SO ORDERED.

SIGNED this 25 day of September, 2009.

ROBERT E. NUGENT
UNITED STATES CHIEF BANKRUPTCY JUDGE

OPINION DESIGNATED FOR ON - LINE PUBLICATION
BUT NOT PRINT PUBLICATION

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF KANSAS

IN RE:	)	
	)	
DALORA ANN LOUISE SAKARI,	)	**Case No. 08-12498**
	)	**Chapter 7**
Debtor.	)	
	)	
	)	
TRACY'S AUTOMOTIVE CORP.	)	
	)	
Plaintiff,	)	
vs.	)	**Adversary No. 08-5296**
	)	
DALORA ANN LOUISE SAKARI, a/k/a DEE SAKARI,	)	
	)	
Defendant.	)	

ORDER GRANTING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

Plaintiff moves for summary judgment on its adversary complaint seeking to have

defendant's debt of $1,975.91 declared non-dischargeable pursuant to 11 U.S.C. § 523(a)(2)(A). Defendant, proceeding pro se, filed no memorandum in opposition to plaintiff's motion.[1] The Court took plaintiff's motion under advisement and is now prepared to rule on the motion.

Nature of Case

The underlying adversary complaint alleged that defendant drafted a check make payable to plaintiff on a closed account and that defendant knew that there were no funds to pay the check. Plaintiff had performed repairs on defendant's car and the check was issued to plaintiff in order for defendant to obtain possession of her car. After defendant gave the worthless check, plaintiff sued defendant in Sedgwick County District Court and obtained a default judgment against defendant with a specific finding that defendant obtained goods and services from plaintiff through actual fraud. Defendant subsequently filed bankruptcy and this nondischargeability complaint followed.

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.

Findings of Fact[4]

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[1] Defendant's attorney was permitted to withdraw on June 4, 2009. Adv. Dkt. 18.

[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 its 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(e)(2) (made applicable in adversary proceedings by Fed. R. Bankr. P. 7056); D. Kan. LBR 7056.1(a) (All material facts set forth in the statement of the movant shall be deemed admitted . . . unless specifically controverted by . . . the opposing

The Court's findings of uncontroverted fact set forth below derive from the default judgment entered against defendant in the state court case[5] and from the plaintiff's requests for admission served on defendant in this adversary proceeding and to which defendant failed to respond.[6]

On September 21, 2006, defendant signed and delivered to plaintiff check # 1135 in the amount of $440.05 drawn upon her closed account at Medical Community Credit Union.[7] Defendant issued the check to obtain possession of her motor vehicle after the plaintiff had performed repairs to the vehicle at its retail establishment.[8] At the time defendant delivered the check to plaintiff, she knew there were no funds in the account to pay the check and knew that the account had been previously closed.[9] Plaintiff reasonably relied on the validity of the check by

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party."); *Reed v. Bennett*, 312 F.3d 1190, 1195 (10th Cir. 2002).

[5] Under principles of collateral estoppel the defendant is bound by the findings contained in the state court judgment and cannot re-litigate those factual determinations. *See Grogan v. Garner*, 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); *In re Wallace*, 840 F. 2d 762, 764-65 (10th Cir. 1988) (Although the bankruptcy court in a dischargeability action under section 523(a) ultimately determines whether or not a debt is dischargeable, the doctrine of collateral estoppel may be invoked to bar re-litigation of the factual issues underlying the determination of dischargeability.).

[6] The court adopts as true the plaintiff's statements of fact established by its requests for admission served upon defendant. Because defendant has failed to respond to the requests for admission, the matters are deemed admitted pursuant to Fed. R. Civ. P. 36(a), made applicable in adversary proceedings by Fed. R. Bankr. P. 7036.

[7] *See* Request Nos. 1-2, Requests for Admission attached to Adv. Dkt. 20 as Attachment 1. The amount of the debt at issue in this proceeding ($1,975.91) is attributable to, in addition to the face amount of the check, court costs, service charge, statutory interest, attorney fees and damages all as provided by Kansas' worthless check statute, KAN. STAT. ANN. § 60-2610(a).

[8] *See* Request Nos. 5, 18.

[9] Request Nos. 3-4, 19.

delivering to the defendant her vehicle in exchange for the check.[10] Defendant intended that plaintiff would rely on the representation of sufficient funds which her check would create.[11]

On November 28, 2006, plaintiff gave statutory notice and written demand upon defendant under Kansas law for payment of the check.[12] Despite demand, defendant failed to pay the worthless check.[13] On January 10, 2007 plaintiff commenced a civil action against defendant styled *Tracy's Automotive Corp. v. Dalora Ann Louise Sakari*, Case No. 07 LM 483, under KAN. STAT. ANN. § 60-2610 in the District Court of Sedgwick County.[14] In addition to a monetary judgment, plaintiff prayed for a finding "that the defendant obtained goods and services from the plaintiff through actual fraud." Defendant failed to appear and on February 7, 2007, plaintiff was granted judgment against defendant in the amount of $1,410.10, with interest at the rate of 12% per annum, and attorney fees in the amount of $250.[15] The district court made a specific finding that "defendant obtained goods and services from the plaintiff through actual fraud."

Debtor filed her voluntary chapter 7 petition on September 30, 2008. Plaintiff timely commenced this dischargeability proceeding on December 2, 2008. On May 1, 2009, plaintiff

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[10] Request No. 6.

[11] Request No. 7.

[12] KAN. STAT. ANN. § 60-2610(b) (2005) (civil liability for worthless check). *See* Request Nos. 8-9.

[13] Request No. 10.

[14] Request Nos. 11-13.

[15] Request Nos. 14-16.

served 23 numbered requests for admission on defendant through her then counsel.[16] Defendant failed to serve written responses to the requests. On June 11, 2009, after expiration of the thirty (30) day period for responding to the requests for admission, plaintiff moved for summary judgment on its complaint. It attached as supporting exhibits, the unanswered requests for admission, the petition and journal entry of judgment in the state court worthless check case, 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 plaintiff's summary judgment motion and controvert the plaintiff's statements of fact, this Court must independently determine whether those uncontroverted statements of fact entitle plaintiff to judgment as a matter of law on its adversary complaint.[17] As applied to this case, then, the question is whether the statement of material facts, which this Court accepts as true, establish as a matter of law the fraud discharge exception as provided in § 523(a)(2)(A). At trial, the plaintiff would have the burden of proving by a preponderance of evidence that the debt falls within the fraud discharge exception.[18]

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

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[16] Adv. Dkt. 17. Defendant's attorney filed a motion to withdraw as her attorney on the same day, representing that defendant had failed to maintain contact with him. Adv. Dkt. 15.

[17] *Reed v. Bennett*, 312 F.3d 1190, 1194-95 (10th Cir. 2002); Fed. R. Civ. P. 56(e)(2) ("If the opposing party does not so respond, summary judgment should, *if appropriate*, be entered against that party.").

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

> actual fraud, other than a statement respecting the debtor's or an insider's financial condition.

The elements of the fraud discharge exception were recited in *In re Abraham*[19] 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.[20] As discussed below, the plaintiff has established all of these elements of actual fraud by the requests for admission and the application of collateral estoppel to the state court judgment.

The United States Supreme Court held in *Grogan v. Garner*[21] that collateral estoppel principles apply in § 523(a) nondischargeability proceedings under the Bankruptcy Code. The Tenth Circuit Court of Appeals has likewise applied collateral estoppel to bar relitigation of the facts underlying the determination of dischargeability of a debt.[22] Where the prior judgment is a state court judgment, the law of collateral estoppel of the state in which the judgment was rendered applies to determine its preclusive effect.[23] For collateral estoppel to apply under Kansas law, the following elements must be present: (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

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[19] 247 B.R. 479, 483 n.12 (Bankr. D. Kan. 2000).

[20] *See also, Fowler Bros. v. Young*, 91 F.3d 1367 (10th Cir. 1996).

[21] 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).

[22] *In re Wallace*, 840 F. 2d 762, 764-65 (10th Cir. 1988).

[23] *In re Lewis*, 271 B.R. 877, 883 (10th Cir. BAP 2002).

determined and necessary to support the judgment.[24] Here, collateral estoppel precludes this Court from considering whether the defendant engaged in fraud when she issued the worthless check. In state court, the plaintiff pled the statutory civil action of giving a worthless check under KAN. STAT. ANN. § 60-2610(a) (2005). That statute provides that the giving of a worthless check includes issuing or delivering a check for the payment of money with intent to defraud or which is dishonored because the drawer had no deposits with the drawee.[25] Here, plaintiff alleged in its state court petition that defendant issued the subject check "deceitfully and with intent to defraud the plaintiff," and expressly prayed for a finding of fraud. In its journal entry of judgment, the state court determined that the defendant obtained goods and services from plaintiff through fraud. Thus, the state court determined the issue of fraud and the state court judgment is entitled to preclusive effect. This Court will not disturb that factual determination.

A default judgment may be given preclusive effect under the doctrine of collateral estoppel.[26] Here, defendant was afforded a full and fair opportunity to litigate the fraud issue in the state court worthless check case.[27] She was properly served with the summons and complaint and failed to appear for trial. Under Kansas law, a default judgment qualifies as a judgment on the merits for

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[24] *Jackson Trak Group, Inc. ex rel. Jackson Jordan, Inc. v. Mid States Port Authority*, 242 Kan. 683, 690, 751 P.2d 122 (1988)

[25] *See* § 60-2610(h).

[26] *See In re Edie*, 314 B.R. 6 (Bankr. D. Utah 2004) (intent issue in state court default judgment entitled to preclusive effect in dischargeability proceeding under § 523(a)(6) because a defaulting defendant is presumed to admit all facts pled in the complaint); *In re Calvert*, 105 F.3d 315 (6th Cir. 1997) (state court fraud default judgment entitled to collateral estoppel effect in bankruptcy dischargeability proceeding); *In re Jordana*, 232 B.R. 469 (10th Cir. BAP 1999) (default judgment entered against debtor in securities fraud action precluded relitigation of fraud issue in § 523(a)(2) discharge exception).

[27] *See In re Lewis*, 271 B.R. 877, 883-84 (10th Cir. BAP 2002)

preclusion purposes.[28] Accordingly, this Court concludes that the state court default judgment precludes relitigation of the fraud issue and is entitled to preclusive effect in this dischargeability proceeding.

Even without application of the doctrine of collateral estoppel, plaintiff's requests for admission establish each of the elements for nondischargeability under § 523(a)(2)(A) and entitle plaintiff to summary judgment on its adversary complaint. Each of plaintiff's requests for admission is deemed admitted by defendant's failure to either admit or deny the matters stated.[29] Request numbers 1 through 5, 18-19 and 22 establish that defendant signed and delivered the worthless check to plaintiff, that she obtained auto repair services and the return of her car from plaintiff by the issuance of the worthless check, and that she knew at the time the check was presented to the plaintiff that it would not be honored due to the fact that the account had been previously closed.[30] Request for admission number 6 establishes plaintiff's reliance upon the validity of the check presented by defendant and return of her repaired car in exchange for the check. Request numbers 3, 4 and 7 establishes the defendant's intent to deceive. Request for admission numbers 10 and 17

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[28] *See Dennis v. Southeastern Kansas Gas Company*, 227 Kan. 872, 878-80, 610 P.2d 627 (1980); *Banister v. Carnes*, 9 Kan. App. 2d 133, 135-38, 675 P.2d 906 (1983); *Harris v. Byard (In re Byard)*, 47 B.R. 700, 706 (Bankr. M.D. Tenn. 1985) (applying Kansas law); *Miller v. Miller*, 107 Kan. 505, 192 P. 747 (1920) (A judgment by default upon personal service of summons upon the defendant is as conclusive against him upon every matter admitted by the default as if defendant personally appeared and contested the plaintiff's right to recover).

[29] *See* Fed. R. Civ. P. 36.

[30] *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)); *In re Davis*, 246 B.R. 646 (10th Cir. BAP 2000), *affirming in part, vacating in part on other grounds* 35 Fed. Appx. 826 (10th Cir. May 24, 2002) (A false representation can be established if the debtor did not intend to pay the creditor when the check was issued and knew that the check would bounce.).

establish that defendant has failed to pay the worthless check or the state court judgment and that plaintiff has been damaged. Request number 23, deemed admitted by defendant, states that "[t]he defendant did obtain possession of her motor vehicle from the plaintiff by means of false pretenses, false representations and actual fraud," by delivery of the worthless check to plaintiff. In sum, plaintiff, through the requests for admission, has proven each of the elements for a fraud discharge exception.

Conclusion

The Court therefore concludes that defendant's debt in the amount of $1,975.91 should be and is hereby excepted from discharge under § 523(a)(2)(A). The plaintiff's motion for summary judgment is GRANTED.

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