

The relief described hereinbelow is **SO ORDERED**.

SIGNED this 22nd day of March, 2021.




Robert D. Berger
United States Bankruptcy Judge

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

In re:

**JOSEPH L. FREY and
ERIN B. FREY,**

Debtors.

Case No. 19-20862
Chapter 7

**JOSEPH FORD and
BRANDY FORD,**

Plaintiffs,

Adv. No. 19-6039

v.

**JOSEPH L. FREY and
JOSEPH L. FREY d/b/a
JOE'S CABINET SHOP,**

Defendants.

ORDER DENYING PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

Plaintiffs Joseph and Brandy Ford hired defendant/debtor Joseph Frey in 2017 to supply and install kitchen cabinets in their Kingsville, Missouri, home. However, the Fords were dissatisfied with Frey's work. After Frey placed a mechanic's lien on the Fords' property, the Fords obtained a default judgment¹ against Frey in the circuit court of Johnson County, Missouri. Frey then filed for bankruptcy under Chapter 7. The Fords filed an unsecured claim against Frey for \$25,548.75, and filed this adversary proceeding to determine the dischargeability of that debt under [11 U.S.C. § 523\(a\)\(2\), \(4\), and \(6\)](#).

This matter comes before the Court on the Fords' motion for judgment on the pleadings under [Fed. R. Civ. P. 12\(c\)](#) or, in the alternative, for summary judgment under [Fed. R. Civ. P. 56](#).² Frey opposes the motion pro se.³ Because the parties have presented material outside the pleadings, the Court will treat the motion as one for summary judgment. *See* [Fed. R. Civ. P. 12\(d\)](#); *Woodie v. Berkshire Hathaway Homestate Ins. Co.*, 806 F. App'x 658, 664 (10th Cir. 2020) (“[T]he district

¹ The default judgment removed the mechanic's lien and awarded the Fords \$24,700 in damages for slander of title and breach of contract.

² ECF 39. Rules 12(c) and 56 apply to this adversary proceeding via [Fed. R. Bankr. P. 7012](#) and [7056](#).

³ ECF 44. “A pro se litigant's pleadings are to be construed liberally and held to a less stringent standard than formal pleadings drafted by lawyers.” *Hall v. Bellmon*, [935 F.2d 1106, 1110](#) (10th Cir. 1991) (citing *Haines v. Kerner*, [404 U.S. 519, 520-21 \(1972\)](#)). While a pro se litigant must “follow the same rules of procedure that govern other litigants,” the court may “make some allowances for . . . his unfamiliarity with pleading requirements.” *Garrett v. Selby Connor Maddux & Janer*, [425 F.3d 836, 840](#) (10th Cir. 2005) (citations omitted).

court has broad discretion in determining whether to accept materials beyond the pleadings.”) (citation omitted).

To be entitled to summary judgment, a movant must show that “there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a). “[T]he evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor.” *Tolan v. Cotton*, 572 U.S. 650, 651 (2014) (per curiam) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986)). Here, the Fords argue that they are entitled to summary judgment because (1) Frey’s amended answer admits the material allegations of their adversary complaint and (2) the Missouri judgment should be given collateral estoppel effect. Because both of these arguments fail as explained below, the Fords’ motion will be denied.

First, citing Frey’s amended answer,⁴ the Fords argue that Frey did not respond to “most of” the factual allegations in their adversary complaint and has, therefore, admitted those allegations. The Fords are correct that under Rule 8(b)(1)(B),⁵ a party must “admit or deny the allegations asserted against it by an opposing party,” and that under Rule 8(b)(6), “[a]n allegation—other than one relating to the amount of damages—is admitted if a responsive pleading is required and the allegation is not denied.” However, their characterization of Frey’s amended answer is incorrect.

⁴ ECF 19.

⁵ Fed. R. Civ. P. 8 applies to this adversary proceeding via Fed. R. Bankr. P. 7008.

The Fords' adversary complaint contains a factual narrative at paragraphs 1-35, under the heading "Background," and legal conclusions regarding the applicability of [11 U.S.C. § 523\(a\)\(2\), \(4\), and \(6\)](#), at paragraphs 36-47, under the headings "Count I," "Count II," and "Count III." Frey's amended answer fairly responds to—and denies most of—the Fords' factual narrative: according to Frey, he installed the correct kitchen cabinets and failed to complete the work only because the Fords failed to make a payment required by the parties' contract. Frey also alleges that the Fords "stole" an additional \$10,000 worth of cabinets from his shop; while he admits placing (and refusing to release) a mechanic's lien on the Fords' property, he states that he only did so to recover money the Fords owed him (i.e., in good faith). While the Fords correctly point out that Frey's amended answer does not respond to paragraphs 37-43 (aside from a few question marks), those paragraphs consist of legal conclusions that this Court need not accept as true for purposes of summary judgment. *See Lantec, Inc. v. Novell, Inc.*, [306 F.3d 1003, 1019](#) (10th Cir. 2002). Viewed in the light most favorable to Frey (as is required at this stage of the proceeding), the pleadings—which "must be construed as to do justice," [Fed. R. Civ. P. 8\(e\)](#)—do not establish that there are no genuine disputes as to the material facts of this case. Therefore, the Fords are not entitled to summary judgment based on the pleadings.

Next, the Fords argue that the Missouri judgment should be given collateral estoppel effect in this proceeding. "The preclusive effect of a state court judgment in a subsequent federal lawsuit generally is determined by the full faith and credit

statute, [28 U.S.C. § 1738](#), which directs a federal court to refer to the preclusion law of the State in which judgment was rendered.” *Sierra Club v. Two Elk Generation Partners, Ltd. P’ship*, [646 F.3d 1258, 1264](#) (10th Cir. 2011) (quoting *Brady v. UBS Fin. Servs., Inc.*, [538 F.3d 1319, 1327](#) (10th Cir. 2008)). Therefore, this Court will look to Missouri law.

Courts in Missouri consider four factors in determining whether collateral estoppel principles apply to a previous judgment:

- (1) whether the issue decided in the prior adjudication was identical to the issue presented in the present action;
- (2) whether the prior adjudication resulted in a judgment on the merits;
- (3) whether the party against whom estoppel is asserted was a party or was in privity with a party to the prior adjudication; and
- (4) whether the party against whom collateral estoppel is asserted had a full and fair opportunity to litigate the issue in the prior suit.

James v. Paul, [49 S.W.3d 678, 682](#) (Mo. 2001) (citing *Oates v. Safeco Ins. Co. of Am.*, [583 S.W.2d 713, 719](#) (Mo. 1979) (en banc)). A default judgment is not a “judgment on the merits.” See *Hangley v. Am. Family Mut. Ins. Co.*, [872 S.W.2d 544, 547-48](#) (Mo. Ct. App. 1994); see also *Balloon Soc’y of St. Louis, Inc. v. Graham (In re Graham)*, [272 B.R. 705, 709](#) (Bankr. E.D. Mo. 2002) (holding that prior Missouri default judgment would not be given collateral estoppel effect in adversary proceeding to determine dischargeability under § 523(a)).

The Fords’ Missouri judgment against Frey was a default judgment:

After reviewing the file and being well advised in the premises, the Court finds that defendants Joseph Frey, Joseph Frey doing business as Joe’s Cabinet Shop, and Real Estate Renovations, LLC doing business as Joe’s Cabinet Shop were personally served with summons and

petition on December 23, 2018 and have failed to file an answer or otherwise respond to the Petition.

Accordingly, *the Court finds that the defendants are in default*, and judgment should be entered in favor of the Plaintiffs and against the defendants as follows⁶

Because the Missouri judgment was thus not a judgment on the merits, collateral estoppel does not apply.

Finally, the Fords argue in their reply brief that Frey’s “Opposing Memorandum,”⁷ which consists of his “Sworn Affidavit,” is fatally defective because it (a) does not respond paragraph-by-paragraph to their numbered “Statement of Material Facts” and (b) is “unsworn.” However, the Fords base their Statement of Material Facts almost entirely on the pleadings. *See* ECF 39 at 3-9 nn. 19-58.

Because the pleadings do not establish that there are no genuine disputes as to material fact, *see* page 4 *supra*, the Fords are not entitled to summary judgment *regardless* of any procedural flaws in Frey’s response.

For all of the foregoing reasons, the Fords’ motion for summary judgment is hereby denied.

IT IS SO ORDERED.

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⁶ ECF 1-3 (emphasis added).

⁷ ECF 44.