



The relief described hereinbelow is SO ORDERED.

Signed November 17, 2010.

A handwritten signature in cursive script that reads "Robert D. Berger".

ROBERT D. BERGER
United States Bankruptcy Judge

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

In re:

**WILLIAM DONALD FRIEND and
HEATHER LEIGH FRIEND,
Debtors.**

**Case No. 08-21806
Chapter 7**

**ALISHA M. PROPHET et al.,
Plaintiffs,**

v.

Adv. No. 08-6111

**WILLIAM DONALD FRIEND and
HEATHER LEIGH FRIEND,
Defendants.**

ORDER DENYING PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

Plaintiffs' unopposed Motion for Summary Judgment is before the Court.¹ Plaintiffs Alisha Prophet and Daniel Cavender seek to except from discharge under 11 U.S.C. §523(a)(6) a pre-petition judgment against Debtors for their failure to pay Plaintiffs' last week of wages in

¹ Doc. No. 29.

the amount of \$903 and \$2,254, respectively. The default judgment is for \$509,447, which includes statutory damages, attorney's fees and punitive damages for filing retaliatory counterclaims in the state court proceeding.

Findings of Fact

Debtors filed for bankruptcy on July 25, 2008. On October 17, 2008, Plaintiffs filed their adversary complaint alleging a May 13, 2008, state court judgment conclusively established Debtors had committed willful and malicious acts with the intent to cause economic harm to Plaintiffs. The state court judgment includes:

- \$22,316.40 to Prophet for breach of an employment contract;
- \$26,115.96 to Cavender for breach of an employment contract;
- \$903.85 to Prophet under the Kansas Wage Payment Act (KWPA) for unpaid wages and an additional \$903.85 as a penalty;
- \$750.00 to Cavender under the KWPA for unpaid wages and an additional \$750.00 as a penalty; and
- \$1,504.69 to Cavender under the Fair Labor Standards Act (FLSA) for unpaid overtime and an additional \$1,504.69 as liquidated damages;

The judgment contains three separate recoveries for retaliation based on Defendants filing counterclaims in the state court action. They are:

- \$32,424.79 as economic damages and an additional \$32,424.79 as liquidated damages for retaliatory counterclaims under FLSA;
- \$32,424.79 as damages for retaliatory counterclaims under common law; and
- \$291,823.11 as punitive damages because of the counterclaims.

The judgment also includes:

- \$64,850.08 for attorney's fees and expenses under FLSA; and
- findings piercing the corporate veil, assigning joint and several liability, dismissing Debtors' remaining counterclaims (which had survived summary judgment) with prejudice and finding they lacked any reasonable basis in law or in fact.

Plaintiffs allege the case was adjudicated on the merits; however, the file presented shows differently. The May 13, 2008, minute sheet hand-written by the state court judge states, "Default judgment granted. Defendants stated affirmatively that they were aware of the trial date and did not intend to appear." The judge ordered Plaintiffs to prepare the journal entry. Plaintiffs' counsel prepared and submitted The Findings of Fact, Conclusions of Law, Entry of Judgment, and Awards, and it was entered that same day.

Debtors' sworn statement of financial affairs show Debtors had engaged bankruptcy counsel the day prior to trial on May 12, 2008.

Plaintiffs' summary judgment motion also presents facts underlying the judgment in the event collateral estoppel does not apply. The supporting depositions, discovery responses and pleadings are rife with genuine issues as to almost every material fact. The gist of the underlying complaint is a business enterprise and friendship which both failed, leaving the parties acrimonious. A comprehensive review of the facts is not necessary at this time because Plaintiffs have not met their burden to establish they are entitled to judgment under §523(a)(6) as a matter of law. Debtors are entitled to present evidence at trial.²

² Debtors did not respond to summary judgment, and their bankruptcy counsel has withdrawn, in part, for Debtors' failure to communicate. However, unopposed summary judgment motions are not to be rubber-stamped,

Conclusions of Law

A. Summary Judgment Standard.

Summary judgment is appropriate if the moving party demonstrates there is no genuine issue as to any material fact, and he is entitled to judgment as a matter of law.³ The fact the motion may be unopposed does not relieve the court of its responsibility to determine whether a material factual dispute exists. All material facts set forth in the movant's statement shall be deemed admitted for the purpose of summary judgment unless specifically controverted by the statement of the opposing party.⁴ If the opposing party does not respond, summary judgment should, if appropriate, be entered against that party.⁵ All inferences are to be construed in favor of the non-moving party.⁶ Only when reasonable minds could not differ as to the import of the proffered evidence is summary judgment proper.⁷ In determining whether any genuine issues of material fact exist, the court must construe the record liberally in favor of the party opposing the summary judgment.⁸ An issue is "genuine" if sufficient evidence exists on each side "so that a rational trier of fact could resolve the issue either way" and "[a]n issue is 'material' if under the substantive law it is essential to the proper disposition of the claim."⁹ The moving party has the burden of establishing that he or she is entitled to summary judgment.¹⁰ This Court's function is not to weigh the evidence, but merely to determine whether there is sufficient evidence favoring

especially in this case where Plaintiffs are claiming contract damages, which are dischargeable, and have failed to elect one remedy for each injury they request be declared nondischargeable.

³ Fed. R. Bankr. P. 7056.

⁴ D. Kan. LBR 7056.1(a).

⁵ Fed. R. Bankr. P. 7056; Fed. R. Civ. P. 56(e)(2).

⁶ *Atlantic Richfield Co. v. Farm Credit Bank of Wichita*, 226 F.3d 1138, 1148 (10th Cir. 2000).

⁷ *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250-51 (1986).

⁸ *McKibben v. Chubb*, 840 F.2d 1525, 1528 (10th Cir. 1988) (citation omitted).

⁹ *Adler v. Wal-Mart Stores, Inc.*, 144 F.3d 664, 670 (10th Cir. 1998).

¹⁰ *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986).

the non-movant for a finder of fact to return a verdict in that party's favor.¹¹ Essentially, this Court performs the threshold inquiry of determining whether a trial is necessary.¹² As a general rule, questions involving intent or state of mind cannot be resolved by summary judgment.¹³

B. Collateral Estoppel, State Court Judgments, and Dischargeability.

The doctrine of collateral estoppel, also known as issue preclusion, bars the relitigation of issues that have been actually tried in a prior lawsuit.¹⁴ Collateral estoppel applies to dischargeability proceedings.¹⁵ State law determines whether a state court default judgment has preclusive effect in bankruptcy nondischargeability proceedings.¹⁶ Under Kansas law, for collateral estoppel to apply the following elements must be established: (1) a prior judgment on the merits which determined the rights and liabilities of the parties on the issue based upon ultimate facts as disclosed by the pleadings and judgment; (2) the parties must be the same or in privity; and (3) the issue litigated must have been determined and necessary to support the judgment.¹⁷

In this case, the default judgment was entered without a trial on the merits, and the issue of the Debtors' intent and state of mind was not actually determined by the trial court. Issue preclusion does not apply. Further the conflicting evidence contained in the summary judgment motion raises far too many factual disputes to entitle Plaintiffs to judgment as a matter of law.

¹¹ *Anderson*, 477 U.S. at 249.

¹² *Id.* at 250.

¹³ *Compton v. Hermann (In re Hermann)*, 355 B.R. 287, 291 (Bankr. D. Kan. 2006).

¹⁴ *Parklane Hosiery Co., Inc. v. Shore*, 439 U.S. 322, 326 (1979).

¹⁵ *Grogan v. Garner*, 498 U.S. 279, 284-85 n.11 (1991).

¹⁶ 28 U.S.C. §1738.

¹⁷ *Hawkinson v. Bennett*, 265 Kan. 564 (1998).

Conclusion

IT IS THEREFORE ORDERED Plaintiffs' Motion for Summary Judgment under 11
U.S.C. §523(6) is DENIED.

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ROBERT D. BERGER
U.S. BANKRUPTCY JUDGE
DISTRICT OF KANSAS