because Debtor has sworn— under penalty of perjury—that he did not receive notice, the Court is unwilling to decide this case, on summary judgment, on the basis that the prior agency action should be given preclusive effect. The Court will judge Debtor's

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608 (3d Cir. 1979); *Stokes v. Vierra*, 185 B.R. 341, 344 (N.D. Cal. 1995).

[29] No. 11-3053, Adv. 11-5241, 2012 WL 6680363 (Bankr. D. Kan. 2012). *See also KC Coring & Cutting Construction, Inc. V. McArthur (In re McArthur)*, 391 B.R. 453, 458 (Bankr. D. Kan. 2008).

[30] 2012 WL 6680363, at *4.

credibility, should he testify at trial, on this issue, as well.

This Court acknowledges that Judge Nugent has very recently held in *State of Kansas v. Maskrid*, a similar KDOL § 523(a) case, that the agency findings of fraud were entitled to preclusive effect on a summary judgment motion.[31] But the facts of that case are distinguishable. First, that debtor apparently never argued that he did not receive notice of the agency actions.[32] Second, that debtor offered nothing other than a bare, unsupported denial in his response to the motion for summary judgment of KDOL's uncontroverted statement of facts.[33] Contrast those facts with the summary judgment record here, where Debtor provided a sworn affidavit that he did not receive notice of the agency action and that he did not intend to defraud.

Admittedly, the evidence in support of Debtor's denials is not overwhelming, but it is sufficient to raise a dispute as to a material fact about whether Debtor intended to defraud. As a result, there are material facts in dispute both about whether Debtor had an opportunity to meaningfully participate at the agency level,

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[31] *State of Kansas v. Maskrid (In re Maskrid)*, No. 17-11419, Adv. 17-5144, 2018 WL 2293590 (Bankr. D. Kan. May 17, 2018).

[32] Judge Nugent recognized that before preclusive effect can be given to an agency determination, the parties must have had "an adequate opportunity to litigate the issue" by citing *University of Tennessee v. Elliott*, 478 U.S. 788, 799 (1986) (federal courts must give preclusive effect to fact findings of state administrative agency acting in a judicial capacity if parties had an adequate opportunity to litigate the issue). *Maskrid*, 2018 Wl 2293590, at *6 n.39.

[33] *Id*. at *3 (noting that "Maskid's counter-affidavit consists of four-numbered paragraphs that fail to directly respond to any of the 31 contentions in the Department's [affidavit].").

and ultimately, whether he intended to defraud the agency. I decline to decide those facts on the summary judgment record before me.

III. Conclusion

Although the Court has denied KDOL's motion for summary judgment, the scope of the trial set for **July 17, 2018** will be limited. Because the Debtor has stipulated to every element of KDOL's 11 U.S.C. 523(a)(2)(A) claim except the second element regarding intent, the Court will hear evidence only regarding Debtor's intent surrounding his applications for unemployment benefits, and, if KDOL wishes to preserve its argument about the preclusive effects of its agency determination, evidence surrounding Debtor's receipt of notices from the agency of its proceedings.

It is so Ordered.